

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

OVANDO

(Last Name)

EMERSON

(First Name)

A

MI

(DoD ID No.)

DC3/E4

(Rank)

(Unit/Command Name)

U.S. NAVY

(Branch of Service)

(Location)

By

General Court-Martial (GCM)

(GCM, SPCM, or SCM)

COURT-MARTIAL

Convened by

COMMANDING OFFICER

(Title of Convening Authority)

(Unit/Command of Convening Authority)

Tried at

(Place or Places of Trial)

On

21 JUNE 2022 to 24 JUNE 2022

(Date or Dates of Trial)

Companion and other cases

None

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

CONVENING ORDER



DEPARTMENT OF THE NAVY

16 June 2022

GENERAL COURT-MARTIAL CONVENING ORDER 3B-21

Pursuant to the authority contained in paragraph 0120(a), Judge Advocate General of the Navy Instruction 5800.7G of 15 January 2021, a General Court-Martial is convened. The following members, detailed to the General Court-Martial convened by order 3A-21, this command, dated 8 June 2022, are hereby relieved for the trial of DC3 Emerson Ovando, U.S. Navy, only:

Captain [REDACTED] U.S. Navy;
Lieutenant Commander [REDACTED] U.S. Navy; and
Lieutenant [REDACTED] U.S. Navy.

The following members are detailed to the General Court-Martial convened by order 3A-21, this command, dated 8 June 2022, for the trial of DC3 Emerson Ovando, U.S. Navy, only:

Lieutenant [REDACTED] U.S. Navy;
Lieutenant [REDACTED] U.S. Navy;
Senior Chief Sonar Technician - Submarine [REDACTED] U.S. Navy;
Chief Cryptologic Technician - Technical [REDACTED] U.S. Navy;
Chief Master-At-Arms [REDACTED] U.S. Navy; and
Chief Aviation Maintenance Administrationman [REDACTED] U.S. Navy.

If, after the exercise of all challenges, excess members remain, the Military Judge is authorized to impanel no greater than three (3) alternate members.

[REDACTED]
C. A. LAHTI
Rear Admiral, U.S. Navy
Commander, Navy Region Japan

CHARGE SHEET

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) OVANDO, EMERSON, A.		2. SSN [REDACTED]	3. RANK/RATE DC3	4. PAY GRADE E-4
5. UNIT OR ORGANIZATION [REDACTED]			6. CURRENT SERVICE a. INITIAL DATE 11 Apr 2019	
			b. TERM 4 YEARS	
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED		
a. BASIC \$2,652.00	b. SEA/FOREIGN DUTY \$80.00	c. TOTAL \$2,732.00	9. DATE(S) IMPOSED N/A	

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 120 (Sexual Assault)

Specification 1 (Sexual Assault – Incapable of consenting): In that Damage Controlman Third Class Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did onboard Fleet Activities [REDACTED] on or about 18 July 2020, commit a sexual act upon Seaman [REDACTED] U.S. Navy, by causing contact between Damage Controlman Third Class, Emerson A. Ovando's mouth and Seaman [REDACTED] vulva, with the intent to gratify the sexual desire of Damage Controlman Third Class Emerson A. Ovando, when Seaman [REDACTED] was incapable of consenting to the sexual act because she was impaired by an intoxicant, to wit: alcohol, and the accused reasonably should have known of that condition.

Specification 2 (Sexual Assault – Of a person who is unconscious): In that Damage Controlman Third Class, Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did onboard Fleet Activities [REDACTED] on or about 18 July 2020, commit a sexual act upon Seaman [REDACTED] U.S. Navy, by causing contact between Damage Controlman Third Class, Emerson A. Ovando's mouth and Seaman [REDACTED] vulva, with the intent to gratify the sexual desire of DC3 Emerson A. Ovando, when he reasonably should have known that SN [REDACTED] was unconscious.

SEE CONTINUATION PAGE

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]	b. GRADE LNC	c. ORGANIZATION OF ACCUSER [REDACTED]
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE 2 JUNE 2021	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 2nd day of JUNE, 20 21, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

BLACK, S. ROSS
Typed Name of Officer

[REDACTED]
Organization of Officer

LT, JAGC, USN
Grade and Service

TRIAL COUNSEL
Official Capacity to Administer Oaths
(See R.C.M. 307(b)--must be commissioned officer)

[REDACTED]
Signature

ORIGINAL

12 On 08 SEP 2021 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. 305(c)) (See R.C.M. 306 if notification cannot be made.)
[Redacted]
Type Name of Immediate Commander
[Redacted]
Signature
ENS / O1
[Redacted]
Signature
2 Sep 21

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY
13 The above charges were received at 600 hours 17 E 20 21 21 [Redacted]
Officer Exercising Summary Court-Martial Jurisdiction - See R.C.M. 31-402
FOR THE:
[Redacted]
Type Name of Officer
CAPT, USN
[Redacted]
Signature
COMMANDING OFFICER
Official Capacity of Officer Signing
2 Sep 21

V. REFERRAL; SERVICE OF CHARGES
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY [Redacted]
b. PLACE [Redacted]
c. DATE 7 Sept 2021
Referred for trial to the GENERAL court-martial convened by GENERAL COURT-MARTIAL CONVENING ORDER 1-21
Dated 19 January 20 21, subject to the following instructions:² Referred charge will be joined and tried concurrently with the charge preferred against DC3 Ovando on 13 August 2021
By C. A. LAHII of [Redacted]
Command or Order
Type Name of Officer
RDML, USN
Signature
15. On 8 September 20 21, I (ceased to be) served a copy hereof on (each of) the above named accused.
GREGORY ESCOBAR
Type Name of Trial Counsel
[Redacted]
Signature
LT, JAGC, USN
Grade or Rank of Trial Counsel
FOOTNOTES
1 - When an appropriate commander signs personally, the phrase "I signed" must be shown.
2 - See R.C.M. 301(a) concerning instructions. If none is able.

CONTINUATION OF CHARGES ICO U.S. V DC3 EMERSON A. OVANDO, U.S. NAVY

Specification 3 (Abusive sexual contact – Incapable of consenting): In that Damage Controlman Third Class, Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did onboard Fleet Activities [REDACTED] on or about 48 July 2020, touch the breast of Seaman [REDACTED] with [REDACTED] with Damage Controlman Third Class, Emerson A. Ovando's mouth, with an intent to gratify the sexual desire of DC3 Emerson A. Ovando, when Seaman [REDACTED] was incapable of consenting to the sexual contact because she was impaired by an intoxicant, to wit: alcohol, and the accused reasonably should have known of that condition. 4 NOV 21

Specification 4 (Abusive sexual contact – Of a person who is unconscious): In that Damage Controlman Third Class, Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did onboard Fleet Activities [REDACTED] on or about 48 July 2020, touch the breast of Seaman [REDACTED] with Damage Controlman Third Class, Emerson A. Ovando's mouth, with an intent to gratify the sexual desire of DC3 Emerson A. Ovando, when he reasonably should have known that SN [REDACTED] was unconscious. 4 NOV 21
2 JUN 22

AND NOTHING FURTHER.

CHARGE SHEET					
I. PERSONAL DATA					
1 NAME OF ACCUSED (Last, First, MI)		2 SSN	3 RANK/RATE	4 PAY GRADE	
OVANDO, EMERSON, A.		[REDACTED]	DC3	E 1	
5 UNIT OR ORGANIZATION		6 CURRENT SERVICE			
[REDACTED]		a INITIAL DATE		b TERM	
[REDACTED]		11 Apr 2019		4 YEARS	
7 PAY PER MONTH		8 NATURE OF RESTRAINT OF ACCUSED		9 DATE IMPOSED	
a BASIC	b SEA/FOREIGN DUTY	c TOTAL	N/A		N/A
\$2652.00	\$80.00	\$2732.00			
\$2419.85		\$2520.80			
II. CHARGES AND SPECIFICATIONS					
10 CHARGE: VIOLATION OF THE UCMJ, ARTICLE 120 (Sexual Assault)					
Additional Specification 1 (Sexual Assault – Without consent) In that Damage Controlman Third Class Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did, onboard Fleet Activities [REDACTED] commit a sexual act upon Seaman [REDACTED] U.S. Navy, by penetrating Seaman [REDACTED] vulva with Damage Controlman Third Class Emerson A. Ovando's finger, with an intent to gratify the sexual desire of Damage Controlman Third Class Emerson A. Ovando, without the consent of Seaman [REDACTED] WITHDRAWN AND DISMISSED BY ORDER OF THE JUDGE ADVOCATE GENERAL WITHOUT PREJUDICE					
Additional Specification 2 (Sexual Assault – Incapable of consenting) In that Damage Controlman Third Class Emerson A. Ovando, U.S. Navy, [REDACTED] on active duty, did, onboard Fleet Activities [REDACTED] on or about 18 July 2020, commit a sexual act upon Seaman [REDACTED] U.S. Navy, by penetrating Seaman [REDACTED] vulva with Damage Controlman Third Class Emerson A. Ovando's finger, with an intent to gratify the sexual desire of Damage Controlman Third Class Emerson A. Ovando, when Seaman [REDACTED] was incapable of consenting to the sexual act because she was impaired by an intoxicant, to wit: alcohol, and the accused reasonably should have known of that condition.					
AND NO OTHERS.					
III. PREFERRAL					
11a NAME OF ACCUSER (Last, First, MI)		b GRADE		ORGANIZATION OF ACCUSER	
[REDACTED]		LN2 E-5		[REDACTED]	
c SIGNATURE OF ACCUSER		d DATE			
[REDACTED]		13 August 2021			
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>13th</u> day of <u>August</u>, 20<u>21</u>, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.					
Collette K. Tolbert		[REDACTED]			
Typed Name of Officer		Organization of Officer			
LT, JAGC, USN		Judge Advocate			
[REDACTED]		Official Capacity to Administer Oaths			
[REDACTED]		(See R.C.M. 307(b)-must be commissioned officer)			
[REDACTED]		[REDACTED]			
Signature					

12. On 25 August, 20 21 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(e)) (See R C M. 308 if notification cannot be made.)

Typed Name of Immediate Commander

Organization of Immediate Commander

CAPT

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1000 hours, 7 Sept 20 21 at

Designation of Command or

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

FOR THE

C.A. LAHII
Typed Name of Officer

Official Capacity of Officer Signing

RDML, USN

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

7 Sept 2021

Referred for trial to the GENERAL court-martial convened by GENERAL COURT-MARTIAL CONVENING ORDER 1-2)

Dated 19 January 20 21, subject to the following instructions: Referred charge will be heard and tried concurrently with the charge preferred against DC3 Ovando on 2 June 2021

By

of

Command or Order

C.A. LAHII

Typed Name of Officer

Official Capacity of Officer Signing

RDML, USN

Signature

15. On 8 September 20 21, I (caused to be) served a copy hereof on (each of) the above named accused

GREGORY ESCOBAR

Typed Name of Trial Counsel

LT, JAGC, USN

Grade or Rank of Trial Counsel

Signature

FOOTNOTES

1 -- When an appropriate commander signs personally inapplicable words are stricken.
2 -- See R C M 501(e) concerning instructions. If none, so state.

TRIAL COURT MOTIONS & RESPONSES

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION TO COMPEL
EXPERT CONSULTANT IN THE
FIELD OF FORENSIC PSYCHOLOGY

21 OCT 21

1. **Nature of Motion.** The Defense respectfully moves this Court to compel the appointment and funding of Dr. [REDACTED] Psy.D., as a confidential expert consultant in the field of Forensic Psychology, pursuant to Rule for Courts-Martial (R.C.M.) 703(d)(2). Defense specifically requests funding for fifteen (15) hours of pre-trial consulting.

2. **Facts.**

a. DC3 Ovando has been charged with violating UCMJ Article 120. Charge I consists of four specifications of sexual assault, under theories of incapable of consenting, of a person who is unconscious, and without consent, and two specifications of abusive sexual contact, under theories of incapable of consenting and of a person who is unconscious. All specifications stem from an alleged encounter with SN [REDACTED] that took place in July 2020.

b. On 21 August 2020, NCIS interviewed SN [REDACTED] regarding her allegations in the instant case. At the start of this interview, SN [REDACTED] told NCIS “most of the details that I’m going to tell you, I didn’t remember. I had a friend tell me.” SN [REDACTED] told NCIS, “This was all, this all had to be told to me. I couldn’t remember anything.”¹

c. SN [REDACTED] stated “ [REDACTED] cked out. But I had flashes of, moments that it happened. And so, when I asked [EM3] [REDACTED] what has happened that night, he told me.”²

d. When SN [REDACTED] was asked “Is this stuff that you were told, or is this what you remember?” she stated, “Feeling.” SN [REDACTED] then stated she had recently experienced a “triggered” memory after someone touched her body. SN [REDACTED] stated she was scared and experienced a flash of her hands being pinned down. This is the first time SN [REDACTED] mentioned her hands being “pinned down” in her allegations against DC3 Ovando.³

e. SN [REDACTED]

¹ Defense Enclosure 3 – Defense MIL 412

² *Id.*

³ *Id.*

⁴ Defense Enclosure 6 – Defense MIL 412

f. On 30 September 2021, the Defense submitted a request for expert consultants to the Convening Authority (“CA”). Per the Trial Management Order in this case, the request was timely.⁵

g. On 4 October 2021, the CA stated it had insufficient information to make a final determination, but authorized two (2) hours of consulting fees for the purpose of facilitating the requested expert to produce an affidavit to provide amplifying information.⁶

h. After Defense questioned the limited approval, the CA responded on 6 October 2021 by stating “I’m not entirely sure Dr. [REDACTED] can expertly testify to the issue of memory formation and transference” and “[b]efore we w [REDACTED] oney going down this rabbit whole [sic], I would suggest you win a MRE 412 motion.”⁷

i. Defense submitted a renewed request for the appointment of Dr. [REDACTED] as an expert consultant to the CA on 13 October 2021.⁸

j. On 13 October 2021, the CA responded by stating, “our Admiral is currently on travel, so it’s going to take a week or so to get you an answer on this.”⁹

k. Per the Trial Management Order in the case, the Government’s response to Defense’s request for expert consultants was due on 14 October 2021. To date, the CA has not definitively responded regarding Dr. [REDACTED] appointment.

3. **Burden.** The Defense, as the moving party, bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.**

a. As a matter of military due process, servicemembers are entitled to expert assistance when “necessary for an adequate defense.”¹⁰ Unlike civilian defendants, “the military accused has the resources of the Government at his disposal.”¹¹ R.C.M. 703(d) further codifies the defense’s right to request that the Government provide an expert consultant that is necessary for the adequate defense of the case. This specific rule is consistent with the due process and fundamental fairness concepts of the U.S. Constitution and military due process. Further, expert consultation can assist the defense in adequately confronting any witnesses testifying against an accused, thereby satisfying the Confrontation Clause of the Sixth Amendment. Most importantly, R.C.M. 703(d) provides counsel the opportunity to provide the military accused effective assistance of counsel.

⁵ Defense Enclosures 1 and 2.

⁶ Defense Enclosure 2.

⁷ *Id.*

⁸ Defense Enclosures 3 and 4.

⁹ Defense Enclosure 4.

¹⁰ *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986).

¹¹ *Id.*

b. “Frequently, the results of a trial will hinge on expert testimony.”¹² However, an expert consultant’s value does not only rest in the possibility of future testimony. Experts acting as a pre-trial consultant can “advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.”¹³

c. The defense must demonstrate “the necessity of the services” when requesting expert assistance.¹⁴ Necessary means “reasonably necessary” and an adequate defense includes, among other things, “preparation for cross-examination” of government witnesses.¹⁵ Necessity “requires more than a mere possibility of assistance.”¹⁶ Military courts have established a two-pronged test for determining necessity: 1) that an expert would be of assistance to the defense; and 2) that denial of expert assistance would result in a fundamentally unfair trial.¹⁷ In order to establish the first prong, an accused must show: 1) why expert assistance is needed; 2) what the expert assistance would accomplish for the accused; and 3) why the defense counsel was unable to gather and present the evidence that the expert assistance would be able to develop.¹⁸

5. Argument.

a. Dr. ██████ expertise would be of assistance to the Defense.

i. Why Dr. ██████ expertise is needed.

The charged language of the instant case, specifically “incapable of consenting” and “of a person who is unconscious,” places the ultimate question before the finder of fact squarely in the realm of forensic psychology. The finder of fact will have to evaluate the evidence presented in this case, and render a verdict, based on what they believe to be SN ██████ level of consciousness and her capacity to consent at the time of the alleged incident with DC3 Ovando. Human consciousness is a very nuanced and particular science. The difference between one level of consciousness from the next could be extremely slight and practicably unnoticeable to the untrained eye. Furthermore, because SN ██████ reported no independent memories of the alleged incident, and all relevant parties were under the influence an intoxicant that affects memory, the science of memory and how memories are stored will also be relevant in this case. Moreover, the fact that SN ██████ has a history of prior sexual trauma and reported “triggered memories” calls for an analysis of the extent to which that prior experience may have influenced the instant case. Lastly, due to the nature of the charged offenses, DC3 Ovando faces the potential of a sentencing phase and a significant total period of confinement. Because of this, a psychological evaluation that addresses the risk of re-offense is critical to the imposition of a fair and appropriate sentence. As such, this case is primed for expert assistance in various subareas of the field of forensic psychology.

¹² *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989).

¹³ *Id.*

¹⁴ *Garries*, 22 M.J. at 291 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

¹⁵ *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976).

¹⁶ *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (internal citations omitted)..

¹⁷ *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (internal citations omitted).

¹⁸ *Id.* (quoting *Bresnahan*, 62 M.J. at 143).

ii. What Dr. [REDACTED] expertise would accomplish for DC3 Ovando.

Dr. [REDACTED] expert assistance would enable the Defense to properly prepare for trial. Dr. [REDACTED] review of available discovery would enable her to assist Defense Counsel in formulating and/or ruling out various case theories dealing with memory and alcohol considerations. Her expertise would also assist Defense counsel in preparing cross-examination questions in support of these case theories. Based on Dr. [REDACTED] substantial experience with sexual assault cases, she will be able to assist Defense Counsel in evaluating whether a causal link exists between SN [REDACTED] prior sexual trauma and the instant case. Regardless of the outcome of Defense's Mil. R. Evid. 412 motion, discussing this prior trauma with a trained forensic psychologist will help Defense Counsel better understand the psyche of the complaining witness and, therefore, facilitate better cross-examination questions. Additionally, Dr. [REDACTED] possesses the clinical skills and specific knowledge necessary to evaluate DC3 Ovando for recidivism. She will conduct a series of diagnostic testing on DC3 Ovando, which will enable the Defense to prepare a more comprehensive sentencing case, in the event a sentencing phase is required.

iii. Why Defense Counsel is unable to gather and present the evidence that Dr. [REDACTED] assistance would be able to develop.

Defense Counsel does not have the academic background, training, or practical experience to perform the necessary analysis noted above, nor could Defense Counsel, in a reasonable amount of time, attain the necessary level of professional certification to render such services and analysis. These are specialized areas of study that require intimate knowledge of the applicable literature. While the Defense could achieve some level of understanding in this area through literature review, the Defense would not be knowledgeable enough to apply the underlying principles and theories to the specifics of this case. Furthermore, it may become necessary for the expert to testify at trial, something Defense Counsel cannot do itself. Without Dr. [REDACTED] as an expert consultant, the Defense simply cannot properly prepare and present its case at trial.

b. Denial of Dr. [REDACTED] expert assistance would result in a fundamentally unfair trial.

As indicated above, Defense Counsel does not possess the technical expertise to flesh out the scientifically nuanced details of SN [REDACTED] specific state of consciousness nor the formation of memory and how it is affected by the interplay of alcohol intoxication. Furthermore, Defense counsel cannot evaluate DC3 Ovando's psychological makeup as it pertains to the factors that may point to recidivism, mitigation, or extenuation. The circumstances of the instant case suggest that expert analysis is required. To deny Dr. [REDACTED] assistance, therefore, would be to deny DC3 Ovando access to an adequate defense.

Thus, for the reasons stated above, Dr. [REDACTED] expertise is necessary because it would be of assistance to the preparation of DC3 Ovando's defense and its denial would result in a fundamentally unfair trial.

6. **Evidence.** The Defense respectfully submits Enclosures 1 through 4, as well as the previously submitted Enclosures 2 and 6 of Defense's MIL 412, as indicated in the separate

evidentiary package, in support of this motion.

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

8. **Relief Requested.** The Defense respectfully requests that this Court compel the appointment and funding of Dr [REDACTED] Psy.D., as a confidential expert consultant in the field of forensic psychology. Specifically, Defense respectfully requests funding for fifteen (15) hours of pre-trial consulting.

DOHERTY.MATHEW.C. Digitally signed by
DOHERTY.MATHEW.C.
Date: 2021.10.21
19:22:26 +09'00'

M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, a copy of this motion was served on the Court and Trial Counsel.

DOHERTY.MATHEW.C. Digitally signed by
DOHERTY.MATHEW.C.
Date: 2021.10.21 19:23:28
+09'00'

M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
EXPERT CONSULTANT IN THE
FIELD OF FORENSIC PSYCHOLOGY

28 OCT 21

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 703(d)(2), the Government respectfully requests that the Court find the Defense 21 October 2021 *Motion to Compel Expert Consultant in the Field of Forensic Psychology* as Moot.

2. **Facts.** The Government concurs with the Defense summary of facts and adds the following:

a. On 22 October 2021, the Convening Authority approved the 12 October 2021 Defense *Renewed Request for Appointment of Dr. [REDACTED] as Confidential Expert Consultant ICO U.S. v. DC3 Emerson Ovando, USN.*¹

3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.** The Government concurs with the Defense recitation of the law.

5. **Argument.**

On 4 October, 2021, the Convening Authority approved two hours of consulting in response to Defense 30 September request for an expert consultant.² Defense renewed its request for an expert consultant on 13 October.³ The Convening Authority approved the Defense request on 22 October 2021.⁴

6. **Evidence and Enclosures.** In addition to the referenced previously submitted enclosures, the Government respectfully submits the following enclosure in support of this motion:

A. Government Response MTC Expert, Enclosure 1: Approval of Defense Expert Consultant Request for Dr. [REDACTED]

¹ Government Response MTC Expert, Enclosure 1.

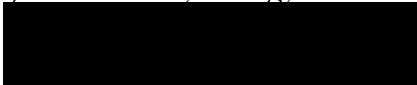
² Defense MTC Expert, Enclosure 2.

³ Defense MTC Expert, Enclosure 3.

⁴ Government Response MTC Expert, Enclosure 1.

7. **Relief Requested.**

The Government respectfully requests that the Court find the Defense 21 October 2021 *Motion to Compel Expert Consultant in the Field of Forensic Psychology* as Moot.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, a copy of this motion was served on Defense Counsel.



LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION TO COMPEL
PRODUCTION OF EVIDENCE

21 OCT 21

1. **Nature of Motion.** Pursuant to Uniform Code of Military Justice (UCMJ), Article 46 and Rule for Courts-Martial (R.C.M.) 703(e)(1), the Defense respectfully moves this Court to compel production of the following items: (1) All call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020; (2) All internet search histories of SN [REDACTED] cellular phone from 11-12 July 2020; (3) SN [REDACTED] Facebook activity log from 11-12 2020; and (4) All of SN [REDACTED] Facebook call logs from 11-12 July 2020.

2. **Facts.**

a. On 20 September 2021, the Defense requested discovery from the Government regarding the following items¹:

- i. “All call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 18-19 July 2020;”
- ii. “All internet search histories of SN [REDACTED] cellular phone from 18-19 July 2020;”
- iii. “SN [REDACTED] Facebook activity log from 18-19 July 2020;”
- iv. “All of SN [REDACTED] Facebook call logs from 18-19 July 2020.”

b. At the time of the request, the Government’s theory of the case had the alleged incident between SN [REDACTED] and DC3 Ovando occurring on 18-19 July 2020. Based on newly discovered evidence as of 20 October 2021, the Government’s new theory is that the alleged incident occurred on 11-12 July 2020.²

c. On 24 September 2021, the Government responded to Defense’s discovery request and denied all of the abovementioned items, stating, “Denied, absent a showing of relevance. Additionally, this material is not within the possession or control of the government.”³

¹ Defense Enclosure 1.

² Defense Enclosure 5 – Defense MIL 412.

³ Defense Enclosure 2.

d. On the night in question, FN [REDACTED] was receiving text message responses from SN [REDACTED] cell phone.⁴

e. SN [REDACTED] called her mother “soon after” the alleged incident with DC3 Ovando.⁵

f. On 12 October 2021, SN [REDACTED] “found” a video on her phone of herself in EM3 [REDACTED] bathtub on the night in question. She had not previously disclosed said video.⁶

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

4. **Law.**

a. Parties to a court martial “shall have equal opportunity to obtain witnesses and other evidence.”⁷ Trial Counsel’s obligation under this rule “includes removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.”⁸ The R.C.M.s pertaining to discovery aid in the enforcement of Article 46 and “[t]he parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate.”⁹

b. Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.¹⁰ An accused is entitled to the production of evidence outside the custody or control of military authorities when it is relevant and necessary.¹¹ Relevant evidence is necessary when it is not cumulative and it would contribute to the presentation of an accused’s case in some positive way.¹²

5. **Argument.**

a. **The call logs, text logs, and internet search histories are relevant and necessary, and should therefore be produced.**

Call and text logs, as well as internet search histories, from SN [REDACTED] cell phone on the night in question are relevant and necessary. DC3 Ovando is charged with violating UCMJ Article 120 under theories of incapable of consenting and of a person who is unconscious. SN [REDACTED] reported no first-hand recollection of the alleged incident and told NCIS she “blacked out.” The available discovery in this case presents several instances that point to SN [REDACTED] using her cell phone to communicate with others during the night in question, despite her lack of memories from that night. The Government has to prove beyond a reasonable doubt that SN [REDACTED] was

⁴ Defense Enclosure 3 at page 1.

⁵ Defense Enclosure 9 – Defense MTS Statements.

⁶ Defense Enclosure 5 – Defense MIL 412.

⁷ UCMJ, Article 46.

⁸ *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F 2015) (internal quotations omitted).

⁹ *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)).

¹⁰ Mil. R. Evid. 401.

¹¹ R.C.M. 703(e)(1).

¹² *Id.*

either incapable of consent and/or unconscious during the alleged incident. Evidence of SN [REDACTED] using her cell phone to make calls and send text messages makes the Government's theory of the case less probable. Therefore, the Defense must be able to see the call and text activity from SN [REDACTED] cell phone on the night in question.

6. **Evidence.** The Defense respectfully submits Enclosures 1 through 3, as well as the previously submitted Enclosure 5 of Defense's MIL 412 and Enclosure 9 of Defense's MTS Statements, as indicated in the separate evidentiary package, in support of this motion.

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

8. **Relief Requested.** The Defense respectfully moves this Court to compel production of the following items: (1) All call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020; (2) All internet search histories of SN [REDACTED] cellular phone from 11-12 July 2020; (3) SN [REDACTED] Facebook activity log from 11-12 July 2020; and (4) All of SN [REDACTED] Facebook call logs from 11-12 July 2020.

DOHERTY.M
ATTHEW.C. Digitally signed by
DOHERTY.MATTH
EW.C [REDACTED]
Date: 2021.10.21
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M. C. DOHERTY
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Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, a copy of this motion was served on the Court and Trial Counsel.

DOHERTY.M
ATTHEW.C. Digitally signed by
DOHERTY.MATTH
EW.C [REDACTED]
Date: 2021.10.21
19:21:23 +09'00'

M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
PRODUCTION OF EVIDENCE

28 OCT 21

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 703(e)(1) and (R.C.M.) 703(g)(3), the Government respectfully requests that the Court deny Defense's 21 October 2021 *Motion to Compel Production of Evidence*.

2. **Facts.** The Government concurs with the Defense summary of facts and adds the following:

a. On 14 October 2021, the Government requested that GMSN [REDACTED] allow a search of her phone through LT John McGlaughlin, her VLC. GMSN [REDACTED] denied Government's request.¹

b. FN [REDACTED] indicated that the messages he received via Snapchat from GMSN [REDACTED] phone were not from GMSN [REDACTED].

c. GMSN [REDACTED] called her mother approximately two days after the alleged incident.³

d. GMSN [REDACTED] initially estimated that the offenses occurred between approximately 2300 and 0100.⁴ GMSN [REDACTED] also identified video footage of her in the bathtub at approximately 0101 and 0106 on 12 July 2021.⁵

3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.** The Government concurs with the Defense recitation of the law and adds the following:

The Government is required to provide the defense "any books, papers, documents, data, photographs, tangible objects ... or copies or portions of these items, *if the item is within the possession, custody, or control of military authorities.*"⁶

¹ Government MTC Production, Enclosure 1, page 1.

² Defense MTC Production, Enclosure 3, page 1.

³ Government MTC Production, Enclosure 2, page 3.

⁴ Defense MIL 412, Enclosure 3, page 35, lines 3-5.

⁵ Defense MIL 412, Enclosure 5, page 1.

⁶ R.C.M. 701(a)(2)(A)(emphasis added).

“[C]ourts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement.”⁷

Persuasively, the Air Force Court of Criminal Appeals has held that the argument the Government has a legal right to evidence simply because it could compel its production “is overly broad and would lead to all evidence subject to compulsory process to be within the Government's control regardless of where it was held and by whom. A legal process to obtain evidence, like a subpoena, is not the same thing as a legal right to such evidence.”⁸

The Government is only required compel the production evidence not within its possession upon sufficient showing by the Defense that the evidence is both relevant and necessary.⁹

In order for the Defense to demonstrate that evidence is relevant and necessary, the Defense first has a burden to demonstrate that evidence exists. “[W]e conclude that Appellant did not carry his burden as the moving party to demonstrate that the [evidence] he requested existed. Consequently, he did not show that [it was] relevant and necessary and should have been produced through compulsory process.”¹⁰

5. Argument.

On 14 October 2021, GMSN ██████ chose to not voluntarily provide Defense’s requested evidence. As a result, the Government does not possess any of the pertinent evidence and does not meet the first of the *Stellato* exceptions, because that would require that the Government have both knowledge and access to the evidence. Of the remaining three *Stellato* exceptions, only the second, that the prosecution has the legal right to obtain the evidence, is applicable here because the other two involve outside law enforcement. Here, the Defense has demanded GMSN ██████ to provide evidence in her possession. While the Government has a legal process to obtain the evidence, such process does not inherently grant the Government lawful right to order GMSN ██████ to provide the pertinent evidence. First, Defense must demonstrate that the pertinent evidence exists and that it is both relevant and necessary.

Defense has made the following demands: (1) All call logs, text messages, text logs, and cellular data of SN ██████ cellular phone from 11-12 July 2020; (2) All internet search histories of SN ██████ cellular phone from 11-12 July 2020; (3) SN ██████ Facebook activity log from 11-12 July 2020; and (4) All of SN ██████ Facebook call logs from 11-12 July 2020.

Defense speculates that the requested evidence would show that GMSN ██████ used her phone

⁷ *United States v. Stellato*, 74 M.J. 473, 484-485 (C.A.A.F. 2015).

⁸ *United States v. Crump*, 2020 CCA LEXIS 405, 105-106 (A.F.C.C.A., 2020)(quotation marks omitted).

⁹ R.C.M. 703(g)(3).

¹⁰ *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

the night of the incident. Defense has relied upon the following two statements for its speculation: (1) FN [REDACTED] statement that he was in contact with GMSN [REDACTED] phone; and (2) SA [REDACTED] email referring to the fact that GMSN [REDACTED] had spoken to her mother “soon after” the alleged incident. However, FN [REDACTED] stated that his understanding was that someone else was in possession of GMSN [REDACTED] phone the night of the alleged incident and EM3 [REDACTED] stated that GMSN [REDACTED] contacted her mother with his help approximately two days after the alleged incident. Defense has provide nothing to indicate that GMSN [REDACTED] used her cellular phone was the night of the incident to make any calls, texts, or use Facebook, or that GMSN [REDACTED] was even in possession of her phone during the relevant time periods that evening.

Finally, Defense’s request for all call logs, text messages, text logs, cellular data, internet search histories, Facebook activity, and Facebook call logs from 11-12 July 2020 is both vague and overbroad as to subject and timeframe. Requests for “cellular data” and “Facebook activity” are too vague to provide the Government sufficient means to subpoena a third party to conduct a search. Call logs, text logs, internet search histories, and Facebook call logs are overbroad as to subject because there is no indication that there is any relevant and necessary evidence in those logs. While there is evidence that someone else was using Snapchat on GMSN [REDACTED] phone, there is no evidence that calls, texts, internet searches, or Facebook use were made or conducted. Defense request for data from 11-12 July 2020 is similarly overbroad as to time because there is no indication the incident occurred before 2300 on 11 July 2020 or significantly after 0100 on 12 July 2020.

6. **Evidence and Enclosures.** In addition to the referenced previously submitted enclosures, the Government respectfully submits the following enclosure in support of this motion:

- a. Government MTC Production, Enclosure 1: Email dtd 14 October 2021 from LT McGlaughlin (VLC); Victim Declination to Produce, 2 pages.
- b. Government MTC Production, Enclosure 2: Report of Interview of EM3 [REDACTED] dtd 1 Sep 20, 4 pages.

7. **Relief Requested.** The Government respectfully requests that the Court deny the Defense 21 October 2021 *Motion to Compel Production of Evidence*.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, a copy of this motion was served on Defense Counsel.



LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION TO SUPPRESS
UNWARNED AND INVOLUNTARY
STATEMENTS

21 OCT 2021

1. **Nature of Motion.** Pursuant to the Fifth Amendment of the United States Constitution, 10 U.S.C. §831, Article 31, Uniform Code of Military Justice (UCMJ), Rule for Courts-Martial (R.C.M.) 905(b)(3), and Military Rules of Evidence (Mil. R. Evid.) 304 and 305, the Defense moves to suppress all statements made by DC3 Ovando to NCIS.

2. **Facts.**

a. DC3 Ovando has been charged with violating UCMJ Article 120. Charge I consists of four specifications of sexual assault, under theories of incapable of consenting, of a person who is unconscious, and without consent, and two specifications of abusive sexual contact, under theories of incapable of consenting and of a person who is unconscious. All specifications stem from an alleged encounter with SN [REDACTED] that took place in July 2020.

b. Sometime after the night in question, DC3 Ovando approached his Leading Petty Officer (LPO), DC1 [REDACTED] on a duty day while the [REDACTED] was still in port. DC3 Ovando had just spoken to his wife over the phone and was visibly upset. DC1 [REDACTED] began consoling DC3 Ovando.¹

c. During the course of this conversation, DC3 Ovando discussed a party he recently attended and described a female coming onto him while he was using the bathroom. DC3 Ovando told DC1 [REDACTED] that he gave into the female's advances and got into the bathtub with her. He subsequently stated that people from the party walked in on them in the bathtub and kicked DC3 Ovando out of the party. DC1 [REDACTED] then informed DC3 Ovando that what he just recounted was serious in nature and that it would have to be reported up the chain of command.²

d. DC1 [REDACTED] told DC3 Ovando that the situation could be perceived as rape and then proceeded to discuss the situation with their Leading Chief Petty Officer (LCPO), HTCS [REDACTED]³

e. DC1 Castillo briefed HTCS [REDACTED] on the situation and informed him that DC3 Ovando stated everything was consensual. DC1 [REDACTED] suggested having DC3 Ovando write a

¹ Defense Enclosure 1.

