

140a UCMJ Special Request  
For the Public

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

<b>UNITED STATES</b>  v.  <b>BRYCE S. PEDICINI</b> <b>FCAC/E-7      USN</b>	<b>Government Motion for <i>ex parte</i> Review and Authorization of Summary of Records under MRE 505(h)(1)(A)</b>  <b>8 April 2024</b>
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**NATURE OF MOTION**

United States of America, by and through undersigned counsel, respectfully requests this Court: (1) consider the relevant records in the possession of the United States Government (hereinafter referred to as “the records”), and the declaration of the equity holder asserting the United States’ Classified Information Privilege (hereinafter referred to as “the declaration”) *in camera* and *ex parte*; and (2) authorize a summary of the relevant information in the records under Military Rule of Evidence (MRE) 505(h)(2).

**SUMMARY OF FACTS**

- a. On 22 March 2024, the Court ordered “the equity holder of information pertaining to the identity of Individual #1, in possession of the United States Government to disclose, to the extent such information exists, to the trial counsel for discovery to the defense information pertaining to the identity of Individual #1, subject to the limitation and/or protection contained within Military Rules of Evidence (M.R.E.) 505.”<sup>1</sup>
- b. The equity holder has identified the responsive information (the records) and on 8 April 2024, claimed the United States’ Classified Information Privilege over the records through the declaration. The declaration itself is classified Top Secret.
- c. Government counsel has prepared a summary of the relevant information contained in the records for consideration by the Military Judge per MRE 505(h)(2)(B).

**BURDEN OF PROOF**

As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

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<sup>1</sup> Order to Produce Discovery dtd 22 Mar 24

## LAW

M.R.E. 505(a) provides, “Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.” M.R.E. 505(h) authorizes the military judge, upon the submission of a declaration invoking the United States’ classified information privilege, to deny or otherwise restrict discovery to the accused of classified documents and information.<sup>2</sup>

Upon the request of the prosecution, the military judge must conduct an *in camera* review of the prosecution’s motion and any materials submitted in support thereof and must not disclose such information to the accused.<sup>3</sup> If the information is discoverable, it must be determined how the information is to be protected from disclosure through various means.<sup>4</sup> If the discovery of or access to classified information would be noncumulative and relevant to a legally cognizable defense, rebuttal to the prosecution’s case, or to sentencing, the military judge may authorize substitutions and other alternatives.<sup>5</sup> The government may demonstrate that substitutions and other alternatives are warranted in an *ex parte, in camera* hearing with the military judge alone.<sup>6</sup>

For example, the government may request that the court deny discovery of a classified document in its entirety because it is not discoverable under the relevant legal standard.<sup>7</sup> Alternatively, the government may file a motion to delete specific classified information from a document that either the government or the court has deemed discoverable, or to substitute an unclassified summary or admission in the place of the document.<sup>8</sup> The military judge must grant the request for alternatives if the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.<sup>9</sup> Moreover, an order of a military judge authorizing to substitute, summarize, withhold, or prevent access to classified information is not subject to a motion for reconsideration by the accused if entered pursuant to an *ex parte* showing.<sup>10</sup>

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<sup>2</sup> M.R.E. 505(h). See *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (After an *ex parte, in camera* hearing, the United States obtained permission to substitute admissions for discoverable documents).

<sup>3</sup> M.R.E. 505(h)(2)(B).

<sup>4</sup> See *United States v. Libby*, 429 F. Supp. 2d 18, 22 (D.D.C. 2006) (amended by *United States v. Libby*, 429 F. Supp. 2d 46, 47 (D.D.C. 2006)); see also *Klimavicius-Viloria*, 144 F.3d at 1261-62; *Rezaq*, 134 F.3d at 1142; *Yunis*, 867 F.2d at 619-25; *Kasi v. Angelone*, 200 F. Supp. 2d 585, 596 n.6 (E.D. Va. 2002).

<sup>5</sup> M.R.E. 505(h).

<sup>6</sup> See *Aref*, 533 F.3d at 81 (“In a case involving classified documents, ... *ex parte, in camera* hearings in which the government counsel participates to the exclusion of the defense counsel are part of the process that the district court may use in order to decide the relevancy of the information.” (quoting *Klimavicius-Viloria*, 144 F.3d at 1261)); see also *Yunis*, 867 F.2d at 619.

<sup>7</sup> See, e.g., *Abu-Jihaad*, 630 F.3d at 141-42; *Yunis*, 867 F.2d at 624-25; *Libby*, 429 F. Supp. 2d at 47-48.

<sup>8</sup> See *Libby*, 429 F. Supp. 2d at 47; see also *In re Terrorist Bombings of the U.S. Embassies in E. Afr.*, 552 F.3d 93, 124-25 (2d Cir. 2008) (approving the substitution of government stipulations in the place of otherwise helpful classified information); *Dumeisi*, 424 F.3d at 578 (approving substitution of unclassified summary in the place of classified information); *United States v. Rahman*, 870 F. Supp. 47, 53 (S.D.N.Y. 1994) (“[I]t is sufficient to disclose the substance of the information...[T]he document itself need not be disclosed.”).

<sup>9</sup> M.R.E. 505(h)(2)(C).

<sup>10</sup> M.R.E. 505(h)(3).

**DISCUSSION AND RELIEF REQUESTED**

Pursuant to the Court’s Order, the equity holder has provided the relevant information and has claimed the United States’ Classified information privilege in a proper declaration. Per MRE 505 and because of the classification level of both the records and the declaration, trial counsel seeks to have an ex parte conference with the Military Judge to provide the declaration, the records, and trial counsel’s proposed summary.


**EVIDENCE**

Trial Counsel seeks to provide the declaration, the records, and the proposed summary in an *ex parte* conference in classified spaces.

**ORAL ARGUMENT**

Government does not request oral argument.


Respectfully submitted,

  
CDR, JAGC, USN  
Trial Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this motion was served on the Military Judge and Defense Counsel on this 8<sup>th</sup> day of April 2024.

  
L.A. OBRIEN  
CDR, JAGC, USN  
Trial Counsel

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

<p><b>UNITED STATES</b></p> <p><b>v.</b></p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC, USN</b></p>	<p><b>GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – COMPEL WITNESS ON PRE-SENTENCING</b></p> <p><b>15 MARCH 2024</b></p>
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**NATURE OF RESPONSE**

The Government concedes that the in-person testimony of either the Accused’s mother or father should be granted. The Government will grant the telephonic testimony of the other parent. The Government respectfully requests that the Court deny Defense’s Motion for Appropriate Relief – Compel Witness on Pre-Sentencing (“Defense’s Motion”). Defense has failed to meet its burden, pursuant to Rules for Courts-Martial (RCM) 703 and Article 46 of the Uniform Code of Military Justice (UCMJ), to show that the in-person testimony of the Accused’s father is necessary.

**FACTS**

1. FCAC Pedicini is charged, inter alia, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>1</sup>
2. For each of the Charge III Specifications, FCAC Pedicini faces life in prison and a dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>2</sup>
3. On 27 February 2024, the Defense sent a request for production of witnesses to the Government, which included the following:  
“b. [REDACTED], The Defense requests Mrs. [REDACTED] for sentencing. Mrs. [REDACTED] is FCAC’s mother and will be *able to testify about FCAC Pedicini’s childhood, upbringing, time in the Navy, character, and rehabilitative potential* which will be relevant to the factfinder in determining an appropriate sentence if FCAC Pedicini is convicted.

<sup>1</sup> Charge Sheet.