² *Id.*

³ *Id.*

statement regarding what occurred at the party. HTCS [REDACTED] proceeded to route this suggestion to the Command Master Chief of [REDACTED].⁴

f. HTCS [REDACTED] discussed the situation with the CMC, who eventually approved the suggestion to have DC3 Ovando write a statement because that was all they could do at that time. At no point during this discussion did HTCS [REDACTED] and the CMC discuss Article 31(b) rights.⁵

g. HTCS [REDACTED] told DC1 [REDACTED] to tell DC3 Ovando to write a statement so that it would be preserved in case a report was made. DC1 [REDACTED] understood this to be an order.⁶

h. DC1 [REDACTED] went to DC3 Ovando in his LPO capacity and informed DC3 Ovando that he routed the situation up the chain of command and that HTCS [REDACTED] said for him to write a statement. DC [REDACTED] told DC3 Ovando he could write the statement on his phone. DC1 [REDACTED] never read DC3 Ovando his Article 31(b) rights.⁷

i. DC3 Ovando understood and complied with the order to write a statement. He even tried to show DC1 [REDACTED] the statement he drafted on his phone after it was finished.⁸

j. DC1 [REDACTED] has previously issued DC3 Ovando disciplinary counseling chits.⁹

k. Both DC3 Ovando's LPO and LCPO agree that DC3 Ovando saw the instruction to write a statement as an order.¹⁰

l. On 1 September 2020, NCIS interrogated DC3 Ovando onboard [REDACTED], while the ship was underway.¹¹ After advising DC3 Ovando of his rights, NCIS SA [REDACTED] asked DC3 Ovando if he wanted to have a conversation. DC3 Ovando replied, "Today? I have a written statement."¹²

m. SA [REDACTED] was surprised by DC3 Ovando's response and stated he would like to have DC3 Ovando's statement. SA [REDACTED] interrupted DC3 Ovando's response to the question of whether he actually wanted to give NCIS the written statement by discussing follow-up questions based on the previously written statement, effectively narrowing DC3 Ovando's options to two choices: "Do you want to answer the questions as I ask them? Or do you want to just give me the statement and walk out the door?" DC3 Ovando elected to provide the written statement and not answer any questions.¹³

⁴ Defense Enclosure 2.

⁵ *Id.*

⁶ Defense Enclosure 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Defense Enclosures 1 and 2.

¹¹ Defense Enclosures 3 and 4.

¹² Defense Enclosure 5, page 15 line 20.

¹³ Defense Enclosure 5, pages 15-17 (SA: "I'm sorry, say it one more time." DC3: "I have a written statement, so." SA: "You have a written statement?" DC3: "Yes." SA: "You already prepared it?"...SA: "I mean so, a little confusing for me. I've never had a subject say that they had a written statement prepared. How do we...did you want to give me that?" DC3: "Yes if it's - SA: "I would like it. I may have questions about it. Do you want to

n. Due to technological difficulties associated with transferring the written statement from DC3 Ovando's phone, SA [REDACTED] convinced DC3 Ovando to provide a handwritten copy of the previously drafted statement.¹⁴

o. SA [REDACTED] also instructed DC3 Ovando to incorporate a handwritten addendum to the Military Suspect's Acknowledgment and Waiver of Rights form used at the beginning of the interrogation. At no point was a separate cleansing warning used for the previously drafted written statement on DC3 Ovando's phone. In fact, SA [REDACTED] never informed DC3 Ovando that he did not have to provide the previously drafted written statement.¹⁵

p. DC3 Ovando, with significant help from SA [REDACTED] wrote on the Military Suspect's Acknowledgment and Waiver of Rights form "At this time I want to remain silent but I do have a written statement on my phone. I am willing to provide a handwritten statement to NCIS."¹⁶

q. DC3 Ovando then retrieved his phone and began transcribing a word-for-word, handwritten version of the statement he had previously drafted on his phone.¹⁷ Based on the photographs taken by NCIS, the pre-drafted statement was in a "Notes" app entry dated 22 August 2020.¹⁸

r. After receiving the handwritten copy of the previously drafted statement, swearing DC3 Ovando to it, and photographing the previously drafted copy on DC3 Ovando's phone, SA [REDACTED] told DC3 Ovando that if he changed his mind about answering follow-up questions, "all you do is email me or let your chain of command know that you want to talk to me." DC3 Ovando asked about the nature of the questions and SA [REDACTED] replied, "They would be incriminating in nature" and he would have to read DC3 Ovando his rights.¹⁹ That discussion concluded DC3 Ovando's first interrogation.

s. In an email to the ESG-7 Staff Judge Advocate, the [REDACTED] trial paralegal, and the NCIS [REDACTED] Supervisory Special Agent, dated 8 September 2020, SA [REDACTED] indicated that he "asked S/OVANDO if he would be willing to take a polygraph, to date he has not responded."²⁰

t. Based on the Government's discovery, the Defense has no record of the manner/contents of this initial request for a polygraph from SA [REDACTED] to DC3 Ovando. In an email to NCIS

answer the questions as I ask them? Or do you want to just give me the statement and walk out the door?" DC3: "I feel like, I'll give you the statement, and just walk out the door.").

¹⁴ *Id* at page 18 lines 7-11.

¹⁵ *Id* at page 18 line 22 – page 19 line 9 (SA: "So, whatever, however you want to explain this to me that I choose to remain silent, but I'm willing to provide you with a written statement. However, you know what I'm saying? Like, this thing basically says if you want to talk to me, you don't want to talk to me, but you do want to give me a written statement. Does that make sense?" DC3: "Yes.").

¹⁶ Defense Enclosure 5 at page 20 line 2 – page 21 line 16; Defense Enclosure 6.

¹⁷ Defense Enclosures 5, 7, and 8.

¹⁸ Defense Enclosure 8.

¹⁹ Defense Enclosure 5 page 38.

²⁰ Defense Enclosure 9.

██████████ Supervisory Special Agent, dated 2 August 2021, SA ██████████ stated that his PST files containing “old case emails” were corrupted and would not open, transfer, or save.²¹

u. On 9 September 2020, DC3 Ovando emailed SA ██████████ stating he “agreed on taking the [polygraph] test.”²²

v. On 10 September 2020, SA ██████████ emailed NCIS ██████████ Supervisory Special Agent and stated “I was hoping to see if he [DC3 Ovando] would cop to anything more than oral sex. But, if he is unwilling to talk to LE any further – this may be an exercise in futility.”²³

w. SA ██████████ would not send another email to DC3 Ovando until 25 September 2020.²⁴ Prior to sending this email to DC3 Ovando, SA ██████████ emailed the Assistant Special Agent in Charge of the San Diego Polygraph Services Field Office. In that email, SA ██████████ noted that DC3 Ovando “declined to make a statement or answer any questions I had” and asked the Assistant Special Agent in Charge whether it would be possible to “verify” five additional questions. SA ██████████ also opined that the “setup” of the investigation was not “optimal.”²⁵

x. The Assistant Special Agent in Charge replied to SA ██████████ email and stated that law enforcement needed DC3 Ovando to deny that SN ██████████ “tol ██████████ or stop” and suggested framing the next communication with DC3 Ovando as “ask S/Ovando if he really wants to take the exam to prove his innocence. If he does, then you can tell him we [polygraph] need him to deny the allegations.”²⁶

y. SA ██████████ took the Assistant Special Agent in Charge’s advice and routed him a draft of the email he intended to send to DC3 Ovando. In it, SA ██████████ stated “Second, if you want to take the exam to prove your innocence, polygraph examiners need you to deny the allegations that you sexually assaulted [SN ██████████]. Does that make sense? As it stands in your statement, you are not specifically denying you sexually assaulted [SN ██████████]...If you are not willing to do that, then we cannot offer the polygraph to you.”²⁷

z. The Assistant Special Agent in Charge approved of SA ██████████ draft and SA ██████████ forwarded it word-for-word to DC3 Ovando.²⁸

aa. On 29 September 2020, SA ██████████ sent DC3 Ovando another email stating, “I do need a reply on this email in order to get the Polygraph coordinated.”²⁹

bb. On 29 September 2020, DC3 Ovando replied to SA ██████████ second email and expressed

²¹ Defense Enclosure 10.

²² Defense Enclosure 11.

²³ *Id.*

²⁴ Defense Enclosure 12.

²⁵ Defense Enclosure 13, page 6.

²⁶ *Id.* at page 4.

²⁷ *Id.* at pages 2-4.

²⁸ Defense Enclosures 12 and 13.

²⁹ Defense Enclosure 12 at page 2.

confusion about what was being asked of him.³⁰

cc. SA [REDACTED] replied to DC3 Ovando's confusion by stating, "I am iust trying to make sure you are still up for a polygraph – you can back out at any time." SA [REDACTED] went on to state "we need an answer from you that addresses the allegation of sexual assault...the issue at hand is you didn't address the allegation...in order to qualify for the polygraph – it needs to be addressed."³¹

dd. Based on SA [REDACTED] framing of the request for a polygraph, DC3 Ovando replied, "Yes I'm still up for the polygraph and yes I'll do the interview with him" on 1 October 2020.³²

ee. On 2 November 2020, NCIS interrogated DC3 Ovando again and conducted a polygraph examination.³³ DC3 Ovando signed both a Military Suspect's Acknowledgement and Waiver of Rights form and a Polygraph Examination waiver.³⁴

ff. During the rights advisement, DC3 Ovando expressed confusion about the fact that he would be talking about the alleged incident. SA [REDACTED] ignored this confusion and re-framed the focus to the idea of voluntariness, which ultimately led DC3 Ovando to agree with a one-word "yes."³⁵

gg. SA [REDACTED] proceeded to interrogate DC3 Ovando prior to administering the polygraph. DC3 Ovando described being told to write a statement by his LPO and that this was the reason why he had a pre-written statement at his first interrogation.³⁶

hh. DC3 Ovando's recitation of the night in question during this second interrogation was consistent with what he provided in the pre-drafted written statement from the first interrogation.³⁷

ii. SA [REDACTED] introduced the notion of DC3 Ovando pinning SN [REDACTED] hands down and digitally penetrating her vagina. SA [REDACTED] told DC3 Ovando that SN [REDACTED] "specifically remembers where your hands were, okay, and I'm pulling this from that profile."³⁸

jj. SA [REDACTED] introduction of this information was part of a much larger diatribe directed at DC3 Ovando that spanned approximately 57 lines of transcript and ended with him asking

³⁰ *Id.*

³¹ *Id.* at page 1.

³² *Id.*

³³ Defense Enclosures 14 and 15.

³⁴ Defense Enclosures 16 and 17.

³⁵ Defense Enclosure 18, page 11 line 22 – page 12 line 10 (SA: "With that being said, would you wish to speak with me surrounding the facts today?" DC3: "Speak to you about the – SA: "Yeah, the incident." DC3: "Oh." SA: "Well, just so you – so what that says is that you do not wish to have a lawyer present and that you want to speak with me voluntarily." DC3: "Yes.").

³⁶ *Id.* at page 58 lines 13-20 (DC3: "And I talked to him [LPO]. And I was like, you know, like this is what happened. He was like, almost like, really? I was like, yeah. And then he was like, you know, just write everything down that happened that night. I wrote everything down. That's why I had a pre-written statement of everything that happened that night, so –").

³⁷ *Id.* at page 64 lines (SA: "I mean, that's pretty much in line with what you said in your statement before.").

³⁸ *Id.* at page 68 lines 8-16.

DC3 Ovando “are you agreeing with me?” and DC3 Ovando simply responding with “yeah.”³⁹

kk. SA [REDACTED] confronted DC3 Ovando, stating “I think you’re leaving out some facts.” DC3 Ovando replied “I don’t think so.”⁴⁰ SA [REDACTED] proceeded to tell DC3 Ovando “you knew there was [sic] times when she wasn’t conscious when you were doing this.”⁴¹

ll. SA [REDACTED] framed oral sex as an “unusual” sex act and told DC3 Ovando “your mouth’s not supposed to be down there, right.”⁴²

mm. SA [REDACTED] then conducted the polygraph examination of DC3 Ovando.⁴³ Following the examination, SA [REDACTED] interrogated DC3 Ovando and began by stating “so I can see in my charts man, okay. I can tell you’re not being a hundred percent truthful with me...I can see there’s no shadow of a doubt that you haven’t [sic] been truthful with me.”⁴⁴

nn. During this interrogation, SA [REDACTED] spent a significant amount of time talking at DC3 Ovando, who primarily responded with one-word answers. On three separate occasions, SA [REDACTED] expressed concern that DC3 Ovando was simply agreeing with him and telling him what he wanted to hear.⁴⁵

oo. At multiple points, SA [REDACTED] created a choice for DC3 Ovando: he is either a monster or he made a mistake.⁴⁶ However, when DC3 Ovando disagreed with SA [REDACTED]’s recitation of the night in question, SA [REDACTED] took away the choice and told DC3 Ovando he was a “sexual monster.”⁴⁷

pp. During this interrogation, SA [REDACTED] attempted to generate a timeline of the night in question. DC3 Ovando expressed confusion and uncertainty⁴⁸ throughout this questioning, but

³⁹ Defense Enclosure 18, pages 68-70.

⁴⁰ *Id* at 72 lines 12-15.

⁴¹ *Id* at 74 lines 8-15.

⁴² *Id* at 103 lines 14-16.

⁴³ Defense Enclosure 15.

⁴⁴ Defense Enclosure 18, page 146 line 20 – page 147 line 5.

⁴⁵ *Id* at page 152 lines 1-3 (SA: “don’t tell me what I want to hear. I want to hear it from you. If you disagree with me, tell me.”); page 165 lines 14-16 (SA: “I don’t want you to just agree with what I say because you tell the police [sic]. I want you to say no.”); page 181 line 20 – 182 line 2 (SA: “Are you agreeing with me or are you just telling me what I want to hear? Are you actually agreeing with (simultaneous speaking)” DC3: “I agree with you.”).

⁴⁶ *Id* at page 157 lines 15-18 (SA: “Bad person? Someone would realize they make a mistake. Monster? Someone that just, his life has made them make their bad decisions. Which one is it?”); page 158 lines 4-9 (SA: “And like I said before, I don’t think you’re that monster because you said it was about 10 to 15 minutes. I don’t think you did that for the whole 15 minutes. I think you’re the kind of person that’s not a monster.”); page 159 lines 13-15 (SA: “You’re either this or this. One of [sic] the other, you’re the monster or you just made a mistake, a portion of the time.”); page 161 lines 18-20 (SA: “Well, how many minutes we’re [sic] you talking here? Not 15. Right? On [sic] that monster minutes.”); page 162 line 15-16 (SA: “What was it? Because were you that sexual monster?”).

⁴⁷ *Id* at page 162 lines 15-16.

⁴⁸ *Id* at 160 lines 17-21 (SA: “It wasn’t 15 minutes. How much of that time would you say that you were sexually involved with her when she was unaware of what was going on? When she was unconscious?” DC3: “Like three.”); page 161 lines 12-17 (SA: “Okay. But you could tell that she wasn’t there. Right? Can you tell that she wasn’t there mentally, physically, emotionally?” DC3: “Yes, I think I saw she didn’t really realize.”); page 166 lines 6-11 (SA: “With her? Then, where was this three minutes at that you said that you were continuing to do this. That she wasn’t

ultimately signed it as accurate.⁴⁹

qq. SA [REDACTED] told DC3 Ovando how he “feels” and convinced him to write SN [REDACTED] an apology letter⁵⁰ because he “respect[s] women and to do the right thing, you should apologize and let her know what went on that night.”⁵¹

rr. SA [REDACTED] told DC3 Ovando exactly what to include in this apology letter.⁵²

ss. At the time of these interrogations, DC3 Ovando was a junior Sailor with no prior involvement with law enforcement.⁵³ DC3 Ovando was [REDACTED] years old at the time of his first NCIS interrogation and [REDACTED] years old at the time of his NCIS polygraph examination.

3. **Burden.** Upon motion by the Defense to suppress statements of the Accused under Mil. R. Evid. 304, the prosecution has the burden of establishing the admissibility of the evidence.⁵⁴

4. **Law.**

a. **Fifth Amendment and UCMJ Article 31.**

The Fifth Amendment to the United States Constitution states that, “[n]o person...shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.”⁵⁵ This right to silence “protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”⁵⁶ Before interrogating a suspect in custody, law enforcement officials must provide rights warnings, to include a warning about the right to remain silent.⁵⁷ UCMJ Article 31 incorporates the Fifth Amendment’s protection against compulsory self-incrimination and prohibits a person subject to the UCMJ from interrogating or

conscious?” DC3: “It’s probably like at the last. Before [Miranda] bars [sic] in.”); page 168 line 16 – page 170 line 4; page 170 lines 17-22 (SA: “She was unconscious and wasn’t aware. Right? Right or wrong?” DC3: “Yes.” SA: “Is that right or wrong?” DC3: “(inaudible)”)”; page 177 lines 2-6 (SA: “So within that three minutes, what was going through your mind? How many times did you tell yourself that you should probably stop? Within that three minutes.” DC3: “Probably the whole time.”); page 180 lines 4-9 (SA: “Did you ever tell yourself that man? It’s not a good time because she’s unconscious here, she’s not aware. She’s not moving anymore.” DC3: “I regretted the next day. That’s all that came to my mind.”); page 180 lines 15-16 (DC3: “She probably didn’t know me. She probably didn’t know where I am.”); pages 196-206.

⁴⁹ Defense Enclosure 19.

⁵⁰ Defense Enclosure 20.

⁵¹ Defense Enclosure 18, page 182 line 11 – page 183 line 5.

⁵² *Id* at page 185 line 14 – page 186 line 5 (SA: “But maybe it’s good to get it off your chest too and write it down. So I would be very, very candid in this letter. Okay. Explain to her everything like you told me. What was going on in your life. You saw her, she was doing this and you continued, and then she seemed to [sic] aroused. Then she went out and you continued to please her when you knew that she was not aware. Give her peace of mind, because she doesn’t remember what’s going on that night. Do you want to do that?” DC3: “Yes.”).

⁵³ Defense Enclosure 21.

⁵⁴ Mil. R. Evid. 304(f)(6).

⁵⁵ U.S. CONST., amend. V.

⁵⁶ *United States v. Traum*, 60 M.J. 226, 230 (C.A.A.F. 2004) (quoting *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)).

⁵⁷ See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966); *United States v. Tempia*, 37 C.M.R. 249, 257 (C.M.A. 1967).

requesting any statement from a servicemember accused or suspected of an offense without first: (1) informing them of the nature of the accusation; (2) advising them that they have the right to remain silent; and (3) advising them that anything they say may be used against them at trial by court-martial.⁵⁸ “Military officials and civilians acting on their behalf are required to provide rights warnings prior to interrogating a member of the armed forces if that servicemember is a suspect, irrespective of custody.”⁵⁹ Article 31 rights advisements, therefore, are required *whenever* a person subject to the UCMJ interrogates or requests *any* statement from a servicemember who is suspected of an offense and the statements pertain to that offense for which they are suspected.⁶⁰ “No statement obtained...in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence...in trial by court-martial.”⁶¹ A military order “which contravenes the fundamental protections afforded by Article 31...is illegal.”⁶² Military Rules of Evidence 304 and 305 implement Article 31’s protections.

For the purposes of Article 31 and Mil. R. Evid. 305, a “person subject to the code” means a “person subject to the Uniform Code of Military Justice” and “includes... a knowing agent of any such person or military unit.”⁶³ Military questioners are required to warn servicemembers under Article 31(b) if the servicemember is suspected of an offense and “the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry, as opposed to having a personal motivation for the inquiry.”⁶⁴ Whether a person is suspected of an offense is a question that “is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense.”⁶⁵ Courts must consider “all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity.”⁶⁶ Whether the questioner could be considered to be acting in a disciplinary capacity is “judged by reference to a reasonable man in the suspect’s position.”⁶⁷ “However, any questioning of a suspect by a military superior in his immediate chain of command will normally be presumed to be for disciplinary purposes.”⁶⁸ This presumption is “strong” and must be rebutted by the Government.⁶⁹

An adequate rights advisement under Article 31(b) must include “informing the accused or suspect of the nature of the accusation.”⁷⁰ “The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly

⁵⁸ 10 U.S.C. §831(b).

⁵⁹ *United States v. Delarosa*, 60 M.J. 318, 320 (C.A.A.F. 2009); Article 31(b), UCMJ, 10 U.S.C. § 831(b).

⁶⁰ *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).

⁶¹ 10 U.S.C. §831(d).

⁶² *United States v. Jordan*, 22 C.M.R. 242, 244 (U.S.C.M.A. 1957)(citations omitted).

⁶³ Mil. R. Evid. 305.

⁶⁴ *Jones*, 73 M.J. at 361. (internal quotation marks omitted).

⁶⁵ *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted).

⁶⁶ *Id.*

⁶⁷ *Jones*, 73 M.J. at 362. (internal quotation marks omitted).

⁶⁸ *Good*, 32 M.J. at 108 (citing *United States v. Loukas*, 29 M.J. 385, 389 (U.S.C.M.A. 1990)).

⁶⁹ *Id.*

⁷⁰ Mil. R. Evid. 305(c)(1)(A).

involved[.]” not necessarily “to spell out the details...with technical nicety.”⁷¹ While “technical nicety” is not required in this regard, the suspect “must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event.”⁷² Factors to consider in analyzing the sufficiency of this requirement are “whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses.”⁷³ “Necessarily, in questions of this type, each case must turn on its own facts.”⁷⁴

“[I]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”⁷⁵ Mil. R. Evid. 305(c)(4) incorporates this principle when it states, “[i]f a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately.” “Although no particular words or actions are required to exercise one’s Fifth Amendment right to silence, [military courts] have held that its invocation must be unequivocal before all questioning must stop.”⁷⁶ A servicemember’s right to silence under Article 31(b), UCMJ “does not depend upon whether he is in fact innocent or guilty; it depends upon whether he is a suspect.”⁷⁷ Variations of, or qualifications on, the warning surrounding the right to remain silent in ways that tend to dilute this absoluteness violate Article 31(b).⁷⁸ Under Mil. R. Evid. 305, “[a] statement obtained from the accused in violation of an accused’s rights under Article 31 is involuntary and is therefore inadmissible against the accused.”⁷⁹ If an unwarned statement is collected in violation of Article 31 and followed by subsequent statements, the subsequent statements may bare the taint of the first involuntary statement.⁸⁰ “The appropriate legal inquiry in these types of cases is whether [the suspect’s] subsequent confession was voluntary considering all the facts and circumstances of the case including the earlier technical violation of Article 31(b).”⁸¹

b. Involuntary Statements.

Involuntary statements may not be offered against an accused at trial. Upon motion or objection by the Defense, “an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial.”⁸² A statement is deemed involuntary when it is “obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31 [of the UCMJ], or through the use of coercion,

⁷¹ *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 29 C.M.R. 340, 342 (U.S.C.M.A. 1960)(internal quotation marks omitted)).

⁷² *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000)(internal citations omitted).

⁷³ *Id.*

⁷⁴ *United States v. Pipkin*, 58 M.J. 358, 361(CA.A.F. 2003)(quoting *United States v. Nitschke*, 31 C.M.R. 75, 78 (U.S.C.M.A. 1961)).

⁷⁵ *Traum*, 60 M.J. at 230 (quoting *Miranda*, 384 U.S. at 473).

⁷⁶ *Traum*, 60 M.J. at 230 (quoting *United States v. Sager*, 36 M.J. 137, 145 (C.M.A. 1992).

⁷⁷ *United States v. Hundley*, 45 C.M.R. 94, 98 (U.S.C.M.A. 1972).

⁷⁸ See *United States v. Allen*, 48 C.M.R. 474 (A.C.M.A. 1972) (Article 31(b) warning invalidated where CID told suspect that right to remain silent did not apply if they were wrong in suspecting him).

⁷⁹ Mil. R. Evid. 305(c)(1).

⁸⁰ *Hundley*, 45 C.M.R. at 99.

⁸¹ *United States v. Steward*, 31 M.J. 259, 265 (C.A.A.F. 2006).

⁸² Mil. R. Evid. 304(a).

unlawful influence, or unlawful inducement.”⁸³

In cases dealing with the issue of involuntary statements, the Supreme Court has consistently “enforce[d] the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.”⁸⁴ This consistent attitude, however, does not lend itself to a “talismanic definition of voluntariness, mechanically applicable” to all statements across the board.⁸⁵ Instead, the test for voluntariness requires an assessment of the “totality of all the surrounding circumstances – both characteristics of the accused and details of the interrogation.”⁸⁶ The Court of Appeals for the Armed Forces has stated that this inquiry boils down to “whether the confession is the product of an essentially free and unconstrained choice by its maker” or “[i]f, instead, the maker’s will was overborne and his capacity for self-determination was critically impaired.”⁸⁷ When an accused’s will is overborne, “use of his confession would offend due process.”⁸⁸ Courts have considered a variety of factors when evaluating voluntariness. Some relevant factors include: the age and education of the accused,⁸⁹ the nature of the questioning,⁹⁰ the lack of advice regarding constitutional rights,⁹¹ the mental condition, including psychological abnormalities, and intelligence of the accused,⁹² the length of the interrogation preceding the statement,⁹³ the use of threats or inducements regarding consequences of not cooperating,⁹⁴ whether the accused had any prior experience with law enforcement practices or techniques,⁹⁵ and the use of lies, threats, or promises.⁹⁶ Again, a finding of voluntariness does not turn “on the presence or absence of a single controlling criterion,” but rather on “a careful scrutiny of all the surrounding circumstances.”⁹⁷

Importantly, the truthfulness of the statement is *not* a relevant factor to the determination of voluntariness because in criminal cases the Constitution “forbids ‘fundamental unfairness in the

⁸³ *Id.* at § (a)(1)(A); see 10 U.S.C. § 831(d) (“No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”)

⁸⁴ *Blackburn v. Alabama*, 361 U.S. 199, 206-207 (1960).

⁸⁵ *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (citing *Columbe v. Connecticut*, 367 U.S. 568, 604-605 (1961) (internal quotation marks omitted)).

⁸⁶ *Id.* at 226.

⁸⁷ *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) (citing *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961)).

⁸⁸ *Id.*

⁸⁹ *E.g.*, *Haley v. Ohio*, 332 U.S. 596 (1948); *Payne v. Arkansas*, 356 U.S. 560 (1958).

⁹⁰ *E.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

⁹¹ *E.g.*, *Davis v. North Carolina*, 384 U.S. 737 (1966).

⁹² *E.g.*, *Fikes v. Alabama*, 352 U.S. 191, 197 (1957) (noting uneducated prisoner was “certainly of low mentality, if not mentally ill”).

⁹³ *E.g.*, *Watts v. Indiana*, 338 U.S. 49, 55 (1949) (“Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive to the accusatorial system.”)

⁹⁴ *E.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

⁹⁵ *Id.*

⁹⁶ *E.g.*, *United States v. Cobb*, 2019 CCA LEXIS 220, *9 (N-M Ct. Crim. App. May 20, 2019) (citing *United States v. Freeman*, 65 M.J. 451, 453-54 (C.A.A.F. 2008)).

⁹⁷ *Bustamonte*, 412 U.S. at 226 (internal citations omitted).

use of evidence, *whether true or false*.”⁹⁸ Even factually accurate statements can “be the product of constitutionally impermissible methods in their inducement... [where] a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected.”⁹⁹ Similarly, coercion does not require physical violence and words alone may suffice to overcome an accused’s free will. “[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.”¹⁰⁰ Coercion “need not depend upon actual violence by a government agent”¹⁰¹ and “[s]ubtle pressures may be as telling as coarse and vulgar ones.”¹⁰² The Supreme Court reflected on one such “subtle pressure,” the choice between forfeiting a job or self-incrimination, and stated that such a choice “is the antithesis of free choice to speak out or remain silent.”¹⁰³ In a similar case, the Court overturned a defendant’s conviction because it was “abundantly clear that [her] oral confession was made *only after* the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not cooperate.”¹⁰⁴

Military courts have not deviated from the Supreme Court’s lead. In *United States v. Martinez*, the court reversed the service court of appeals and upheld the military judge’s suppression of a statement when the trial court properly considered the appellant’s “psychological state” in finding that he “cracked and gave up,” telling law enforcement what it “wanted to hear.”¹⁰⁵ In another case involving coercive interrogation tactics, the Court of Military Appeals overturned a conviction because it was error to admit a confession where “an exhortation or adjuration to speak the truth is connected with suggestions of a threat or benefit.”¹⁰⁶

5. Argument.

a. DC3 Ovando’s immediate chain of command violated Article 31 when they failed to provide a rights advisement and illegally ordered him to write a statement concerning the situation with SN [REDACTED]

DC3 Ovando was suspected of committing an offense at the time he was ordered to write a statement by his LPO. While his initial conversation with the LPO began out of personal motivation, the tone quickly changed to that of one squarely in the realm of a disciplinary inquiry as soon as DC3 Ovando mentioned the situation with SN [REDACTED]. This is demonstrated by the fact that the LPO told DC3 Ovando that the events with SN [REDACTED] were “serious” and that it would have to be reported up the chain of command. The LPO even told DC3 Ovando that the situation

⁹⁸ *Blackburn*, 361 U.S. at 206 (emphasis added) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961) (“[W]hether Rogers’ confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment.”)).

⁹⁹ *Rogers*, 365 U.S. at 541.

¹⁰⁰ *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (quoting *Blackburn*, 412 U.S. at 206).

¹⁰¹ *Id.*

¹⁰² *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967) (citing *Leyra v. Denno*, 347 U.S. 556 (1954)).

¹⁰³ *Id.*

¹⁰⁴ *Lynum*, 372 U.S. at 534-35 (emphasis added).

¹⁰⁵ 38 M.J. 82, 87 (C.M.A. 1993).

¹⁰⁶ *United States v. Handsome*, 21 C.M.A. 330, 333 (1972).

could be perceived as rape, further signaling that from that moment on DC3 Ovando was suspected of committing an offense. Moreover, the fact that the situation was actually routed up the chain of command, through the LCPO to the ship's CMC, demonstrates the suspicion of DC3 Ovando. Lastly, the chain of command based its decision to have DC3 Ovando write a statement on the desire to preserve his version of events in case of a report, clearly pointing to a definitive suspicion that DC3 Ovando committed an offense; for if there is no suspicion there is no need for preservation.

Furthermore, the LPO was DC3 Ovando's direct supervisor in his immediate chain of command when he ordered DC3 Ovando to write the statement. Even without the strong presumption of a disciplinary nature inherent in such questioning, the totality of the circumstances also point to the conclusion that a reasonable person in DC3 Ovando's position would have seen the LPO operating in a disciplinary capacity. First, the LPO received the order from his superior to have DC3 Ovando write the statement and then explicitly re-engaged DC3 Ovando in the capacity of being his LPO, not as someone there to provide consolation. Second, the LPO had previously issued DC3 Ovando disciplinary counseling chits, establishing a foundation for the LPO to be viewed as a disciplinarian. Finally, the LPO reinforced the authority of the request by telling DC3 Ovando that the order to write a statement came from the departmental LCPO.

It is also worth noting that the evidence reflects that both the LPO and DC3 Ovando viewed the request to have DC3 Ovando write a statement as a military order. While the LCPO claims the intent was never actually to order him to write a statement, the conveyance of that intent and subsequent actions taken down the chain of command point to the contrary. The LPO understood the pass-down from the LCPO as an order and viewed DC3 Ovando as having understood that it was an order based on his reaction and compliance with said order. DC3 Ovando even attempted to show the LPO the statement once it was completed. Even the LCPO agrees that DC3 Ovando is the type of Sailor to take anything from a superior as an official order and that he would have seen the request for a statement as a military order.

The circumstances leading up to DC3 Ovando writing the statement violate Article 31 in two significant ways. First, the fact that the LPO ordered DC3 Ovando to write the statement violates the fundamental protections of Article 31(a) and is therefore illegal. Second, since the LPO suspected DC3 Ovando of committing an offense and was operating in a disciplinary capacity, he was required to advise DC3 Ovando of his Article 31 rights before requesting the statement. However, no such advisement took place, in violation of Article 31(b), and as a result, the statement DC3 Ovando drafted in response to the LPO's order is unwarned, involuntary, and inadmissible.

The fact that DC3 Ovando viewed the request for a written statement as a military order directly plays into how the Government came into possession of the statement. When NCIS first interrogated DC3 Ovando and asked him if he wanted to have a conversation about the situation with SN [REDACTED] DC3 Ovando's immediate response was "Today? I have a written statement."¹⁰⁷ DC3 Ovando came into that interrogation with the understanding that he had to submit the statement that he had been previously ordered to write. DC3 Ovando's response clearly

¹⁰⁷ Defense Enclosure 5, page 15 lines 18-21.

surprised SA [REDACTED] who stated, “I’ve never had a subject say that they had a written statement prepared,”¹⁰⁸ and he immediately focused on getting the previously prepared statement. He did not ask a single question about how the previously prepared statement came to be written, despite DC3 Ovando stating he was willing to submit it, but not answer any questions about it. SA [REDACTED] never issued a cleansing warning for the statement prior to accepting it and the brief addendum he dictated to DC3 Ovando to write on the original Military Suspect’s Acknowledgement and Waiver of Rights form does not do enough to remove the taint from the LPO’s illegal order. Had DC3 Ovando never been ordered to write the statement, the Government would have never received the information contained within the statement because DC3 Ovando would have invoked his right to remain silent, as indicated by his invocation regarding the follow-on questions about the statement. This is demonstrated by a comment made to SA [REDACTED] during the polygraph interrogation when DC3 Ovando stated that his “first class” told him to “just write everything down that happened that night...That’s why I had a pre-written statement of everything that happened that night.”¹⁰⁹ The pre-written statement was born of an illegal order and is the byproduct of an unwarned solicitation by someone, acting in a disciplinary capacity, who suspected DC3 Ovando of committing an offense; it is the poisonous tree and should therefore be suppressed.

b. DC3 Ovando’s subsequent statements to NCIS are the fruit of the abovementioned poisonous tree and even if they were not, they are still involuntary as the byproducts of coercive tactics.

As mentioned above, without the statement from the illegal order, there would be no follow-on polygraph interrogations, no timeline, and no apology letter. All evidence from DC3 Ovando that was collected by NCIS stemmed from that original unwarned statement. However, even if these statements are not seen as the fruit of the poisonous tree, they are still involuntary because NCIS elicited them through the use of coercive tactics in violation of Mil. R. Evid. 304.

To begin, even with the poisonous pre-written statement, NCIS did not like the prospects of its case against DC3 Ovando. Based email correspondence, SA [REDACTED] thought there were still questions left unanswered and approached DC3 Ovando on 8 September 2020 about taking a polygraph examination, despite previously telling DC3 Ovando at the end of the first interrogation that, since he invoked his right to remain silent, DC3 Ovando would have to initiate further conversations. Because SA [REDACTED] lost his case files, the Defense has no record of the manner in which this follow-up approach took place nor what transpired between the two of them. What is clear, however, is that DC3 Ovando did not immediately agree to the polygraph during that follow-up on 8 September and that once he subsequently did, SA [REDACTED] told his superiors that the setup was not “optimal” and that if DC3 Ovando did not “cop to anything more than oral sex” and provide more information to law enforcement it “may be an exercise in futility.”¹¹⁰

NCIS needed DC3 Ovando to make more incriminating statements and actively strategized about how its agents should frame the polygraph examination in order to ensure it would get

¹⁰⁸ *Id.* at 16 lines 17-19.

¹⁰⁹ Defense Enclosure 18, page 58 lines 10-20.

¹¹⁰ Defense Enclosures 11 and 13.

DC3 Ovando talking. The Assistant Special Agent in Charge of the San Diego Polygraph Services Field Office suggested dangling the polygraph examination as the means by which DC3 Ovando could “prove his innocence.”¹¹¹ SA [REDACTED] ran with this suggestion and even sent the Assistant Special Agent in Charge a draft write-up before sending it to DC3 Ovando. In that email, which was a word-for-word copy of the draft, SA [REDACTED] stated, “if you want to take the exam to prove your innocence, polygraph examiners *need* you to deny the allegations that you sexually assaulted [SN [REDACTED]]...Had I been able to ask you questions, I would have asked you this question when I met you aboard the ship...I need that in a sworn written statement prior to coordinating the polygraph examination. If you are not willing to do that, then we *cannot offer* the polygraph to you.”¹¹² In so doing, SA [REDACTED] effectively presented the polygraph as the way DC3 Ovando could extricate himself from this situation and prove his innocence, but qualified it as only being possible if he waived his right to remain silent, a right which he had *already* invoked. SA [REDACTED] framed DC3 Ovando’s invocation of the right to remain silent as an obstacle in the way of proving his innocence. Furthermore, while SA [REDACTED] advised DC3 Ovando “that participating in this exam means you are willing to be asked questions by NCIS,” he never advised that the answers to those questions could be used against DC3 Ovando. He also minimized DC3 Ovando’s right to refuse to answer questions by saying, “NCIS will need to ask you questions – which you can again elect to decline to answer the questions but – that makes the exam pointless.”¹¹³ Through this carefully concocted coercive approach, NCIS misled DC3 Ovando into agreeing to the 2 November 2020 polygraph examination and conditioned him into believing that the only means of proving his innocence would be *pointless* without answering the questions he had previously refused to answer through the invocation of his right to remain silent.

The coercive tactics only continued at the 2 November 2020 polygraph examination. Initially, despite SA [REDACTED] best efforts to entice DC3 Ovando to incriminate himself during the pre-polygraph interrogation, to include lying to DC3 Ovando that SN [REDACTED] remembered exactly where his hands were, suggesting the notion that he had pinned her down and digitally penetrated her, telling him he knew there were times when she was unconscious, and framing oral sex as an unusual sex act, DC3 Ovando remained consistent to the version of events that was recorded in the poisonous pre-written statement. SA [REDACTED] even confronted DC3 Ovando, by stating “I think you’re leaving out some facts,” but DC3 Ovando replied “I don’t think so.”¹¹⁴ SA [REDACTED] commented on DC3 Ovando’s consistency when he said, “I mean, that’s pretty much in line with what you said in your statement before.”¹¹⁵ It was only after the guise of the failed polygraph examination that this would change and the coercive tactics would intensify. Immediately after concluding the test, the first words out of SA [REDACTED] mouth were that “without a shadow of a doubt” the science indicated DC3 Ovando was lying. Similar to the accused in *Martinez*, this moment had a significant effect on DC3 Ovando’s “psychological state” and he slowly began “crack[ing] and g[iving] up,” telling SA [REDACTED] exactly what he “wanted to hear.” SA [REDACTED] approach during this second polygraph interrogation was much more forceful and he spent a great amount of time lecturing DC3 Ovando, through long-winded

¹¹¹ Defense Enclosure 13.

¹¹² Defense Enclosure 12.

¹¹³ *Id.*

¹¹⁴ Defense Enclosure 18.

¹¹⁵ *Id.*

diatribes, about the case as he saw it. DC3 Ovando's answers were brief, usually one-word "yes's." SA [REDACTED] realized he was being too heavy handed because on three separate occasions he explicitly had to ask DC3 Ovando if he was "actually agreeing with him" or "just telling him what he wanted to hear." SA [REDACTED], however, wanted DC3 Ovando to go along with his version of the narrative because whenever DC3 Ovando would push back, SA [REDACTED] would employ the tried and true binary trap: DC3 Ovando was either a sexual monster or a person who just made a mistake; it was one or the other and it could not be anything in between. Whenever DC3 Ovando would state something that did not gel with the agent's narrative of the case, SA [REDACTED] would confront him with the conclusion that DC3 Ovando must be "that sexual monster." The psychological tension between the differences in how DC3 Ovando remembered the situation with SN [REDACTED], combined with the fact that he did not remember the entire situation in the first place, and the fear of being labeled a sexual monster led DC3 Ovando to agree with the version of events that SA [REDACTED] was repeatedly lecturing him about. Once he had DC3 Ovando in this agreeable state, SA [REDACTED] utilized "an exhortation or adjuration to speak the truth" that was "connected with suggestions of a threat or benefit" just like in the *Handsome* case. SA [REDACTED] told DC3 Ovando what his emotions should be and that he does actually feel "bad and remorseful about that stuff." He framed the apology letter as a way for DC3 Ovando to "respect women and to do the right thing." The benefit SA [REDACTED] dangled in front of DC3 Ovando was being able to "close this door" and finally obtain the status of the person who just made a mistake as opposed to the sexual monster he had been threatened with over the course of the interrogations. The solution to DC3 Ovando's problem that had been carefully crafted by SA [REDACTED] was to write another statement, one in which SA [REDACTED] told him *exactly* what to include.

Under the totality of the circumstances, given the fact that DC3 Ovando was a junior Sailor and only [REDACTED] years old, that he had no prior experience with law enforcement, that the polygraph interrogation lasted several hours, that SA [REDACTED] utilized manipulative and coercive tactics, and that NCIS employed a misleading and calculated approach to get DC3 Ovando to agree to waive the right to remain silent that he had already invoked, DC3 Ovando's statements can only be seen as the product of unlawful inducement and coercion. DC3 Ovando's will was overborne and his capacity for self-determination was critically impaired. As such, his statements were involuntary and should be suppressed.

6. Evidence and Enclosures. Defense respectfully requests that the Government produce DC1 [REDACTED] USN and HTCS [REDACTED] USN as witnesses to provide testimony in support of this motion. Defense respectfully submits Enclosures 1 through 21, as indicated in the separate evidentiary package, in support of this motion.

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

8. **Relief Requested.** The Defense respectfully moves this Court to suppress all statements made by DC3 Ovando to NCIS. The statements were obtained in violation of the Fifth Amendment of the U.S. Constitution, Article 31 of the UCMJ, and Mil. R. Evid. 304 and 305. As such, they are involuntary and inadmissible.

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M. C. DOHERTY
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, an electronic copy of this motion was served on the Court and Trial Counsel.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION TO SUPPRESS
UNWARNED AND INVOLUNTARY
STATEMENTS

28 OCT 21

1. **Nature of Motion.** The Government requests that the Court deny the Defense 21 October 2021 *Motion to Suppress Unwarned and Involuntary Statements*. A preponderance of the evidence shows that the Accused's oral statements to DC1 [REDACTED] were spontaneous, his 1 September 2020 written statement to NCIS Special Agent [REDACTED] was voluntary, the permissive authorization to search DC3 Ovando's phone was valid, and DC3 Ovando's 2 November 2020 statements to NCIS Special Agent [REDACTED] were voluntary.

2. **Facts.**

a. DC3 Ovando is charged with six specifications of violating the Uniform Code of Military Justice (UCMJ) Article 120. The specifications are based on DC3 Ovando's conduct toward GMSN [REDACTED] in July 2020.¹

b. Approximately one week after the a party he had attended, DC3 Ovando approached his Leading Petty Officer (LPO), DC1 [REDACTED] and spontaneously volunteered information about his interaction with GMSN [REDACTED] at the party the weekend prior.²

c. DC1 [REDACTED] believed that the incident could be perceived as rape, reported the incident to his Leading Chief Petty Officer (LPCO), HTC [REDACTED] and then instructed DC3 Ovando to write a statement documenting his versions of the night in question.³

d. DC1 [REDACTED] did not instruct DC3 Ovando to provide him, or anyone else, with a copy of the statement. When DC3 Ovando tried to show the statement to DC1 [REDACTED], DC1 [REDACTED] declined to view or accept the written statement.⁴

e. The date from the screenshot of DC3 Ovando's phone indicates that his statement was last updated August 22, 2020 at 22:15.⁵

¹ Charge Sheet.

² Defense MTS Statements, Enclosure 1.

³ *Id.*

⁴ *Id.*; Anticipated testimony of DC1 [REDACTED]

⁵ Defense MTS Statements, Enclosure 8, page 1.

f. On 1 September 2020, NCIS Special Agent ██████ interrogated DC3 Ovando aboard ██████⁶

g. Prior to questioning DC3 Ovando, Special Agent ██████ reviewed with DC3 Ovando his Article 31(b) rights.⁷ Special Agent ██████ told DC3 Ovando “[U]p to you entirely, man. You don’t have to talk with me today, it’s up to you.”⁸ Special Agent ██████ told DC3 Ovando “[Y]ou have the right to remain silent, make no statement at all. You don’t have to talk to me today...any statement you make can be used on trial by court martial, or other judicial, or administrative proceeding.”⁹ Special Agent ██████ asked DC3 Ovando if he understood his right not to make a statement, to which DC3 Ovando replied, “Yes.”¹⁰ Special Agent ██████ also explained to DC3 Ovando his right to an attorney and his right to end the interview at any time.¹¹

h. When Special Agent ██████ asked if DC3 Ovando wished to make a statement, DC3 Ovando replied that he wanted to provide a written statement, but did not want to answer other questions.¹² When DC3 Ovando told Special Agent ██████ that he had a written statement prepared, Special Agent ██████ asked DC3 Ovando “do you want to give me that?” to which DC3 Ovando replied “yes.”¹³ Special Agent ██████ asked “how do you want to give me the statement?” to which DC3 Ovando replied “I could come back in like, ten minutes.”¹⁴ Special Agent ██████ asked DC3 Ovando “how do we get it off your phone?” to which DC3 Ovando replied, “I could type it.”¹⁵ Special Agent ██████ then realized he had no printer, and suggested that DC3 Ovando handwrite rather than type the statement “if you’re okay with that.”¹⁶

i. DC3 Ovando acknowledged his rights and elected to provide a handwritten statement to NCIS.¹⁷

j. DC3 Ovando then spent approximately 31 minutes to handwrite a statement and subsequently provided that statement to Special Agent ██████¹⁸ During this time, Special Agent ██████ asks no questions and DC3 Ovando is uninterrupted save for a brief comment by Special Agent ██████ complimenting DC3 Ovando’s handwriting.¹⁹ In his handwritten statement, DC3 Ovando stated that the girl in the bathtub “was talking to me, saying ‘hey baby, come over here’...she said I was cute and she asked for a kiss...while we were kissing she said to do

⁶ Defense MTS Statements, Enclosure 3.

⁷ Defense MTS Statements, Enclosure 5, pages 12-15; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:07:43 to 00:09:45.

⁸ Defense MTS Statements, Enclosure 5, page 13, lines 2-3.

⁹ Defense MTS Statements, Enclosure 5, page 14, lines 3-9.

¹⁰ Defense MTS Statements, Enclosure 5, page 14, lines 9-11.

¹¹ Defense MTS Statements, Enclosure 5, pages 14-15.

¹² Defense MTS Statements, Enclosure 5, pages 15-18; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:09:47 to 00:11:19.

¹³ Defense MTS Statements, Enclosure 5, page 16, lines 19-21; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:10:18.

¹⁴ Defense MTS Statements, Enclosure 5, page 17, lines 7-10.

¹⁵ Defense MTS Statements, Enclosure 5, page 17, lines 11-17.

¹⁶ Defense MTS Statements, Enclosure 5, page 18, lines 7-9.

¹⁷ Defense MTS Statements, Enclosure 6.

¹⁸ Defense MTS Statements, Enclosure 7; Defense MTS Statements, Enclosure 4, video 2 of 3.

¹⁹ *Id.*

more.”²⁰

k. After DC3 Ovando had finished handwriting his statement, Special Agent [REDACTED] explained, “This is what we call a sworn statement. So just to be clear, this is the statement that you’re providing voluntarily to me. You’re okay with that?” to which DC3 Ovando replied, “Yes.”²¹

l. Special Agent [REDACTED] asked “are you cool with letting me take pictures of...the statement on your phone?”²² Special Agent [REDACTED] then proceeded to inform DC3 Ovando of his Constitutional right to refuse a search and told DC3 Ovando “You don’t have to let me do this. You can say no.”²³

m. DC3 Ovando signed a Permissive Authorization for Search and Seizure to allow Special Agent [REDACTED] to take photos of the screen of his phone displaying the written statement.²⁴

n. Special Agent [REDACTED] then took photos of DC3 Ovando’s phone screen displaying the written statement.²⁵

o. The content of the typed statement from photos of DC3 Ovando’s phone is substantially identical to the content of the handwritten statement of DC3 Ovando.²⁶

p. On 2 November 2020, NCIS Special Agent [REDACTED] interrogated DC3 Ovando at NCIS Resident Agency [REDACTED].²⁷

q. Prior to questioning DC3 Ovando, Special Agent [REDACTED] reviewed with DC3 Ovando his Article 31(b) rights.²⁸ DC3 Ovando acknowledged and waived his rights and elected to provide a statement.²⁹ Special Agent [REDACTED] also reviewed with DC3 Ovando his rights concerning taking a polygraph examination and DC3 Ovando agreed to participate in the polygraph examination.³⁰

r. Special Agent [REDACTED] then interrogated DC3 Ovando for approximately 3 hours, 10 minutes, which includes the completion of a polygraph examination.³¹ At the end of this interrogation, DC3 Ovando agreed to write a letter and Special Agent [REDACTED] left the room for

²⁰ Defense MTS Statements, Enclosure 7.

²¹ Defense MTS Statements, Enclosure 5, page 29, lines 12-16.

²² Defense MTS Statements, Enclosure 5, page 31, lines 11-12; Defense MTS Statements, Enclosure 4, video 2 of 3, timestamp 00:39:27.

²³ Defense MTS Statements, Enclosure 5, page 32, lines 11-15; Defense MTS Statements, Enclosure 4, video 3 of 3, timestamp 00:00:16.

²⁴ Government MTS Statements, Enclosure 1.

²⁵ Defense MTS Statements, Enclosure 8; *See also* Defense MTS Statements, Enclosure 3.

²⁶ *Compare* Defense MTS Statements, Enclosure 8, *with* Defense MTS Statements, Enclosure 7.

²⁷ Defense MTS Statements, Enclosure 14; Defense MTS Statements, Enclosure 15.

²⁸ Defense MTS Statements, Enclosure 15, timestamp 00:11:47 to 00:15:49; Defense MTS Statements, Enclosure 18, pages 8-12.

²⁹ *Id.*; Defense MTS Statements, Enclosure 16.

³⁰ Defense MTS Statements, Enclosure 17; Defense MTS Statements, Enclosure 18, pages 12-18.

³¹ Defense MTS Statements, Enclosure 15, timestamp 00:07:15 to 03:17:55

approximately 58 minutes while DC3 Ovando handwrote the letter.³² After completing the letter, DC3 Ovando took a restroom break and got water.³³ After the break, Special Agent [REDACTED] questioned DC3 Ovando for an additional 32 minutes.³⁴

3. **Burden.** The Government bears the burden of proof to establish by a preponderance of the evidence that the statement of the accused was made voluntarily. M.R.E. 304(f).

4. **Law.**

a. Voluntariness of Statements

A confession is involuntary, and thus inadmissible, if it was obtained “in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.”³⁵ The prosecution bears the burden of establishing by a preponderance of the evidence that the confession was voluntary.³⁶ A determination of whether a confession is voluntary requires an assessment of the totality of all the surrounding circumstances of both the characteristics of the accused and the details of the interrogation.³⁷

A totality of circumstances analysis can include the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.³⁸ Further, the use of promises, lies, threats, inducements, or ploys are not determinative of involuntariness, but rather considered as factors in the totality of circumstances.³⁹

In *United States v. Freeman*, the Court found the accused’s confession voluntary where the interrogation lasted ten hours, the agents lied to the accused claiming to have witnesses who saw him and his fingerprints found at the scene.⁴⁰ The Agents in *Freeman* also advised Freeman that they would tell his commander whether he had cooperated and threatened to turn the case over to civilian authorities if he did not cooperate.⁴¹

Law enforcement may generally offer to tell the prosecutor about the accused’s cooperation and may also suggest that cooperation may increase the likelihood of a more lenient sentence.⁴² Military Courts have also found that informing the accused of the advantages of cooperating

³² Defense MTS Statements, Enclosure 15, timestamp 03:17:55 to 04:15:46.

³³ Defense MTS Statements, Enclosure 15, timestamp 04:15:53 to 04:19:48.

³⁴ Defense MTS Statements, Enclosure 15, timestamp 04:19:48 to 04:51:28.

³⁵ M.R.E. 304(a).

³⁶ *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996); M.R.E. 304(f).

³⁷ *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1993) (citing *Schnecko v. Bustamonte*, 412 U.S. 218, 226, (1973)).

³⁸ *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002)

³⁹ *United States v. Freeman*, 65 M.J. 451, 455 (C.A.A.F. 2008)

⁴⁰ *Freeman*, 65 M.J. at 455.

⁴¹ *Id.*

⁴² *United States v. Harrison*, 34 F.3d 886, 891 (9th Cir. 1994)

does not overbear the accused's voluntary decision to make a statement.⁴³ Additionally, informing an accused of the potential consequences of his decision to cooperate does not render a statement involuntary.⁴⁴ Finally, admissions made in order to present an exculpatory story support a finding that the admissions are voluntary.⁴⁵

Spontaneous statements, even if incriminating, are not within the purview of Article 31.⁴⁶

b. Warned statements made subsequent to unwarned statements

“Where a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to actual coercion, duress, or inducement, the subsequent confession is presumptively tainted as a product of the earlier one. On the other hand, where the earlier confession was “involuntary” only because the suspect had not been properly warned of his panoply of rights to silence and to counsel, the voluntariness of the second confession is determined by the totality of the circumstances. The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession.”⁴⁷

The lack of a “cleansing warning” does not negate the voluntariness of a confession where an accused understands his rights and freely waives them.⁴⁸ Additional factors in the totality of the circumstances are whether law enforcement made reference to the earlier, unwarned statements.⁴⁹

c. Analysis of *United States v. Lichtenhan*.

In *United States v. Lichtenhan*, HMC ██████ approached the accused, whom he suspected may be responsible for an attempt to obtain drugs from the intensive care unit.⁵⁰ When HMC ██████ approached, but before he asked any questions about his suspicions, the accused told him he needed help and provided an admission of taking drugs from the pharmacy.⁵¹ HMC ██████ did not provide a rights warning.⁵² The Court found these statements to be spontaneous and not under the purview of Article 31.⁵³

⁴³ See *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991), *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984).

⁴⁴ *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002) (finding that informing the accused that his children may be taken away was not unlawful coercion because it was an accurate picture of what might happen).

⁴⁵ See *United States v. Henderson*, 52 M.J. 14, 18 (C.A.A.F. 1999); *United States v. Washington*, 46 M.J. 477, 482 (C.A.A.F. 1997).

⁴⁶ *United States v. Lichtenhan*, 40 M.J. 466, 469 (C.A.A.F. 1994) (citing *United States v. Vitale*, 34 M.J. 210, 212 (CMA 1992)).

⁴⁷ *United States v. Phillips*, 32 M.J. 76, 79 (C.A.A.F. 1991) (findings that the warned statement to NIS was involuntary in part because of the agent's reference to the earlier, unwarned statements).

⁴⁸ *United States v. Ford*, 51 M.J. 445, 452 (C.A.A.F. 1999)

⁴⁹ *United States v. Ford*, 51 M.J. 445, 452 (C.A.A.F. 1999) (upholding the voluntariness of a confession where “there was no reference to the earlier unwarned statements at the barracks”).

⁵⁰ *United States v. Lichtenhan*, 40 M.J. 466, 468 (C.A.A.F. 1994).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 469.

HMC [REDACTED] then asked the accused in *Lichtenhan* to put down his oral statement into a written statement, to which the accused complied and provided a written statement to HTC [REDACTED].⁵⁴ The Court ruled that the written statement to HMC Paterson was inadmissible because it was obtained in violation of Article 31(b).⁵⁵

Finally, three days after the accused's conversation with HMC [REDACTED] the accused made a written confession to NIS agents where the agents did not provide a cleansing warning.⁵⁶ The Court held that despite the lack of a cleansing warning, the totality of the circumstances supported the military judge's finding that the confession to NIS was voluntary.⁵⁷

5. Argument.

a. DC3 Ovando's oral statements to DC1 [REDACTED] were spontaneous and not the result of interrogation.

Unlike in *Lichtenhan*, where HMC [REDACTED] approached the accused with suspicion in his mind, here DC3 Ovando was the one who approached DC1 [REDACTED] while DC1 [REDACTED] had no suspicion whatsoever. Similarly to *Lichtenhan*, however, DC3 Ovando began to spontaneously tell DC1 [REDACTED] about the night of his interactions with GMSN [REDACTED]. DC1 [REDACTED] did not question or interrogate DC3 Ovando, but simply listened to DC3 Ovando's statements. While DC1 [REDACTED] did not read DC3 Ovando his rights, he was not required to because DC3 Ovando's oral statements were spontaneous. DC3 Ovando's oral statements to DC1 [REDACTED] are admissible.

b. Even if DC3 Ovando were illegally ordered to write a statement, he was not coerced into providing a statement.

DC1 [REDACTED] never ordered DC3 Ovando to provide him or anyone else with a statement. In fact, when DC3 Ovando offered to provide him a copy of the written statement, DC1 [REDACTED] declined. Thus, while DC3 Ovando *formed* a statement at the direction of DC1 [REDACTED] he was not coerced or persuaded to *provide* that statement.

In fact, while DC3 Ovando told Special Agent [REDACTED] that the reason he had a pre-written statement prepared was because he had spoken with his LPO,⁵⁸ there is no evidence that the written statement that DC3 Ovando drafted based on DC1 [REDACTED] direction was at all similar to the statement provided to Special Agent [REDACTED] on 1 September. There *is* evidence that between approximately 12-19 July 2020 when DC3 Ovando spoke with DC1 [REDACTED] and 1 September 2020 when DC3 Ovando provided a statement to Special Agent [REDACTED] that the note on DC3 Ovando's phone has been edited and updated at least once on 22 August 2020. Ultimately, the reason why there is no evidence of what was contained in the statement DC3 Ovando drafted after speaking with DC1 [REDACTED] is because DC3 Ovando never actually provided that statement. DC3 Ovando never provided any written statement until after he had

⁵⁴ *Id.* at 468.

⁵⁵ *Id.* at 469.

⁵⁶ *Id.*

⁵⁷ *Id.* at 470.

⁵⁸ Defense Enclosure 18, page 58, lines 13-20.

been warned of his rights under Article 31(b).

The facts here on this matter are in stark contrast with the facts of *Lichtenhan*. Where the accused in *Lichtenhan* was ordered to *write and provide* a statement to HMC [REDACTED] here, DC3 Ovando was never ordered to provide his statement to DC1 [REDACTED] or anyone else.

c. DC3 Ovando provided his written statement to NCIS voluntarily on 1 September 2020.

DC3 Ovando's meeting with NCIS took place more than a month after speaking with DC1 [REDACTED] in July 2020. In comparison, the Court in *Lichtenhan*, upheld the voluntariness of the accused's statement, where the accused met with NIS three days after his unwarned statements to HMC [REDACTED]⁵⁹

On 1 September 2020, DC3 Ovando voluntarily provided a written statement to NCIS. Prior to being asked whether he wished to provide a statement, Special Agent [REDACTED] told DC3 Ovando "You don't have to talk with me today, it's up to you,"⁶⁰ and "[Y]ou have the right to remain silent, make no statement at all. You don't have to talk to me today...any statement you make can be used on trial by court martial, or other judicial, or administrative proceeding."⁶¹ Not only did Special Agent [REDACTED] tell DC3 Ovando of his rights, but also he positively confirmed that DC3 Ovando understood his right not to make a statement.⁶²

After these clear warnings, Special Agent [REDACTED] asked if DC3 Ovando wished to make a statement, and DC3 Ovando replied that he had a written statement,⁶³ that he wanted to give the written statement to Special Agent [REDACTED]⁶⁴ and even began to volunteer different ways that he could provide his written statement.⁶⁵ Far from being coerced into providing a statement, after being told multiple times that he did not have to provide any statement, DC3 Ovando indicated that he *wanted* to provide his written statement.

Throughout this exchange, Special Agent [REDACTED] made no reference to either DC3 Ovando's earlier oral statement to DC1 [REDACTED] or DC3 Ovando's written statement on his phone. Rather, the evidence shows that Special Agent [REDACTED] seemed surprised and had no knowledge that DC3 Ovando had written a statement until DC3 Ovando volunteered that information.⁶⁶ The fact that Special Agent [REDACTED] made no reference to the earlier statement also weighs towards the voluntariness of DC3 Ovando's statement in the totality of circumstances.⁶⁷

⁵⁹ *Id.*

⁶⁰ Defense MTS Statements, Enclosure 5, page 13, lines 2-3.

⁶¹ Defense MTS Statements, Enclosure 5, page 14, lines 3-9.

⁶² Defense MTS Statements, Enclosure 5, page 14, lines 9-11.

⁶³ Defense MTS Statements, Enclosure 5, pages 15-18; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:09:47 to 00:11:19.

⁶⁴ Defense MTS Statements, Enclosure 5, page 16, lines 19-21; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:10:18.

⁶⁵ See, Defense MTS Statements, Enclosure 5, page 17, lines 7-10 and Defense MTS Statements, Enclosure 5, page 17, lines 11-17.

⁶⁶ Defense MTS Statements, Enclosure 5, page 16; Defense MTS Statements, Enclosure 4, video 1 of 3, timestamp 00:09:47 to 00:10:25.

⁶⁷ *United States v. Ford*, 51 M.J. 445, 452 (C.A.A.F. 1999) (upholding the voluntariness of a confession where "there

After telling Special Agent [REDACTED] that he wanted to provide his written statement, DC3 Ovando spent over 30 minutes handwriting his statement. During this time, DC3 Ovando was not questioned or interrupted. He was not asked to further elaborate on any matter, he was not challenged on any assertion, he was not directed or otherwise guided in what he was to write. He chose to transcribe what he had prepared from his phone, but could have written and provided any statement that he wanted.

DC3 Ovando's written statement itself is largely presented as exculpatory. In it, he claims that GMSN [REDACTED] was initiating sexual activity, responding to him, and asking for him to do "more."⁶⁸ The fact that DC3 Ovando used the opportunity to make a statement in order to present an exculpatory story also supports finding that the admissions are voluntary in the totality of circumstances.⁶⁹

After DC3 Ovando had completed writing his statement, Special Agent [REDACTED] again confirmed that DC3 Ovando wanted to provide the statement and was doing so voluntarily.⁷⁰ The evidence shows that DC3 Ovando knew that he was under no obligation to provide any statement and that he voluntarily chose to provide a handwritten statement.

d. DC3 Ovando provided a valid Permissive Authorization for Search and Seizure of his cell phone.

Even if DC3 Ovando had not handwritten a statement to provide to NCIS, he did provide a valid search authorization of his phone. DC3 Ovando volunteered that he had evidence that he wished to provide that was located on his phone, namely the contents of a electronic note that DC3 Ovando represented to be his prepared statement. Prior to searching his phone, Special Agent [REDACTED] confirmed that DC3 Ovando was willing to let him take photos of his phone's display of DC3 Ovando's saved note.⁷¹ Special Agent [REDACTED] informed DC3 Ovando of his rights,⁷² and DC3 Ovando signed a Permissive Authorization for Search and Seizure to authorize Special Agent [REDACTED] to take photos of the screen of his phone.⁷³ The note found on DC3 Ovando's phone is distinct evidence from the statement DC3 Ovando handwrote for NCIS. DC3 Ovando was never compelled or coerced to consent to a search of his phone, he did so freely and voluntarily.

e. DC3 Ovando's statement to NCIS on 2 November 2020 were voluntary based on the totality of the circumstances.

was no reference to the earlier unwarned statements at the barracks").

⁶⁸ Defense MTS Statements, Enclosure 7.

⁶⁹ See *United States v. Henderson*, 52 M.J. 14, 18 (C.A.A.F. 1999); *United States v. Washington*, 46 M.J. 477, 482 (C.A.A.F. 1997).

⁷⁰ Defense MTS Statements, Enclosure 5, page 29, lines 12-16.

⁷¹ Defense MTS Statements, Enclosure 5, page 31, lines 11-12; Defense MTS Statements, Enclosure 4, video 2 of 3, timestamp 00:39:27.

⁷² Defense MTS Statements, Enclosure 5, page 32, lines 11-15; Defense MTS Statements, Enclosure 4, video 3 of 3, timestamp 00:00:16.

⁷³ Government MTS Statements, Enclosure 1.

DC3 Ovando's statements to NCIS Special Agent ██████ took place on 2 November 2020, approximately two months after his statement to Special Agent ██████

In examining the totality of the circumstances of whether a statement is voluntary, courts look to the characteristics of the accused and the details of the interrogation.⁷⁴

In this case, the characteristics of DC3 Ovando support a finding that his statement was voluntary. First, there no evidence that DC3 Ovando is not of average intelligence, has not completed high school, cannot read and write, or is in any way mentally impaired.⁷⁵ DC3 Ovando did not complain about the process, never asked for an attorney, never asked to stop the interview or leave, or in any other way indicate that he felt coerced or pressured into making a statement.⁷⁶

The details of the interrogation also support a finding that DC3 Ovando's statement was voluntary. Before being questioned DC3 Ovando was properly advised of his rights.⁷⁷ DC3 Ovando elected to waive his rights and make a statement.⁷⁸ DC3 Ovando was provided opportunity to use the restroom or take a break at any time.⁷⁹ DC3 Ovando was interrogated for approximately 3 hours, 10 minutes,⁸⁰ at which point Special Agent ██████ left the room while DC3 Ovando opted to write a letter for approximately 58 minutes.⁸¹ After completing the letter, DC3 Ovando took a restroom break and got water.⁸² After the break, Special Agent ██████ questioned DC3 Ovando for an additional 32 minutes.⁸³ The length of his interrogation was not inordinately long.⁸⁴ Throughout the interview, Special Agent ██████ spoke in a calm, relaxed manner.⁸⁵ Similarly, throughout the video DC3 Ovando also spoke in a calm, relaxed manner and did not give any indication of being worn down or agitated.⁸⁶

In argument, Defense lists a slew of "coercive tactics" that are not actually coercive. A long winded diatribe is not coercive; especially when DC3 Ovando was informed of his right to end the interview and leave at any time. Neither are calling oral sex 'unusual' or confronting a suspect when you think they are being dishonest forms of coercion. Defense claims that Special Agent ██████ lied about GMSN ██████ memory of where DC3 Ovando's hands were, but

⁷⁴ *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, (1973)).

⁷⁵ See *United States v. Freeman*, 65 M.J. 451, 454 (C.A.A.F. 2008) (Finding the accused statement voluntary in part based on these same factors)

⁷⁶ *Id.*

⁷⁷ Defense MTS Statements, Enclosure 15, timestamp 00:11:47 to 00:15:49; Defense MTS Statements, Enclosure 18, pages 8-12.

⁷⁸ Defense MTS Statements, Enclosure 16.

⁷⁹ Defense MTS Statements, Enclosure 18, page 5, lines 5-6.

⁸⁰ Defense MTS Statements, Enclosure 15, timestamp 00:07:15 to 03:17:55

⁸¹ Defense MTS Statements, Enclosure 15, timestamp 03:17:55 to 04:15:46.

⁸² Defense MTS Statements, Enclosure 15, timestamp 04:15:53 to 04:19:48.

⁸³ Defense MTS Statements, Enclosure 15, timestamp 04:19:48 to 04:51:28.

⁸⁴ *United States v. Scholz*, Docket No. NMCCA 200800512, 2009 CCA LEXIS 43, at 6 (N-M Crim. App. Feb. 10, 2009) (finding that an interrogation of 10 hours on one occasion and less than four on another were not inordinately long interrogations).

⁸⁵ Defense MTS Statements, Enclosure 15.

⁸⁶ *Id.*

presents no evidence this was a lie. On the contrary, the GMSN [REDACTED] did state that she knew where DC3 Ovando's hands were placed.⁸⁷ Even if Special Agent [REDACTED] were lying the state of the evidence, the use of promises, lies, threats, inducements, or ploys are not determinative.⁸⁸

Defense argues that when Special Agent [REDACTED] confronts DC3 Ovando with the polygraph examination results indicating deception it has a "significant effect" on DC3 Ovando's psychological state and indicates the moment where DC3 Ovando began "cracking up" like the accused in *Martinez*.⁸⁹ Yet, rather this being a pivotal moment where DC3 Ovando's will began to be overborne and where he starts to tell Special Agent [REDACTED] "exactly what he wanted to hear," DC3 Ovando continues to disagree with, contest, and reframe some assertions of Special Agent [REDACTED] while confirming and agreeing with others. For example, DC3 Ovando denies Special Agent [REDACTED] assertion that he had sex with GMSN [REDACTED] with his penis,⁹⁰ denies trying to get hard or masturbate,⁹¹ denies GMSN [REDACTED] being "wet" but clarifies he knew she was aroused by her nipples,⁹² continues to deny remembering where his body was while performing oral sex despite Special Agent [REDACTED] explicit incredulity,⁹³ claims GMSN [REDACTED] was moaning in response to Special Agent [REDACTED] assertion that she was non-responsive,⁹⁴ denies that GMSN [REDACTED] made any indication to stop,⁹⁵ and more.⁹⁶ Defense also notes that three times, Special Agent [REDACTED] confirmed that DC3 Ovando positively asserted that his statements were his own and that he was *not* just telling Special Agent [REDACTED] what he wanted to hear.⁹⁷ These are not the actions of someone whose will is overborne or whose capacity for self-determination was critically impaired.

Based on all these factors, the totality of the circumstances shows that DC3 Ovando's statements to Special Agent [REDACTED] on 2 November 2020 were voluntary.

6. **Evidence and Enclosures.** Government relies on the previously submitted Defense Enclosures and respectfully submits the following enclosure in support of this motion:

A. Government MTS Statements, Enclosure 1: Permissive Authorization for Search and Seizure dtd 1 Sep 20

7. **Relief Requested.** Government respectfully requests that the Court deny the *Defense 21 October 2021 Motion to Suppress Unwarned and Involuntary Statements* and find that the following statements are admissible:

a. Oral statements made by DC3 Ovando to DC1 [REDACTED] in July 2020 regarding DC3 Ovando's interactions with the woman in the bathtub at the party.

⁸⁷ Defense MIL 412, Enclosure 3, page 15 lin 22 to page 16 line 3.

⁸⁸ *United States v. Freeman*, 65 M.J. 451, 455 (C.A.A.F. 2008)

⁸⁹ *United States v. Martinez*, 38 M.J. 82, 87 (C.M.A. 1993).

⁹⁰ Defense MTS Statements, Enclosure 18, page 167, lines 4-8.

⁹¹ Defense MTS Statements, Enclosure 18, page 169, lines 19-22.

⁹² Defense MTS Statements, Enclosure 18, page 170, lines 5-11.

⁹³ Defense MTS Statements, Enclosure 18, pages 172-173.

⁹⁴ Defense MTS Statements, Enclosure 18, page 173, lines 12-21; *See also* page 176, line 2-5.

⁹⁵ Defense MTS Statements, Enclosure 18, pages 174-175.

⁹⁶ *See e.g.* Defense MTS Statements, Enclosure 18, pages 175-181..

⁹⁷ Defense MTS Statements, Enclosure 18, page 152 lines 1-3; page 165 lines 14-16; pages 181-182.

- b. The handwritten statement made by DC3 Ovando on 1 September 2020 and provided to Special Agent [REDACTED]
- c. The photos of the screen of DC3 Ovando's phone displaying the statement last edited on 22 August 2020.
- d. Oral statement and written statements made by DC3 Ovando to Special Agent [REDACTED] on 2 November 2020.

[REDACTED]

LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, a copy of this motion was served on Defense Counsel.

[REDACTED]

LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT MOTION FOR
APPROPRIATE RELIEF TO AMEND
CHARGES

21 OCT 21

1. **Nature of Motion.** Pursuant to Rule for Court Martial (R.C.M.) 906(b)(4) and R.C.M. 603(e), the Government respectfully requests appropriate relief to make a minor change to the charge sheet to substitute the words “18 July 2020” with “12 July 2020.”

2. **Facts.**

a. On 21 August 2020, SN [REDACTED] conducted an interview with NCIS Special Agent [REDACTED] regarding her allegations of sexual assault against DC3 Emerson Ovando.¹ During that interview, SN [REDACTED] stated that the assault occurred on the weekend of 18-19 July 2020.²

b. In her statement, SN [REDACTED] reported that she entered the barracks room of EM3 [REDACTED] in an intoxicated state and was placed in the bathtub. While she was in the bathtub, she reported that DC3 Ovando stated he needed to use the bathroom and was allowed by EM3 [REDACTED] to use the bathroom. SN [REDACTED] reported that while DC3 Ovando was in the bathroom, he sexually assaulted her in the bathtub.³

c. On 1 September 2020, DC3 Emerson Ovando provided NCIS Special Agent [REDACTED] with a previously prepared written statement on his phone which he also copied by hand.⁴

d. In both copies of his written statement, DC3 Ovando wrote that he went to the room of a buddy of his and at the end of the night a “random girl” came and DC3 Ovando’s buddy decided it was best to put her in the bathroom tub. DC3 Ovando wrote that he asked permission to use the bathroom and while he was in the bathroom, he had sexual contact with and committed a sexual act upon the girl in the bathtub.⁵

e. In DC3 Ovando’s written statement, the heading of both the statement on his phone and the handwritten copy of that statement was “Saturday July 11th”.⁶

¹ Government MFAR Enclosure 1, page 1 of 2.

² *Id.*

³ *Id.*

⁴ Government MFAR Enclosure 2, pages 1-8.

⁵ *Id.*

⁶ Government MFAR Enclosure 2 pages 2 and 6.

f. On 12 October 2021, VLC provided Trial Counsel with two videos of SN [REDACTED] in a bathtub. On 13 October 2021, based on these videos, SN [REDACTED] stated that the assault occurred on 12 July 2020.⁷

g. The timestamps on the videos are 0101 and 0106 on 12 July 2020 respectively.⁸

h. 12 July 2020 is a Sunday, approximately one week before 18 July 2020.