<sup>2</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

“c. [REDACTED], [], The Defense requests Mr. [REDACTED] for sentencing. Mr. [REDACTED] is FCAC Pedicini’s father and will be able to testify at sentencing, if necessary, concerning FCAC Pedicini’s childhood experiences and upbringing, Naval service, and other mitigating factors including rehabilitative potential. [REDACTED] is not cumulative with [REDACTED] because he will offer a different perspective and memories of different facts for consideration of the factfinder.”<sup>1</sup>

4. On 4 March 2024, the Government responded to the Defense request for production of witnesses and denied Defense’s request for [REDACTED] as cumulative with the mother’s testimony.<sup>2</sup>
5. On 11 March 2024, Defense filed a motion to compel production of [REDACTED] in-person testimony for presentencing, stating the following as the reason why it is not distinct from the Accused’s mother’s testimony:

“His mother will provide a nurturing maternal perspective on FCAC Pedicini, his background and early years, through to his time joining the military. Hers is a unique perspective that is inherently different from his father’s because of the different roles of a mother and a father. Each balances the other in providing a complete picture of FCAC Pedicini[.]”<sup>3</sup>

### **BURDEN**

The burden of proof for establishing the materiality and necessity of the witnesses and evidence by a preponderance of the evidence rests with the Defense. R.C.M 905(c).

### **LAW**

Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits would be relevant and necessary, and who is not unavailable. As the moving party, the Defense must demonstrate that its requested witnesses are relevant and necessary before any order to produce is required.<sup>4</sup>

Evidence is relevant if it has any “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>5</sup> Relevant testimony is necessary “when it is not cumulative and when it would contribute to a party’s presentation in some positive way on a matter in issue.”<sup>6</sup> To avoid being cumulative, the testimony of the requested witness must vary in some way from the

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<sup>1</sup> Enclosure A (emphasis added).

<sup>2</sup> Enclosure B.

<sup>3</sup> Enclosure C.

<sup>4</sup> R.C.M. 905(c); *United States v. Allen*, 31 M.J. 572 610 (N.M.C.R. 1990) (citing *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978)); *United States v. Breeding*, 44 M.J. 345 (1996).

<sup>5</sup> Military Rule of Evidence (M.R.E.) 401.

<sup>6</sup> See R.C.M. 703(b)(1), Discussion.

testimony of the already-attending witnesses.<sup>1</sup> In *United States v. Allen*, the court set forth three questions the Military Judge must resolve in determining whether witnesses are cumulative:

(1) Is the credibility and demeanor of the requested witness greater than that of the attending witness? (2) Is the testimony of the requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of the attending witness? (3) Will any benefit accrue to the accused from an additional witness saying the same thing other witnesses have already said?<sup>2</sup>

Materiality is defined as “reasonable likelihood that the evidence could have affected the judgement of the military judge or the court members.”<sup>3</sup> “A witness is material when he either negates the Governments evidence or supports the Defense.”<sup>4</sup>

The court, with the consent of the parties, may permit any witness to testify via remote means.<sup>5</sup> The court may permit a witness to testify as to interlocutory questions by remote means over the Accused’s objection if the “practical difficulties of producing the witness outweigh the significance of the witness’ personal appearance.”<sup>6</sup> Factors to be considered in making this determination include: “the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.”<sup>7</sup>

With regard to presentencing proceedings, there is also much greater latitude to receive information from witnesses testifying remotely under R.C.M. 1001(f)(1). Parties seeking production of an in-person sentencing witnesses must establish the following factors to show necessity:

- (a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.
- (b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence.
- (c) The other party refuses to enter into a stipulation of fact.
- (d) Other forms of evidence (deposition, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence.

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<sup>1</sup> See *Allen*, 31 M.J. at 611.

<sup>2</sup> *Id.*

<sup>3</sup> *Allen*, 31 M.J. at 610.

<sup>4</sup> *Id.*

<sup>5</sup> R.C.M. 703(b)(1).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

(e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production.<sup>1</sup>

The Defense shoulders the burden to set forth a synopsis of expected testimony, grounded in evidence rather than mere proffer or speculation, sufficient to show relevance and necessity. Pursuant to R.C.M. 703(c)(2)(B)(i), the Defense must set forth a “synopsis of the expected testimony sufficient to show its relevance and necessity.” Both in the initial request submitted to trial counsel and in a subsequent motion to the court, a witness production request “requires more than a suppositional ‘could have’ or ‘might be’ justification. To get the abstract issue into the present controversy, the Defense must cross the threshold with some evidence tending to show that what could have or might have happened, did happen, in this case.”

Without a sufficient showing, grounded in evidence, the witness production request should be denied and doing so does not result in error under Article 46 or contravene the accused’s constitutional rights. Further, with respect to presentencing proceedings, the defense must include in their request the “reasons why the witness’s personal appearance will be necessary under the standard set forth in” RCM 1001(f).

## **DISCUSSION**

1. Government will concede to granting the in-person testimony of one parent and the telephonic testimony of the other parent.

In an effort to show good faith, the Government will not contest Defense’s assertions that the testimony of both the Accused’s parents will be helpful to Defense’s sentencing case.

2. Defense has not met its burden to show that in-person testimony of more than one parent is necessary pursuant to the RCM 1001(f) factors.

Although the Defense has a wide latitude to request presentencing witnesses, especially in a case where the punishment faced is life in prison, Defense have presented no reasons for why remote testimony of one parent would not be sufficient. Defense offers the naked assertion that the mother’s testimony “is a unique perspective that is inherently different from his father’s because of the different roles of a mother and a father.”<sup>2</sup> This explanation offers no expected testimony for the Court to consider pursuant to RCM 703. It offers no reason why one of the parent’s remote testimony “would not be sufficient in the determination of an appropriate sentence.”<sup>3</sup>

## **RELIEF REQUESTED**

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<sup>1</sup> R.C.M. 1001(f)(2).

<sup>2</sup> Enclosure C.

<sup>3</sup> R.C.M. 1001(f)(2)(d).



The Government respectfully requests the Court deny the Defense's request for the in-person testimony of [REDACTED] and instead grant one of the parents' permission to testify remotely for presentencing.

### **EVIDENCE**

Enclosure A: Defense's Witness Request

Enclosure B: Government's Response to Defense's Witness Request

Enclosure C: Defense's Motion

### **ORAL ARGUMENT**

The Government is prepared to make oral argument.

[REDACTED]

A. R. REMSEN  
LT, JAGC, USN  
Trial Counsel

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I certify that I have served a true copy (via e-mail) of the above on the Military Judge and Defense counsel on 15 March 2024.

[REDACTED]

A. R. REMSEN  
LT, JAGC, USN  
Trial Counsel

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

U N I T E D   S T A T E S

v.

**BRYCE S. PEDICINI**

**FCAC/E-7, USN**

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION FOR  
APPROPRIATE RELIEF**  
(Compel Discovery or Abate Proceedings)

15 Feb 24

**NATURE OF RESPONSE**

The government is not in the possession of the full name, address, phone number and email address of the [REDACTED] and therefore has complied with its discovery obligations under Rule for Courts-Martial (RCM) 701(a)(2)(A). As such, the government respectfully requests the Court deny the defense's motion.

**FACTS**

The government agrees with defense's enumerated facts and adds the following:

1. On 13 February, government responded to defense's request for discovery. Enclosure (1).
2. The information included in defense's discovery request is not in the possession of the government.
3. The government has provided the defense with the country of origin of the [REDACTED], which is a foreign country.
4. Since the inception of this case, the government has been working to declassify additional intelligence information related to the country of origin and employment status of the [REDACTED]. The government expects to be able to discover information at the SECRET level on this topic by 20 February. However, this discovery does not include the specific items requested by defense, which are the subject of this motion.

**BURDEN**

As the moving party, the defense bears the burden of proof and persuasion.<sup>1</sup> The standard for any factual issue necessary to resolve this motion is by a preponderance of the evidence.<sup>2</sup>

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<sup>1</sup> R.C.M. 905(c)(2)(A).

<sup>2</sup> R.C.M. 905(c)(1).

## LAW

Article 46 of the Uniform Code of Military Justice (UCMJ) states that the parties to a court-martial “shall have equal opportunity to obtain witnesses and other evidence.” RCM 701(a) and 703 are the applications of this statutory demand. RCM 701(a)(2)(A) entitles the defense, upon request, to inspect any documents “which are within the possession, custody, or control of military authorities, and which are relevant to the preparation of the defense.” Notwithstanding a party’s entitlement to evidence that is relevant to defense preparation, a party is “not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process.”<sup>1</sup> Further, as the moving party, the defense is required as a threshold matter to show that the requested material exists.<sup>2</sup>

## DISCUSSION

Defense essentially seeks the contact information of an individual who is a known intelligence officer of a foreign country. The government does not have this information but has agreed to provide defense with what information it does have concerning the [REDACTED]. This information speaks to the government’s assertion that the [REDACTED] is “a citizen and employee of a foreign government.”

In the event defense’s motion changes to a production request under RCM 703, government will be prepared to argue under that standard.

## EVIDENCE

Enclosure (1): Government Response to Defense Initial Request for Discovery ICO United States v. FCAC Bryce S. Pedicini, U.S. Navy

## ORAL ARGUMENT

Once it is available, government plans to file approximately 20 pages of SECRET discovery with the Court to supplement this motion. Government requests the Court review this filing prior to an unclassified session of court on 21 February. Government believes there is not a need for a classified court session at this time.

[REDACTED]  
E. A. O'BRIEN  
CDR, JAGC, USN  
Trial Counsel


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<sup>1</sup> RCM 703(e)(2).

<sup>2</sup> *United States v Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); see *United States v Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992) (noting, generally, the “government has no responsibility to create records to satisfy demands for them”).

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I certify that I have served a true copy (via e-mail) of the above on the Military Judge and Defense counsel on 15 February 2024.



L. A. O'BRIEN  
CDR, JAGC, USN  
Trial Counsel

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

<b>UNITED STATES</b>  v.  <b>BRYCE S. PEDICINI</b> FCAC, USN	<b>GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – COMPEL WITNESS PRODUCTION</b>  <b>15 MARCH 2024</b>
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**NATURE OF RESPONSE**

The Government respectfully requests that the Court deny Defense’s Motion for Appropriate Relief to Compel Witness Production for trial (“Defense’s motion”). Defense has failed to meet its burden, pursuant to Rules for Courts-Martial (RCM) 703 and Article 46 of the Uniform Code of Military Justice (UCMJ), to show that the production of the [REDACTED] (herein [REDACTED] is relevant and necessary, nor is he/she reasonably available.

**FACTS**

1. On 24 October, 2022, the [REDACTED] contacted the Accused via Facebook messenger and stated that he/she was a defense researcher from [REDACTED].<sup>1</sup>
2. Over Facebook messenger, the [REDACTED] offered the Accused money in exchange for information about the United States military capabilities and strategies in the [REDACTED] Region.<sup>2</sup>
3. Over Facebook messenger, the [REDACTED] told the Accused that he/she would send the Accused more money based on the value and sensitivity of the information the Accused could provide and specifically asked for classified information.<sup>3</sup>
4. Between November 2022 and May 2023, the Accused sent documents titled “article 1112,” “Article 1112 add on 2,” article 1112 add on 3,” “Article 1223,” “Article 1223 add on 1,” Article 1223 add on 2,” and “1223 Updates” to the [REDACTED] through Facebook messenger and other electronic means.<sup>4</sup>
5. On 8 May, 2023, the Accused sent photographs of material accessed on a SIPR terminal to

<sup>1</sup> Enclosure D at bates 00874.

<sup>2</sup> Id. At bates 00555-00582.

<sup>3</sup> Id. At bates 00555-00582.

<sup>4</sup> Charge Sheet at pg 2-3; Enclosure D; SECRET Enclosure E.

the [REDACTED] by electronic means.<sup>1</sup>

6. FCAC Pedicini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>2</sup>
7. On 29 February 2024, Government counsel requested information about the [REDACTED] from the government agencies listed in SECRET Enclosure A. As of the date of this filing, no government agency has returned the [REDACTED] contact information or current location.
8. On 27 February 2024, Defense requested the production of the [REDACTED] as a witness.<sup>3</sup>
9. On 4 March 2024, the Government denied Defense's request.<sup>4</sup>
10. On 11 March 2024, Defense filed the instant motion to compel production of the [REDACTED] as a witness for trial.<sup>5</sup>

## BURDEN

The burden of proof for establishing the materiality and necessity of the witnesses and evidence by a preponderance of the evidence rests with the Defense. R.C.M 905(c).

## LAW

### 1. Only witnesses with necessary and relevant testimony must be produced.

Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits would be relevant and necessary, and who is not unavailable. As the moving party, the Defense must demonstrate that its requested witnesses are relevant and necessary before any order to produce is required.<sup>6</sup>

Evidence is relevant if it has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>7</sup> Relevant testimony is necessary "when it is not cumulative and when it would contribute to a party's presentation in some positive way on a matter in issue."<sup>8</sup> To avoid being cumulative, the testimony of the requested witness must vary in some way from the

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<sup>1</sup> SECRET Enclosure E.

<sup>2</sup> Charge Sheet.

<sup>3</sup> Enclosure G.

<sup>4</sup> Enclosure H.

<sup>5</sup> Enclosure I.

<sup>6</sup> R.C.M. 905(c); *United States v. Allen*, 31 M.J. 572, 610 (N.M.C.R. 1990) (citing *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978)); *United States v. Breeding*, 44 M.J. 345 (1996).

<sup>7</sup> Military Rule of Evidence (M.R.E.) 401.

<sup>8</sup> See R.C.M. 703(b)(1), Discussion.

testimony of the already-attending witnesses.<sup>1</sup> In *United States v. Allen*, the court set forth three questions the Military Judge must resolve in determining whether witnesses are cumulative:

(1) Is the credibility and demeanor of the requested witness greater than that of the attending witness? (2) Is the testimony of the requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of the attending witness? (3) Will any benefit accrue to the accused from an additional witness saying the same thing other witnesses have already said?<sup>2</sup>

Materiality is defined as “reasonable likelihood that the evidence could have affected the judgement of the military judge or the court members.”<sup>3</sup> “A witness is material when he either negates the Governments evidence or supports the Defense.”<sup>4</sup>

The Defense shoulders the burden to set forth a synopsis of expected testimony, grounded in evidence rather than mere proffer or speculation, sufficient to show relevance and necessity. Pursuant to R.C.M. 703(c)(2)(B)(i), the Defense must set forth a “synopsis of the expected testimony sufficient to show its relevance and necessity.” Both in the initial request submitted to trial counsel and in a subsequent motion to the court, a witness production request “requires more than a suppositional ‘could have’ or ‘might be’ justification. To get the abstract issue into the present controversy, the Defense must cross the threshold with some evidence tending to show that what could have or might have happened, did happen, in this case.”

Without a sufficient showing, grounded in evidence, the witness production request should be denied and doing so does not result in error under Article 46 or contravene the accused’s constitutional rights. Further, with respect to presentencing proceedings, the defense must include in their request the “reasons why the witness’s personal appearance will be necessary under the standard set forth in” RCM 1001(f).

## 2. There is no right to the production of a witness who is unavailable.

The Defense does not have a right to production of a witness who is unavailable, per R.C.M. 703(b)(3) and M.R.E. 804(a).<sup>5</sup> A witness is unavailable, per M.R.E. 804(a)(5)(A) and 804(a)(5)(B), when the Government is not “able, by process or other reasonable means, to procure . . . the declarant’s attendance . . . or testimony.” Whether the Government has satisfied its duty to produce a witness is a question of reasonableness.<sup>6</sup> “The ultimate question is whether

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<sup>1</sup> See *Allen*, 31 M.J. at 611.

<sup>2</sup> *Id.*

<sup>3</sup> *Allen*, 31 M.J. at 610.

<sup>4</sup> *Id.*

<sup>5</sup> R.C.M. 703(b)(3); M.R.E. 804(a); see *United States v. Kitmanyen*, No. ARMY 20110609, 2011 CCA LEXIS 374, at \*19 (A. Ct. Crim. App. Oct. 31, 2011). “[A] party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a).”

<sup>6</sup> See *United States v. Barreto*, 57 M.J. 127, 132 (C.A.A.F. 2002). “Insofar as Mil.R.Evid. 804(b)(5) is concerned . . . the requirements for establishing unavailability may not be so high as those imposed by the sixth amendment.” *United States v. Cordero*, 22 M.J. 216, 220 (C.M.A. 1986).

the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.”<sup>1</sup> Reasonable means include obtaining subpoenas and writs of attachment.