3. **Burden.** The Government bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.**

After arraignment, the military judge may permit minor changes in the charges and specifications at any time before findings are announced if no substantial right or the accused is prejudiced.⁹

Generally, post-arraignment changes in the alleged time or date of an offense are permissible since they normally do not affect the substance of the offense, preclude invocation of the statute of limitations, or mislead the accused as to that which he must defend against.¹⁰

The words “on or about” in pleadings mean that “the government is not required to prove the exact date, if a date *reasonably near* is established.”¹¹ Where evidence established that an offense occurred within 3 weeks of the “on or about” date listed on the charge sheet, the Court in *US v. Hunt* found that there was no improper material variance.¹² Where variance is established, the element of prejudice is assessed by a dual test: (1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense.¹³

5. **Argument.**

The Government seeks to amend the charge sheet based on new evidence not previously known to the Government. On 12 October 2021, the Government became aware of new evidence that supported the fact that the alleged offenses occurred on 12 July 2020 rather than 18 July 2020.¹⁴ Specifically, the video evidence provided by SN [REDACTED] indicates that the assault occurred after 0100 on 12 July 2020, approximately one week before the 18 July 2020 date originally identified by SN [REDACTED] to NCIS during her interview on 21 August 2020.

⁷ Government MFAR Enclosure 3, page 1 of 2.

⁸ Government MFAR Enclosure 4, pages 1-2.

⁹ R.C.M. 603(e).

¹⁰ *United States v. Longmire*, 39 M.J. 536, 538 (A.C.M.R. 1994).

¹¹ *United States v. Hunt*, 37 M.J. 344, 347 (C.A.A.F. 1993) (citing *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987) (emphasis in original)).

¹² *Id.*

¹³ *United States v. Lee*, 50 C.M.R. 161, 162 (U.S. C.M.A. 1975).

¹⁴ Government MFAR Enclosure 3, page 1 of 2.

Date changes to the charge sheet are generally permissible.¹⁵ Here, DC3 Ovando was put on notice that the alleged offenses occurred “on or about” 18 July 2020.¹⁶ Where in *Hunt*, the Court found no material variance in a change of date by three weeks,¹⁷ here the requested change would be merely the weekend before.

DC3 Ovando has also demonstrated that he has not been misled regarding the nature or substance of the offense he must defend against. In the statement provided to NCIS on 1 September 2020, DC3 Ovando provided a clear indication that he was aware of the incident that is the subject of this case. He has prepared a pre-written statement on his phone regarding an incident that occurred with a girl in a bathtub in the room of his buddy when he had asked to use the bathroom.¹⁸ This is the same incident alleged by SN [REDACTED] while she was in the bathtub in the room of EM3 [REDACTED] that took place after DC3 Ovando asked to use the bathroom.¹⁹ The charge sheet is clear in its reference to the alleged sexual acts and sexual contact that occurred between DC3 Ovando and SN [REDACTED] on board Fleet Activities [REDACTED] on or about 18 July 2020.

Additionally, DC3 Ovando has indicated that he was already aware that the date of the alleged offenses was the weekend of 11-12 July 2020 rather than 18-19 July 2020. In his written statement to NCIS, the heading of his statement was “Saturday July 11th” indicating that he was associating the events that took place on 11-12 July 2020 with the investigation. Based on all the surrounding circumstances, DC3 Ovando has not been misled as to the nature or substance of the charges against him.

Based on DC3 Ovando’s demonstrated knowledge and understanding of the charges, the lack of material variance, and the lack of prejudice to DC3 Ovando, the Government respectfully requests to amend the charge sheet pursuant to R.C.M. 603(e).

6. **Evidence and Enclosures.**

- A. Government MFAR Enclosure 1: Report of Interview of SN [REDACTED] dtd 21 Aug 21
- B. Government MFAR Enclosure 2: Written Statement of DC3 Ovando
- C. Government MFAR Enclosure 3: Memo of Interview with SN [REDACTED] dtd 20 Oct 21
- D. Government MFAR Enclosure 4: Screenshots of Video Timestamps

7. **Relief Requested.** Pursuant to Rule for Court Martial (R.C.M.) 906(b)(4) and R.C.M. 603(e), the Government respectfully requests appropriate relief to make a minor change to the charge sheet as follows:

- a. Under the sole Charge, Specification 1: To substitute the words “18 July 2020” with “12 July 2020”.
- b. Under the sole Charge, Specification 2: To substitute the words “18 July 2020” with “12 July 2020”.

¹⁵ *United States v. Longmire*, 39 M.J. 536, 538 (A.C.M.R. 1994).

¹⁶ Charge Sheet.

¹⁷ *United States v. Hunt*, 37 M.J. 344, 347 (C.A.A.F. 1993).

¹⁸ Government MFAR Enclosure 2, pages 1-8.

¹⁹ Government MFAR Enclosure 1, page 1 of 2.

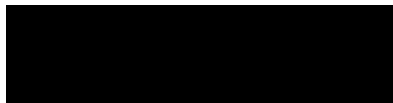
- c. Under the sole Charge, Specification 3: To substitute the words “18 July 2020” with “12 July 2020”.
- d. Under the sole Charge, Specification 4: To substitute the words “18 July 2020” with “12 July 2020”.
- e. Under the sole Charge, Additional Specification 1: To substitute the words “18 July 2020” with “12 July 2020”.
- f. Under the sole Charge, Additional Specification 2: To substitute the words “18 July 2020” with “12 July 2020”.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE RESPONSE TO
GOVERNMENT MOTION FOR
APPROPRIATE RELIEF TO AMEND
CHARGES

28 OCT 21

1. **Response to Government Motion.** The Defense does not oppose the Government's motion to make the minor change of substituting the words "18 July 2020" with "12 July 2020" in all specifications under the sole charge.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, a copy of this response was served on the Court and Trial Counsel.

DOHERTY.M Digitally signed by
DOHERTY.MATTHEW.C
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Date: 2021.10.28
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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E4, USN

VICTIM'S RESPONSE TO
DEFENSE MOTION TO COMPEL
PRODUCTION OF EVIDENCE
28 OCT 21

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 703(e)(1) and (R.C.M.) 703(g)(3), the Victim, by and through counsel, respectfully requests that the Court deny Defense's 21 October 2021 Motion to Compel Production of Evidence.
2. **Facts.** The Victim concurs with the Defense summary of facts and the Government summary of facts.
3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence.¹
4. **Law.** The Victim concurs with the Government's recitation of the law.
5. **Argument.** The Victim concurs with and adopts the arguments of the Government presented in the 28 October 21 *Government Response to Defense Motion to Compel Production of Evidence*.
6. **Relief Requested.** Victim, by and through counsel, respectfully requests this Court deny the Defense 21 October 21 *Motion to Compel Production of Evidence*.

J. A. MCGLAUGHLIN
LT, JAGC, USN
Victims' Legal Counsel

¹ R.C.M. 905(c).

CERTIFICATE OF SERVICE

I hereby certify that on the *28th* day of *October* 2021, a copy of this motion was electronically served on the Court, Trial and Defense Counsel.



J. A. MCGLAUGHLIN
LT, JAGC, USN
Victims' Legal Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

V.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION FOR
APPROPRIATE RELIEF -
CONTINUANCE

16 DEC 2021

1. **Nature of Motion.** Pursuant to Article 40, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §840, and Rule for Courts-Martial 906(b)(1), the Defense moves this Court to continue trial on the merits in this case to a date no earlier than 16 May 2022. A continuance is necessary to facilitate the appearance of the Defense's expert consultant in forensic psychology at trial on the merits. Without the requested continuance, and the physical presence of the Defense's expert consultant, the Defense would be unable to evaluate testimony pertaining to memory and convey the analysis of that testimony in a meaningful way to the finders of fact. Alternatively, if the Government can produce suitable substitutes for the Defense's expert consultants in the fields of forensic toxicology and forensic psychology, the Defense is amenable to a continuance of trial on the merits to a date no earlier than 21 February 2022.

2. **Facts.**

- a. Trial in this case is currently scheduled to begin 18 January 2022.
- b. Due to the nature of the charges in this case, the Defense requested¹ and was granted expert consultants in the fields of forensic toxicology and forensic psychology.
- c. Dr. [REDACTED] Ph.D. was approved as a confidential Defense expert consultant in the field of forensic toxicology on 15 Oct 2021.²
- d. Dr. [REDACTED] Psy.D. was approved as a confidential Defense expert consultant in the field of forensic psychology on 27 Oct 2021.³
- e. The Defense requested in-person consultation for Dr. [REDACTED] and Dr. [REDACTED] during the week of trial on the merits on 10 Dec 2021.⁴

¹ Def. MTC Expert Consultant, Enclosure 1.

² Enclosure 1.

³ Enclosure 2.

⁴ Enclosure 3.

- f. Dr. [REDACTED] informed the Defense, while assisting with another contested matter, that she is no longer available the week of 18 Jan 2022. She memorialized her unavailability in an affidavit drafted on 4 Dec 2021.⁵
- g. Dr. [REDACTED] supplemented her initial affidavit on 12 Dec 2021, after reviewing the available discovery, and indicated that her anticipated testimony would include topics involving “memory, from the interaction between alcohol and memory, to the concept of confabulation as well as the role that prior victimization (sexual assault) may have on a complaining witness’ emotional state, the potential for flashbacks and how these various considerations and experiences may contribute to unreliable accounts of an incident.”⁶
- h. The Defense provided the Government notice of intended expert testimony on 13 Dec 2021.⁷
- i. The earliest Dr. [REDACTED] is available is 16 May 2022.⁸
- j. Dr. [REDACTED] is available in May 2022, but is likely unavailable the week of 21 Feb 2022.⁹
- k. This is the Defense’s first request for a continuance of trial in this case.

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

4. **Law.**

Article 40 of the U.C.M.J. provides that the “military judge...may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.”¹⁰ Consistent with that authority, the military judge is empowered to set the time for each session of a court-martial¹¹ and is the only person who may grant a continuance.¹² Reasons for a continuance include, but are not limited to: “insufficient opportunity to prepare for trial; unavailability of an essential witness...and illness of an accused, counsel, military judge, or member.”¹³

A military judge’s decision to deny a continuance request is reviewed for an abuse of discretion.¹⁴ The factors applied to whether the military judge has abused their discretion include: “Surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance,

⁵ Enclosure 4.

⁶ Enclosure 5.

⁷ Enclosure 6.

⁸ Enclosure 7.

⁹ Enclosure 8.

¹⁰ 10 U.S.C. §840.

¹¹ R.C.M. 801(a)(1)

¹² R.C.M. 906(b)(1); *see United States v. Knudson*, 4 U.S.C.M.A. 587 (1954).

¹³ Discussion, R.C.M. 906(b)(1), U.S. Manual for Courts-Martial (2019 ed.).

¹⁴ *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.”¹⁵ There is an abuse of discretion where the “reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice.”¹⁶ Furthermore, an “[u]nreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay is an abuse of discretion.”¹⁷ A reasonable request for a continuance “should ordinarily be granted.”¹⁸

The United States Court of Military Appeals has found abuse of discretion where the trial court refused a continuance to secure the personal appearance of a relevant witness and instead relied on a deposition.¹⁹ The Court of Appeals for the Armed Forces (C.A.A.F.) has also “warned judges to be cautious when denying a continuance which will deprive a party of essential evidence.”²⁰ Our highest appellate court has emphasized that “witnesses...are not fungible”²¹ and where the military judge “uncritically accept[ed] the prosecution’s representations about [a witness’] expected testimony,” and rejected a contradictory proffer by defense counsel, refusing to grant a continuance to take testimony from the witness, the C.A.A.F. found an abuse of discretion.²²

5. **Argument.**

The requested delay is less than four months and does not prejudice the Government’s case in any meaningful way. Dr. [REDACTED] is a relevant and necessary witness, whose expert testimony supports DC3 Ovando’s theory of the case. Dr. [REDACTED] is not available for trial on the currently scheduled date. Her in-person consultation during the week of trial is paramount to the Defense’s ability to put on an adequate defense and her expert testimony is the only vehicle through which the Defense can present pivotal evidence to the finders of fact. This is the Defense’s first request for a continuance in this case.

6. **Evidence.** The Defense respectfully submits Enclosures 1 through 8, as well as the previously submitted Enclosure 1 of Defense’s MTC Expert Consultant, as indicated in the separate evidentiary package, in support of this motion.

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

¹⁵ *Id.* (internal quotation marks and citations omitted).

¹⁶ *United States v. Weisbeck*, 50 M.J. 461, 464 (C.A.A.F. 1999) (internal quotation marks and citations omitted).

¹⁷ *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) (internal citations and quotation marks omitted).

¹⁸ *United States v. James*, 14 U.S.C.M.A. 247, 249 (1963) (citing *United States v. Nichols*, 2 U.S.C.M.A. 27, 36 (1952)).

¹⁹ *United States v. Davis*, 19 U.S.C.M.A. 217 (1970), see also *United States v. Hinton*, 21 M.J. 267 (C.M.A. 1986) (finding an abuse of discretion where the military judge denied a continuance request after subpoenaed civilian alibi witness failed to appear for trial).

²⁰ *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998) (citing *United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985)).

²¹ *Id.* (quoting *United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995)).

²² *Id.*

8. **Relief Requested.** The Defense respectfully moves this Court to continue trial to a date no earlier than 16 May 2022, or in the alternative, if the Government can produce adequate substitute expert consultants in the fields of forensic toxicology and forensic psychology, to a date no earlier than 21 February 2022.

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Date: 2021.12.16
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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December 2021, a copy of this motion was served on the Court, Trial Counsel, and Victim's Legal Counsel.

DOHERTY.MAT
THEW.C
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W. [REDACTED]
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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES

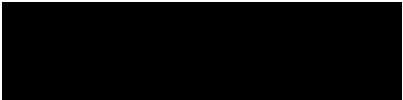
v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION FOR
APPROPRIATE RELIEF –
CONTINUANCE

23 DEC 21

1. **Nature of Motion.** Government does not object to the 16 December 2021 Defense *Motion for Appropriate Relief – Continuance*.
2. **Facts.** The Government concurs with the Defense summary of facts.
3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).
4. **Law.** The Government concurs with the Defense recitation of the law.
5. **Discussion.** The Government is prepared to move forward with the case as scheduled on 18 January 2022, alternatively on 21 February 2022, or on 16 May 2022. Government is further prepared to fund and sponsor the travel for Defense expert witnesses for trial in accordance with the trial management order. At this time, Government does not agree to produce substitute expert consultants.
6. **Relief Requested.** The Government is prepared to move forward with the case in accordance with the trial management order and fund travel for Defense expert witnesses, but does not object to the 16 December 2021 Defense *Motion for Appropriate Relief – Continuance*



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2021, a copy of this motion was served on Defense Counsel.



LT, JAGC, USN
Trial Counsel

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USNDEFENSE MOTION FOR
APPROPRIATE RELIEF –
CONTINUANCE (AMENDED)

30 DEC 21

1. **Nature of Motion.** The Defense respectfully amends its *Motion for Appropriate Relief – Continuance* of 16 December 2021 and respectfully moves this Court to continue trial on the merits in this case to a date no earlier than 6 June 2022, to facilitate the appearance of the Defense’s expert consultant in the field of forensic psychology.

2. **Facts.** The Defense adopts the facts of its 16 December *Motion for Appropriate Relief – Continuance* and adds the following:

a. On 16 December 2021, Dr. [REDACTED] communicated with the Defense and was aware that Defense was requesting a continuance for trial on the merits to a date no earlier than 16 May 2022 based on her previously provided dates of availability.¹

b. On 17 December 2021, Dr. [REDACTED] informed the Defense that she was no longer available during the week of 16 May 2022 because counsel in another matter had selected that date without her knowledge.²

c. Defense instructed Dr. [REDACTED] to attempt to have the other matter moved, since the Defense had already moved this Court based on her prior availability. Dr. [REDACTED] was unsuccessful in her attempt.³

d. Dr. [REDACTED] has locked in the week of 6 June 2022 for trial on the merits in this case.⁴

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

¹ Enclosure 9.

² *Id.*

³ *Id.*

⁴ *Id.*

4. **Law.** The Defense adopts the law section of its 16 December *Motion for Appropriate Relief – Continuance*.
5. **Argument.** The Defense adopts the argument section of its 16 December *Motion for Appropriate Relief – Continuance*.
6. **Evidence.** The Defense respectfully submits Enclosure 9, as well as the previously submitted Enclosures 1 through 8 of its *Motion for Appropriate Relief – Continuance*, as indicated in the separate evidentiary package, in support of this motion.
7. **Oral Argument.** If this motion is opposed by the Government, the Defense respectfully requests, pursuant to R.C.M. 905(h), an Article 39(a) session to present oral argument and evidence.
8. **Relief Requested.** The Defense respectfully moves this Court to continue trial on the merits in this case to a date no earlier than 6 June 2022.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December 2021, a copy of this motion was served on the Court, Trial Counsel, and Victim's Legal Counsel.

DOHERTY.MATTHEW.C
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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT MOTION FOR
APPROPRIATE RELIEF –
CONTINUANCE

13 May 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1), the Government respectfully requests a continuance ICO *US v. Ovando* to 21 June 2022 to facilitate the in-person appearance of EM2 [REDACTED]

2. **Facts.**

a. Trial in this case is currently scheduled to begin 6 June 2022.

b. EM2 [REDACTED] was present in the room of EM3 [REDACTED] on the evening of the alleged offenses in July 2020 and observed GM [REDACTED] arrive at the room and be placed in the bathtub. DC3 Ovando ask to use the restroom twice and go into the restroom with GM3 [REDACTED] in the bathroom, and observed both DC3 Ovando and GM3 [REDACTED] in the bathroom immediately after the alleged sexual assault occurred.¹ Additionally she witnessed statements by GM3 [REDACTED] immediately after the alleged sexual assault.²

c. Government intends to call EM2 [REDACTED] as a witness for trial.

d. Commanding Officer, [REDACTED] is unable to produce EM2 [REDACTED] for in-person testimony due to [REDACTED] impact to military operations.³ EM2 [REDACTED] is available for in-person testimony from 20 June to 8 July 2022.⁴

e. Based on communication with Defense Counsel, Defense expert witnesses would be available for trial 20 June 2022 through 29 June 2022.

3. **Burden.** The Government bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.**

¹ Gov MFAR Continuance (13 May), Enclosure 1.

² Def Reconsider 412, Enclosure 1.

³ Gov MFAR Continuance (13 May), Enclosure 2.

⁴ *Id.*

A continuance may only be granted by the military judge.⁵ The military judge should grant a continuance upon a showing of reasonable cause for as long and as often as just.⁶ Reasons for a continuance include the unavailability of an essential witness.⁷

5. **Argument.** EM2 [REDACTED] is an essential witness to the case. She was present the night of the alleged assault and observed DC3 Ovando and GM3 [REDACTED] immediately before and immediately after the alleged sexual assault. However, her in-person testimony for the currently scheduled 6-10 June 2022 dates would prevent [REDACTED] from meeting minimum manning requirements. The requested delay of two weeks would not prejudice the Defense and would allow EM2 [REDACTED] to testify in-person for trial.

6. **Relief Requested.** The Government respectfully requests a continuance *ICO US v. Ovando* to 21 June 2022 to facilitate the in-person appearance of EM2 [REDACTED]

[REDACTED]

LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]

G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

⁵ R.C.M. 906(b)(1).

⁶ R.C.M. 906(b)(1), Discussion.

⁷ *Id.*

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE RESPONSE TO
GOVERNMENT MOTION FOR
CONTINUANCE

16 MAY 22

1. **Response to Government Motion.** The Defense does not oppose the Government's motion to continue trial on the merits in this case to 21 June 2022.

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M. C. DOHERTY
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Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2022, a copy of this response was served on the Court and Trial Counsel.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION TO COMPEL
PRODUCTION OF WITNESS

1 JUN 22

1. **Nature of Motion.** Pursuant to Article 46, Uniform Code of Military Justice (UCMJ) and Rule for Courts-Martial (R.C.M.) 703, as well as the Sixth Amendment to the U.S. Constitution, the Defense respectfully moves this Court to compel production of EN2 [REDACTED] USN as a necessary Defense witness at trial. Good cause exists for the timing of the underlying witness request, and the filing of this motion, because EN2 [REDACTED] was deployed onboard [REDACTED] from 7 July 2021 – 25 October 2021 and from 14 January 2022 – 8 April 2022. Defense counsel was TAD from 3 November 2021 – 28 December 2021 and from 11-12 January 2022, and was not able to interview EN2 [REDACTED] during his brief window back in port. Defense counsel was also out of office for a [REDACTED] from 23 March 2022 – 2 May 2022, and attempted to interview EN2 [REDACTED] as soon as practicable upon his return to the office. Defense was able to secure an interview with EN2 [REDACTED] on 20 May 2022 and requested his presence at trial immediately thereafter on 23 May 2022, the next business day and the day Trial counsel returned from leave.

2. **Facts.**

a. DC3 Ovando has been charged with violating UCMJ Article 120. Charge I consists of four specifications of sexual assault, under theories of incapable of consenting due to intoxication, of a person who is unconscious, and without consent, and two specifications of abusive sexual contact, under theories of incapable of consenting due to intoxication and of a person who is unconscious. All specifications stem from an alleged encounter with GM3 [REDACTED] that took place in July 2020.

b. During her 21 August 2020 NCIS interview, GM3 [REDACTED] told NCIS that on the night in question she was drinking “mostly tequila” and that she had consumed “half a bottle.”¹

c. When asked if she was drinking other alcoholic beverages that night, GM3 [REDACTED] stated, “No, a little less of the other stuff.”²

d. EN2 [REDACTED] was in a romantic relationship with GM3 [REDACTED] on the night in

¹ Def. Encl. 3 of Def-MIL 412, p. 11, lines 1-12.

² *Id.*

question and spent time with her before the alleged incident.³

e. EN2 ██████ observed GM3 ██████ drinking alcohol on the night in question. He observed her purchase a bottle of Evan Williams cherry flavored whiskey and only drink “two swigs” from it.⁴

f. EN2 ██████ observed GM3 ██████ “freak out” during instances of consensual sexual contact during the course of their relationship.⁵

g. EN2 ██████ described GM3 ██████ behavior during these “freak outs” as her experiencing 180-degree mood changes and having a fearful look in her eyes.⁶

h. EN2 ██████ stated these “freak outs” occurred two to three times during the course of their relationship, both before and after the night in question with DC3 Ovando.⁷

i. GM3 ██████ told EN2 ██████ that she had “sexual problems in her past” and EN2 ██████ believed she “emotional baggage” because of it.⁸

j. GM3 ██████ provided two videos of herself, purported to be from the night in question, to the Government on 12 October 2021.⁹

k. GM3 ██████ stated she discussed the existence of digital evidence with EM2 ██████ another witness in this case, on 8 October 2021.¹⁰

l. EN2 ██████ has a habit of preserving all of his Snapchat messages and stated that it would be unusual for him to delete any messages.¹¹

m. EN2 ██████ has a saved snapchat message thread of the conversations between himself and GM3 ██████ but the thread begins at 0900 on 12 July 2020.¹²

n. EN2 ██████ stated he would not have deleted his prior messages with GM3 ██████ unless he had a reason and that he believes GM3 ██████ may have told him to delete the prior messages.

o. The Defense requested EN2 ██████ be produced at trial as a necessary witness on 23 May 2022.¹³

³ Def. Encl. 1 of Def-Second MIL 412; Def. Encl. 1.

⁴ Def. Encl. 1.

⁵ Def. Encl. 1 of Def-Second MIL 412.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Def. Encl. 5 of Def-MIL 412.

¹⁰ *Id.*

¹¹ Def. Encl. 1.

¹² *Id.* [There is a scrivener’s error in the request when it reads 12 July 2022]

¹³ *Id.*

p. The Government denied the Defense's request on 31 May 2022, asserting that EN2 [REDACTED] is an irrelevant witness and that the Defense's request was untimely.¹⁴

3. **Burden.** The Defense, as the moving party, bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.**

a. The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor."¹⁵ This right is "well established in military law and has been guarded by [our highest Court]."¹⁶ Consistent with this constitutional mandate, both the prosecution and the defense "shall have equal opportunity to obtain witnesses and evidence...including the benefit of compulsory process."¹⁷ Additionally, "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."¹⁸

b. Evidence is relevant when it has any tendency to make a fact of consequence more or less probable.¹⁹ Evidence is necessary when it is not cumulative and would contribute to a party's presentation of the case in some positive way.²⁰ In determining whether a requested witness' testimony is cumulative of a witness whose appearance at trial is assured, the military judge should consider: whether the testimony of the requested witness' credibility is greater than that of the attending witness; whether the testimony of the requested witness is relevant to the accused with respect to character traits or other evidence observed during a different time period from the attending witness; and whether there is any benefit to the accused from having an additional witness say the same thing other witnesses have said.²¹ If the court determines that a defense witness is cumulative, the Defense is entitled to choose which of the cumulative witnesses it desires to call.²²

c. An accused's right "to present his own witnesses to establish a defense" is a "fundamental element of due process of law."²³ Therefore, an accused's "opportunity to obtain witness and other evidence" must be equal to the Government's.²⁴ The court-martial rules that implement these rights require that in order to obtain witnesses for trial, the defense must first submit a request to trial counsel.²⁵ The request must include the witness' name, telephone

¹⁴ Def. Encl. 2.

¹⁵ U.S. CONST., amend. VI.

¹⁶ *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986) (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976); *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975)).

¹⁷ R.C.M. 703(a).

¹⁸ R.C.M. 703(b)(1).

¹⁹ Mil. R. Evid. 401.

²⁰ R.C.M. 703(b)(1), Discussion, Manual for Courts-Martial (2019 ed.).

²¹ *United States v. Jones*, 20 M.J. 919, 927 (N-M. Ct. Crim. App. 1985) (internal citations omitted).

²² *United States v. Harmon*, 40 M.J. 107, 108 (C.A.A.F. 1994) (internal citations omitted).

²³ *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

²⁴ *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005) (internal quotation marks omitted).

²⁵ R.C.M. 703(c)(2).

number if known, and address or location of the witness “such that the witness can be found upon the exercise of due diligence.”²⁶ It must also include a synopsis of the witness’ expected testimony.²⁷ If the trial counsel contends that production is not required under the rule, the defense may submit the matter to the military judge.²⁸ If the military judge grants the motion, the trial counsel “shall produce the witness or the proceedings shall be abated.”²⁹

5. Argument.

a. EN2 Houston is relevant and necessary.

The Government has alleged that DC3 Ovando sexually assaulted GM3 [REDACTED] under a theory of liability that she was incapable of consenting due to alcohol intoxication. This theory persists in three of the six specifications currently referred against DC3 Ovando. GM3 [REDACTED] told NCIS that she drank half a bottle of tequila and that tequila was the primary alcohol she consumed on the night in question. EN2 [REDACTED] was drinking alcohol with GM3 [REDACTED] on the night in question directly before she arrived at EM3 [REDACTED] barracks room. His observations directly contradict GM3 [REDACTED] account of what she had to drink that night, as he observed her purchasing a bottle of cherry flavored whiskey and *only drinking* “two swigs” from it. This evidence is relevant because it makes the Government’s theory of liability less probable in that “two swigs” of whiskey is significantly less alcohol than half a bottle of tequila, and therefore less likely to cause intoxication to the point where the ability to consent is not possible.

Furthermore, GM3 [REDACTED] prior history with sexual assault from when she was [REDACTED] years old, and her reactions to the trauma associated with that incident, has already been deemed admissible in a previous ruling by this Court. EN2 [REDACTED] observation of GM3 [REDACTED] “freak outs” during otherwise consensual sexual encounters, as well as his observation of GM3 [REDACTED] general anxiety outside of sexual intimacy, corroborates the evidence already deemed admissible. The fact that EN2 [REDACTED] bserved these “freak outs” both before and after the alleged incident with DC3 Ovando amplifies the already apparent risk of confabulation from GM3 [REDACTED] prior trauma from when she was [REDACTED] with her interactions with DC3 Ovando on the night in question. The fact that EN2 [REDACTED] can testify to GM3 [REDACTED] fearful reaction to consensual sexual activity makes it more likely that the Defense’s theory of confabulation is probable, and by doing so, makes the allegations against DC3 Ovando less probable.

Lastly, GM3 [REDACTED] has already admitted to the Government that she has been discussing the evidence of this case with other witnesses. On 8 October 2021, she discussed the existence of videos with EM3 [REDACTED] and soon thereafter provided two videos that were not originally disclosed to NCIS. EN2 [REDACTED] preserves all of his Snapchat conversations and does not delete messages unless he has a reason to do so. He has all of the messages between himself and GM3 [REDACTED] saved, but for those messages sent before 0900 on 12 July 2020. EN2 [REDACTED] believes GM3 [REDACTED] may have told him to delete those messages. This evidence goes toward the members’ ability to evaluate GM3 [REDACTED] credibility. The fact that EN2 [REDACTED] explanation

²⁶ R.C.M. 703(c)(2)(B).

²⁷ *Id.*

²⁸ R.C.M. 703(c)(2)(D).

²⁹ *Id.*

for why he broke his habit and deleted messages was because GM3 [REDACTED] told him to do so is evidence of bias and makes the veracity of her allegations less probable. It also ties into the Defense's theory that GM3 [REDACTED] does not have any first hand recollections of what transpired with DC3 Ovando and is now trying to rationalize the events in the light most favorable to herself. This evidence also points to the existence of messages between GM3 [REDACTED] and EN2 [REDACTED] on 11 July 2020, potentially during the time in question, which rebuts the Government's allegation that GM3 [REDACTED] was either too drunk to consent or unconscious, since one cannot send Snapchat messages while in either of those states.

EN2 [REDACTED] is necessary because his testimony is not cumulative with any other evidence, and instead contradicts much of GM3 [REDACTED] narrative. EN2 [REDACTED] testimony would positively contribute to the presentation of DC3 Ovando's defense because it directly confronts the Government's theory of liability in fifty percent of the referred specifications, enhances the Defense's theory of confabulation, and calls into question the credibility of the complaining witness.

6. **Evidence.** Defense respectfully requests that the Government produce EN2 [REDACTED] as a witness to provide testimony in support of this motion. Defense respectfully submits Enclosures 1 and 2 in support of this motion, as well as Enclosures 3 and 5 from the Defense's MIL 412 Evidence and Enclosure 1 from the Defense's Second MIL 412 Evidence, in the separate evidentiary package.

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

8. **Relief Requested.** The Defense respectfully moves this Court to compel production of EN2 [REDACTED] USN as a necessary Defense witness at trial.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June 2022, a copy of this motion was electronically served on The Court, Trial Counsel, and VLC.

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M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
PRODUCTION OF WITNESS

1 Jun 22

1. **Nature of Motion.** The Government requests that the Court rule that the production of EN2 [REDACTED] is not required for trial. In the alternative, the Government respectfully requests a continuance and requests one week to confirm availability for all trial and defense witnesses and propose an alternate trial date.

2. **Facts.** The Government adopts the Findings of Facts from the Court's 11 November 2021 *Ruling – Defense Motion to Compel Production* and the Finding of Facts from the Court's 24 November 2021 *Ruling - Defense Motion for Preliminary Ruling on Admissibility of Evidence - M.R.E. 412* and adds the following:

a. On 17 September 2021, the Court set the deadline for Defense requests for production of witnesses for 30 September 2021.¹ Government had provided contact information for EN2 [REDACTED] to Defense prior to 24 September 2021.²

b. On Monday, 23 May 2022, Defense Counsel submitted a *Third Request for the Production of Witnesses ICO US v. Ovando*.³ This request followed a phone call earlier that morning where Defense Counsel informed Trial Counsel of the anticipated forthcoming request.

c. On Wednesday, 25 May 2022, Defense Counsel submitted notice and a Motion in Limine regarding the admissibility of evidence pursuant to MRE 412.⁴

d. EN2 [REDACTED] is anticipated to testify that he was in a relationship with GM3 [REDACTED] during a two month period, including July 2020. That on a few occasions both before and after 11 July 2020, where he and GM3 [REDACTED] were sexually intimate GM3 [REDACTED] mood would change and she would look afraid.⁵

e. EN2 [REDACTED] is also anticipated to testify that he observed GM3 [REDACTED] drink two swigs of

¹ US v. Ovando, Trial Management Order dtd 17 September 2021

² Def MTC Production, Encl. 2, page 8.

³ Def MTC Witness, Encl. 1.

⁴ *Second Defense Notice and Motion in Limine for Preliminary Ruling on Admissibility Pursuant to M.R.E. 412* dtd 25 May 2022.

⁵ Def Second MIL 412, Encl. 1.

Evan Williams Cherry on 11 July 2020.⁶

f. EN2 [REDACTED] is also anticipated to testify observed GM3 [REDACTED] experience panic attacks, where GM3 [REDACTED] would lay on the ground and gasp for air.⁷

g. EN2 [REDACTED] is also anticipated to testify that he does not usually delete his messages on Snapchat and that he has no messages from GM3 [REDACTED] on Snapchat before 0900 12 July 2020.⁸ EN2 [REDACTED] speculates that this GM3 [REDACTED] may have told him to delete the messages.⁹

h. EN2 [REDACTED] and GM3 [REDACTED] met on 10 July 2020 and were not sexually active until two or three weeks later.¹⁰

i. GM3 [REDACTED] was with EN2 [REDACTED] and his friends most of the night of 11 July 2020. She was sharing the bottle of alcohol with three to four other people and drank between one quarter and one half of the bottle. While GM3 [REDACTED] was drinking on the night of 11 July 2020, she was either in the presence of EN2 [REDACTED] or in same barracks, which consisted of a kitchen, bathroom, living room, and bedroom. GM3 [REDACTED] does not know if she was in EN2 [REDACTED] line of sight each time she consumed alcohol.¹¹

j. GM3 [REDACTED] did not start texting EN2 [REDACTED] on Snapchat until 11 July 2020. Prior to 0900 12 July 2020, GM3 [REDACTED] messages to EN2 [REDACTED] were regarding her leaving her room key on his counter and arranging to pick it up and planning to watch a movie together.¹²

k. On Tuesday, 31 May 2022, Government denied Defense request for the production of EN2 [REDACTED]¹³

l. Upon receipt of Defense request on 23 May 2022, Government immediately reached out to determine whether EN2 [REDACTED] would be available for trial.¹⁴ EN2 [REDACTED] is currently assigned to [REDACTED] and is not available for trial on 21-24 June 2022.¹⁵

3. **Burden.** Where trial counsel contends that witness production is not required under R.C.M. 703, the matter may be submitted to the military judge.¹⁶ As the moving party, the Government bears the burden of proof by a preponderance of the evidence for its motion requesting a preliminary ruling not to compel production of EN2 [REDACTED]¹⁷ For any Defense motion to compel the production of EN2 [REDACTED] the Defense would bear the burden of the moving party

⁶ Def MTC Witness, Encl. 1.

⁷ *Id.*

⁸ *Id.* Government believes the date “12 July 2022” is a typographical error in the Defense request.

⁹ *Id.*

¹⁰ Gov Prelim Rul Witness Production, Encl. 1.

¹¹ *Id.*

¹² *Id.*

¹³ Def MTC Witness, Encl. 2.

¹⁴ Gov Prelim Rul Witness Production, Encl. 2.

¹⁵ Gov Prelim Rul Witness Production, Encl. 3.

¹⁶ R.C.M. 703(c)(2)(D).

¹⁷ RCM 905(c).

by a preponderance of the evidence.¹⁸

4. **Law.**

The prosecution and defense shall have an equal opportunity to obtain witnesses, including the benefit of compulsory process.¹⁹ A party is entitled to the production of any witness whose testimony on a matter in issue on the merits would be relevant and necessary.²⁰ Evidence is “relevant” if it has any tendency to make a fact of consequence more or less probably than it would be without the evidence.²¹ Evidence is “necessary” when it is not cumulative and contributes to a party’s presentation of the case in some positive way on a matter in issue.²²

Notwithstanding a witnesses’ relevance and necessity, a party is not entitled to the presence of a witness who is unavailable, unless that witness is of such central importance to an issue that is essential to a fair trial and there is no adequate substitute for such testimony.²³ A witness is considered unavailable when the witness is absent from the trial and the proponent has not been able, by process or other reasonable means, to procure the declarant’s attendance.²⁴ A witness is not considered “unavailable” unless the Government has exhausted every reasonable means to secure his or her live testimony.²⁵ A continuance is an appropriate remedy where an unavailable witness *is* of such central importance to an essential issue.²⁶

5. **Argument.**

a. EN2 [REDACTED] anticipated testimony is not relevant or necessary.