However, a witness must be subject to United States jurisdiction to be subject to United States process.<sup>2</sup> Even with foreign treaties, military courts have no means “whereby a [foreign] national can be compelled to travel to California to testify in an American court-martial.”<sup>3</sup> The duty of the Government to exhaust reasonable means to produce a witness does not require futile actions if no possibility of procuring the witness exists.<sup>4</sup>

If a witness is unavailable, but their testimony 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’s presence or shall abate the proceedings.<sup>5</sup> No relief should be granted if the unavailability of the witness is the fault of or could have been prevented by the requesting party.<sup>6</sup>

## DISCUSSION

1. The [REDACTED] testimony is not relevant and necessary because other witnesses can provide the information.

The [REDACTED] testimony on his/her specific identity and on what information is publically available is not relevant and necessary because other evidence may establish the [REDACTED] as an agent or employee of a foreign nation and because the [REDACTED] is not an authority on what information is public. First, while the [REDACTED] testimony may meet the low threshold of relevance, Defense has not shown any evidence that the [REDACTED] testimony is necessary to establish the status of the [REDACTED]. Defense has offered no evidence, or even speculation, that the testimony will help Defense refute the assertion that the [REDACTED] is a foreigner not entitled to receive national defense information. To the contrary, the [REDACTED] states in Facebook messages that he/she is an employee of a Japanese research organization,<sup>7</sup> making him/her both foreign and not entitled to receive national defense information.

Second, Defense has not offered any evidence or expected testimony about why the [REDACTED] testimony is necessary to establish what information was or was not publically available. Another witness, such as an expert in the field, would be better suited to present evidence that certain information the Accused produced was publically available. The [REDACTED] lay opinion about what was or was not publically available is neither relevant nor necessary to present a defense to Charges II and IV.

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<sup>1</sup> *Id.*

<sup>2</sup> *United States v. Ortiz*, 35 M.J. 391, 393 (C.A.A.F. 1992) (internal quotations omitted).

<sup>3</sup> *United States v. Cordero*, 22 M.J. 216, 220 (C.M.A. 1986)

<sup>4</sup> See *United States v. Crockett*, 21 M.J. 423, 429-30 (C.M.A. 1986); *United States v. Kitmanyen*, No. ARMY 20110609, 2011 CCA LEXIS 374, at \*20 (A. Ct. Crim. App. Oct. 31, 2011); *Ohio v. Roberts*, 448 U.S. 56, 74-75, 100 S. Ct. 2531, 2543 (1980).

<sup>5</sup> R.C.M. 703(b)(3).

<sup>6</sup> R.C.M. 703(b)(3).

<sup>7</sup> Enclosure D.



Defense has failed to set forth a synopsis of expected testimony that would meet the requirements of R.C.M. 703(c)(2)(B)(i) for both topics of testimony, and therefore Defense has not shown that the [REDACTED] testimony is relevant and necessary. Defense's request for production should be denied.

2. The [REDACTED] is unavailable because the Government has exhausted all reasonable means of contacting the [REDACTED].

Even if the [REDACTED] production was relevant and necessary, Defense does not have a right to production of a witness who is unavailable, per R.C.M. 703(b)(3) and M.R.E. 804(a).<sup>1</sup> The Government has met its burden to make a reasonable, good-faith effort to locate and present the [REDACTED]. The [REDACTED] is a person whose contact information and current location is unknown to the Government. The Government has made a good-faith effort to get the contact information of the [REDACTED] and has requested this information from intelligence community agencies, enumerated in SECRET Government Enclosure A. As of the date of this filing, the agencies have not provided any contact information for the [REDACTED] nor information that would help the Government make reasonable efforts to procure the [REDACTED] for trial. Even if the Government possessed the contact information of the [REDACTED] the [REDACTED] is a foreign person not subject to the American legal process, and thus the Government has no way to compel a foreigner to participate in a court-martial.<sup>2</sup>

In *United States v. Barreto*, two unknown German witnesses were deemed to be "unavailable" for the purposes of R.C.M. 703 when the prosecution team placed advertisements in local papers where the witnesses might see them and was still not able to locate the witnesses. In this case, we similarly have a foreign witness whose location is *not* known. Even after consulting the government agencies listed in Enclosure A, the Government has no means by which to contact or attempt to contact the [REDACTED]. The Government is not obligated to do a "futile" act in order to attempt to contact potentially unavailable witnesses. Unlike in *Barreto*, where the unknown persons had witnessed a car accident and thus may conceivably answer a newspaper ad seeking their testimony, a foreign intelligence officer is not going to answer a public call for their testimony. It would be futile and unreasonable for Government counsel in this case to solicit the country named in SECRET Enclosure B to put them in contact with one of their intelligence officers.

The Government has exhausted all reasonable methods to contact the [REDACTED] by seeking contact information through the government agencies listed in Enclosure A. Because the Government cannot contact the [REDACTED], the [REDACTED] is unavailable under per M.R.E. 804(a)(5)(A), M.R.E. 804(a)(5)(B), and R.C.M. 703.

3. The [REDACTED] testimony is not essential to a fair trial and there are adequate substitute witnesses who can testify to any potentially publically available information.

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<sup>1</sup> R.C.M. 703(b)(3); M.R.E. 804(a); see *United States v. Kitmanyen*, No. ARMY 20110609, 2011 CCA LEXIS 374, at \*19 (A. Ct. Crim. App. Oct. 31, 2011). "[A] party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a)."

<sup>2</sup> Enclosure C.

A fair trial in this case does not require the [REDACTED] presence or testimony. Defense asserts that they intend to call the [REDACTED] to testify “that the information provided by FCAC Pedicini is publically available . . . .”<sup>1</sup> The [REDACTED] lay opinion of what information is publically available is not essential to a fair trial, because alternative witnesses are able to testify with greater credibility to what information is or is not publically available. Defense is welcome to call experts in digital forensics, the history of the internet, or from the intelligence community to discuss what information is publically available.

Defense asserts that the [REDACTED] will also testify about his/her identity as it relates to Charges III and IV and that “there is no substitute to the [REDACTED] testimony regarding his or her identity.”<sup>2</sup> It is true that, in order to prove Charges III and IV, the Government must show that the [REDACTED] is a citizen or employee of a foreign nation or a person not entitled to receive national defense information. However, the [REDACTED] first-hand in-person testimony about his/her identity is not essential for the Accused to have a fair trial. It cannot be possible that, in every espionage prosecution in America, the foreigner or foreign spy must be called to testify in trial. If that were the case, there would never be any espionage prosecutions at all and U.C.M.J. Article 103a and The Espionage Act would be meaningless. The Government can find no published espionage case where the Government was able, or required, to call an [REDACTED] [REDACTED] as a trial witness, except where that [REDACTED] was also an American citizen.

In this case, Defense possess meaningful alternatives to the [REDACTED] testimony about his/her identity in the form of the correspondence between the Accused and the [REDACTED] over Facebook, where the [REDACTED] stated that he/she was Japanese.<sup>3</sup> Defense also possess the statement of the Accused’s colleague, to whom the Accused told that the Accused believed he was in contact with someone or something from the country named in SECRET Enclosure B.<sup>4</sup>

The [REDACTED] testimony is not relevant and necessary to this case. Further, the [REDACTED] is unavailable pursuant to R.C.M. 703 and his/her testimony is not necessary for a fair trial.

### **RELIEF REQUESTED**

The Government respectfully requests the Court deny the Defense’s motion.

### **EVIDENCE**

Enclosure A: SECRET agency names  
Enclosure B: SECRET [REDACTED] country of origin  
Enclosure C: SECRET Initial NCIS ROI, bates S 1-8  
Enclosure D: Facebook Conversation  
Enclosure E: SECRET Signal Messages  
Enclosure F: NCIS combined ROIS May 2023

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<sup>1</sup> Enclosure I.

<sup>2</sup> Enclosure I.

<sup>3</sup> Enclosure D at bates 000874.

<sup>4</sup> Enclosure F at bates 00069-00070; Enclosure B.

Enclosure G: Defense Request for Witnesses dtd 27 February 24  
Enclosure H: Government Response dtd 4 March 24  
Enclosure I: Defense Motion to Compel Production of Witness dtd 8 March 24

**ORAL ARGUMENT**

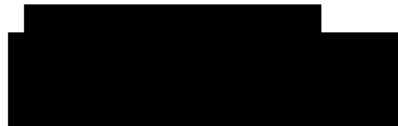
The Government is prepared to make oral argument.



A. R. REMSEN  
LT, JAGC, USN  
Trial Counsel

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I certify that I have served a true copy (via e-mail) of the above on the Military Judge and Defense counsel on 15 March 2024.



A. R. REMSEN  
LT, JAGC, USN  
Trial Counsel

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

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<p><b>UNITED STATES</b></p> <p>v.</p> <p><b>BRYCE S. PEDICINI</b> FCAC/E-7                  USN</p>	<p><b>GOVERNMENT MOTION FOR APPROPRIATE RELIEF (PRE- ADMISSION OF EVIDENCE)</b></p> <p><b>11 March 2024</b></p>
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**NATURE OF MOTION**

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13), the Government moves for a preliminary ruling admitting into evidence the Accused’s signed security briefing acknowledgement form, which is an enclosure to the HIGGINSINST 5510.2C.

**BURDEN**

As the moving party, the Government bears the burden of persuasion on the factual issues of this motion by a preponderance of the evidence. R.C.M. 905(c)(1) and (2).

**FACTS**

a. The accused is charged, *inter alia*, with two specifications of failing to obey a command instruction, in violation of Article 92, Uniform Code of Military Justice (UCMJ), and eight specifications of espionage, in violation of Article 103a, UCMJ. (Charge Sheet).

b. After arriving at [REDACTED] the Accused was provided a security briefing form on 25 April 2023 from the Security Manager for the command via the Security Petty Officer, which is an enclosure to the command’s security manual instruction; identified as HIGGINSINST 5510.2C. (Enclosure 1).

c. On 25 April 2023, the Accused signed the security briefing form acknowledging he was aware of the orders within the instruction. (Enclosure 1).

d. The instruction, *inter alia*, required the Accused to report: (1) foreign contacts; and (2) any solicitations of classified information by an unauthorized person. (Enclosure 1).

e. Lieutenant Junior-Grade (LTJG) [REDACTED] who has been appointed as the command's Special Security Officer and Assistant Security Manager, provided a certification stating that the Accused's signed security briefing acknowledgement form was made and kept by [REDACTED] in the ordinary course of a regularly conducted activity and made at or near the time of the occurrence by a person with knowledge of those matters. (Enclosure 2).

#### LAW

R.C.M. 906(b)(13) permits parties to request a preliminary ruling on the admissibility of evidence. Pursuant to Mil. R. Evid. 402, all relevant evidence is admissible unless otherwise inadmissible by law. Evidence is relevant if: (1) it makes a fact more or less probable; and (2) the fact is consequential in determining the action. M.R.E. 401. However, courts may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, confusion, or waste of time. M.R.E. 403.

An out of court statement offered to prove the truth of the matter asserted is considered hearsay and is inadmissible unless excluded or excepted from the rule. M.R.E. 801, 802, 803. One exception to the rule against hearsay is for records of regularly conducted activity. M.R.E. 803(6). Under this exception, a record of an act can be admitted if: "(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a [business, organization, or occupation,] whether or not conducted for profit; (C) making the record was a regular practice of

that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [M.R.E.] 902(11) or with a statute permitting certification in a criminal proceeding in a court of the United States; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” *Id.*

Under Mil. R. Evid. 902(11), certified domestic records of a regularly conducted activity are self-authenticating, meaning they require no extrinsic evidence of authenticity to be admitted. For evidence to be self-authenticating, the original or copy of the record must meet M.R.E. 803(6)(A)-(C) requirements, “as shown by a certification of the custodian or another qualified person . . . [b]efore the trial or hearing . . . .” M.R.E. 902(11). “The proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them.” *Id.*

## **DISCUSSION**

### **A. The Accused’s acknowledgement form to the HIGGINSINST 5510.2C should be pre-admitted because it is relevant to Charge II, Specifications 2 and 3.**

The Government moves to pre-admit the Accused’s security briefing acknowledgement form to the HIGGINSINST 5510.2C, which he signed on 25 April 2023. To prove the Accused’s failure to obey the lawful order, HIGGINSINST 5510.2C, which was issued by the Commanding Officer, [REDACTED] the Government must show the Accused first knew of said order. The lawful orders alleged in Charge II, Specifications 2 and 3, respectively, requires the Accused to report foreign contacts as well as solicitations of classified information by unauthorized persons. The acknowledgement form is relevant because it establishes that the Accused was aware of those orders; an element of the offense.

**B. The Accused's acknowledgement form to the HIGGINSINST 5510.2C should be pre-admitted because it satisfies Mil. R. Evid. 803(6) and is self-authenticating.**

The Accused's security briefing acknowledgement form qualifies as an exception to the rule against hearsay because it is a record of a regularly conducted activity, pursuant to Mil. R. Evid. 803(6), and is self-authenticating. The security briefing acknowledgement form is accompanied by a declaration from LTJG [REDACTED] who has been appointed as the Special Security Officer and Assistant Security Manager for [REDACTED]. As a person qualified to make such a declaration, LTJG [REDACTED] certified that, based on his position and knowledge of the command's practices and procedures, the security briefing acknowledgement form is a record "made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters." He also certified that it is the regular practice of [REDACTED] to make and keep this security briefing acknowledgement form in the ordinary course of regularly conduct activities. Accordingly, the Accused's acknowledgement form satisfies the requirements of a self-authenticating record of a regularly conducted activity under M.R.E. 902(11).

**RELIEF REQUESTED**

The Government respectfully requests the Court pre-admit the Accused's signed security briefing acknowledgement form as relevant, admissible evidence pursuant to R.C.M. 906(b)(13).

**ORAL ARGUMENT**

The Government is prepared to make oral argument on this motion.

**EVIDENCE**

Enclosure 1: Accused's Security Briefing Acknowledgement Form

Enclosure 2: Declaration of LTJG [REDACTED]

[REDACTED]  
C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served upon Defense Counsel and the Court in the above captioned case on 11 March 2024.

[REDACTED]  
C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel



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

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<p style="text-align:center"><b>UNITED STATES</b></p> <p style="text-align:center">v.</p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC/E-7</b> <b>U.S. NAVY</b></p>	<p style="text-align:center"><b>DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE PURSUANT TO M.R.E. 404(b)</b></p> <p style="text-align:center"><b>8 MARCH 2024</b></p>
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**MOTION**

Pursuant to Rule for Courts-Martial (R.C.M.) 905 and Military Rule of Evidence (M.R.E.) 404(b), the Defense moves this Court to preclude the government from providing evidence that FCAC Pedcini received a document from the [REDACTED] that was marked “secret” in order to show motive, plan, and intent.

**SUMMARY**

On 4 March 2024, the Government notified the Defense of its intent to introduce evidence that may fall under M.R.E. 404(b). In the notification, the Government stated it intended to offer evidence that FCAC Pedcini received a document marked “secret” from the [REDACTED] as an example of “what he/she wanted” from the Accused. The Government fails to meet the three-pronged test of *United States v. Reynolds* in all three categories and the Defense moves this court to exclude the evidence under M.R.E. 404(b).

**BURDEN**

As the proponent of the evidence, the Government bears the burden.