Defense seeks for EN2 [REDACTED] to testify on four issues: 1) That he observed GM3 [REDACTED] consume two swigs of Evan Williams Cherry, 2) GM3 [REDACTED] would “freak out” during consensual sexual activity by a sudden change of mood and a fearful look in her eyes, 3) That GM3 [REDACTED] and 4) That the reason he does not have Snapchat messages from GM3 [REDACTED] before 0900 on 12 July 2022 might be that GM3 [REDACTED] told him to delete them. None of this testimony is relevant or necessary.

First, whether EN2 [REDACTED] observed GM3 [REDACTED] consume two swigs of Evan Williams Cherry bourbon is not relevant. There is no evidence that EN2 [REDACTED] was watching GM3 [REDACTED] the entire night so that she would not have been able to consume alcohol without his observing it. EN2 [REDACTED] cannot testify regarding the totality of alcohol consumed by GM3 [REDACTED] on 11 July 2020. That he personally observed her consume two swigs that evening does not make any fact of consequence more or less likely.

¹⁸ R.C.M. 905(c).

¹⁹ R.C.M. 703(a).

²⁰ R.C.M. 703(b)(1).

²¹ M.R.E. 401.

²² Discussion, R.C.M. 703(b)(1).

²³ R.C.M. 703(b)(3).

²⁴ M.R.E. 804(a)(5).

²⁵ *United States v. Burns*, 27 M.J. 92, 97 (C.M.A. 1988)

²⁶ R.C.M. 703(b)(3).

Second, GM3 [REDACTED] could not have “freaked out” during sexual activity with EN2 [REDACTED] before 12 July 2020 because GM3 [REDACTED] did not engage in sexual activity with EN2 [REDACTED] before 12 July 2020.²⁷ However, assuming that EN2 [REDACTED] would testify that there was sexual activity before 12 July 2020 where GM3 [REDACTED] would “freak out,” such testimony would not be relevant. There is no evidence that GM3 [REDACTED] had a sudden mood change or had a fearful look in her eye during the alleged assault by DC3 Ovando.²⁸ There is no evidence of any similarity between these alleged “freak outs” and any actions of GM3 [REDACTED] during the alleged assault by DC3 Ovando. Whether or not GM3 [REDACTED] had a mood swing during interactions with EN2 [REDACTED] is irrelevant to the allegations against DC3 Ovando.

Third, whether or not GM3 [REDACTED] has no relevance to the alleged offenses by DC3 Ovando. There is no evidence that GM3 [REDACTED] by DC3 Ovando and no evidence that any panic attacks observed by EN2 [REDACTED] are connected in any way to DC3 Ovando’s alleged assault.

Fourth, EN2 [REDACTED] belief that GM3 [REDACTED] *may* have told him to delete messages is speculation, not recollection. There is no evidence that GM3 [REDACTED] actually did ask him to delete any messages, nor is there any evidence that those messages are at all relevant to the alleged assault by DC3 Ovando. Rather, the evidence from GM3 [REDACTED] statements are that she did not ask EN2 [REDACTED] to delete any messages and that the messages she has with him before the alleged assault are not relevant.

b. Defense’s request for EN2 [REDACTED] is untimely

Defense sought and received contact information for EN2 [REDACTED] in September 2021. While Defense request for EN2 [REDACTED] was provided to the Government approximately one month before the scheduled trial, the request was made eight months after the deadline for witness requests.

6. **Evidence and Enclosures.** The Government relies on previously submitted Defense Second MIL 412, Enclosure 1, Defense MTS Statements, Enclosure 18, Defense MTC Production, Enclosure 2, Defense MTC Witness Enclosures 1-2, and respectfully submits the following enclosures in support of this motion:

Enclosure 1: Interview of GM3 [REDACTED] dtd 1 Jun 22

Enclosure 2: Emails with [REDACTED] Legal Officer ICO EN2 [REDACTED]

Enclosure 3: Letter from Commanding Officer, [REDACTED] dtd 27 May 22

Pursuant to RCM 703(c)(2), Government denies and objects to the Defense request for EN2 [REDACTED] on this interlocutory question on the grounds that his testimony is unnecessarily cumulative to affidavits already provided by Defense.

7. **Relief Requested.** The Government requests that the Court rule that the production of EN2 [REDACTED] is not required for trial. In the alternative, the Government respectfully requests a

²⁷ Gov Prelim Rul Witness Production, Encl. 1.

²⁸ Def MTS Statements, Enclosure 18, page 61-63, 94-95, 164 (line 17) – 176 (line 21).

continuance and requests one week to confirm availability for all trial and defense witnesses and propose an alternate trial date.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June 2022, a copy of this motion was served on Defense Counsel.



LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E-4, USN

DEFENSE MOTION TO AMEND
FORMAT OF 2 NOV 2020 INTERVIEW

14 JUN 2022

1. **Nature of Motion.** Pursuant to the Mil. R. Evid. 403, 707 and 801, the Defense objects to content within the 2 November 2020 interview of DC3 Ovando, and requests their redaction prior to such evidence being introduced for admission into evidence. Further, pursuant to Mil. R. Evid. 106, the Defense requests references to “criminal profiling” information be introduced with the interview. Finally, pursuant to Mil. R. Evid. 403, the Defense requests that the interview be introduced as an audio exhibit, rather than a video, to minimize the confusion or implications generated by the redactions.

2. **Facts.**

a. DC3 Ovando has been charged with violating UCMJ Article 120. Charge I consists of four specifications of sexual assault, under theories of incapable of consenting, of a person who is unconscious, and without consent, and two specifications of abusive sexual contact, under theories of incapable of consenting and of a person who is unconscious. All specifications stem from an alleged encounter with GM3 [REDACTED] that took place in July 2020.

b. In the late evening of 2 June 2022, the Government dismissed the Article 120 specifications which alleged that the sexual assault was committed through theories of “non-consent” and while the victim was “unconscious”. The only remaining charged theory is that the sexual acts occurred while the victim was incapacitated due to consumption of alcohol.

c. During the 2 November 2020 interview, DC3 Ovando stated that the alleged victim verbally initiated the encounter with him, and generally manifested consent nonverbally while he provided oral sex to her.

d. Special Agent (SA [REDACTED]) conducted the 2 November 2020 interview, using a polygraph examination as part of his interrogation. SA [REDACTED] centered his polygraph on two questions: 1) “Did you perform any sexual act with that female while she was unconscious”¹ and 2) “During that sexual encounter, did that female indicate for you to stop?”²

e. After repeated questioning, where SA [REDACTED] forcefully asserted DC3 Ovando was lying, and after being presented the dichotomy of “You’re the monster or you just made a

¹ Encl (1), pgs. 51-54, 84, 87-90

² Encl (1) pgs. 55-56, 84, 87-90

mistake a portion of the time,” DC3 Ovando adopted SA [REDACTED] assertion he had “made a mistake a portion of the time”. Asked to give a time frame, DC3 Ovando offered “about like three [minutes]”³

f. SA [REDACTED] repeatedly characterizes the alleged victim as “unconscious”, but also uses the term “unconscious”, “unaware” and “blacked out” largely interchangeably.⁴

g. DC3 Ovando, when asked to describe the victim’s state while “unconscious”, described her as moaning and brushing his hair.

h. DC3 Ovando agreed with SA [REDACTED] that he continued sexual acts while the victim was unconscious.

i. On the evening of 8 June 2022, the Government forwarded a proposed edited transcript of the 2 November 2020 NCIS interview of DC3 Ovando. On 9 June 2022, the Defense responded, proposing further redactions. On 9 June 2022, the Government responded, adopting some redactions, and rejecting others.

j. On 14 June, Trial Counsel advised Defense Counsel of further modifications to the redactions, and forwarded the video of the current proposed redactions to Defense counsel. In the current video, at approximately 22m15s, the video shows an obvious redaction of approximately 80 minutes, after which the door to the interview room is closed and DC3 Ovando is de-bloused.⁵

k. On 14 June, Defense Counsel requested Trial Counsel agree to un-redact the portions of the interview relating to FBI profiling and “unusual sex acts” on pages 48-50 and 58-61, respectively.

3. **Burden.** As the moving party, the Defense bears the burden of persuasion.

4. **Law.**

Mil. R. Evid. 403 states relevant evidence may be excluded 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.

The “uncharged misconduct” doctrine is based on Mil. R. Evid. 403 and 404(b). Read together these rules provide that if “evidence of other crimes, wrongs or acts” committed by appellant is logically relevant to prove a fact in issue other than appellant’s character *and* proof of that fact outweighs the evidence’s unfairly prejudicial character, the evidence is admissible.⁶

³ Encl (1) pgs. 101-102

⁴ Encl (1) pgs. 101-105

⁵ For judicial economy, in lieu of submitting the entire interview, the Defense references enclosure (15) of the previously submitted motion to suppress, in conjunction with enclosure (1) of this motion.

⁶ *United States v. Metz*, 34 MJ 349, 351 (1992)

Mil. R. Evid. 707(a) states any reference to the taking of a polygraph examination is not admissible.

Mil. R. Evid. 106 states that if a party introduces a recorded statement, an adverse party may require the introduction of any other part of the recorded statement that in fairness ought to be considered at the same time.

It is a basic principle of criminal practice that “human lie detector” evidence is not admissible at trial.⁷

5. Argument.

a. DC3 Ovando’s admissions to continuing sexual acts while the victim was unconscious is inadmissible “uncharged misconduct” as it is not substantially more probative than prejudicial.

The currently charged theory of sexual assault, that is, “impaired by an intoxicant”, will require the members to apply the definition of impairment or “incapable of consenting” which followed from *United States v. Pease*⁸. In contrast, sexual assaults under a theory of “while asleep” or “while unconscious” provide a more binary factual choice—either the victim was or was not asleep or unconscious.

This is significant because an admission to committing sexual acts upon a sleeping or unconscious person is therefore a more complete and objective confession of a criminal act, whereas admitting to having sex with someone who is “too drunk” is much more subjective and uncertain.

In short, if DC3 Ovando’s admissions that he continued sexual acts while the alleged victim was unconscious remain in the interview, there is a high risk that members will ascribe more weight and blameworthiness to those statements rather than statements regarding the alleged victim’s intoxication. This presents a high risk of unfair prejudice and confusion of the issues, as the Government has, by its own election, withdrawn and dismissed the charges. The members are likely to consider DC3 Ovando guilty of crimes which are no longer on the charge sheet, and apply that blameworthiness to the much more subjective and uncertain charges which remain.

Further, the references to the alleged victim’s unconscious can be removed from the interview while retaining the discussion of DC3 Ovando’s perception of the alleged victim’s intoxication, so it is not necessary for the Government to present the *res gestae* of the offense.

Finally, DC3 Ovando’s agreement with SA [REDACTED] that he was getting ready to have sex with the alleged victim when he’d pulled his shorts down is a potential crime which was never charged—an Attempted Sexual Assault (while the alleged victim is unconscious). This is even more prejudicial, as it is a potential new sex act while the victim is unconscious (vice a

⁷ *United States v. Whitney*, 55 M.J. 413, 415 (C.A.A.F. 2001)

⁸ 75 M.J. 180 (C.A.A.F. 2016)

continuation of an act commenced when the victim was conscious). Simultaneously, it is less intertwined with the prior, charged act. In short, it is unnecessary evidence for the question of the currently charged misconduct, highlighted by the fact that it never occurred, and was after the charged acts. As a result, whatever value could have as *res gestae* is outweighed by the substantial danger of unfair prejudice.

b. SA [REDACTED] assertions that the victim manifested non-consent is inadmissible hearsay, applicable to uncharged misconduct.

SA [REDACTED] describes the victim's account that she was trying to say "no", "stop", and was pinned down. He further makes comments about the victim's non-consent. DC3 Ovando never appears to agree these statements.

As DC3 Ovando never adopts these statements, they are otherwise inadmissible hearsay which is not needed to demonstrate any effect on the listener. Moreover, they are hearsay statements reiterating facts which apply to a theory which the Government has elected to withdraw and dismiss. They therefore carry more risk of unfair prejudice, and should be excluded under Mil. R. Evid. 403, as well as Mil. R. Evid. 801.

c. SA [REDACTED] statements regarding behavioral profiling are necessary for fair consideration of the 2 November 2020 interview.

SA [REDACTED] tells DC3 Ovando that sexual predators fit a criminal "profile" built by the FBI. Namely, that they are deceitful, and engage in "unusual sex acts". In turn, when he describes "unusual sex acts", SA [REDACTED] includes acts that DC3 Ovando has very likely engaged in (e.g., anal sex, masturbation) or possibly fantasized about (a "threesome"). This is especially valuable for understanding the context when SA [REDACTED] later proposes a dichotomy to DC3 Ovando, between a "monster" and a man who made a "mistake". It also highlights the coercion and acquiescence evident in the interview. Per Mil. R. Evid. 106, it should therefore be admitted in the 2 November 2020 interview.

d. The 2 November 2020 interview should be played in an audio format to minimize the risk of unfair prejudice or raise the implication of a polygraph examination.

As demonstrated in Enclosure (1), multiple redactions exist even in the Government proposed version of the interview. Most notably, at approximately 22 minutes, there is a 1 hour, 20 minute redaction (when the polygraph takes place), after which DC3 Ovando has been de-bloused and the door to the room has been closed.

Whether instructed to or not, members may be likely to wonder about the large gap in the transcript in the middle of the interview. Further, any members with experience with a polygraph examination, or with law enforcement experience, may reasonably conclude, seeing DC3 Ovando being de-bloused, and interviewed by a second outside agent, with a large redacted gap, that a polygraph examination was conducted.

Therefore the Defense requests that the audio of the interview, rather than the video, be

presented to the members. This will dramatically reduce the impact and potential confusion presented by the redactions, without altering the substance of the information provided by the interview.

e. Listed objections in Enclosure (1).

Pages 39-40 (highlighted text): Mil. R. Evid. 801- SA [REDACTED] describes potential descriptions from other witnesses. Given DC3 Ovando's minimal responses, there is no meaningful adoption of the statements, leaving them as simple inadmissible hearsay assertions by SA [REDACTED] about the facts of the case.

Page 43: Mil. R. Evid. 403 - Reference to alleged victim being unconscious.

Page 45: Mil. R. Evid. 403 - Reference to alleged victim being unconscious.

Page 97-98: Mil. R. Evid. 403 - References to alleged victim being unconscious.

Page 99: Mil. R. Evid. 403 – Reference to victim unawareness or non-consent.

Page 100-103: Mil. R. Evid. 403 – Reference to victim being unconscious, unaware.

Page 106-107: Mil. R. Evid. 403 - Reference to alleged victim being unconscious.

Page 107-108: Mil. R. Evid. 403 - Reference to uncharged misconduct which are not *res gestae* (potential attempt).

Page 109-110: Mil. R. Evid. 403 – Reference to victim being unconscious, unaware.

Page 112: Mil. R. Evid. 403 – Reference to victim being unconscious.

Page 113: Mil. R. Evid. 403, 707 – Reference to polygraph questions regarding unconsciousness and non-consent; reference to victim being unconscious.

Page 116-118: Mil. R. Evid. 403 – Reference to victim being unconscious, unaware.

Page 121: Mil. R. Evid. 403 – Reference to victim being unaware.

Page 128: Mil. R. Evid. 403 – Reference to victim being unconscious.

Page 129: Mil. R. Evid. 403 – Reference to victim being unaware.

Page 135: Mil. R. Evid. 403 – Reference to victim being unconscious.

Pages 48-50, 58-61: Mil. R. Evid 106 – SA [REDACTED] description of the criminal “profile” of a sex offender, followed by a description of “unusual” sex acts fitting that profile (including oral sex, masturbation, etc.), is crucial for the Defense’s ability to demonstrate and argue the coercive

nature of SA [REDACTED] interview tactics.

6. **Evidence and Enclosures.** Defense respectfully submits Enclosure 1. The Defense also references the previously submitted Enclosure (15) (recorded interview of the polygraph examination of DC3 Ovando) to the Defense motion to suppress the statements of DC3 Ovando.

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

8. **Relief Requested.** The Defense respectfully moves this Court to redact the statements highlight as listed above and in Enclosure (1), and direct the introduction of the statements on pages 48-50 and 58-61. The Defense also respectfully request the Government be required to admit only the audio portion of the interview.

GARCIA.BENJAMIN.BE
NIDICT MI. [REDACTED]
Digitally signed by
GARCIA.BENJAMIN.BENIDICT
MI [REDACTED]
Date: 2022.06.14 18:26:59 +09'00'
B. B. GARCIA
CDR, JAGC, USN
Assistant Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June 2022, an electronic copy of this motion was served on the Court and Trial Counsel.

GARCIA.BENJAMIN.BE
NIDICT MI. [REDACTED]
Digitally signed by
GARCIA.BENJAMIN.BENIDICT
MI [REDACTED]
Da [REDACTED] 8:27:48 +09'00'
B. B. GARCIA
CDR, JAGC, USN
Assistant Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES

V.

**EMERSON A. OVANDO
DC3/E-4, USN**

**DEFENSE –
MOTION TO REDACT 2 NOV 2020
INTERVIEW**

14 JUN 2022

The Defense respectfully submits the following evidentiary enclosures in support of the above titled motion:

Enclosure 1: Transcript of 2 November 2020 Interview with Government Redactions and Proposed Defense Edits; 140 pages.

GARCIA.BENJAMIN.BENIDICT
N.BENIDICT
MI. [REDACTED]
Date: 2022.06.14 18:36:32
+09'00'

**B. B. GARCIA
CDR, JAGC, USN
Defense Counsel**

NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. EMERSON A. OVANDO DC3/E-4, USN	GOVERNMENT RESPONSE TO DEFENSE MOTION TO AMEND FORMAT OF 2 NOV 2020 INTERVIEW 15 JUN 22
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1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13) the Government respectfully requests that the Court deny Defense's 14 June 2022 *Motion To Amend Format of 2 Nov 2020 Interview*.

2. **Facts.**

a. DC3 Ovando was charged with six specifications of violation of Article 120, which was referred to a general court martial on 7 September 2021. The charge consisted of four specifications of sexual assault, under theories of incapable of consenting, of a person who is unconscious, and without consent, and two specifications of abusive sexual contact, under theories of incapable of consenting and of a person who is unconscious. All specifications stem from an alleged encounter with SN [REDACTED] that took place in July 2020.

b. On 23 September 2021, the Government provided notice of its intent to introduce the following:

i. The written statement by DC3 Ovando to NCIS Special Agents [REDACTED] on 1 September 2020;

ii. DC3 Ovando's recorded statement, written letter, and timeline sketch to NCIS Special Agent [REDACTED] on 2 November 2020.

iii. Photographic evidence from the Accused's cell phone on 1 September 2020, which contain a typed copy of the Accused's handwritten statement.¹

c. On 28 October 2021, the Government filed the *Government Response to Defense Motion to Suppress Unwarned and Involuntary Statements* requesting the Court to rule the following as admissible:

i. The handwritten statement made by DC3 Ovando on 1 September 2020 and provided to Special Agent [REDACTED]

¹ Gov Mot. to Amend, Enclosure 1.

ii. The photos of the screen of DC3 Ovando's phone displaying the statement last edited on 22 August 2020.

iii. Oral statement and written statements made by DC3 Ovando to Special Agent [REDACTED] on 2 November 2020.

d. On 2 June 2022, the Trial Counsel provided an amended charge sheet withdrawing Charge, Specification 2, Charge, Specification 4, and Charge, Additional Specification 1. The remaining specifications allege two specifications sexual assault and one specification of abusive sexual contact all under the theory of incapable of consenting.

e. On 7 June 2022, the Trial Counsel provided Defense with a transcript of its proposed redactions for video evidence of DC3 Ovando's 2 November 2020 interview with NCIS Special Agent [REDACTED].

f. On 9 June 2022, Trial Counsel spoke with Defense Counsel and discussed the Government's objection to redacting references to GM3 [REDACTED] being unconscious.

3. **Burden.** The Government bears the burden of proof as the proponent of the evidence.²

4. **Law.**

M.R.E. 404(b)

M.R.E. 404(b) is a rule of inclusion rather than exclusion.³ Under M.R.E. 404(b) relevant evidence of uncharged misconduct may be offered to show the accused's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁴ M.R.E. 404(b) requires the Government to provide reasonable notice in advance of trial of the "general nature of any such evidence" it intends to offer at trial.⁵

U.S. v. Reynolds establishes a three-part test for evidence the Government intends to offer pursuant to M.R.E. 404(b): 1) the evidence must reasonably tend to show the accused committed the prior acts; 2) the evidence must show some fact of consequence more or less probable; and 3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.⁶

Under the first prong of the *Reynolds* test, this Court "simply examines all the evidence in the case and decides whether the jury *could* reasonably find the conditional fact...by a preponderance of the evidence."⁷ The standard required to meet this first prong is low.⁸

² *United States v. Shover*, 45 M.J. 119, 122 (C.A.A.F. 1996).

³ *U.S. v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000).

⁴ *U.S. v. Mirandez-Gonzalez*, 26 M.J. 411, 413 (C.M.A. 1988).

⁵ M.R.E. 404(b)(2)(A)(emphasis added).

⁶ *U.S. v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

⁷ *Huddleston v. U.S.*, 485 U.S. 681, 690 (1988)(emphasis added); *see also, U.S. v. Cuellar*, 27 M.J. 50, 54 (C.M.A. 1989).

⁸ *U.S. v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006); *see also, United States v. Peterson*, 20 M.J. 806, 813 (N-M.C.M.R. 1985)("There is no rigid limitation with respect to the quantum of proof required for admissibility of

Under the second prong of the *Reynolds* test, the uncharged acts must be admissible for purposes other than propensity in order to be considered relevant. The determination for relevance under M.R.E. 404(b) is that it “must directly relate to some specific fact that is of consequence to the... action, not to the general issue of criminality.”⁹ The list of permitted uses of M.R.E. 404(b) is illustrative, not exhaustive.¹⁰

Under the third prong of the *Reynolds* test—the M.R.E. 403 balancing test—the probative value of contested evidence must be weighed in light of the purposes for which it is offered.¹¹ “[T]he military judge is given wide discretion in balancing the probative value of evidence with its danger of unfair prejudice.”¹² When weighing the probative value of evidence against the danger of unfair prejudice, this Court should favor admission.¹³

M.R.E. 413

If the prosecution intends to offer evidence under M.R.E. 413, it must disclose it to the accused at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.¹⁴

Before admitting evidence under M.R.E. 413, the Court in *United States v. Wright* determined three threshold findings are required: 1) The accused is charged with a sexual assault, 2) the evidence proffered is evidence of the defendant’s commission of another offense of sexual assault, and 3) the evidence is relevant under Rule 401 and 402.¹⁵ The Court also found that the evidence must be weighed with a Rule 403 balancing test and listed the following factors to be examined: Strength of proof of prior act, probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; and time needed for proof of prior conduct, temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties.¹⁶ The judge must find that the jury could find by a preponderance of evidence that the offense occurred.¹⁷ M.R.E. 413 puts evidence of prior sexual offenses on the same footing as other evidence not subject to an exclusionary rule with the presumption is in favor of admission.¹⁸

5. Argument.

a. The Government agrees to redactions of SA [REDACTED] description of the allegations, references to polygraph questions, and agrees to underact the requested portions regarding behavioral profiling

an extrinsic offense.”).

⁹ *U.S. v. Ferguson*, 28 M.J. 104, 108 (C.A.A.F. 1989).

¹⁰ *Id.*

¹¹ *U.S. v. Peterson*, 20 M.J. 806, 813-14 (N-M.C.M.R. 1985).

¹² *U.S. v. Shields*, 20 M.J. 174, 176 (C.M.A. 1985)(internal quotation marks and citation omitted).

¹³ *U.S. v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981), rev’d in part on other grounds, 16 M.J. 68 (C.M.A. 1983)).

¹⁴ RCM 413(b).

¹⁵ *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000).

¹⁶ *Id.*

¹⁷ *Id.* 53 M.J. at 483.

¹⁸ *Id.*

The Government has no objection to redacting the highlighted portions of Pages 39-40, the highlighted portion of Page 113 in regards to references to polygraph questions only, and agrees to unredact the highlighted portions of Pages 48-50 and 58-61, which reference behavioral profiling.

The remaining issues of disagreement are references to GM3 [REDACTED] being unconscious, unaware, non-consenting, or DC3 Ovando's intent to have vaginal sex with her.

b. Evidence that DC3 Ovando's sexual acts occurred while GM3 [REDACTED] was unconscious, unaware, or non-consenting is not 404(b) evidence of uncharged misconduct

DC3 Ovando is charged with causing contact between his mouth and GM3 [REDACTED] vulva, causing contact between his mouth and GM3 [REDACTED] mouth, and penetrating GM3 [REDACTED] vulva with his finger. Whether GM3 [REDACTED] was incapable of consent, unconscious, not consenting, or even consenting changes the theory of criminality, but it is not an "other act" under M.R.E. 404(b). DC3 Ovando's perception of whether his sexual acts took place while GM3 [REDACTED] was unconscious, impaired by an intoxicant, consenting or non-consenting, refer only to his state of mind and beliefs as he represented them to NCIS. It is up to the finder of fact to determine whether these beliefs were reasonable, whether DC3 Ovando was making a false exculpatory statements, or whether GM3 [REDACTED] was in fact unconscious, unaware, or consenting or non-consenting rather than impaired by alcohol. Of note, Defense highlights that SA [REDACTED] often uses the terms "unconscious," "unaware," and "blacked out" interchangeably and DC3 Ovando describes GM3 [REDACTED] as "brushing his hair" while "unconscious." These descriptions provide further indication that DC3 Ovando is not discussing a specific "other act" of sexual contact, but rather using different ideas to describe the charged misconduct. Finally, GM3 [REDACTED] slipping in and out of a state of consciousness is evidence of her state of intoxication; DC3 Ovando's recognition that she appeared unconscious during his sexual acts is positive evidence that she was too intoxicated to consent.

These are not acts of uncharged misconduct. DC3 Ovando's reference of sexual contact and sexual acts with GM3 [REDACTED] are not references to separate acts on some other occasion, but rather his explanation of the very acts he is charged with.

c. Other sexual acts would be admissible under M.R.E. 413

Assuming arguendo that statements that DC3 Ovando committed sexual acts against GM3 [REDACTED] while she was unconscious, unaware, or non-consenting were referencing different act than the charged misconduct, such evidence would be admissible under M.R.E. 413.

Evidence is admissible under M.R.E. 413 when 1) The accused is charged with a sexual assault, 2) the evidence proffered is evidence of the defendant's commission of another offense of sexual assault, and 3) the evidence is relevant under Rule 401 and 402.¹⁹ Here, the accused is charged with a sexual assault and the evidence proffered is evidence of DC3 Ovando's commission of what Defense represents as "another" offense of sexual assault. The evidence is relevant because it took place in the same course of events as the charged misconduct: on the

¹⁹ *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000).

same night, at the same place, with the same victim, in the same sequence of events.

d. Other acts would be admissible under M.R.E. 404(b)

Assuming arguendo that these acts were not sexual and would not fall under M.R.E. 413, they would be admissible under M.R.E. 404(b). Because DC3 Ovando's commission of these "other acts" with GM3 [REDACTED] were occurring in the same window of time as the charged conduct, it goes to show DC3 Ovando's sexual intent, physical preparation to commit the charged sexual acts, his knowledge that he was committing sexual acts, knowledge as to GM3 [REDACTED] state of intoxication, and his opportunity to commit sexual acts against GM3 [REDACTED].

These statements are also highly relevant as to DC3 Ovando's belief that GM3 [REDACTED] was unconscious or unaware as it relates to his reasonable knowledge of her state of intoxication. DC3 Ovando is not a forensic psychiatrist, but his layman's description of her state of unconsciousness or unawareness as he saw it to be is highly probative to his knowledge.

Specifically regarding DC3 Ovando's admission of pulling his pants down to prepare to have sex with GM3 [REDACTED] this evidence is relevant to DC3 Ovando's sexual intent to gratify his sexual desires; a necessary element the Government must prove.

Under a 403 balancing test, the danger of unfair prejudice does not substantially outweigh the probative value. Members will be instructed on the elements of the charge and specifications that DC3 Ovando is charged with and instructed to judge whether he is guilty of those specifications.

e. Defense has been on notice of the Government's intent to offer such evidence

The Government does not believe this evidence falls under M.R.E. 413 or M.R.E. 404(b) because it constitutes the same acts as the charged offenses. However, if the Government improperly identified this evidence, the Defense has still been on notice of the Government's intent to offer this evidence since 23 September 2021.

Defense's argument for the timeliness of their motion stems from the Government's withdrawal of several charges on 2 June 2022. The Government provided additional notice of their intent to introduce this evidence on 7 June 2022 by sending Defense a transcript of its proposed video evidence. Government's notice of its intent to use this evidence is reasonable.

f. Video evidence is necessary to provide fidelity to DC3 Ovando's statements

At numerous points in the interview, DC3 Ovando indicates assent or disagreement by nodding or shaking his head or demonstrates actions for SA [REDACTED]²⁰ Video evidence is necessary, not just to capture these actions and descriptions, but also to show the demeanor of DC3 Ovando while

²⁰ Def Mot. to Amend, Enclosure 1, page 2 (nodding head), page 8 (signing rights waiver statement), page 48 (shaking head), 106 (demonstrating action), page 111 (demonstrating action), page 113 (demonstrating action), page 128 (demonstrating action), page 130 (demonstrating action), page 131 (demonstrating action), page 134 (nodding head), page 135 (demonstrating action), page 137 (signing sketch to verify for accuracy)

making these statements. DC3 Ovando's body language and demeanor are highly probative for members to judge the trustworthiness of DC3 Ovando's statements or, as Defense has indicated its intent to argue, whether these statements came as the result of coercion.

Defense's assertion that a 1 hour, 20 minute gap would lead members to conclude that a polygraph has taken place is pure speculation and can be appropriately addressed in individual voir dire to follow up on responses regarding experience with law enforcement. Government would contend that anyone with law enforcement experience would likely not consider a 1 hour, 20 minute break in an interrogation to be unusual. Further, the fact the DC3 Ovando debloused does not indicate a polygraph took place. SA [REDACTED] makes a specific statement about the fan feeling good, which would indicate that heat, not a polygraph was the cause of deblousing.²¹

6. **Relief Requested.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13) the Government respectfully requests that the Court deny Defense's 14 June 2022 *Motion To Amend Format of 2 Nov 2020 Interview*. Specifically the Government asks that the interview be ruled admissible as video evidence and that the following statements from Defense Mot. to Amend, Enclosure 1 be ruled admissible:

Page 43: Reference to unconsciousness.

Page 45: Reference to unconsciousness.

Pages 97-98: Reference to unconsciousness.

Page 99: Reference to unawareness or non-consent.

Pages 100-103: Reference to unconsciousness, unaware.

Pages 106-107: Reference to unconsciousness.

Pages 107-108: References to Accused's intent.

Pages 109-110: Reference to unconsciousness, unaware.

Pages 116-118: Reference to unconsciousness, unaware.

Page 121: Reference to being unaware.

Page 128: Reference to unconsciousness.

Page 129: Reference to being unaware.

Page 135: Reference to unconsciousness.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

²¹ Id. at page 123

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

REQUESTS

UNITED STATES v. EMERSON A. OVANDO DC3/E-4, USN	GOVERNMENT REQUEST FOR EXTENSION TO PROVIDE AMENDED CONVENING ORDER AND MEMBERS QUESTIONNAIRES 2 Jun 22
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1. **Nature of Request.** The Government respectfully requests that the Court grant an extension until 8 June 2022 to provide the amended convening order and member questionnaires.

2. **Background.**

a. Due to witness unavailability, the Government requested and the Court granted a continuance for trial dates ICO US v. Ovando from 6 June 2022 to 21 June 2022.

b. The change in dates required the Convening Authority select from a new pool of members who would be available for the new dates.

c. The Court set the deadline for pre-trial matters for 6 June 2022.

d. Due to the shortened timeframe, the responsiveness of commands, and the Convening Authority's travel, the Convening Authority was unable to select new members prior to travel. The Convening Authority is scheduled to return from travel on 7 June 2022.¹

3. **Reason for Request.** The Government is working expeditiously to provide an updated convening order and member questionnaires, but the Convening Authority will be unable to select from a pool of available members until return from travel. A two day delay is requested in order to permit the Convening Authority to select members upon return from travel, sign an amended convening order, and gather the member questionnaires for the selected members.

4. **Relief Requested.** The Government respectfully requests leave from the Court to provide members questionnaires and the amended convening order by 8 June 2022.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

¹ Enclosure 1, Email from Deputy Force Judge Advocate, Commander, [REDACTED] dtd 2 June 2022.

CERTIFICATE OF SERVICE

I hereby certify that on the 2st day of June 2022, a copy of this request was served on Defense Counsel.

A solid black rectangular box used to redact the signature of the Trial Counsel.

G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

v.

EMERSON A. OVANDO
DC3/E4, USN

VICTIM'S ACCOMMODATION
REQUEST PURSUANT TO R.C.M. 611
AND R.C.M. 801

22 JUN 22

1. **Nature of Motion.** Pursuant to Military Rules of Evidence (M.R.E.) 611(a), the Victim, by and through counsel, moves the Court for an accommodation request to permit Victims' Legal Counsel to sit behind government counsel's table and in direct line of sight with Victim when she testifies. Good cause exists for the timing of the motion as GM3 [REDACTED] did not observe the [REDACTED] courtroom until 20 Jun 22 and did not anticipate her emotions being disruptive to court proceedings until 21 Jun 22.

2. **Facts.**

a. GM3 [REDACTED] is the named Victim of the offenses charged in this court-martial.

b. This court has permitted the defense to cross-examine GM3 [REDACTED] on a series of sensitive topics, including her prior sexual assault when she was [REDACTED] years old, her [REDACTED] history, and her previous sexual relationship with EM3 [REDACTED]

c. GM3's request that the convening authority fund travel for her [REDACTED] based victim advocate to attend the court-martial was denied.¹

d. GM3 [REDACTED] first observed the [REDACTED] courtroom on 20 Jun 22.²

e. At that time, GM3 [REDACTED] realized that she could not see the gallery, including her Victims' Legal Counsel, while seated in the witness chair due to the unique configuration of the courtroom.³

f. On 21 Jun 22 at approximately 1830, government counsel conducted a mock cross-examination of GM3 [REDACTED]⁴

g. Based on her experience with government counsel, GM3 [REDACTED] believes that her emotions during testimony will be disruptive to court-martial proceedings.

¹ LCDR [REDACTED] JAGC, USN, email exchange with Victims' Legal Counsel.

² GM3 [REDACTED] Witness Accommodation Request

³ Id.

⁴ Id.

⁵ Id.

3. **Burden.** The burden of proof for any factual allegations is by a preponderance of the evidence, and the burden of persuasion rests with the moving party.⁶

4. **Law.**

M.R.E. 611 discusses “Mode and order of examining witnesses and presenting evidence.”⁷ Subsection (a) of M.R.E. 611 provides that “The military judge shall exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment.”⁸ Similarly, R.C.M. 801(a) provides that the military judge shall “ensure that the dignity and decorum of the proceedings are maintained” and “exercise reasonable control over the proceedings.”⁹ Indeed, the discussion section of R.C.M. 801 explains that “Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented” and instructs the military judge to “prevent unnecessary waste of time and promote the ascertainment of truth.”¹⁰

As a result, a military judge has the power to make accommodations for witnesses to satisfy the conditions of M.R.E. 611(a). For example, under certain circumstances a military judge may permit a Victim Advocate to sit next to a child victim of sexual misconduct while the victim testifies at trial.¹¹ Additionally, “in a case involving domestic violence or the abuse of a child, the military judge must, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or witness to testify from an area outside the courtroom.”¹²

If a military judge’s decision to accommodate a witness is later challenged by defense on appeal, the appellate court reviews “a military judge’s control of the mode of witness interrogation pursuant to M.R.E. 611 for abuse of discretion.”¹³ Importantly, the abuse of discretion “must be more than a mere difference of opinion; rather it must be arbitrary, fanciful, clearly unreasonable or clearly erroneous.”¹⁴ Additionally, the appellate court reviews a military judge’s exercise of reasonable control over the proceedings “pursuant to R.C.M. 801 for abuse of discretion.”¹⁵

Under this standard, the Court in *Brown* upheld the decision of the military judge to allow a Victim Advocate to sit next to the child victim while she testified at trial.¹⁶ The military judge

⁶ R.C.M. 905

⁷ M.R.E. 611

⁸ *Id.*

⁹ R.C.M. 801

¹⁰ R.C.M. 801

¹¹ See *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013).