**FACTS**

1. FCAC Pedcini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>1</sup>
2. For each of the Charge III Specifications, FCAC Pedcini faces life in prison and a

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<sup>1</sup> Charge Sheet.

dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>2</sup>

3. On 4 March 2024, the Government provided the Defense notice of M.R.E. 404(b) evidence that included the following:

“d. The Government intends to offer evidence that the Accused received a document marked “secret” from the [REDACTED] as an example of what he/she wanted the Accused to send in return, which is also known in discovery as the “Mitch document”, located on Bates #00774. This evidence, along with the context of the conversation, will be used to show the Accused’s motive, plan, and intent he had in later accessing and sending what he believed to be secret documentation.”<sup>3</sup>”

## LAW

M.R.E. 404(b)(1) provides that evidence of other crimes, wrongs, or other acts is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.<sup>4</sup> M.R.E. 404 states that the evidence of other crimes, wrongs, or other acts *may* be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.<sup>5</sup> The admissibility of such evidence is also subject to the requirement that its probative value be weighed against danger of unfair prejudice.<sup>6</sup>

M.R.E. 404(b) notice requirements were amended on 1 June 2022 to parallel the Federal Rules of Evidence amendment made on 1 December 2020.<sup>7</sup> While previously, the government only had to provide notice of the general nature of the evidence it would offer under 404(b)<sup>8</sup>, now the government must also (1) “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence” and (2) state the “reasoning that supports the purpose.”<sup>9</sup>

To determine whether uncharged conduct is admissible evidence under M.R.E. 404(b), a court must determine: (1) whether the evidence reasonably supports a finding by members that the accused committed prior crimes, wrongs, or acts; (2) the fact of consequence that is made more or less probable by the existence of this evidence; and (3) whether the probative value substantially outweighs the danger of unfair prejudice under M.R.E. 403.<sup>10</sup> The length of time between when the alleged offense took place and the act sought to be introduced clearly affects the relevancy of the offered evidence with regards to M.R.E. 404(b).<sup>11</sup>

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<sup>2</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

<sup>3</sup> Attachment A at 1.

<sup>4</sup> M.R.E. 404(b)(1).

<sup>5</sup> M.R.E. 404(b)(2) (emphasis added).

<sup>6</sup> *United States v. Mirandes-Gonzalez*, 26 M.J. 411, 413 (C.M.A. 1988) (citing M.R.E. 403).

<sup>7</sup> M.R.E. 1102(a); FED. R. EVID. 404(b)(3).

<sup>8</sup> M.R.E. 404(b)(2)(A).

<sup>9</sup> FED. R. EVID. 404(b)(3).

<sup>10</sup> *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

<sup>11</sup> *United States v. Franklin*, 250 F.3d 653 (8<sup>th</sup> Cir. 2001).

To be admissible, the evidence must have some independent relevance under M.R.E. 401 and 402.<sup>12</sup> Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action.<sup>13</sup> Irrelevant evidence is not admissible.<sup>14</sup>

Under M.R.E. 404(b) evidence should not be admitted if the only purpose for which it is being offered is to show the accused's predisposition to commit the crime.<sup>15</sup> "[G]enerally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper."<sup>16</sup> Such evidence is improper because it treads too closely to character evidence offered to show that an accused acted in conformity with that character and, therefore, committed the act in question, evidence prohibited under MRE 404(b).<sup>17</sup> M.R.E. 404(b) prohibits the "propensity inference"—that a person's character (either as a trait, or in the form of specific instances of past conduct) suggests that the person did something because of a propensity to do such things.

When the evidence raises the defense of mistake, the government must disprove the defense beyond a reasonable doubt.<sup>18</sup> However, if no defense of mistake is raised, then the Government cannot put on evidence to rebut it.<sup>19</sup> The more serious the extrinsic acts are, the more likely it is that court members will misuse the evidence and paint the accused as a bad person. As a general matter, Rules 403 and 404(b) suggest that where the probative value and the prejudicial effect of 404(b) evidence are both high and close, the evidence should be admitted.<sup>20</sup> Alternatively, when the probative value is low and the extrinsic evidence's prejudicial effect is high, the evidence should be excluded.<sup>21</sup>

Additionally, M.R.E. 403 can preclude the admission of evidence, even if it would otherwise be admissible. M.R.E. 403 allows the Military Judge to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>22</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> M.R.E. 401.

<sup>14</sup> M.R.E. 402(b).

<sup>15</sup> *United States v. Booker*, 62 M.J. 703, 708 (A.F. Ct. Crim. App. 2006).

<sup>16</sup> *United States v. Banks*, 36 M.J. 150, CITE (C.M.A. 1992).

<sup>17</sup> *Id.*

<sup>18</sup> *United States v. Thompson*, 39 C.M.R. 537 (A.B.R. 1968) (reversing conviction for desertion because the military judge failed to instruct on burden of proof for mistake of fact).

<sup>19</sup> *United States v. Thompson*, 63 M.J. 228 (2006); *United States v. Diaz*, 59 M.J. 79 (2003) *cf.* *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007) (finding that even if Defense does not outright argue mistake or accident, if the evidence reveals that injuries could have been the results of an accident, then the evidence may be admitted.).

<sup>20</sup> *See, e.g., United States v. McCarty*, 36 F.3d 1349 (5th Cir. 1994) (no error to admit evidence of prior house burglary and weapons theft where same weapons were used in the charged bank robbery).

<sup>21</sup> *See, e.g., United States v. Pratt*, 73 F.3d 450 (1st Cir. 1996) (admission of very emotional and marginally relevant threat evidence was outweighed by its unfair effect on the jury).

<sup>22</sup> M.R.E. 403.

## ARGUMENT

1. Evidence that FCAC Pedcini received a document from the [REDACTED] that was marked “secret” should be excluded as M.R.E. 404(b) evidence.

Evidence that FCAC Pedcini received a document marked “secret” from the [REDACTED] as an example of what the [REDACTED] wanted FCAC Pedcini to send fails all three prongs of the *Reynolds* test. First, the evidence does not support a finding by the court members that FCAC Pedcini committed a prior crime, wrong, or act. The document was allegedly sent by the [REDACTED] to FCAC Pedcini, and was therefore not a crime, wrong or act committed by him. Second, it makes no fact of consequence more or less probable and has nothing to do with his motive, intent or plan in later accessing and sending alleged secret documentation, unless the Government is planning to argue that FCAC Pedcini was not previously aware what “secret” markings looked like. Finally, the evidence fails the M.R.E. 403 balancing test, in that it offers no probative value, is not an act even committed by FCAC Pedcini, and only serves as inflammatory evidence that FCAC received a “secret” marked document from the [REDACTED]

## EVIDENCE PRESENTED

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

Attachment A: Government Notice Pursuant to M.R.E 404(b) dtd 4 March 2024

## RELIEF REQUESTED

The Defense moves this Court to preclude the Government from offering the following evidence under M.R.E. 404(b):

a. Evidence that FCAC Pedcini received a document from the [REDACTED] that was marked “secret” in order to show motive, plan ,and intent to later access and send what secret documentation.

## ORAL ARGUMENT

The Defense desires to make oral argument on this motion if opposed by the Government.

[REDACTED]  
J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

## CERTIFICATE OF SERVICE

I certify that on 8 March 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.



J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

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

<p><b>UNITED STATES</b></p> <p><b>v.</b></p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC / E-7</b> <b>U.S. NAVY</b></p>	<p><b>DEFENSE MOTION FOR APPROPRIATE RELIEF</b></p> <p><b>(Unreasonable Multiplication of Charges)</b></p> <p><b>11 March 2024</b></p>
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**MOTION**

Pursuant to Rules for Court-Martial (R.C.M.) 907(b)(3)(B) and R.C.M. 906(b)(12), the Defense moves this Court to dismiss specifications 1 through 7 of Charge III as they are an unreasonable multiplication of charges with specifications 1 through 7 of Charge IV; or, in the alternative to merge those specifications for the same reason that they are an unreasonable multiplication of charges.

**SUMMARY**

FCAC Pedicini is charged is charged with, *inter alia*, seven specifications of violating Article 103a for alleged espionage and seven specifications of violating Article 134 for crimes not capital with the alleged crimes being violations of the federal espionage act. Each of these specifications is a one-for-one match of the same numbered specification under Article 134 as it is under Article 103a. Therefore, they unreasonably multiply the charges against FCAC Pedicini and should be dismissed or, at a minimum, merged.

**BURDEN**

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

**FACTS**

1. Chief Pedicini is charged is charged with, *inter alia*, seven specifications of violating Article 103a for alleged espionage and seven specification of violating Article 134 as crimes not capital with the alleged crimes being violations of the federal espionage act.<sup>1</sup>

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<sup>1</sup> Charge Sheet.