¹² M.R.E. 611(d)

¹³ *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 361.

determined that the victim in that case was “unintelligible and unable to speak because she was crying.”¹⁷ Also, before granting the witness accommodation, the military judge “made an effort to proceed without the accommodation of a support person.”¹⁸ However, once those efforts failed, the judge determined the accommodation was necessary pursuant to R.C.M. 611 in order to avoid wasting time and to make the procedures effective for determining the truth.¹⁹ Furthermore, “The military judge minimized the risk of prejudice to the accused by instructing the advocate not to communicate with the witness and by instructing the jurors to disregard the presence of the advocate.”²⁰

5. Argument.

This case arises out of multiple allegations of sexual assault. This court has permitted the defense to cross-examine GM3 [REDACTED] on a series of sensitive topics, including her prior sexual assault when she was [REDACTED] old, her [REDACTED] history, and her previous sexual relationship with EM3 [REDACTED].

Although GM3 [REDACTED] is not a child, she did seek [REDACTED] treatment after experiencing the alleged sexual assault by DC3 Ovando after experiencing a variety of symptoms, including inability to focus and feeling afraid. GM3 [REDACTED] does not have the support of her victim advocate at these proceedings and, due to the unique configuration of the courtroom, cannot see her Victims’ Legal Counsel while seated in the witness chair.

As a result, GM3 [REDACTED] believes her emotions will be disruptive to the court proceedings during her testimony. However, to assist in her ability to control her emotions, GM3 [REDACTED] has requested the presence of Victims’ Legal Counsel to be seated directly behind government counsel’s table and in her direct line of sight.

Allowing her Victims’ Legal Counsel to sit in her direct line of sight would not be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Similar to *U.S. v. Brown*, this Court would benefit from granting GM3 [REDACTED] accommodation request pursuant to R.C.M. 611 in order to avoid wasting time and to make the procedures effective for determining the truth. Before granting the accommodation, the court may conduct findings to determine if GM3 [REDACTED] can proceed without the accommodation.

Additionally, this Court could still “ensure that the dignity and decorum of the proceedings are maintained” and “exercise reasonable control over the proceedings” pursuant to RCM 801. The Victims’ Legal Counsel will be seated behind government counsel during testimony, largely out of sight of the members, and will not create a distraction for the court. Finally, the court can minimize the risk of prejudice to the Accused by instructing the Victims’ Legal Counsel to not communicate with GM3 [REDACTED] and by instructing the members to disregard the presence of the Victims’ Legal Counsel.

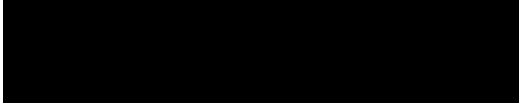
¹⁷ *Id.* at 362.

¹⁸ *Id.*

¹⁹ See *Id.* at 363.

²⁰ *Id.*

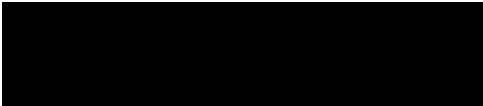
6. **Evidence.** Victim, by and through counsel, respectfully submits Enclosure 1.
7. **Relief Requested.** Victim, by and through counsel, respectfully requests this Court permit Victims' Legal Counsel to sit behind the prosecution table and in direct line of sight with Victim when she testifies.



J. A. MCGLAUGHLIN
LT, JAGC, USN
Victims' Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *22nd* day of *June* 2022, a copy of this motion was electronically served on the Court, Trial and Defense Counsel.



J. A. MCGLAUGHLIN
LT, JAGC, USN
Victims' Legal Counsel

NOTICES

**DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES

v.

EMERSON OVANDO,
DC3, USN

)
)
)
)
)
)

VICTIMS' LEGAL COUNSEL
COURT-MARTIAL NOTICE OF
APPEARANCE ON BEHALF OF
SN [REDACTED] USN

1. I, LT John McGlaughlin, JAGC, USN, Victims' Legal Counsel, Pacific Office, [REDACTED] admitted to practice law and currently in good standing in the Commonwealth of Pennsylvania and, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of SN [REDACTED] USN, a named victim in the charges.

2. On 15 October 2020, I was detailed to represent SN [REDACTED] and I have formed an attorney-client relationship with SN [REDACTED]. I have not acted in any manner which might disqualify me in the above captioned court-martial.

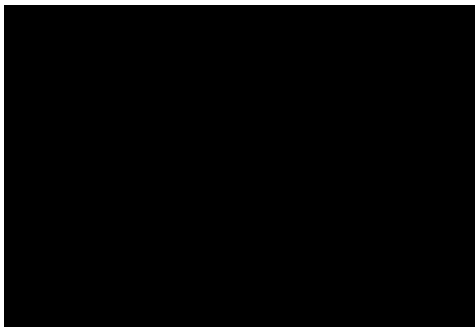
3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the [REDACTED] Rules of Court.

4. SN [REDACTED] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, except for closed proceedings that do not involve SN [REDACTED]

5. To permit a meaningful exercise of SN [REDACTED] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which SN [REDACTED] rights and privileges are addressed.

6. SN [REDACTED] has limited standing in this court-martial, and SN [REDACTED] reserves the right to make factual statements and legal arguments herself or through counsel.

7. My current contact information is as follows:



Respectfully submitted this 29th day of September, 2021.

A large black rectangular redaction box covering the signature of J. A. McLaughlin.

J. A. MCGLAUGHLIN

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on 29th September 2021 via the  Circuit's SharePoint page and E-mail.

A large black rectangular redaction box covering the signature of J. A. McLaughlin.

J. A. MCGLAUGHLIN

NAVY-MARINE CORPS TRIAL JUDICIARY

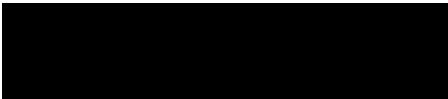
GENERAL COURT-MARTIAL

UNITED STATES v. EMERSON A. OVANDO DC3/E-4, USN	DEFENSE NOTICE OF PLEAS AND FORUM 13 DEC 21
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1. **Forum Election.** Pursuant to Rule for Courts-Martial 903(b), DC3 Emerson A. Ovando, USN, through counsel, elects trial by a court composed of **members with enlisted representation.**

2. **Entry of Pleas.** Pursuant to Rule for Courts-Martial 910, DC3 Emerson A. Ovando, USN, through counsel, intends to enter the follow plea:

To the sole Charge and all Specifications thereunder: NOT GUILTY


E. A. OVANDO
DC3, USN


M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2021, a copy of this notice was served on the Court, Trial Counsel, and Victim's Legal Counsel.


M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES v. EMERSON A. OVANDO DC3/E-4, USN	DEFENSE NOTICE OF PLEAS AND FORUM 9 MAY 22
--	--

1. **Forum Election**. Pursuant to Rule for Courts-Martial 903(b), DC3 Emerson A. Ovando, USN, through counsel, elects trial by a court composed of **members with enlisted representation**.
2. **Entry of Pleas**. Pursuant to Rule for Courts-Martial 910, DC3 Emerson A. Ovando, USN, through counsel, intends to enter the follow plea:

To the sole Charge and all Specifications thereunder: NOT GUILTY

E. A. OVANDO
DC3, USN

M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May 2022, a copy of this notice was served on the Court, Trial Counsel, and Victim's Legal Counsel.

M. C. DOHERTY
LT, JAGC, USN
Defense Counsel

COURT RULINGS & ORDERS

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES

V.

**EMERSON A. OVANDO
DC3/E-4, USN**

**RULING – DEFENSE MOTION TO
COMPEL PRODUCTION**

11 NOV 2021

1. Statement of the Case.

The Defense filed a Motion For Appropriate Relief¹ pursuant to Article 46 and Rules for Courts-Martial 703(e) and 906(b)(7).² The Government responded on 28 October 2021.³ On 4 November 2021, an Article 39(a)⁴ hearing was held onboard [REDACTED]. The evidence on this issue includes Appellate Exhibits (AE) XII, XII(a), and XIV.

2. Issue

a. Should the Government be compelled to produce all the call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020?

b. Should the Government be compelled to produce all internet search histories of SN [REDACTED] cellular phone from 11-12 July 2020?

c. Should the Government be compelled to produce SN [REDACTED] Facebook activity log and call logs from 11-12 July 2020?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence currently before it and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

a. The Government has charged the Accused with sexually assaulting SN [REDACTED] in EM3 [REDACTED] barracks room. She made her allegation to Naval Criminal Investigative Service (NCIS) on 21 August 2020 and interviewed the same day. When she made her allegation, SN [REDACTED] believed the alleged sexual assault occurred on 18 or 19 July 2020. In October 2021 SN [REDACTED] notified the Government that the alleged sexual assault occurred on 12 July 2020.⁵

¹ AE XI.

² M.C.M. (2019).

³ AE XIII.

⁴ U.C.M.J. (2019).

⁵ As a result, the Government filed a motion to change the dates on the charge sheet from “18 July 2020” to “12 July

b. EM3 [REDACTED] has been SN [REDACTED] “close friend” since they met in March 2020. Their relationship was “romantic” and “sexual” for its first three or four months, until approximately July 2020. Due to their close friendship, EM3 [REDACTED] is protective of, and looks out for, SN [REDACTED]

c. On the night of the alleged sexual assault, EM3 [REDACTED] had a party in his barracks room. SN [REDACTED] arrived at EM3 [REDACTED] room between 2300 and midnight. An unknown male dropped SN [REDACTED] off at the door, but he did not come inside, introduce himself, or talk to anyone. EM3 [REDACTED] believed SN [REDACTED] was heavily intoxicated based on her demeanor. With the help of EM2 [REDACTED] EM3 [REDACTED] placed SN [REDACTED] in his bathtub, where she stayed until after the alleged sexual assault.

d. The Accused was attending EM3 [REDACTED] barracks party and made plans to stay the night. Between 0100 and 0200, the Accused asked to use the bathroom. EM3 [REDACTED] and EM2 [REDACTED] ensured SN [REDACTED] who appeared to be asleep at the time, was covered with a blanket and the shower curtain was closed. The Accused used the restroom, washed his hands, and exited the bathroom. Thirty minutes later, he asked to use the bathroom again. When they did not hear the Accused using the bathroom or washing his hands, EM3 [REDACTED] and EM2 [REDACTED] entered the bathroom. There they saw SN [REDACTED] laying in the bathtub. Accused kneeling between her spread knees. EM3 [REDACTED] removed the Accused from the bathroom and made him leave the barracks room. EM2 [REDACTED] helped SN [REDACTED] get dressed. EM3 [REDACTED] and EM2 [REDACTED] eventually moved SN [REDACTED] to the couch, where she fell asleep.

e. EM3 [REDACTED] and SN [REDACTED] did not discuss the alleged sexual assault the next morning. Two days later, SN [REDACTED] asked EM3 [REDACTED] what happened. After he told her about the incident, SN [REDACTED] called her mother. EM3 [REDACTED] has not discussed the alleged sexual assault with SN [REDACTED] electronically.

f. During her 21 August 2020 interview with NCIS, SN [REDACTED] said the alleged sexual assault occurred on a Saturday night, either 18 or 19 July 2020. The night began with her hanging out with another Sailor, [REDACTED] and his friends. SN [REDACTED] got drunker than she “should have been” and went to EM3 [REDACTED] barracks room. In the 21 August interview, she referenced a then-current boyfriend, EN3 [REDACTED]. Towards the end of the interview, NCIS asked SN [REDACTED] if she had any contact with the Accused after the alleged sexual assault and then asked “Are you on Facebook with him or social media? Or do you text him? Or Snap? Or Insta? Or anything like that?” In response, SN [REDACTED] said “Nothing ... I had no idea who he was until [REDACTED] ... gave me his name.” When NCIS asked if she had a Facebook account she said she did not. The phone SN [REDACTED] had during the NCIS interview did not have service.

g. NCIS interviewed SN [REDACTED] again on 15 September 2020. SN [REDACTED] told NCIS she had Snapchat and Instagram accounts and confirmed their respective account/profile names. She told him she did not have a Facebook account.

h. EM3 [REDACTED] told NCIS SN [REDACTED] does not have a Facebook account, but she does have

2020.” See AE XIX.

an Instagram account.

i. SN [REDACTED] through her Victim's Legal Counsel (VLC), provided two videos to the Government on 12 October 2021. The videos were timestamped 0101 and 0106 12 July 2020. SN [REDACTED] had previously been unaware of the videos because she believed the alleged sexual assault happened on 18 or 19 July and therefore had not looked for anything on these dates. EM3 [REDACTED] sent the 0101 video to her on 8 October 2021, at her request. SN [REDACTED] found the 0106 video in her Snapchat "memories" when reviewing her phone.⁶ The 0106 allegedly shows SN [REDACTED] in EM3 [REDACTED] bathtub. Based on her position in the 0106 video, SN [REDACTED] could not have taken the video.⁷ SN [REDACTED] did not have a passcode lock on her phone on 12 July 2020.

j. The Defense Litigation Support Specialist conducted social media searches for SN [REDACTED] on 13 August and 4 November 2021. The searches turned up two Facebook accounts associated with SN [REDACTED].⁸ The first account, [REDACTED] lists 372 "Friends" and appears to have four posts: 20 July 2015; 8 December 2015; 23 June 2017; and 18 August 2017. The second account, [REDACTED] has 141 "Friends" and two posts, both on 8 December 2020. The six posts of [REDACTED] are notices indicating either the profile or cover photos have been updated.

k. The Defense interviewed SN [REDACTED] on 19 October 2021, in relation to her other allegation of abusive sexual contact; she was not accompanied by her VLC.

l. FN [REDACTED] went out with SN [REDACTED] and several other Sailors in mid-July 2020. The group included SN [REDACTED] FN [REDACTED] best friend and SN [REDACTED] then-boyfriend. After drinking at [REDACTED] the group went to SN [REDACTED] room and drank for approximately 90 more minutes. SN [REDACTED] became intoxicated; she was slurring her speech and having difficulty walking on her own. SN [REDACTED] left his barracks room to take SN [REDACTED] home. Before he got her to her room, they were intercepted by Shore Patrol, who took custody of SN [REDACTED] FN [REDACTED] messaged SN [REDACTED] Snapchat account around midnight that same evening. Based on the rude responses he received, FN [REDACTED] believed a male, and not SN [REDACTED] was answering his messages.

m. NCIS interviewed the Accused on 1 September 2020 on board the [REDACTED] [REDACTED]. After he was given his Article 31(b) and *Miranda* rights, the Accused gave NCIS a written statement he had drafted on his phone about a week after the alleged sexual assault.⁹ NCIS also interviewed the Accused on 2 November 2020 as part of a polygraph examination. In his statements to NCIS,¹⁰ the Accused claimed SN [REDACTED] talked to him from the bathtub and then asked him for a kiss. As he kissed her, she told him to "do more." The Accused did not mention

⁶ There is no evidence how SN [REDACTED] became aware of the 0101 video or why she was reviewing her Snapchat "memories."

⁷ The Court has seen neither video. The Defense proffered this characterization of the 0106 video; the Government did not dispute it.

⁸ Neither the Government nor the VLC contested the Defense's contention that the accounts are connected to SN [REDACTED]

The Defense has challenged the voluntariness of this statement. See AE XV.

¹⁰ The statement drafted on his phone, the handwritten statement made on 1 September 2020, and his 2 November 2020 interview.

SN [REDACTED] using her phone at any point in the evening.

4. Statement of Law.

“[T]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence.”¹¹ “The prosecutor’s obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.”¹² The right to equal opportunity to obtain evidence includes the right to compulsory process for relevant and necessary evidence.¹³

Relevant evidence has any tendency to make a fact at issue more or less probable.¹⁴ “Relevant evidence is necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.”¹⁵

The moving party bears the burden of persuasion on motions for appropriate relief.¹⁶

5. Analysis and Conclusions of Law.

The issue before the Court is one of production, not discovery.¹⁷ The Defense, as the moving party, is “required as a threshold matter to show that the requested material existed.”¹⁸ The Defense has failed to meet the burden that any of the requested evidence existed. Failing to show that the requested evidence existed, the Defense is unable to show that it is relevant and necessary and therefore subject to production by compulsory process.¹⁹

a. **Should the Government be compelled to produce all call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020?**

The Defense has failed to show that the call logs, text messages, text logs, and cellular data from SN [REDACTED] phone from 11-12 July 2020 would show any phone calls or text messages sent by SN [REDACTED]. In its argument, the Defense relied on three pieces of evidence to support its request to compel production of the evidence: 1. SN [REDACTED] was a young person with a phone; 2. FN [REDACTED] messages to SN [REDACTED] Snapchat; and 3. SN [REDACTED] phone call to her mother. This evidence, even taken together, does not meet the Defense’s burden.

It is undisputed that SN [REDACTED] had a cellular phone on 11 and 12 July 2020. The use of her cellular phone from the time she arrived at EM3 [REDACTED] room until the alleged sexual assault

¹¹ Article 46, U.C.M.J. See R.C.M. 703(a).

¹² *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

¹³ Article 46 and R.C.M. 703(g)(3)(A) (Relevant and necessary evidence “not under the control of the Government may be obtained by subpoena.”). See *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

¹⁴ M.R.E. 401.

¹⁵ *Discussion*, R.C.M. 703(e)(1).

¹⁶ R.C.M. 905(c)(2)(A) and 906(b)(7).

¹⁷ The Defense has not argued the Government is in possession of the evidence requested.

¹⁸ *Rodriguez*, 60 M.J. at 246.

¹⁹ *Id.*

might be relevant to attack SN [REDACTED] lack of capacity or consciousness. However, there is no evidence before this Court to show that she used her phone on 11 and 12 July 2020. More specifically, there is no evidence she made a phone call or sent a text message during the relevant time. The Defense's contention that the Court should assume she was using her phone in EM3 [REDACTED] room, merely because she was a young person with a phone, is to broad a leap for this [REDACTED] take. SN [REDACTED] arrived at EM3 [REDACTED] barracks room heavily intoxicated. Based on previous experience with SN [REDACTED] EM3 [REDACTED] and EM2 [REDACTED] placed her in the bathtub. There is no evidence SN [REDACTED] had her phone with her when she arrived, much less that she was using her phone. Though the Accused claimed SN [REDACTED] was conscious and talking to him before the alleged sexual assault, he made no claim that she was using her phone when he was in the bathroom with her. Finally, there is no evidence from anyone who received a text message or phone call from SN [REDACTED] on 11 or 12 July 2020.

The Defense argues that FN [REDACTED] Snapchat messages to SN [REDACTED] are sufficient to compel production of her call and text logs. This argument does not taken into account three important distinctions. Initially, the evidence does not establish that FN [REDACTED] sent the messages on 12 July 2020. At the time NCIS interviewed FN [REDACTED] they believed the alleged sexual assault occurred on 18 or 19 July 2020. FN [REDACTED] only said he sent the messages to her in mid-July. Additionally, on the night FN Amerson messaged SN [REDACTED] Shore Patrol intercepted her and SN [REDACTED] and took her back to her room. When SN [REDACTED] arrived at EM3 [REDACTED] room on 12 July 2020, she was in the company of an unknown [REDACTED], not someone wearing a uniform or the other trappings of Shore Patrol. This evidence does not establish that FN [REDACTED] sent messages to SN [REDACTED] Snapchat on 12 July 2020. Consequently, it does not substantiate the Defense argument that there would be text messages on her phone on 12 July 2020.

Second, FN [REDACTED] stated he messaged SN [REDACTED] using Snapchat, not the native text messaging application on his phone. The Defense argues FN [REDACTED] and SN [REDACTED] exchanged text messages based solely on the use of the word "text" in the NCIS Report of Investigation (ROI) summarizing FN [REDACTED] interview. However, the use of this word does not persuade the Court that FN [REDACTED] was using the native text message application on his phone to message as opposed to Snapchat. The paragraph begins by referring to Snapchat as the mode of communication. The use of the word "text" later in the summary is short-hand for an electronic message, not an indication that the native text application was used to send the message. Conversely, it is unreasonable to believe NCIS used "Snapchat" at the beginning of the summary as a catchall term for all electronic messaging applications. It is just as unreasonable to believe FN [REDACTED] switched between Snapchat and the native text application on his phone during the same attempted conversation with SN [REDACTED] and sent messages to the corresponding applications on SN [REDACTED] phone.

Third, the Defense argument does not account for FN [REDACTED] belief that he wasn't even communicating with SN [REDACTED]. Assuming the conversation referenced by FN [REDACTED] occurred on 12 July 2020, he did not believe SN [REDACTED] was answering. Rather, he felt the rude responses came from a male. This scenario is supported by evidence EM3 [REDACTED] used SN [REDACTED] phone to take a video using Snapchat at approximately 0106 on 12 July 2020. If EM3 [REDACTED] had access to SN [REDACTED] phone and Snapchat to take a video, he could have also sent responses to FN [REDACTED] messages. EM3 [REDACTED] or anyone else, answering FN [REDACTED] Snapchat

messages does not show that text messages exist on SN [REDACTED] phone.

SN [REDACTED] used her phone on or about 14 July 2020 to call her mother, after EM3 [REDACTED] told her what happened early on the morning of 12 July. The fact she made the phone call two days later does not establish that SN [REDACTED] made any phone calls on 11 or 12 July 2020. The Court is not persuaded by the Defense argument that it should find the phone call was made on the morning of 12 July 2020 merely because an NCIS Special Agent used the phrase “soon after” to describe the timing of the phone call. The context surrounding the use of the phrase, and the other evidence, refutes the Defense claim.

The Defense request for production of all call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020 is denied.²⁰

b. Should the Government be compelled to produce all internet search histories of SN [REDACTED] cellular phone from 11-12 July 2020?

The Defense has submitted no evidence that SN [REDACTED] used her cellular phone to conduct internet searches on 11 or 12 July 2020, much less during the relevant time period. None of the Defense’s arguments in support of the other requested evidence indicate internet searches were conducted. Accordingly, the Defense request for production of all internet search histories of SN [REDACTED] cellular phone from 11-12 July 2020 is denied.

c. Should the Government be compelled to produce SN [REDACTED] Facebook activity log and call logs from 11-12 July 2020?

The Facebook evidence is limited in that it simply supports a finding that SN [REDACTED] currently has two Facebook accounts. The first account last had public activity August 2017, almost three years before the alleged sexual assault. The only public activity on the second account was five months after the alleged sexual assault.

While a Facebook account does give a user access to Facebook Messenger, there is no evidence before this Court that SN [REDACTED] ever used Facebook Messenger. Merely having access to a communication application does not establish that someone used that application, and certainly not on a specific date. In light of the other evidence in the case, the Court is unconvinced there are Facebook activity or call logs. Her close friend, EM3 [REDACTED] did not know she had a Facebook account, foreclosing the possibility she used it to communicate with him. FN [REDACTED] used Snapchat to send her messages and SN [REDACTED] told NCIS she used Snapchat and Instagram, but not Facebook. The Defense had the names of several potential members of SN [REDACTED] friend group, to include two boyfriends, but did not produce any evidence someone communicated with her via Facebook.²¹

This evidence does show SN [REDACTED] may have lied about having a Facebook account. The

²⁰ The Court’s ruling is focused firmly on what was requested to be produced call logs, text messages, text logs, and cellular data of SN [REDACTED] cellular phone from 11-12 July 2020. There was no request to compel the production of SN [REDACTED] Snapchat communications during the relevant time.

²¹ As [REDACTED] nced by the Defense Initial Discovery Request dated, 20 September 2021.

evidence the Defense presented to the Court is sufficient, in and of itself, to confront SN [REDACTED] and impeach her credibility. However, it does not establish that she used Facebook or Facebook Messenger to communicate with anyone on 11-12 July 2020. The Defense request for production of SN [REDACTED] Facebook activity log and call logs from 11-12 July 2020 is denied.

6. Ruling.

The Defense's motion is **DENIED**.



B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES V. EMERSON A. OVANDO DC3/E-4, USN	RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF – CONTINUANCE 5 JAN 2022
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1. Statement of the Case.

The Defense filed a motion for a continuance pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1) and amended their motion on 30 December 2021.¹ The Defense submitted Appellate Exhibits (AE) XXXIII and XL in support of their motion. On 28 December 2021, the Government filed a written response indicating that it did not object to the requested continuance.²

2. Issues

- a. Should the trial be continued as requested by the Defense?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

- a. The Convening Authority approved Dr. [REDACTED] as an expert consultant on 22 October 2021. Dr. [REDACTED] signed the Initial Expert Consultant Agreement on 27 October 2021. Neither the approval nor the agreement listed the 18 January 2022 trial date.
- b. On 10 December 2021, the Defense requested that Dr. [REDACTED] be produced to testify as an expert witness at trial. The request included a summary of Dr. [REDACTED] anticipated testimony. The Defense notified the Government of their intent to have Dr. [REDACTED] testify as an expert witness on 13 December 2021.
- c. Dr. [REDACTED] is not available for trial the week of 18 January 2022. When Dr. [REDACTED] agreed to serve as an expert consultant for the Defense, Dr. [REDACTED] was scheduled to be in trial in another case, but believed the other case would be continued. That case was not continued and Dr. [REDACTED] cannot testify the week of 18 January.

¹ AEs XXXII and XXXIX respectively.

² AE XXXVIII.

d. The Court incorporates its findings of fact from its ruling on the Defense motion pursuant to Military Rule of Evidence (M.R.E.) 412.³

4. Statement of Law.

Where there is reasonable cause, a military judge may “grant a continuance to any party for such time, and as often, as may appear to be just.”⁴ This is reiterated by the Discussion to R.C.M. 906(b)(1). Accordingly, the burden is on the moving party to prove there is reasonable cause for a continuance.⁵ “Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.”⁶

R.C.M. 703(b)(3) states that “if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance, or other relief in order to attempt to secure the witness’ presence or shall abate the proceedings” It references M.R.E. 804(a) for the definition of unavailability, which includes military necessity.

A judge's decision to deny a continuance is reviewed for an abuse of discretion.⁷ Appellate Courts consider several factors in assessing whether a military judge abused his discretion by denying a continuance.⁸ Those factors include: “surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.”⁹ Not all of the factors will be present in each case.

5. Analysis and Conclusions of Law.

The Defense has established there is reasonable cause for a continuance in this case. The Accused is alleged to have sexually assaulted SN [REDACTED] while she was incapable of consenting due to impairment by alcohol and while she was unconscious. SN [REDACTED] the Accused, and at least two potential witnesses consumed alcohol prior to the alleged sexual assault. During her interview with Naval Criminal Investigative Service (NCIS), SN [REDACTED] indicated she did not have a clear memory of the alleged sexual assault and relied, in some part, on what EM3 [REDACTED] told her. Accordingly, Dr. [REDACTED] testimony regarding memory and the effects of alcohol and trauma on memory is essential to a fair trial.¹⁰

³ AE XXVI.

⁴ Article 40, Uniform Code of Military Justice (U.C.M.J.). See R.C.M. 906(b)(1).

⁵ R.C.M. 905(c).

⁶ Discussion, R.C.M. 906(b)(1).

⁷ *United States v. Weisbeck*, 50 M.J. 461, 464 (1999).

⁸ *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). ; citing F. Gilligan and F. Lederrer, *Court-Martial Procedure* § 18-32.00 at 704 (1991).

⁹ *Id.*

¹⁰ No adequate substitute has been offered.

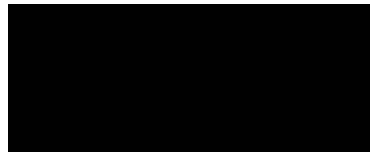
When the Court considers the *Miller* factors, it is further convinced a continuance is appropriate. This is the Defense's first request for a continuance. As discussed above, the Dr. [REDACTED] testimony is essential to the Defense case and could have a direct impact on the verdict. While the continuance request was submitted close to a month before trial, it was submitted soon after Defense Counsel became aware of Dr. [REDACTED] unavailability. Further, Defense Counsel acted diligently in providing the Court with affidavits from Dr. [REDACTED] and coordinated with Trial Counsel to find a new trial date. Given all the circumstances, a continuance is just at this time.

6. Ruling.

The Defense motion is **GRANTED**.

The Court sets the following dates and milestones:

Written notice of forum selection:	9 May 2022
Final pretrial matters: ¹¹	23 May 2022
Trial:	6-10 June 2022



CDR, JAGC, USN
Military Judge

¹¹ To include: member questionnaires, request for judicial notice, proposed voir dire, witness lists, proposed instruction, cleansed charge sheet, proposed findings and sentencing worksheets, and motions for preadmission of evidence.

NAVY-MARINE CORPS TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES V. EMERSON A. OVANDO DC3/E-4, USN	RULING – DEFENSE MOTION TO SUPPRESS – VIOLATIONS OF THE 5TH AMENDMENT AND ARTICLE 31(b) 29 JAN 2022
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1. Statement of the Case.

The Defense filed a motion to suppress pursuant to the Fifth Amendment, Article 31,¹ Rule for Courts-Martial (R.C.M.) 905(b)(3), and Military Rules of Evidence (M.R.E.) 304 and 305, alleging the Accused's statements to members of his chain of command and Naval Criminal Investigative Service (NCIS) Special Agents (SA) were involuntary.² The Government responded on 28 October 2021.³ The Government and Defense provide documentary evidence as enclosures to their motions.⁴ On 13 December 2021, an Article 39(a) session was held at Building 1555, [REDACTED] HTCS [REDACTED] and DC1 [REDACTED] testified.

2. Issues

- a. Was the Accused's oral statement to DC1 [REDACTED] voluntary?
- b. Was the note the Accused wrote in his phone at his chain of command's direction a voluntary statement?
- c. Were the Accused's statements to SA [REDACTED] on 1 September 2020 voluntary?
- d. Were the Accused's statements to SA [REDACTED] on 2 November 2020 voluntary?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

- a. On 12 July 2020, EM3 [REDACTED] had several friends, to include the Accused, in his barracks room for a party. SN [REDACTED] arrived at EM3 [REDACTED] room between 2300 and midnight. Based on her behavior and demeanor, EM3 [REDACTED] believed SN [REDACTED] was heavily intoxicated.

¹ Uniform Code of Military Justice (UCMJ)

² AE XV.

³ AE XVII.

⁴ AEs XVI, XVI(a), XVIII, and XVIII(a).

With the help of EM2 [REDACTED] EM3 [REDACTED] placed SN [REDACTED] in his bathtub.

b. Between 0100 and 0200, the Accused asked to use the bathroom. EM3 [REDACTED] and EM2 [REDACTED] ensured SN [REDACTED], who appeared to be asleep at the time, was covered with a blanket and the shower curtain [REDACTED] closed. The Accused used the restroom, washed his hands, and exited the bathroom. Thirty minutes later, he asked to use the bathroom again. When they didn't hear the Accused using the bathroom or washing his hands, EM3 [REDACTED] and EM2 [REDACTED] entered the bathroom. There they found SN [REDACTED] laying in the bathtub and the Accused kneeling between her spread knees. EM3 [REDACTED] yelled at the Accused, removed him from the bathroom, and made him leave the barracks room.

Oral Statement to DC1 [REDACTED] and Direction from the Chain of Command

c. In the summer of 2020, the Accused was assigned to the [REDACTED]. One day while they were on duty on the flight deck, DC1 [REDACTED] his Leading Petty Officer (LPO), noticed the Accused was teary eyed and upset. When DC1 [REDACTED] asked him what was going on, the Accused detailed his personal struggles, such as being separated from his wife and newborn daughter. After they discussed his marital problems, the Accused told DC1 [REDACTED] about an incident that had occurred a week or two earlier. The Accused described a consensual sexual encounter initiated by a woman in the bathroom.⁵ During the encounter, the Accused's friend barged into the bathroom and confronted the Accused, claiming the woman was too drunk.⁶ EM3 [REDACTED] kicked him out of the bathroom and the adjoining room. As the Accused told his story, DC1 [REDACTED] was quiet and did not ask the Accused any questions.

d. Based on what he heard, DC1 [REDACTED] was concerned about the Accused and SN [REDACTED] having a sexual encounter while they were both intoxicated. Even though he had described a consensual sexual encounter, DC1 [REDACTED] told him it could appear to be sexual harassment or sexual assault. EM3 [REDACTED] intervention and subsequent actions also concerned DC1 [REDACTED]. This was the first DC1 [REDACTED] had heard about anything that could be considered a sexual assault involving the Accused. While he was unsure if a crime occurred, DC1 [REDACTED] knew he need to report what he had been told to their chain of command. DC1 [REDACTED] informed the Accused he was going to tell the chain of command what the Accused had told him, but did not give the Accused any instructions at the time.

e. DC1 [REDACTED] found HTCS [REDACTED] their Leading Chief Petty Officer (LCPO), and relayed the Accused's account. Though he believed the Accused had described a consensual sexual encounter, HTCS [REDACTED] was concerned because alcohol was involved. As they discussed the situation, DC1 [REDACTED] suggested the Accused write a statement about what happened. HTCS [REDACTED] left to find Command Master Chief (CMC) [REDACTED] instructing DC1 [REDACTED] not to do anything until he returned. When he found CMC [REDACTED] HTCS [REDACTED] relayed what DC1 [REDACTED] told him. CMC [REDACTED] greenlighted" the idea to have the Accused write an email to himself detailing his version of the encounter. According to CMC [REDACTED] the email would assist the Accused if the encounter was reported as a sexual assault. HTCS [REDACTED] felt CMC [REDACTED] instruction was an attempt to protect the Accused's side of the story, which

⁵ At the time he talked to DC1 [REDACTED] the Accused did not know SN [REDACTED] name.

⁶ This friend was EM3 [REDACTED]

would be marked with a date and time soon after the encounter.⁷ CMC [REDACTED] did not tell HTCS [REDACTED] to collect or review what the Accused wrote.

f. Less than ninety minutes after they initially talked, HTCS [REDACTED] came back and told DC1 [REDACTED] to have the Accused write down what happened while it was fresh in his mind. However, HTCS [REDACTED] did not tell DC1 [REDACTED] to collect the statement or ask the Accused any questions. DC1 [REDACTED] interpreted this as direction to give the Accused an order. He immediately told the Accused to write down what happened on his phone and to be as detailed as possible. DC1 [REDACTED] did not advise the Accused of his Article 31(b) rights. The Accused was upset and scared about the situation but understood the way ahead. DC1 [REDACTED] told the Accused to keep the note on his person and did not tell him to give it to anyone else. When the Accused later tried to show the note he had written to DC1 [REDACTED] he refused to take, or even look at, it. DC1 [REDACTED] and the Accused did not discuss the incident or what the Accused wrote again. He did, however, counsel the Accused for unauthorized absence and drinking after the alleged incident. When the Accused later told HTCS [REDACTED] he had written the note, HTCS [REDACTED] did not ask to read it or for a copy.

g. At some point, the NBU-7 Command Master Chief notified CMC [REDACTED] of the impending release of a SITREP which named the Accused as a sexual assault suspect. CMC [REDACTED] told his Commanding Officer, Executive Officer, and Legal Officer and then assisted in the drafting of a Military Protective Order (MPO) which ordered the Accused to have no contact with a potential witness who was on board as a part of the NBU-7 Landing Craft team.⁸ He subsequently told HTCS [REDACTED] the Accused was the subject of a pending investigation and should keep an eye on the Accused. CMC [REDACTED] knew NCIS would be involved and did not have any conversations with the Accused about what happened so he would not interfere with their pending investigation. When the Accused was given his MPO, he simply read and signed it, there were no tangible conversations about the underlying allegations.

h. The Accused wrote down what happened in the Notes app on his iPhone. When NCIS photographed the note, the date-time stamp was 22:15 on 22 August 2020.⁹ The note is titled "Saturday July 11th."

i. When SN [REDACTED] first reported the alleged sexual assault on 21 August 2020, she was confused as to when it happened. She clarified the date of the alleged sexual assault in October 2021, after she had reviewed her phone records. A video taken on 11 July 2020 helped SN [REDACTED] determine that the alleged sexual assault occurred on 11 July 2020 as opposed to the following weekend.

j. The Court finds the Accused drafted the note before 22:15, 22 August 2020 and this date-time stamp indicates the last time the note was edited before it was photographed, not when it

⁷ Though CMC [REDACTED] does not remember this conversation, it comports with what he believes he would have done in such a situation. Accordingly, the Court finds HTCS [REDACTED] testimony and statement credible and compelling.

⁸ There is no evidence before this Court indicating when the SITREP was drafted or issued nor a copy of the MPO signed by the Accused.

⁹ There is no evidence before the Court as to whether the time stamp indicates when the note was created or when it was last updated.

was created. The Accused specifically titled the note as “Saturday 11 July,” indicating he made it close in time to the alleged sexual assault and not after SN [REDACTED] made her report to NCIS, her command was notified, and then notified the Accused’s command. Additionally, the Court finds CMC [REDACTED] had no knowledge of SN [REDACTED] allegations or a pending investigation before his discussion with HTCS [REDACTED] about how to address the Accused’s oral statement to DC1 [REDACTED]

Statement to NCIS

k. SA [REDACTED] NCIS, interviewed the Accused on 1 September 2020 on board the [REDACTED] CMC [REDACTED] escorted the Accused to a room on the ship which had been set aside for the interview. CMC [REDACTED] entered the room before the Accused and spoke briefly to SA [REDACTED] As the Accused entered the room, CMC [REDACTED] left the room and told SA [REDACTED] he would come back when the interview was over.

l. After the Accused entered the room, SA [REDACTED] frisked the Accused, showed him his credentials, and informed him that the interview was being audio and visually recorded.¹⁰ He allowed the Accused to take his mask off for comfort before asking standard introductory, biographical questions. When SA [REDACTED] asked the Accused if he knew why he was there, the Accused said “yes.” SA [REDACTED] began the rights advisement process and moved around the table, so he was sitting next to the Accused. He placed a Suspect’s Acknowledgement and Waiver of Rights form¹¹ in front of the Accused. The form advised the Accused he was suspected of sexual assault and abusive sexual contact in violation of Article 120. As he explained the Accused’s rights, SA [REDACTED] pointed to them on the form, which the Accused could read for himself. At least twice, SA [REDACTED] told the Accused he did not have to talk to him. The Accused initialed before and after each right, indicating he understood that right.

m. SA [REDACTED] asked the Accused “Do you want to have a conversation with me today?” In response the Accused said, “Today? I have a written statement.” SA [REDACTED] was clearly surprised by this response and asked the Accused where it was. The Accused told him it was on his phone. When SA [REDACTED] asked the Accused “did you want to give me that,” the Accused said “yes.” The agent followed up by indicating he might have questions about the statement and asked if the Accused wanted to “answer the questions as [I] ask them? Or do you want to just give me the statement and walk out the door?” The Accused chose to provide the statement and then “walk out the door.” He never invoked his right to consult with an attorney.

n. They spent several minutes trying to determine how the Accused would get the statement from his phone to SA [REDACTED] The Accused initially agreed to type the statement, but as SA [REDACTED] did not have a printer, the Accused agreed to handwrite the statement. At SA [REDACTED] direction, the Accused wrote, on the bottom of the Wavier of Rights form, “At this time I want to remain silent but I do have a written statement on my phone. I am willing to provide a handwritten statement to NCIS.” He then signed the form. Several times during the interview, SA [REDACTED] told the Accused he wanted to ensure he didn’t “screw the Accused over” on his rights.

¹⁰ In the recording, the Accused is visible sitting at a red table with the command crest in the center. SA [REDACTED] is sitting off camera to the right, he is not visible.

¹¹ The Court will refer to this as the Waiver of Rights form throughout the rest of this ruling.

o. The Accused left the room with CMC [REDACTED] who had been called in to escort the Accused, to retrieve his phone from his berthing. Before ending the video, SA [REDACTED] spoke directly to the video camera that the Accused had chosen to remain silent, but would provide a previously drafted written statement, which he would attempt to photograph.

p. When the Accused returned to the room, SA [REDACTED] proposed a “dual solution;” the Accused would write the statement and SA [REDACTED] would photograph what the Accused had previously drafted on his phone. The Accused agreed with this plan. SA [REDACTED] drafted a Permissive Authorization for Search and Seizure (PASS) for the Accused’s phone and showed it to the Accused. The PASS indicated the Accused was suspected of “sexual assault of [SN [REDACTED]]” and made it clear the Accused did not have to consent to the search of his phone. After he initialed each paragraph that advised him of his rights, the Accused signed the form and agreed to a search of his iPhone X.

q. The Accused chose to handwrite the statement first, frequently referencing his phone. The only comment SA [REDACTED] made was that the Accused’s handwriting was “amazing.” Once the Accused finished writing the statement, he handed it to SA [REDACTED] who read it. SA [REDACTED] then said, “So in keeping with your wishes, I just accept this. We’re good with that? You said you don’t want to answer any questions, which I’m totally ok with.” He then confirmed the Accused was okay with providing the statement. SA [REDACTED] drew a line at the bottom of the page and asked the Accused to initial before and after each paragraph on the statement form and each page. SA [REDACTED] swore the Accused to the statement, which the Accused signed.

r. After the Accused signed the form, SA [REDACTED] asked him if they could take pictures of his phone. SA [REDACTED] read the PASS form he had previously created and discussed the rights communicated on the form. The Accused agreed to allow SA [REDACTED] to photograph his phone and signed the PASS. SA [REDACTED] clearly told the Accused all he was going to do was take pictures of the previously written note and was not going to look at anything else on the phone. Though SA [REDACTED] took the pictures, the Accused displayed the note on the screen and scrolled through it to ensure pictures were taken of the entire note.

s. At the end of the interview, SA [REDACTED] asked the Accused if he had any questions. The Accused asked if SN [REDACTED] had “reported him.” SA [REDACTED] told the Accused he was “respecting [his] rights” and then asked the Accused if he had any questions about the investigative process. The Accused said he was giving SA [REDACTED] a statement and asked what was next. SA [REDACTED] then described the investigative process and how the investigation would be routed through the command and trial counsel. At no point during the interview did SA [REDACTED] attempt to ask the Accused any questions or get him to change his mind about answering questions. Before the Accused left, SA [REDACTED] told him he could call SA [REDACTED] if he wanted to talk, but SA [REDACTED] would want to ask him possibly incriminating questions and would have to provide the Accused his rights warning again.

t. In his handwritten statement, the Accused described a consensual sexual encounter that was initiated by SN [REDACTED]. He claimed that though she was drunk when she arrived, she “came to her senses” after an hour or two and told him to “do more.” Their encounter was interrupted by

EM3 [REDACTED] who kicked the Accused out of the room. This statement is consistent with what he told DC1 [REDACTED] some weeks earlier and the note photographed on his phone.

Polygraph

u. Sometime between 1 and 8 September 2020, SA [REDACTED] emailed the Accused and asked if he would be willing to take a polygraph.¹² On 9 September 2020, the Accused emailed SA [REDACTED] and told the agent he was willing to take a polygraph. The next day, SA [REDACTED] emailed his Supervisory Special Agent (SSA) to coordinate a polygraph request. SA [REDACTED] indicated his desire was that the Accused “would cop to anything more than oral sex.”

v. After coordinating with his SSA and the polygraph agents, SA [REDACTED] emailed the Accused on 25 September 2020. He opened the email by reminding the Accused he did not have to take a polygraph. Referencing their previous in-person meeting, SA [REDACTED] told the Accused that the polygraph exam process required NCIS to ask follow-on questions. Though the Accused retained the right to not answer those questions, SA [REDACTED] pinned that not answering the follow-on questions would make the polygraph “pointless.” He also told the Accused:

if you want to take the exam to prove your innocence, polygraph examiners need you to deny the allegations that you sexually assaulted [SN [REDACTED]] ... As it stands in your statement, you are not specifically denying you sexually assaulted [SN [REDACTED]]. Had I been able to ask you questions, I would have asked you this question when I met you aboard the ship. If you are denying you sexually assaulted [SN [REDACTED]], I need that in a sworn written statement prior to coordinating the polygraph examination. If you are not willing to do that, then we cannot offer the polygraph to you.

w. The Accused replied on 29 September 2020 saying he wanted to take the polygraph and asking how he would provide the statement denying he sexually assaulted SN [REDACTED]. In an email later that day, SA [REDACTED] explained the process and told the Accused he would need to provide a written statement denying the sexual assault and could provide as much additional information as he wanted. He again told the Accused it was his choice to make the statement, but it was a prerequisite to taking the polygraph. SA [REDACTED] also reminded the Accused that the polygraph would include follow-up questions, which the Accused had not wanted to answer during their previous meeting.¹³ On 1 October 2020, the Accused told SA [REDACTED] he was willing to take the polygraph and answer the follow-on questions.

x. SA [REDACTED] conducted the polygraph examination at NCIS in [REDACTED] on 2 November 2020.¹⁴ The interview room had a desk and three chairs; SA [REDACTED] sat at a chair in front of the desk and the Accused sat in a chair to SA [REDACTED] right and next to an open door.¹⁵ SA [REDACTED] told the Accused he should answer the forthcoming questions about the sexual

¹² There is no evidence of this request as SA [REDACTED] archived emails were corrupted, preventing them from being transferred, saved, or opened.

¹³ SA [REDACTED] emails were coordinated with the NCIS Polygraph Services Field Office in San Diego, CA.

¹⁴ The examination was audio and video recorded.

¹⁵ The door remained open until the actual polygraph exam began.

assault allegation truthfully. As he explained the polygraph examination process, SA [REDACTED] said the goal was to address the incident truthfully and ensure the Accused was not someone NCIS “need[s] to be worried about.” The test, according to SA [REDACTED] was to make sure the Accused was being honest. He indicated he would respect the Accused and not deceive him. In turn, he asked the Accused to be honest during the polygraph examination.¹⁶

y. SA [REDACTED] provided the Accused with a Waiver of Rights form. He read the form to the Accused, who leaned forward and looked at it on a clipboard held by SA [REDACTED]. The Waiver of Rights form notified the Accused he was suspected of rape and sexual assault in violation of Article 120. After he verbally acknowledged each of his rights, the Accused took the form, initialed next to each right, and read the concluding paragraph to himself and out loud. The Accused signed the form, agreeing to waive his rights and speak to SA [REDACTED]. They then reviewed a NCIS Polygraph Examination Waiver form. This form notified the Accused of the allegations against him and the circumstances surrounding the polygraph examination. After the Accused expressed his belief that polygraphs were “pretty accurate,” he read the concluding paragraph and signed the form declining his right to consult with a lawyer and agreeing to take the polygraph examination.

z. SA [REDACTED] emphasized to the Accused the need to be honest with him. He said he wanted the Accused to pass the examination and did not want to confuse or trick the Accused. In response to SA [REDACTED] questions, the Accused indicated he was in good health, was not being seen for any physical or mental conditions, was not taking any medication, had slept for seven hours the night before, and had not had a significant amount of alcohol in the last 24 hours. SA [REDACTED] used the next several minutes to build rapport with the Accused; they discussed his marital issues, his previous liberty incident and that his parents had given him a moral compass. After these background questions were complete, SA [REDACTED] explained how the polygraph worked, why it was important to follow his instructions, what equipment would be used, and how it functioned. SA [REDACTED] spoke with a tempo that indicated that he had given this explanation frequently.

aa. The polygraph examination began with SA [REDACTED] asking about the allegations and the Accused recounting a consensual encounter initiated by SN [REDACTED]. What he told SA [REDACTED] was very similar to what he told DC1 [REDACTED] the note in his phone, and the statement he gave to NCIS. The Accused claimed to have had nightmares every night after the alleged sexual assault.¹⁷ When he recounted his conversation with DC1 [REDACTED] the Accused said “he was like, you know, just write everything down that happened that night. I wrote everything down. That’s why I had a pre-written statement of everything that happened that night, so ... I wouldn’t forget anything.” He did not claim to have been ordered to write the note in his phone.

¹⁶ For the purposes of this ruling only, the Court will refer to the pre-interview, polygraph examination, and the post-exam questioning as the polygraph examination. The differences between these three phases, and their admissibility at trial, are not relevant to the Court’s analysis.

¹⁷ This statement is not in the transcript provided by the Defense (AE XVI, Enclosure 18). The transcript is of exceedingly poor quality. Many transcriptions are incorrect or marked as inaudible, though they are in fact audible. This transcript is insufficient to meet the requirement to provide a transcript of audio and video recordings to the Court. The Court highlights that this was created by a private company, not by any member of the Defense team.

bb. After the Accused told his version of events, SA [REDACTED] asked follow-up questions to gather information he would use to further develop the polygraph examination. SA [REDACTED] told the Accused what SN [REDACTED] and other witnesses had told investigators and alleged the Accused was withholding facts. Specifically, SA [REDACTED] believed the Accused knew SN [REDACTED] was not conscious or aware of what was going on when he performed sexual acts on her. When SA [REDACTED] asked if there was ever a time that SN [REDACTED] was unconscious during sex, the Accused said she was always talking to him while he was in the bathroom, but never said “no” or “stop.” Using an example of a contaminated bottle of water, SA [REDACTED] told the Accused the polygraph could detect “just a little drop” of a lie. The Accused said he had nothing to add but maintained he did not perform any sex act on SN [REDACTED] while she was unaware, unconscious, or so intoxicated she wouldn’t remember.

cc. SA [REDACTED] described the two types of questions he would ask; those focused on the actual incident and “profile” questions to see if the Accused “fit the profile of someone that would be most likely to have committed” the alleged sexual assault.¹⁸ He then asked the Accused the questions he would ask the Accused after he hooked him up to the polygraph machine. During these questions, the Accused was adamant SN [REDACTED] was aware and conscious during their time in the bathroom and never told him to stop or otherwise indicated he should stop. After discussing unusual sexual acts,¹⁹ SA [REDACTED] then asked the Accused all the polygraph examination questions, to include the control questions. While SA [REDACTED] was preparing for the practice test, the Accused initiated small talk with him. SA [REDACTED] showed the Accused the questions he would ask along with the answers the Accused gave earlier. The Accused signed the form confirming those were his previous answer.

dd. SA [REDACTED] connected the polygraph machine to the Accused and administered the practice test. SA [REDACTED] stopped the practice test three times. After the third time, he told the Accused his behavior was making it difficult for SA [REDACTED] to get data to evaluate and made the Accused look bad. The fourth time was sufficient for SA [REDACTED]. He adjusted the connections to the Accused and then asked him the polygraph questions again. SA [REDACTED] frequently corrected the Accused’s breathing while he was connected to the polygraph machine; he used an abrupt tone but did not yell.

ee. When the formal polygraph examination was complete, SA [REDACTED] disconnected the machine from the Accused and told the Accused he wasn’t being completely honest. SA [REDACTED] explained what he believed were the circumstances that led the Accused to making a “bad decision.” According to SA [REDACTED] he wanted to get the real, true story from the Accused. Though SA [REDACTED] described a version of events he believed to be true, he told the Accused, “don’t tell me what I want to hear. I want to hear it from you. If you disagree with me, tell me.” SA [REDACTED] continued to question the Accused, pushing him about SN [REDACTED] impairment and

¹⁸ He told the Accused about the FBI’s sexual assault behavioral analysis unit and claimed this unit had found “patterns of behaviors, traits, characteristics, ... that were indicative of fitting a profile of a certain person like a rapist.” SA [REDACTED] claimed this profile included being untruthful, making poor decisions, and committing unusual sex acts.

¹⁹ SA [REDACTED] opined that anything outside sex between a man and a woman is unusual; he also mentioned sex with animals, sex with inanimate objects, or dressing up in funny costumes. Later SA [REDACTED] added: using toys or tying someone up and choking them would be unusual; sex with two other partners; oral and anal sex; and excessive masturbation or looking at a magazine while masturbating.

when she was unconscious during the alleged sexual assault. As SA [REDACTED] continued his questioning, the Accused waived on his absolute claim that SN [REDACTED] was conscious throughout the encounter and admitted that she may have been unconscious at some point.

ff. During the questioning that followed, SA [REDACTED] sat facing the Accused, their knees almost touching. While the Accused was leaned back in his chair, SA [REDACTED] sat straight up and gestured with his hands. He did not lean forward and invade the Accused's personal space, nor did he raise his voice or yell. Most of the time was spent appealing to the Accused to tell the truth. When SA [REDACTED] gave the Accused another opportunity to explain what happened, the Accused again said SN [REDACTED] called to him from the bathtub, asked him to kiss her, and told him to do more. This time though, the Accused said SN [REDACTED] was unconscious for the last three minutes before EM3 [REDACTED] came in the room. As SA [REDACTED] explored what happened during those three minutes, he asked open-ended questions. Though the Accused agreed with some of the things SA [REDACTED] said, he was not simply parroting SA [REDACTED] words. In fact, when SA [REDACTED] asked him if he is agreeing with him or just telling him what he wanted to hear, the Accused said he was agreeing with SA [REDACTED]

gg. Towards the end of the interview, SA [REDACTED] asked the Accused if he would like to write a letter and tell SN [REDACTED] what happened that night. The Accused said he would but was concerned it would violate the MPO. SA [REDACTED] suggested the Accused write the letter and he would relay it to SN [REDACTED] command. After offering him a bottle of water, SA [REDACTED] left the Accused alone to write the letter. By this point, the Accused had been in the interview room for just over three hours and fifteen minutes. For the next hour, the Accused wrote a letter to SN [REDACTED]. After SA [REDACTED] read the letter, he asked several follow-up questions. According to SA [REDACTED] the polygraph indicated the Accused was "more sensitive" to questions about whether SN [REDACTED] indicated he should stop. Like his answers in the rest of the polygraph examination, some of the Accused's answers provide detail, while others were just yes or no. When SA [REDACTED] asked the Accused if the letter to SN [REDACTED] would suffice as his statement, the Accused said it would. At the end of the polygraph examination, the Accused said he appreciated SA [REDACTED] time. In total, the polygraph examination lasted just short of five hours, approximately one hour of which was the Accused writing the letter in the room alone.

hh. The Accused's handwritten letter is consistent with the story he told DC1 [REDACTED] the note on his phone, and the handwritten statement he gave to NCIS. It described SN [REDACTED] as flirting with him, asking him to kiss her, and then asking him to do more. The main difference in the letter is the Accused wrote that SN [REDACTED] went unconscious three minutes before EM3 [REDACTED] came in the room.

4. Statement of Law.

In response to a timely-made defense objection to the introduction of an accused's statement, the Government must demonstrate by a preponderance of the evidence that the accused made the statement voluntarily before it may be received into evidence.²⁰

²⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. (M.R.E.) 304(f)(6) and (7) (2019); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019); quoting *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

An “involuntary statement” is a statement “obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.”²¹ Whether a statement is involuntary depends on the “the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation.”²² In examining the totality of the circumstances, “the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker,” as opposed to the product of someone whose “will was overborne and [their] capacity for self-determination critically impaired . . .”²³

Factors to be considered in determining the totality of the circumstances include “the mental condition of the accused; his age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.”²⁴ “Other factors include an earlier violation of Article 31(b), whether the admission was made as a result of the questioner’s using earlier, unlawful interrogations, and ‘the presence of a ‘cleansing warning,’ however, the absence of such is not fatal to a finding of voluntariness.”²⁵

Where a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to *actual* coercion, duress, or inducement, the subsequent confession is presumptively tainted as the product of the earlier one. On the other hand, where the earlier confession was “involuntary” only because the suspect had not been properly warned of [their] panoply of rights to silence and to counsel, the voluntariness of the second confession is determined by the totality of the circumstances.²⁶

“The fact that a suspect chooses to speak after being informed of [their] rights, is of course, highly probative.”²⁷ “[E]vidence that the accused was threatened, tricked or cajoled into a waiver will, of course, shows that the [accused] did not voluntarily waive [their] privilege.”²⁸ However, there is no single controlling factor or circumstance.²⁹ When considering the totality of the circumstances, the court should “determine[] the factual circumstances surrounding the

²¹ M.R.E. 304(a)(1)(A). See *Freeman*, 65 M.J. at 453.

²² *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

²³ *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) (citations omitted).

²⁴ *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005); citing *United States v. Ellis* 57 M.J. 375, 379 (C.A.A.F. 2002) and *United States v. Sojfer*, 47 M.J. 425, 429-30 (C.A.A.F. 1998). See also *Freeman*, 65 M.J. at 453-54.

²⁵ *Lewis*, 78 M.J. at 453 (C.A.A.F. 2019); citing *United States v. Byers*, 26 M.J. 132, 135 (C.M.A. 1988) and *United States v. Phillips*, 32 M.J. 76, 80-81 (C.M.A. 1991); and quoting *United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006). See also *United States v. Gardinier*, 65 M.J. 60, 64 (C.A.A.F. 2004) (The absence of a cleansing warning is “not fatal to a finding of voluntariness.”).

²⁶ *Lewis*, 78 M.J. at 453; quoting *United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991). See *Gardinier*, 65 M.J. at 64 and *United States v. Seay*, 60 M.J. 73, 76 (C.A.A.F. 2004) (The “subsequent administration of rights warnings may remove the taint when a suspect has already given an unwarned but uncoerced statement.”).

²⁷ *Lewis*, 78 M.J. at 453; quoting *Oregon v. Elstad*, 470 U.S. 298, 318 (1985).

²⁸ *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

²⁹ *Schneckloth v. Bustamonte*. at 226.

confession, assess[] the psychological impact on the accused, and evaluate[] the legal significance of how the accused reacted.”³⁰

An “interrogation” is any “formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.”³¹ While interrogation is typically viewed as direct questioning of an accused, it also includes “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”³² “M.R.E. 305(b)(2) was broadly fashioned ‘to thwart attempts to circumvent warnings requirements through subtle conversations.’”³³ That said, an interrogation “involves more than merely putting questions to an individual.”³⁴

Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [their] freedom of action in any *significant* way.”³⁵ To determine if a suspect was in custody, a court must look at all the surrounding circumstances of the interrogation and then determine whether a reasonable person would have felt they were not at liberty to end the interrogation and leave.³⁶ C.A.A.F. has recognized several factors to consider, including:

- (1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred; (3) the length of the questioning; (4) the number of law enforcement officers present at the scene; and (5) the degree of physical restraint placed upon the suspect.³⁷

The Fifth Amendment provides that “[n]o person ... shall be compelled in any criminal case to be a witness against [themselves].”³⁸ This constitutional right to remain silent “protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”³⁹ The Fifth Amendment’s protection against self-incrimination “addresses ‘real and appreciable, and not merely imaginary and unsubstantial, hazards of self-incrimination.’”⁴⁰ “To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.”⁴¹

³⁰ *Id.*; citing *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961).

³¹ M.R.E. 305(b)(2).

³² *United States v. Mitchell*, 76 M.J. 413, 418 (C.A.A.F. 2017); quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

³³ *United States v. Traum*, 60 M.J. 226, 229 (C.A.A.F. 2004); quoting *United States v. Ruiz*, 54 M.J. 138, 141 (C.A.A.F. 2000)(internal citation omitted).

³⁴ *Id.*

³⁵ *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009); quoting *Miranda*, 384 U.S. at 444. To

³⁶ See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995), *Stansbury v. California*, 511 U.S. 318, 322, (1994).

³⁷ *Mitchell*, 76 M.J. at 417 (internal alterations omitted); quoting *Chatfield*, 67 M.J. at 438 (further citation omitted).

³⁸ U.S. Const., Amend. V.

³⁹ *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972).

⁴⁰ *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015); quoting *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

⁴¹ *Castillo*, 74 M.J. at 165; quoting *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 189 (2004).

In *Miranda v. Arizona*,⁴² the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. These prophylactic measures were adopted to protect a suspect's Fifth Amendment right from the “inherently compelling pressures” of custodial interrogation.⁴³ “[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege.”⁴⁴ “Once a suspect in custody has ‘expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.’”⁴⁵

In *Tempia*,⁴⁶ the Court of Military Appeals (C.M.A.) quoted frequently and often from *Miranda* when it held its constitutional protections applied to servicemembers. *Tempia* emphasized that an accused, facing a custodial interrogation, had the “right to the presence of an attorney, *either retained or appointed*.”⁴⁷ When a suspect requests the presence of counsel before an interrogation, “the authorities cannot rationally ignore or deny his request on the basis *that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here*.”⁴⁸ M.R.E. 305(c)(2) codifies this right in the military, stating “[i]f a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible.” If counsel is requested, “a judge advocate ... will be provided ... at no expense to the person and without regard to the person’s indigency.”⁴⁹

A suspect’s waiver of their rights to remain silent and to counsel “must be made freely, knowingly, and intelligently.”⁵⁰ The Government must therefore “demonstrate that the accused ‘understood his right to counsel and intelligently and knowingly relinquished it.’”⁵¹ The accused must have “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”⁵² But that should not be read as a requirement that the accused understood “every possible consequence of a waiver of the Fifth Amendment privilege.”⁵³ “[T]he accused must ‘fully understand[] the nature of the right and how it would likely apply in general in the circumstances.’”⁵⁴

Article 31(b), a statutory precursor to *Miranda*, implements the Article 31(a) privilege against self-incrimination in the military.⁵⁵ Article 31(b) requires:

⁴² 384 U.S. 436 (1966).

⁴³ *Miranda*, 384 U.S. at 467.

⁴⁴ *Miranda*, 384 U.S. at 469.

⁴⁵ *Mitchell*, 76 M.J. at 417; quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); citing M.R.E. 305(e)(3).

⁴⁶ *Untied States v. Tempia*, 37 C.M.R. 249, 257 (C.M.A. 1967).

⁴⁷ *Tempia*, 37 C.M.R. at 257 (emphasis in original); quoting *Miranda*, 384 U.S. 436 (1966).

⁴⁸ *Tempia*, 37 C.M.R. at 257 (emphasis in original); quoting *Miranda*, 384 U.S. at 472.

⁴⁹ M.R.E. 305(d).

⁵⁰ M.R.E. 305(e)(1).

⁵¹ *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013); quoting *Edwards v. Arizona* 451 U.S. 477, 484 (1981).

⁵² *Mott*, 72 M.J. at 330; quoting *Berghuis v. Thompkins*, 180 S. Ct. 2250, 2260 (2010).

⁵³ *Mott*, 72 M.J. at 330; quoting *Colorado v. Spring*, 479 U.S. 564, 574 (1987).

⁵⁴ *Mott*, 72 M.J. at 330; quoting *United States v. Ruiz*, 536 U.S. 622, 629-630 (2002) (emphasis in original).

⁵⁵ *United States v. Evans*, 75 M.J. 302, 304-305 (C.A.A.F. 2016).

No person subject to this chapter may interrogate, or request any statement from, an accused or person suspected of an offense without first informing [them] of the nature of the accusation and advising [them] that [they do] not have to make any statement regarding the offense of which [they are] accused or suspected and that any statement made by [them] may be used as evidence against [them] in a trial by court-martial.⁵⁶

These rights were enacted to protect servicemembers from the “subtle pressures which exist[] in military society” which can transform “the mere asking of a question under certain circumstances [into] the equivalent of a command.”⁵⁷ “Article 31(b) warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.”⁵⁸ More succinctly, “Article 31(b) requires rights’ warnings if: (1) the person being interrogated is as suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry.”⁵⁹ A statement taken in violation of Article 31 or “through the use of coercion, unlawful influence, or unlawful inducement” is inadmissible at a court-martial.⁶⁰

A court should assess all the facts and circumstances at the time to determine if the person conducting the questioning was, or could have reasonably been considered to be, participating in an official law enforcement or disciplinary investigation or inquiry.⁶¹

“Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense.”⁶²

Article 31(b) provides in pertinent part that an accused must be informed of “the nature of the accusation” and advised “that he does not have to make any statement regarding the offense of which he is accused or suspected.” An interviewer’s “[a]dvice as to the nature of the charge” to the interviewee “need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge” to comply with Article 31(b).⁶³ While Article 31(b) does not spell out the degree of specificity required, case law sets forth that “the accused or suspect must be informed of the

⁵⁶ U.C.M.J (2019).

⁵⁷ *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014); *quoting United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981)

⁵⁸ *Jones*, 73 M.J. at 361; *citing United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (internal citations omitted).

⁵⁹ *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *citing United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996). C.A.A.F. rejected *Duga*’s second prong, that “the person questioned perceived that the inquiry involved more than a casual conversation,” in *Jones*.

⁶⁰ Article 31(d).

⁶¹ *Jones*, 73 M.J. at 361; *quoting Cohen*, 63 M.J. at 50 (further citation omitted).

⁶² *Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *quoting United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).

⁶³ *United States v. Simpson*, 54 MJ 281, 284 (C.A.A.F. 2000); *quoting United States v. Davis*, 8 U.S.C.M.A. 196, 198 (1957).

general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event.”⁶⁴ Such factors to be considered include “whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses.”⁶⁵ Finally, “[t]he key to the inquiry as to sufficiency of the notice requires considering the precise wording of the warning in the context ‘of the surrounding circumstances and the manifest knowledge of the accused ...’”⁶⁶

5. Analysis and Conclusions of Law.

The Court of Military Appeal’s (C.M.A.) decision in *United States v. Lichtenhan*⁶⁷ is instructive for the Court’s ruling on the issues before it. In that case, a Chief Petty Officer (CPO) had been told that HN Lichtenhan had attempted to steal a box of syringes from the intensive care unit. When the CPO approached HN Lichtenhan and asked if he had a minute to talk, HN Lichtenhan said “Sure ... but there’s something I need to talk to you about first” before he confessed to stealing and using drugs from the pharmacy. The CPO stopped HN Lichtenhan and, after telling him he had been seeking to talk to him about the syringes, asked if he would be willing to write down what he just said in a “voluntary statement,” but did not advise him of his rights. HN Lichtenham then wrote a statement that repeated his oral admissions. Naval Investigative Service (NIS) interviewed HN Lichtenham three days later, after having read the CPO’s report. NIS warned HN Lichtenham of his Article 31 rights, but did not give him a cleansing warning. The C.M.A. first determined that “[s]pontaneous statements, even though incriminating, are not within the purview of Article 31.”⁶⁸ When determining whether HN Lichtenham’s subsequent statement to NIS was inadmissible, the C.M.A. focused on the totality of the circumstances as they found there had been no “actual coercion” in gaining the earlier statement.⁶⁹ The C.M.A. held a “cleansing warning is not a prerequisite to admissibility.”⁷⁰ HN Lichtenham was characterized as “willing – even anxious – to disclose his drug problem.”⁷¹

a. Was the Accused’s oral statement to DC1 [REDACTED] voluntary?

The Accused made a spontaneous, voluntary oral statement to DC1 [REDACTED] on the [REDACTED] flight deck. DC1 [REDACTED] approached the Accused, not because he suspected him of committing an offense or because he sought an incriminating statement. Rather, DC1 [REDACTED] saw the Accused was teary-eyed and upset and wanted to check on his Sailor. Without any prompting or questioning, the Accused told DC1 [REDACTED] about his marital issues and the incident that occurred a week or two earlier. What the Accused told him about the encounter

⁶⁴ *Simpson*, 54 M.J. at 284; citing *United States v. Huelsman*, 27 M.J. 511, 513 (A.C.M.R. 1988) (further citations omitted). See *United States v. Nitschke*, 31 C.M.R. 75 (1961) (Advising a suspect that the agent was investigating a traffic accident was sufficient to warn him of a negligent homicide connected to the accident.).

⁶⁵ *Simpson*, 54 M.J. at 284; citing *United States v. Willeford*, 5 M.J. 634 (A.F.C.M.R. 1978); *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978); and *United States v. Davis*, 24 C.M.R. 6 (C.M.A. 1957).

⁶⁶ *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997); quoting *Davis*, 24 C.M.R. at 8.

⁶⁷ 40 M.J. 466 (C.M.A. 1994).

⁶⁸ *Id.* at 469; citing *United States v. Vitale*, 34 M.J. 210, 212 (C.M.A. 1992).

⁶⁹ *Lichtenhan*, 40 M.J. at 470.

⁷⁰ *Id.* See *United States v. Neiman*, 2016 CCA Lexis 435, *34.

⁷¹ *Id.* at 470.

with SN [REDACTED] made DC1 [REDACTED] believe a sexual assault may have occurred, but the LPO did not ask any follow-on questions or ask for more details. As in *Lichtenhan*, the Accused's oral statement to DC1 [REDACTED] was clearly a spontaneous statement and an Article 31 rights advisement was not required.

The Government has met their burden and demonstrated by a preponderance of the evidence that the Accused made a voluntary oral statement to DC1 [REDACTED] and it may be received into evidence.

b. Was the note the Accused wrote in his phone at his chain of command's direction a voluntary statement?

After hearing the Accused's oral statement, DC1 [REDACTED] talked to HTCS [REDACTED] and suggested the Accused memorialize what happened. HTCS [REDACTED] and CMC [REDACTED] subsequently approved this plan and DC1 [REDACTED] was directed to tell the Accused to write down what happened, but neither of them directed DC1 [REDACTED] to ask follow-up questions or provide guidance other than the Accused should be detailed in what he wrote. The Defense argues the chain of command's instructions to the Accused were orders and produced an involuntary statement. The Court disagrees as no one in the chain of command interrogated, questioned, or sought any incriminating response from the Accused. Further, an incriminating response was not a reasonable consequence of their instruction given the circumstances. The note the Accused wrote in his phone did not become a statement until he chose to provide it to NCIS on 1 September 2020.⁷²

The chain of command's instruction, or order for that matter, does not meet the definition of an interrogation. At the most basic level, no questions were asked of the Accused, he was merely told to write down what happened while it was still fresh in his mind. Similarly, DC1 [REDACTED] was not "participating in an official law enforcement or disciplinary investigation or inquiry," rather he had a personal motivation as the Accused's LPO to ensure the Accused memorialized his account for his own use later. The intent of this instruction was to give the *Accused* something in writing if the allegations were reported and he needed it later. This intent was clearly articulated to the Accused and he was told to use his personal phone to write down what happened. The fact that the Accused did not claim he was forced to write the statement when SA [REDACTED] and SA [REDACTED] interviewed him in September and November also persuades the Court that he understood the note was intended for his own use. The Accused told SA [REDACTED] "he was like, you know, just write everything down that happened that night. I wrote everything down. That's why I had a pre-written statement of everything that happened that night, so ... *I wouldn't forget anything.*"⁷³ When he wrote the note, the Accused knew it was for his own use and not a part of an interrogation or disciplinary inquiry.

At the time he wrote the note in his phone, it was not a statement because it was not provided to the chain of command. The Accused tried to give the note to DC1 [REDACTED] when he finished writing it. However, the LPO refused to take, or even read, the note and remained unaware of what the note said. At some point later, the Accused told HTCS [REDACTED] he had written the note.

⁷² The Court will analyze the voluntariness of that action in the next section of its ruling.

⁷³ Emphasis added.

HTCS ██████ did not ask the Accused to read the note, for a copy of it, or ask any questions about its contents. No one in the Accused's chain of command ever initiated a conversation with the Accused about the note, asked to see it, or instructed the Accused to turn it over to the chain of command or law enforcement. Based on these circumstances, the Accused could not have reasonably believed the note or its contents could have been used against him or would lead to other evidence that might.

The prophylactic measures of *Miranda/Tempia* protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. Article 31 was designed to prevent the military from using the unique authoritative structure to get information from suspects. The chain of command's instruction to the Accused did not violate these fundamental principles. Here, by intent and application, no information or evidence was sought from the Accused nor was any provided to the chain of command. Based on the circumstances that led to the Accused writing the note in his phone, the Accused was not entitled to be warned of his rights under the Fifth Amendment, *Miranda/Tempia*, or Article 31.⁷⁴

As the note the Accused wrote in his phone was not provided to the chain of command, the Court must analyze its admissibility under the totality the circumstances when it was provided to SA ██████ on 1 September 2020.

c. Were the Accused's statements to NCIS on 1 September 2020 voluntary?

When the Accused was interviewed by SA ██████ on 1 September 2020, he was provided a rights advisement via the Wavier of Rights form. This form notified the Accused he was suspected of sexual assault and advised him of his rights under both Article 31 and *Miranda/Tempia*. The Defense has not challenged the sufficiency of the nature of the accusation, nor does it claim the Accused exercised his rights to silence or to an attorney. The Court finds the Accused was properly warned and turns to the totality of the circumstances to determine if the subsequent handwritten statement was voluntary.⁷⁵

The totality of the circumstances show that the Accused gave a voluntary handwritten statement to SA ██████ and voluntarily provided the note written on his phone. Initially, the Court finds there was no taint from the chain of command's instruction for the Accused to write down what happened in his phone. As there was no taint from their actions, the Accused's subsequent statements are not derivative evidence. As discussed above, the Accused was aware, both based on the chain of command's instructions and their actions, that the note was for his own personal use. He was not operating under the belief that he must provide it to anyone. The Court does not find the Accused's claim that CMC ██████ ordered him to give the statement to SA ██████ to be credible. The Accused's statement to SA ██████ on 2 November 2020 and CMC ██████ affidavit do not support the Accused's subsequent claim.⁷⁶

⁷⁴ As the Accused was not entitled to any rights advisement, whether he was in custody or not at this point on the ██████ is not an issue the Court must address.