2. The act alleged in specification one of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “article 1112,” alleged in Charge III to be classified information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>2</sup>

3. The act alleged in specification two of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “Article 1112 add on 2,” alleged in Charge III to be classified information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>3</sup>

4. The act alleged in specification three of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “article 1112 add on 3,” alleged in Charge III to be classified information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>4</sup>

5. The act alleged in specification four of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “Article 1223,” alleged in Charge III to be information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>5</sup>

6. The act alleged in specification five of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “Article 1223 add on 1,” alleged in Charge III to be information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>6</sup>

7. The act alleged in specification six of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “Article 1223 add on 2,” alleged in Charge III to be information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>7</sup>

8. The act alleged in specification seven of Charges III and IV is that Chief Pedicini, on 22 November 2022, delivered a document entitled “1223 Updates,” alleged in Charge III to be

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<sup>2</sup> Charge Sheet.

<sup>3</sup> Charge Sheet.

<sup>4</sup> Charge Sheet.

<sup>5</sup> Charge Sheet.

<sup>6</sup> Charge Sheet.

<sup>7</sup> Charge Sheet.

information relating to the national defense and in Charge IV to be information relating to the national defense, to an individual alleged in Charge III to be a citizen and employee of a foreign government and in Charge IV as a person not entitled to receive that information.<sup>8</sup>

9. The acts alleged in each pair of specifications all involve the same accused, the same alleged recipient, the same information, the same document, the same location, and the same day.<sup>9</sup> Each pair of specifications is the quintessential definition of a single criminal transaction.

## LAW

### **The prohibition against unreasonable multiplication of charges protects against prosecutorial overreach based on fundamental fairness.**

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.”<sup>10</sup> This prohibition against unreasonable multiplication of charges “has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.”<sup>11</sup>

A military judge must “exercise sound judgment to ensure that imaginative prosecutors do not needlessly ‘pile on’ charges against a military accused.”<sup>12</sup> In service of this obligation, a trial court considers four factors in testing whether charges are unreasonably multiplied:

1. Is each charge and specification aimed at distinctly separate criminal acts?
2. Does the number of charges and specifications misrepresent or exaggerate the accused’s criminality?
3. Does the number of charges and specifications unfairly increase the accused’s punitive exposure?
4. Is there evidence of prosecutorial overreaching or abuse in the drafting of the charges?<sup>13</sup>

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<sup>8</sup> Charge Sheet.

<sup>9</sup> Compare Charge III, specification 1 with Charge IV, specification 1; compare Charge III, specification 2 with Charge IV, specification 2; compare Charge III, specification 3 with Charge IV, specification 3; compare Charge III, specification 4 with Charge IV, specification 4; compare Charge III, specification 5 with Charge IV, specification 5; compare Charge III, specification 6 with Charge IV, specification 6; and compare Charge III, specification 7 with Charge IV, specification 7.

<sup>10</sup> R.C.M. 307(c)(4); see *United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001).

<sup>11</sup> *Quiroz*, 55 M.J. at 338 (contrasting multiplicity and unreasonable multiplication doctrines); see also *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (same).

<sup>12</sup> *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds*, *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

<sup>13</sup> *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010) (citing *Quiroz*, 55 M.J. at 338) (approving “in general” factors as non-exhaustive “guide” for analysis).



No single factor requires a finding of unreasonable multiplication of charges; however, “one or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching.”<sup>14</sup>

A military judge has wide discretion to remedy unreasonable multiplications of charges, up to and including dismissal. When charges are unreasonably multiplied, the military judge has wide latitude to craft a remedy, including dismissing offenses, merging them for findings, merging offenses only for sentencing, or limiting the maximum sentence that may be adjudged.<sup>15</sup> In *Quiroz*, where the factors originated, the Navy-Marine Corps Court of Criminal Appeals dismissed a conviction for wrongfully disposing of military property by selling C-4, which was the same act that led to a conviction for violating 18 U.S.C. § 842.<sup>16</sup> Later, in *United States v. Roderick*, the Court of Appeals for the Armed Forces reiterated that dismissal is an available and appropriate remedy for unreasonable multiplication.<sup>17</sup> The *Roderick* court dismissed indecent liberties convictions that arose from the same criminal acts—taking photographs of underage girls—as the appellant’s child pornography convictions under 18 U.S.C. § 2251(a).<sup>18</sup>

Even if the Government’s charging scheme survives for findings due to the Court finding specifications were charged in the alternative, after findings the specifications charged in the alternative should be dismissed or consolidated.<sup>19</sup>

## ARGUMENT

**For each pair of specifications 1-7 in Charge III and Charge IV, the trial-level *Quiroz* factors weigh in favor of the Defense, and relief from these unreasonably multiplied charges is appropriate.**

The facts alleged in each set of specifications 1-7 in Charge III and Charge IV (specification pairs) demonstrate that the Government’s charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*. Each specification pair alleges the same act with the same surrounding details; all that differs is the description of the recipient – in Charge III it is “a citizen and employee of a foreign government” and in Charge IV it is “a person not entitled to receive [the] information.” However, that description of the recipient is so synonymous as to provide no substantial difference to justify multiple charges for the exact same conduct. Thus, each specification pair is unreasonably multiplied with each other as they are aimed at the same course of conduct, the overall number of specifications misrepresents and exaggerates the

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<sup>14</sup> *United States v. Campbell*, 71 M.J. 19, 23-24 (C.A.A.F. 2006).

<sup>15</sup> R.C.M. 906(b)(12).

<sup>16</sup> *United States v. Quiroz*, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999) (where 18 U.S.C. § 842 criminalizes unlawful distribution and transportation of explosive materials).

<sup>17</sup> 62 M.J. 425, 433-34 (C.A.A.F. 2006).

<sup>18</sup> *Id.* See also *United States v. Doss*, 15 M.J. 409, 412 (C.M.A. 1983) (noting that when unreasonable multiplication may have impacted verdict “on the merits as to all the multiplied charges—much like the threat posed by Justice Marshall—we have not hesitated to set aside all tainted findings of guilty”) (citing *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (“where the prosecution’s evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict”) (Marshall, J., dissenting); *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982)).

<sup>19</sup> *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014).

criminality alleged against Chief Pedicini, the number of specifications unfairly increases his punitive exposure, and there is evidence of prosecutorial overreach.

*(1) Each Specification is aimed at substantially the same course of conduct, not distinct criminal acts.*

As mentioned, each specification pair is aimed at Chief Pedicini's alleged conduct in sending the same document with the same information on the same day to the same person.<sup>20</sup> By the language in the charge sheet itself, combined with the Government's bill of particulars, the alleged criminal conduct is the same for each specification pair.<sup>21</sup> From the plain language of the two statutes at issue, the gravamen of the offenses charged is the communication of information relating to the national defense to a person not authorized to receive it.<sup>22</sup> Thus, each specification in the pair is aimed at substantially the same course of conduct and not distinct criminal acts.<sup>23</sup>

As a result, the Government's charging scheme is an example of "parsing of the conduct . . . not separated by time, distance, or impulse . . ." into multiple specifications.<sup>24</sup> The concern with the Government's chosen charging scheme is "[t]he exaggeration of a single offense into [multiple] seemingly separate crimes may, in a particular case, create the impression that the accused is a 'bad character' and thereby lead the court-martial to resolve against him doubt created by the evidence."<sup>25</sup> Here, each specification pair doubles the criminal allegations against Chief Pedicini for the same conduct, increasing the total number of allegations against him from seven to 14: This exaggerates the criminality of the alleged conduct. Therefore, this factor weighs in favor of Chief Pedicini.

*(2) The sheer number of specifications exaggerates the criminality alleged against Chief Pedicini.*

The Government's charging scheme—double-charging each alleged act of disclosure of information into 14 violations instead of seven—unfairly exaggerates the alleged misconduct. Instead of one specification for each alleged communication of national defense information that encompasses each act, the Government has chosen to charge the same act under two separate statutes that reach the exact same conduct. This is improper in form. It also exaggerates the alleged criminality of Chief Pedicini's conduct. While *United States v. Sturdivant* involved the exaggeration of a single offense, the same concern addressed in that case is present here.<sup>26</sup> Again, the doubling of charges for each alleged criminal transaction into multiple seemingly separate crimes could create the impression that Chief Pedicini is a "bad character." The potential

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<sup>20</sup> See Charge Sheet & Attachment A.