As the rights advisement included the right to an attorney, the Court need not determine if the Accused was in custody.

⁷⁶ While CMC ██████ doesn't remember what they talked about on the way to the room, he is certain he did not talk

Even if the chain of command's actions violated Article 31, or otherwise tainted the Accused, the fact that SA [REDACTED] advised the Accused of his rights prior to any interrogation was sufficient to remove that taint. A cleansing warning was not necessary. Unlike the NIS agents in *Lichtenhan*, SA [REDACTED] was not aware the Accused had made an oral statement to DC1 [REDACTED] or had written down what happened in his phone. As he didn't know about the previously written note, SA [REDACTED] did not use it to try and influence the Accused's decision to waive his rights.

The character of the interrogation also supports a finding of voluntariness. The interview was in what appears to be a stateroom onboard the [REDACTED]. Though the room is small, it is larger than the room the 2 November polygraph was held in. The entire process took approximately 70 minutes, to include the Accused returning to his berthing and then handwriting his statement. SA [REDACTED] made no statements to encourage the Accused to speak to him or provide any specific type of statement. Additionally, the Accused's statement to NCIS was a story of a consensual sexual encounter. When an accused uses his statement to law enforcement to present an exculpatory version of events or talk himself out of trouble, it weighs in favor of voluntariness.⁷⁷

SA [REDACTED] actions after the Accused agreed to provide the statement, but not answer follow-on questions further demonstrates the Accused made a voluntary choice that was not the result of coercion, unlawful influence, or unlawful inducement. Not knowing what was in the statement the Accused had agreed to give, SA [REDACTED] made no efforts to have the Accused answer follow-on questions. He accepted his first, and only, decision and had the Accused write at the bottom of the Waiver of Rights form "[a]t this time I want to remain silent but I do have a written statement on my phone. I am willing to provide a handwritten statement to NCIS." This was an accurate description of how the Accused chose to exercise his rights during the interview. In fact, it ensured the Accused's desires were clearly expressed as the standard Waiver of Rights form did not provide the choice the Accused made. Rather it contemplated an all or nothing approach to a suspect exercising their rights. At no time during the interview did SA [REDACTED] attempt to threaten, trick, or cajole the Accused into a waiver of his rights.

The Accused's decision to allow SA [REDACTED] to photograph the note on his phone was also voluntary considering the totality of the circumstances. After being informed of his rights, the Accused voluntarily waived those rights and chose to provide a statement to SA [REDACTED]. The fact that he chose to use what he wrote on his phone and not answer any further questions highlights that the Accused understood his rights. It also emphasizes the Accused made a free and unconstrained choice in which he carefully decided what he would provide to SA [REDACTED]. This bifurcated decision contradicts the Defense contention that the characteristics of the Accused prevented him from understanding and exercising his rights.⁷⁸

about the case and denied telling the Accused he had to talk to NCIS or give them the written statement. Based on his prior experience with NCIS, CMC [REDACTED] new NCIS wanted to maintain the element of surprise and talking to the Accused about the case would jeopardize NCIS's tactics.

⁷⁷ See *United States v. Henderson*, 52 M.J. 14, 18 (C.A.A.F. 1999) and *United States v. Washington*, 48 M.J. 477, 482 (C.A.A.F. 1997).

⁷⁸ The Accused graduated high school in May 2017 and went to boot camp in March 2019. He scored a 33 on the ASVAB.

The Accused was again notified of his rights as the related to the search of his phone via the PASS. The request to photograph the note on the phone was put to the Accused in a straightforward manner as a way to clearly memorialize what the Accused wanted to be his statement. The fact that the Accused had already agreed to handwrite the statement did not affect the voluntariness of his decision to allow photographs of it to be taken. At not point did the Accused express any hesitation to allow SA [REDACTED] to view and photograph the note on his phone. In fact, the Accused offered that note as his statement and only handwrote a note as a way to get the information from the note to SA [REDACTED]. The Accused voluntarily consented to the search of his phone, which remained in his control while the photographs were taken.

The Government has met their burden and demonstrated by a preponderance of the evidence that the Accused gave a voluntary statement to SA [REDACTED] and consented to the photographing of the note on his phone. Both may be received into evidence.

d. Were the Accused's statements to NCIS on 2 November 2020 voluntary?

SA [REDACTED] interviewed the Accused and conducted a polygraph examination on 2 November 2020. At the beginning of this meeting, SA [REDACTED] advised the Accused of his rights via a Wavier of Rights form. This form notified the Accused he was suspected of sexual assault and advised him of his rights under both Article 31 and *Miranda/Tempia*. As with the 1 September 2020 interview, the Defense has not challenged the sufficiency of the nature of the accusation, nor does it claim the Accused exercised his rights to silence or to an attorney. The Court finds the Accused was properly warned and turns to the totality of the circumstances to determine if the subsequent handwritten statement was voluntary.⁷⁹

The email communication between SA [REDACTED] and the Accused does not show coercion, unlawful influence, or unlawful inducement on the part of the NCIS investigator. Instead they demonstrate the Accused freely chose to take a polygraph examination. The Court does not agree with the Accused's claim that he felt pressured to take the polygraph because NCIS told him it was the only way to prove his innocence. As noted above, SA [REDACTED] scrupulously honored the Accused's exercise of his rights on 1 September 2020. None of SA [REDACTED] subsequent emails attempted to persuade the Accused to take the polygraph or answer follow-on questions, they are informative and emphasize the Accused had no obligation to submit to the polygraph or answer follow-on questions. SA [REDACTED] also reminded the Accused he had not wanted to answer follow-on questions during their earlier interview. While SA [REDACTED] did indicate the polygraph examination would be an opportunity to prove his innocence, it was said once, in a single email on 25 September 2020. On 29 September 2020, SA [REDACTED] said, "I'm just trying to make sure you are still up for a polygraph – you can back out at any time." on 1 October 2020, after taking a few days to consider SA [REDACTED] email explaining what would happen during the polygraph exam, the Accused confirmed he still wanted to do the polygraph and would "do the interview with [the polygraph examiner]." Unlike in *Traum*,⁸⁰ the Accused never expressed any concerns about discussing the details of the alleged sexual assault.

⁷⁹ Again, since the rights advisement included the right to an attorney, the Court need not determine if the Accused was in custody.

⁸⁰ *Traum*, 60 M.J. at 228.

The Accused was not in the same room with SA [REDACTED] and subject to any circumstances where he would reasonably feel like he needed to make an immediate decision or lose the chance to take the polygraph examination. In fact, none of the emails show any pressure was placed on the Accused. SA [REDACTED] did not ask the Accused to respond quicker to his emails or establish any type of deadline. When the Accused asked questions about the polygraph examination procedure, SA [REDACTED] answered those questions in a follow-up email. The Accused was not influenced by SA [REDACTED] status as a law enforcement agent as he took several days to respond to each of his emails. Having been advised of the requirements for the polygraph examination, the Accused voluntarily chose to take it.

The circumstances surrounding the actual polygraph examination show the Accused made a free and unconstrained choice to talk to SA [REDACTED].⁸¹ To begin with, the Accused had a month between when he agreed to take the polygraph examination and when he arrived at NCIS to take it. This time allowed him the opportunity to contemplate his decision, seek legal counsel, change his mind, and decide not to take the polygraph examination. Once the Accused arrived at NCIS on 2 November, he was appropriately warned of his rights using a Waiver of Rights form. SA [REDACTED] further emphasized the voluntary nature of the polygraph examination with the NCIS Polygraph Examination Waiver form. At the time the Accused signed that form, he had been fully informed of his right to remain silent and consult with an attorney and chose to waive those rights and take the polygraph examination.

There was nothing inherently coercive, threatening, or otherwise indicative of unlawful influence or inducement during the polygraph examination. It was conducted solely by SA [REDACTED] no other NCIS agents, law enforcement officers, or members of the Accused's chain of command were involved. Throughout the polygraph examination, SA [REDACTED] maintained a calm, even demeanor. He did not threaten or cajole the Accused. SA [REDACTED] did not make any false statements or otherwise try to make the state of the evidence appear overwhelming. The only mention of other evidence was SA [REDACTED] claim that other witnesses' statements caused him to believe the Accused was withholding information. Throughout SA [REDACTED] merely admonished the Accused to tell the truth, which is "not coercion, unlawful inducement, or improper influence."⁴² Nor did SA [REDACTED] suggest the Accused should admit to certain facts or adopt a specific narrative. SA [REDACTED] repeatedly reminded the Accused to tell the truth, not what he wanted to hear and he asked question to ensure the Accused understood that direction.

The characteristics of the Accused do not indicate that his will was overborne by SA [REDACTED]. His behavior showed he was not intimidated or afraid of SA [REDACTED]. In fact, during lulls in the interrogation, he initiated small talk with SA [REDACTED]. The Accused never appeared confused or flustered. He never complained about the polygraph examination process, never asked for an attorney, did not ask to stop the polygraph examination, did not indicate he felt coerced or pressured into making a statement, and was not hesitant to discuss the alleged sexual assault. The five-hour interrogation appeared to have little to no effect on the Accused.⁸² He didn't appear tired, nor did he show any signs of exhaustion during the entire interrogation. At no point did he appear worn into submission. In fact, the Accused appeared comfortable and relatively at

⁸¹ Again, in this ruling only, the "polygraph examination" includes the pre-interview, polygraph examination, and the post-exam questioning as the polygraph examination.

⁸² The Accused was alone, writing a letter to SN [REDACTED] for approximately one hour of the interrogation.

ease during the entire process.

The Government has met their burden and demonstrated by a preponderance of the evidence that the Accused's statements to SA [REDACTED] were voluntary and may be received into evidence.

6. Ruling.

The Defense motion is **DENIED**.



B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI) OVANDO, EMERSON, A	2. BRANCH Navy	3. PAYGRADE E-4	4. DoD ID NUMBER [REDACTED]
5. CONVENING COMMAND [REDACTED]	6. TYPE OF COURT-MARTIAL General	7. COMPOSITION Members	8. DATE SENTENCE ADJUDGED Jun 24, 2022

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL Dishonorable discharge	10. CONFINEMENT 3 years, 6 months	11. FORFEITURES N/A	12. FINES N/A	13. FINE PENALTY N/A
14. REDUCTION E-1	15. DEATH Yes ☐ No ☒	16. REPRIMAND Yes ☐ No ☒	17. HARD LABOR Yes ☐ No ☒	18. RESTRICTION Yes ☐ No ☒
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
--	--	------------------------------------

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 ☐ No ☒	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 ☒ No ☐
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ☒ No ☐
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ☐ No ☒
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ☒ No ☐

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI) ROBERTSON, BENJAMIN, C.	34. BRANCH Navy	35. PAYGRADE O-5	36. DATE SIGNED Jun 24, 2022	38. JUDGE'S SIGNATURE [REDACTED]
37. NOTES The Military Judge conditionally dismissed Specification 3 of the Charge and Specification 2 of the Additional Charge.				

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	120	Specification 1:	Not Guilty	Guilty			120AA2
		Offense description	Sexual assault when the other person is impaired by any drug or intoxicant				
		Specification 2:	No plea entered	W/D			120AA2
		Offense description	Sexual assault when the other person is asleep or unaware				
		Withdrawn and Dismissed					
		Specification 3:	Not Guilty	Guilty			120AA4
		Offense description	Abusive sexual contact when the other person is impaired by any drug or intoxicant				
		Specification 4:	No plea entered	W/D			120AA4
		Offense description	Abusive sexual contact when the other person is asleep or unaware				
		Withdrawn and Dismissed					
Additional Charge	120	Specification 1:	No plea entered	W/D			120AA2
		Offense description	Sexual assault without the consent of other person				
		Withdrawn and Dismissed					
		Specification 2:	Not Guilty	Guilty			120AA2
		Offense description	Sexual assault when the other person is impaired by any drug or intoxicant				

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI) OVANDO, EMERSON, A		2. PAYGRADE/RANK E4	3. DoD ID NUMBER [REDACTED]
4. UNIT OR ORGANIZATION [REDACTED]		5. CURRENT ENLISTMENT 11 APR 2019	6. TERM 4 YEARS
7. CONVENING AUTHORITY (UNIT/ORGANIZATION) [REDACTED]	8. COURT-MARTIAL TYPE General	9. COMPOSITION Members	10. DATE SENTENCE ADJUDGED 24-Jun-2022

Post-Trial Matters to Consider

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

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

Accused, through counsel, requested the Convening Authority defer and waive automatic forfeitures for six months, and that the funds be paid to the Accused's dependent child. The request to waive and redirect funds was approved on 07 July, 2022.

24. Convening Authority Name/Title RADM Carl A. Lahti Commander Naval Forces Japan/Navy Region Japan	25. SJA Name CDR [REDACTED]
26. SJA signature [REDACTED]	27. Date 9 Sep 22

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 further action on the findings or sentence in this case other than waiving and redirecting the automatic forfeitures in accordance with the accused's request.

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

N/A

30. Convening Authority's signature



31. Date

09 SEP 2022

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) OVANDO, EMERSON, A.		2. PAYGRADE/RANK E4	3. DoD ID NUMBER [REDACTED]
4. UNIT OR ORGANIZATION [REDACTED]		5. CURRENT ENLISTMENT 11 APR 2019	6. TERM 4 YEARS
7. CONVENING AUTHORITY (UNIT/ORGANIZATION) [REDACTED]	8. COURT-MARTIAL TYPE General	9. COMPOSITION Enlisted Members	10. DATE COURT-MARTIAL ADJOURNED 24-Jun-2022
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, causing contact with GSM3 [REDACTED] vulva, when she was incapable of consenting on 12 July 2020. Plea: Not Guilty. Finding: Guilty. Specification 2: Sexual assault, causing contact with GSM3 [REDACTED] vulva, when she was unconscious on 12 July 2020. Plea: No plea entered. Finding: Withdrawn and dismissed before trial. Specification 3: Sexual assault, touching GSM3 [REDACTED] breast, when she was incapable of consenting on 12 July 2020. Plea: Not Guilty. Finding: Guilty. Specification 4: Sexual assault by touching GSM3 [REDACTED] breast when she was unconscious on 12 July 2020. Plea: No plea entered. Finding: Withdrawn and dismissed before trial. Additional Specification 1: Sexual assault, penetrating GSM3 [REDACTED] vulva without her consent on 12 July 2020. Plea: No plea entered. Finding: Withdrawn and dismissed before trial. Additional Specification 2: Sexual assault, penetrating GSM3 [REDACTED] vulva, when she was incapable of consenting on 12 July 2020. Plea: Not Guilty. Finding: Guilty.			

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

On 24 June 2022, a panel of officer and enlisted members sentenced the Accused to the following:

Reduction to pay grade E-1.

Confinement for a total of 3 years and 6 months.

A dishonorable discharge.

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

The Accused requested the Convening Authority defer and waive automatic forfeitures for six months, and the funds be paid to the Accused's dependent child. The request was approved on 7 July 2022.

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

N/A

15. Judge's signature:

[REDACTED]

16. Date judgment entered:

Sep 27, 2022

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.

Based on the military judge's finding of unreasonable multiplication of charges, Block 11 should correctly read as follows:

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

Plea: Not Guilty.

Finding: Guilty.

Specification 1: Sexual assault, causing contact with GSM3 [REDACTED] vulva, when she was incapable of consenting on 12 July 2020.

Plea: Not Guilty.

Finding: Guilty.

Specification 2: Sexual assault, causing contact with GSM3 [REDACTED] vulva, when she was unconscious on 12 July 2020.

Plea: No plea entered.

Finding: Withdrawn and dismissed before trial.

18. Judge's signature:

[REDACTED]

19. Date judgment entered:

Sep 29, 2022

CONTINUATION SHEET - ENTRY OF JUDGMENT

17. Military Judge Correction (Continued)

Specification 3: Sexual assault, touching GSM3 [REDACTED] breast, when she was incapable of consenting on 12 July 2020.

Plea: Not Guilty.

Finding: Guilty, but conditionally dismissed upon motion of the Defense as unreasonable multiplication of Specification 1 and Additional Specification 2. The condition is the finding of guilty for Specification 1 being upheld upon completion of appellate review.

Specification 4: Sexual assault by touching GSM3 [REDACTED] breast when she was unconscious on 12 July 2020.

Plea: No plea entered.

Finding: Withdrawn and dismissed before trial.

Additional Specification 1: Sexual assault, penetrating GSM3 [REDACTED] vulva without her consent on 12 July 2020.

Plea: No plea entered.

Finding: Withdrawn and dismissed before trial.

Additional Specification 2: Sexual assault, penetrating GSM3 [REDACTED] vulva, when she was incapable of consenting on 12 July 2020.

Plea: Not Guilty.

Finding: Guilty, but conditionally dismissed upon motion of the Defense as unreasonable multiplication of Specification 1 and Specification 3. The condition is the finding of guilty for Specification 1 being upheld upon completion of appellate review.

APPELLATE INFORMATION

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

Before Panel No. 2

UNITED STATES

Appellee

v.

Emerson T. OVANDO

Damage Controlman Third Class (E-4)
U.S. Navy

Appellant

NMCCA No. 202200236

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

Tried at [REDACTED] on June 21-24,
2022 before a General Court-Martial
convened by Commanding Officer, Navy
Region [REDACTED] Commander Benjamin
Robertson, U.S. Navy, military judge
presiding

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

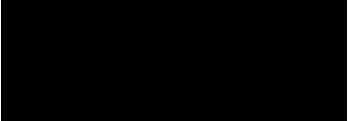
COMES NOW the undersigned and respectfully moves for a first enlargement of time to file a brief and assignments of error. The current due date is December 26, 2022. The number of days requested is thirty. The requested due date is January 26, 2023.

Status of the case:

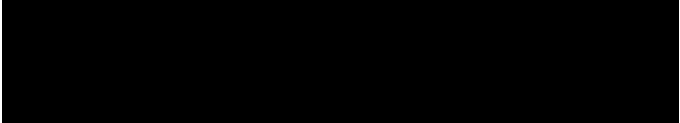
1. The Record of Trial was docketed on October 27, 2022.
2. The Moreno date is April 27, 2024.
3. DC3 Ovando is currently confined. His expected release date is May 19, 2025.
4. The record consists of 1415 transcribed pages and 2902 total pages.
5. Counsel has not reviewed the record.

Good cause is required in this case because counsel requires further time to consult with his client, adequately review the file for error, and draft a brief if necessary. Appellant has been consulted and concurs with the enlargement request.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.



Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374



CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on December 19, 2022, that a copy was uploaded into the Court's case management system on December 19, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [REDACTED] [REDACTED] on December 19, 2022.

[REDACTED]
Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[REDACTED]

Subject: GRANTED - REVIEWED - FILING - Panel 2 - U.S. v. Ovando - NMCCA 202200236 - Motion for a First Enlargement
Date: Monday, December 19, 2022 11:33:54 AM

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

Very Respectfully,

[Redacted Signature]

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: RE: FILING - Panel 2 - U.S. v. Ovando - NMCCA 202200236 - Motion for a First Enlargement

RECEIVED
DECEMBER 19 2022

United States Navy-Marine Corps
Court of Criminal Appeals

Very Respectfully,

[REDACTED]

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

[REDACTED]

Subject: FILING - Panel 2 - U.S. v. Ovando - NMCCA 202200236 - Motion for a First Enlargement

Good Morning Clerk of Court,

Please find attached a motion for a first enlargement in the case of US v. DC3 Ovando. Thank you.

Very Respectfully,

Christopher B. Dempsey

LT, JAGC, USN

Appellate Defense Counsel

Washington Navy Yard

Code 45, Navy and Marine Corps Appellate Review Activity

[REDACTED]



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

Before Panel No. 2

UNITED STATES

Appellee

v.

Emerson T. OVANDO

Damage Controlman Third Class (E-4)
U.S. Navy

Appellant

NMCCA No. 202200236

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

Tried at [REDACTED] on June 21-24,
2022 before a General Court-Martial
convened by Commanding Officer, Navy
Region [REDACTED] Commander Benjamin
Robertson, U.S. Navy, military judge
presiding

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT 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 26, 2023. The number of days requested is thirty. The requested due date is February 26, 2023.

Status of the case:

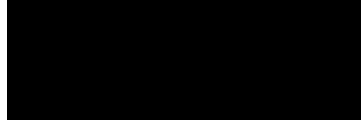
1. The Record of Trial was docketed on October 27, 2022.
2. The Moreno date is April 27, 2024.
3. DC3 Ovando is currently confined. His expected release date is May 19, 2025.
4. The record consists of 1415 transcribed pages and 2902 total pages.
5. Counsel has not reviewed the full record.

Good cause is required in this case because counsel requires further time to consult with his client, adequately review the file for error, and draft a brief if necessary. This case is complex. Appellant was convicted of three specifications of sexual assault under Article 120, UCMJ. The record of his trial contains several errors that may have merit before this Court. Counsel requires more time to review the record and analyze the issues in this case.

Appellant has been consulted and concurs with the enlargement request.

Counsel has reviewed all unsealed portions of the record. While this Court granted a defense motion to review sealed materials on 10 January 2023, the Government filed a proper motion to reconsider on the same day, asserting that the Defense erroneously included a sealed exhibit (App. Ex. XXXIV) in their motion that should not have been included. The Defense concurred in their reply. No modified order has been issued yet.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.



Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374



CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on January 20, 2023, that a copy was uploaded into the Court's case management system on January 20, 2023, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [REDACTED] [REDACTED] on January 20, 2023.

[REDACTED]
Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[REDACTED]

[REDACTED]

Subject: RULING - FILING - Panel 2 - U.S. v. Ovando - NMCCA 202200326- Motion for Second Enlargement
Date: Monday, January 30, 2023 8:58:30 AM

MOTION GRANTED
January 30 2023
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

V/R,

[REDACTED]
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

[REDACTED]

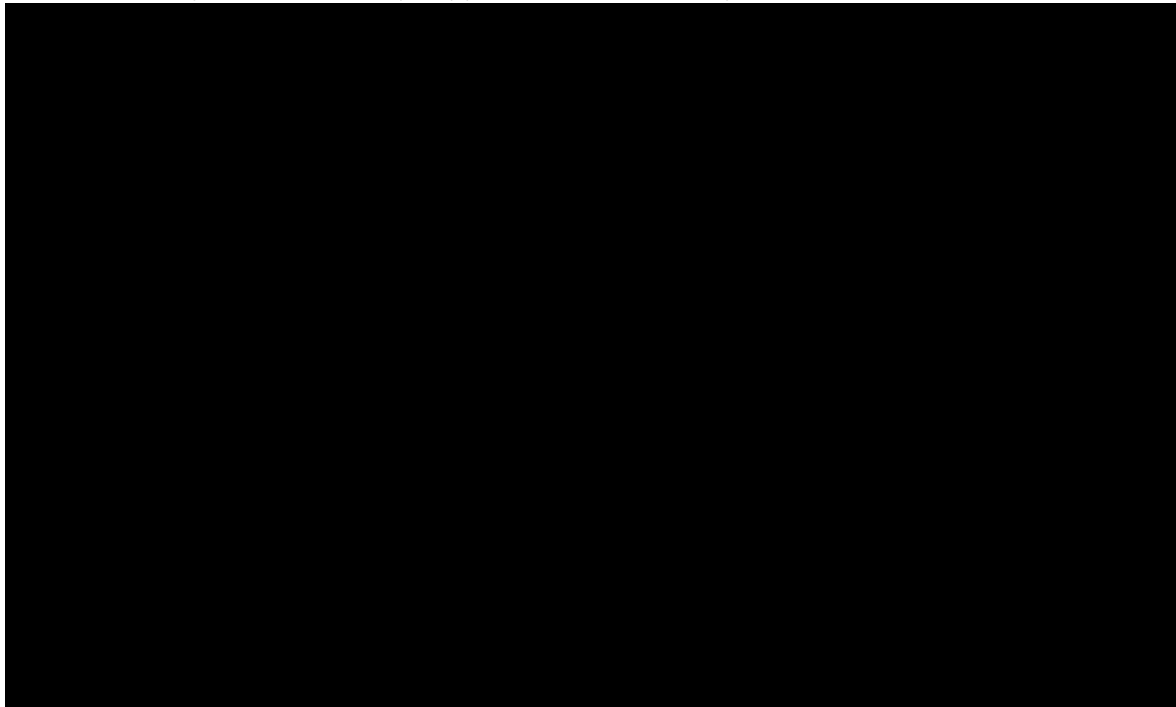
Subject: FILING - Panel 2 - U.S. v. Ovando - NMCCA 202200326- Motion for Second Enlargement

Good Afternoon Clerk of Court,

Please find attached the Defense's motion for a second enlargement in the case of US v. Ovando.
Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity



United States Navy - Marine Corps Court of Criminal Appeals

UNITED STATES

Appellee

v.

Emerson T. OVANDO
Damage Controlman Third Class (E-4)
U.S. Navy

Appellant

NMCCA NO. 202200236

Panel 2

ORDER

Order Denying Appellee's Motion for En Banc Reconsideration and Granting Appellee's Motion for Panel Reconsideration

On 4 January 2023, Appellant filed a Motion to Examine Sealed Materials in the Record of Trial. Specifically Appellant sought to examine **(1)** Transcript pages 89-130, 207-98, 313-53 (closed Mil. R. Evid. 412 hearings); **(2)** Transcript pages 138-68 (closed Mil. R. Evid. 513 hearings); **(3)** Appellate Exhibits IV, V, VI, XVI (encl. 21); XXIII, XXIV, XXVI, XLV, XLVI, XLVII, XLVIII, LII, LIV, and LIX (Mil. R. Evid. 412 motions and evidence), and; **(4)** Appellate Exhibits XXVII, XXVIII, XXVIII(a), XXIX, XXX, XXXIV, XXXV, XXXVI (Mil. R. Evid. 513 motions and evidence).

In his filing, Appellant noted that there is no sealing order in the record for Appellate Exhibits XLV, XLVI, and XLVII, despite the fact that they were sealed by the military judge on the record.¹ In addition, Appellant noted that several portions of the transcript and several exhibits are not properly sealed. "This includes at least pages 89-130, 138-68, 207-98, and 313-53. ... These exhibits are AE IV, V, VI, XVI (Encl. 21), XXIII, XXIV, XXVI, XXVII, XXXIV, XXXV, XXXVI, XLV, XLVI, XLVII, LIII, LIV, and LIX."²

On 9 January 2023, Appellee's window to file an opposition to the motion to examine expired. On 10 January 2023, this Court granted Appellant's request to examine sealed materials in the record. On 10 January 2023, Appellee filed a Motion for En Banc and Panel Reconsideration of our order granting Appellant's request.

¹ R. at 369.

² Appellant's Motion to Examine Sealed Materials, 4 January 2023, at 2.

In their request, Appellee argued that Appellate Exhibit XXXIV was not reviewed by trial counsel and trial defense counsel. Therefore Appellant had failed to make the proper showing of proof required to view sealed exhibits not released to trial counsel or trial defense counsel under this Court's rules.³ Appellee argued that this Court should reconsider granting Appellant's Motion to Examine Sealed Materials as to Appellate Exhibit XXXIV.

In addition, Appellee argued that Appellant's request to view sealed portions of the transcript to "ensure issues are properly raised with the court"⁴ did not meet the good-cause standard and therefore this Court should reconsider permitting examination of the sealed portions of the transcript.

On 11 January 2023, Appellant filed a Reply to Appellant's Motion for Reconsideration. Appellant stated that Appellate Exhibit XXXIV was erroneously included in the original Motion to Examine Sealed Materials and requested that this Court grant a modification to the original request that excluded Appellate Exhibit XXXIV. With regard to the sealed portions of the transcript, Appellant argued that the portions of the transcript related to Mil R. Evid. 412 motions were not subject to claims of privilege and both parties were present during the transcribed closed session of trial. Appellant argued that the portions of the transcript related to Mil R. Evid. 513 motions were subject to claims of privilege under Rule 513 and both parties were present during the transcribed closed session of trial. Appellant stated that access to the sealed portions of the transcript were necessary to "ensure issues are properly raised with the court."⁵ For documents "reviewed at trial by trial counsel or trial defense counsel," the moving party need make "a colorable showing to the Court that examination is reasonably necessary to a proper fulfillment of counsel's responsibilities."

On 11 January 2023, the Court inquired via email correspondence if, in light of Appellant's modification of its request which excluded Appellate Exhibit XXXIV, Appellee would withdraw the Motion for En Banc Reconsideration. Counsel for Appellee informed the Court that it would not be withdrawing the request for en banc consideration.

³ N-M. Ct. Crim. App. R. 6.2(c)(2) (requiring that the moving party, who seeks to view exhibits not released to trial counsel or trial defense counsel, "concisely identify the counsel's need for the sealed portion of the record to perform his or her official duties as well as the specific legal authority authorizing his or her access to that portion of the record").

⁴ Appellee's Mot. for Reconsideration at 4 (quoting Appellant's Mot. to Examine Sealed materials at 2).

⁵ Appellant's Reply at 3.

Having reviewed the filings, record, and sealed materials in question, it is, by the Court, this 30th day of January 2023,

ORDERED:

1. That Appellee's Motion for En Banc Reconsideration is **DENIED**.
2. That Appellee's Motion for Panel Reconsideration is **GRANTED**.
3. That counsel for Appellant is permitted to examine (1) Transcript pages 89-130, 207-98, 313-53; (2) Transcript pages 138-68; (3) Appellate Exhibits IV, V, VI, XVI (encl. 21); XXIII, XXIV, [XXVI](#), XLV, XLVI, XLVII, XLVIII, LII, LIV, and LIX, and; (4) Appellate Exhibits XXVII, XXVIII, XXVIII(a), XXIX, XXX, XXXV, and XXXVI.
4. That counsel may *not* make digital reproductions or photocopies of any of the sealed material. After viewing the material, if counsel still wish to make copies, counsel may file a motion with this Court, and the Court may revisit that portion of this Order.
5. That in accordance with N-M. Ct. Crim. Appl. R. 6.2(4)(A)–(B), the parties may not make any additional copies or disclose the aforementioned documents to any third party.

Upon physical inspection of the record, it appears that all improperly sealed materials have been sealed. However, given the many issues identified by Appellant with the record of trial, including the absence of sealing orders for certain exhibits, it is, by the Court, this 30th day of January 2023, further

ORDERED:

6. That Appellate Exhibits XLV, XLVI, and XLVII be sealed.
7. That Transcript pages 89-130, 138-68, 207-98, and 313-53 be sealed.
8. That Appellate Exhibits AE IV, V, VI, XVI (Encl. 21), XXIII, XXIV, XXVI, XXVII, XXXIV, XXXV, XXXVI, XLV, XLVI, XLVII, LIII, LIV, and LIX be sealed.



FOR THE COURT:

[Redacted signature]

MARK K. JAMISON
Clerk of Court

Copy to: NMCCA; 45 (LT Dempsey);
46 (Maj Finnen); 02

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

Before Panel No. 2

UNITED STATES

Appellee

v.

Emerson T. OVANDO

Damage Controlman Third Class (E-4)
U.S. Navy

Appellant

NMCCA No. 202200236

**APPELLANT’S REPLY AND MOTION
FOR LEAVE TO FILE**

Tried at [REDACTED] on June 21-24,
2022 before a General Court-Martial
convened by Commanding Officer, Navy
Region [REDACTED] Commander Benjamin
Robertson, U.S. Navy, military judge
presiding

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

Appellant, through undersigned Counsel, pursuant to Rule 23 of this Court’s Rules of Appellate Procedure, files a reply to the Government’s response to Appellant’s motion to compel production as well as a motion for leave to file this reply. Good cause exists to allow for Appellant to file this reply so Appellant can adequately respond to the Government’s argument. Appellant’s reply provides more in-depth legal analysis on why production of the requested items is appropriate than is present in his initial motion to compel production.

A. The preliminary hearing report includes exhibits considered by the Preliminary Hearing Officer.

The Air Force Court of Criminal Appeals has held that when an exhibit is missing from the preliminary hearing report, “the preliminary hearing report as a

whole[] ha[s] not been properly attached to the record” pursuant to R.C.M.

1112(f)(1)(A).¹

Therefore, Enclosure (3) from the Preliminary Hearing Officer’s Report and Enclosures (1), (3), and (4) from the Supplemental Preliminary Hearing Officer’s Report are a part of the record and should be compelled and attached pursuant to R.C.M. 1112(f)(1)(A). Moreover, while Enclosure (3) from the Preliminary Hearing Officer’s Report and Enclosure (3) from the Supplemental Preliminary Hearing Officer’s Report are included as lists of exhibits in the record, these enclosures listed “matters [the PHO] considered in completing [her] report”² Accordingly, these are enclosures that are missing exhibits, meaning “the preliminary hearing report as a whole[] ha[s] not been properly attached to the record.”³

B. *United States v. Jessie* permits the adding of evidence “necessary for resolving issues raised by materials in the record.”⁴

The CAAF in *Jessie* articulated a few instances where adding documents to the record was appropriate.⁵ This can occur when “necessary for resolving issues raised by materials in the record.”⁶ Indeed, the CAAF allows Courts of Criminal

1. *United States v. Ort*, No. ACM 40261 (f rev), 2022 CCA LEXIS 571, at *1-2 (A. F. Ct. Crim. App. Oct. 11, 2022).

2. Preliminary Hearing Officer Report (dated 3 Jul 2021); Preliminary Hearing Officer Report (dated 31 Aug 2021).

3. *Ort*, 2022 CCA LEXIS 571, at *1-2.

4. *Jessie*, 79 M.J. at 444.

5. *Jessie*, 79 M.J. at 444.

6. *Id.* at 442-44.

Appeals (CCAs) “to accept affidavits or order a *DuBay* hearing when necessary for resolving claims of ineffective assistance of trial defense counsel and a wide variety of other issues when those claims and issues are raised by the record but are not fully resolvable by the materials in the record.”⁷

Here, in an Article 39(a) session, all parties discussed the proposed voir dire questions that had been submitted to the military judge for review.⁸ The military judge ruled on these questions.⁹ Absent the ability to review these questions, it is unclear what was proposed by each party and if the military judge abused his discretion in ruling on them. Thus, these questions should be attached pursuant to *Jessie* as evidence “necessary for resolving issues raised by materials in the record.”¹⁰

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on January 31, 2023, that a copy was uploaded into the Court’s case management system on January 31, 2023, *and* that a copy of the foregoing was by electronic means with the

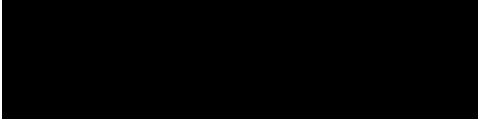
7. *Id.* at 442 (citing *United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993) (emphasis added)).

8. R. at 380-400.

9. R. at 380-400.

10. *Jessie*, 79 M.J. at 444.

consent of the government to Appellate Government Division (DAC-Code46@navy.mil) on January 31, 2023.



Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374





DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS APPELLATE REVIEW ACTIVITY
APPELLATE GOVERNMENT DIVISION
1254 CHARLES MORRIS STREET SE, BLDG 58, STE B01
WASHINGTON NAVY YARD, DC 20374-5011

5814
OJAG 46
17 Jun 24

MEMORANDUM FOR THE CLERK OF THE COURT, UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES, 450
E STREET, N.W., WASHINGTON, D.C. 20442-0001

Subj: UNITED STATES V. DAMAGE CONTROLMAN THIRD CLASS
EMERSON A. OVANDO, DOCKET NO. 24-0154/NA, NMCCA NO.
202200236

1. The United States hereby submits a general opposition to the petition in the above-referenced case and relies on its brief filed with the Navy-Marine Corps Court of Criminal Appeals and on the holdings of the lower court.
2. I certify that the original was electronically delivered to the Court on June 17, 2024, and a copy of the foregoing was electronically delivered to Lieutenant Benjamin M. COOK, JAGC, U.S. Navy, Appellate Defense Counsel, on June 17, 2024.

[REDACTED]
BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Bar no. [REDACTED]

[REDACTED]
JOSEPH M. JENNINGS
Colonel, USMC
Director, Appellate Government
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Bar no. [REDACTED]

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)