<sup>21</sup> See Charge Sheet & Attachment A.

<sup>22</sup> In Charge III this is because the disclosure of the information would be to the harm of the United States or the benefit of a foreign nation; in Charge IV this is because the person is defined as not authorized to receive it.

<sup>23</sup> See Charge Sheet & Attachment A;

<sup>24</sup> *United States v. Kinard*, No. NMCCA 201000084, 2010 CCA LEXIS 70, at \*7 (N-M Ct. Crim. App. June 24, 2010).

<sup>25</sup> *United States v. Sturdivant*, 13 M.J. 323, 330 (C.M.A. 1982) (citing *United States v. Haywood*, 6 M.J. 604 (A.C.M.R. 1978)).

<sup>26</sup> 13 M.J. 323.

result of such a charging scheme could cause “the court-martial to resolve against [Chief Pedicini] doubt created by the evidence.”<sup>27</sup> The seven alleged acts of communication of national defense information have been blown up into 14 allegations involving the same acts and the same parties with the same document in each specification pair. It is an exaggeration to say that Chief Pedicini committed 14 acts of disclosure of national defense information on the facts of this case. Therefore, this factor weighs in favor of Chief Pedicini.

*(3) The charging scheme unfairly increases Chief Pedicini’s punitive exposure.*

The Government’s charging scheme unfairly increases Chief Pedicini’s punitive exposure. Though the Defense was unable to find any case law to support this argument, the Defense believes that the charging scheme unfairly increases Chief Pedicini’s punitive exposure when each specification pair is considered in the analysis. While the cases interpreting the meaning of “punitive exposure” appear to unanimously interpret it to mean the same as “maximum punishment,”<sup>28</sup> the Defense believes this is an overly-restrictive reading. It also seems appropriate to consider under this factor whether the Government’s creative-parsing charging scheme would *in se* tend to cause the sentencing authority to sentence Chief Pedicini to more punishment. The Defense believes that it would. This is because the sentencing authority could weigh against Chief Pedicini the fact that he received a greater number of convictions and would tend then to increase the actual punishment that they imposed. In a case charged in the manner as this case, this is a very real danger and concern. Such an outcome would not just be unjust because it would give the Government inordinate control over an accused, it would also violate the spirit of the unreasonable multiplication of charges doctrine because it would allow, and even encourage, “imaginative prosecutors . . . [to] needlessly ‘pile on’ charges against a military accused”<sup>29</sup> by “exaggerat[ing] a single offense into [multiple] seemingly separate crimes[.]”<sup>30</sup> Therefore, this factor weighs in favor of Chief Pedicini.

*(4) The charging scheme provides evidence of prosecutorial overreach.*

In this case, the evidence of prosecutorial overreach is in the Government’s decision to double each specification in the specification pair despite the conduct being the same, the recipient being the same, the information being the same, and the date being the same. This charging scheme has the unfair and unreasonable effect of giving the Government multiple attempts and opportunities for a second conviction on a single transaction for each specification pair, when they should only have one. Therefore, this factor weighs in favor of Chief Pedicini.

*(5) Dismissal is an appropriate remedy as is merger.*

Because all four trial-level factors weigh in favor of Chief Pedicini, judicial remedy is appropriate. On these facts, either dismissal or merger for findings is appropriate. Both of them

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<sup>27</sup> 13 M.J. at 330.

<sup>28</sup> E.g., *United States v. Simmons*, No. ACM 39342 (rem), 2022 CCA LEXIS 315, at \*6-\*7 (A.F.C.C.A. May 26th, 2022) (discussing reduction in maximum possible confinement from 153 years to 150 years as only a slight change in punitive exposure).

<sup>29</sup> *Foster*, 40 M.J. at 144 n.4.

<sup>30</sup> *Sturdivant*, 13 M.J. at 330.

would remove the issue and neither would impose a greater burden on the Government. Therefore, either remedy is appropriate for each specification pair. If this Court does not dismiss or merge the specification pairs for findings, dismissal or merger for sentencing would also be appropriate and would reduce the punitive exposure faced by FCAC Pedicini in line with the unreasonable multiplication of charges doctrine.

### **EVIDENCE PRESENTED**

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

Attachment A: Government Bill of Particulars

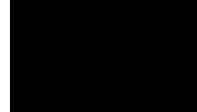
### **RELIEF REQUESTED**

The Defense moves this Court to dismiss specifications 1 through 7 of Charge III as they are an unreasonable multiplication of charges with specifications 1 through 7 of Charge IV; or, in the alternative to merge those specifications for the same reason that they are an unreasonable multiplication of charges.

### **ORAL ARGUMENT**

The Defense desires to make oral argument on this motion if opposed by the Government.

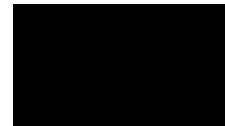
Respectfully submitted,



J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

### **CERTIFICATION OF SERVICE**

I certify that on 11 March 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.



J. T. COLE

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

<b>UNITED STATES</b>  v.  <b>BRYCE S. PEDICINI</b> <b>FCAC/E-7</b> <b>U.S. NAVY</b>	<b>DEFENSE MOTION FOR APPROPRIATE RELIEF</b> <b>(Compel Discovery or Abate Proceedings)</b>  <b>13 FEBRUARY 2024</b>
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**MOTION**

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice [U.C.M.J.], and Rule for Courts-Martial [R.C.M.] 701(a)(2)(A), the Defense moves this Court to compel disclosure of the following item:

a. The full name, address, phone number, and email address of the individual with whom FCAC Pedicini was allegedly communicating and referred to by the Government in the Article 32 preliminary hearing as the [REDACTED]

Pursuant to R.C.M. 703(f)(2), if the Government fails to comply the Defense requests this Court abate the proceedings as they pertain to the specifications in Charge III and Charge IV.

**SUMMARY**

On 21 December 2023, the Defense requested “The full name, address, phone number, and email address of the individual with whom FCAC Pedicini was allegedly communicating and referred to by the Government in the Article 32 preliminary hearing as the [REDACTED] [REDACTED]. The Defense requested a response within five working days of service of this request. In light of the holiday periods, the five working days expired on Wednesday, 3 January 2024. To date the Government has provided no response to this request. The Defense requests the Court compel the Government to produce the requested evidence. The contact information for this witness is central to FCAC Pedicini’s defense to the allegations against him in Charge III and Charge IV. If the Government does not comply with this Court’s order, the Defense requests the abatement of all charges and specifications under Charge III and Charge IV.

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<sup>1</sup> Attachment A.

<sup>2</sup> Attachment A.

## BURDEN

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

## FACTS

1. FCAC Pedicini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>3</sup>
2. For each of the Charge III Specifications, FCAC Pedicini faces life in prison and a dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>4</sup> The statutory maximum confinement if convicted of all of the Charge III Specifications and the Charge IV Specifications is seven life sentences plus 90 years.
3. On 21 December 2023, the Defense requested disclosure from the Government for the following item:
  - a. The full name, address, phone number, and email address of the individual with whom FCAC Pedicini was allegedly communicating and referred to by the Government in the Article 32 preliminary hearing as the [REDACTED]. The Defense requests this information because, based on the contents of the messages allegedly sent to FCAC Pedicini by the [REDACTED] and provided in the secret discovery, the [REDACTED] clearly had exculpatory evidence to provide as well as evidence that is generally favorable to the defense.<sup>5</sup>
4. The identity of the [REDACTED] is critical because this individual is the person alleged in the Charge III Specifications as “a citizen and employee of a foreign government;” and in the Charge IV Specifications as “a person not entitled to receive . . . [information relating to the national defense].”<sup>6</sup>
5. In the communications allegedly between this [REDACTED] and FCAC Pedicini, reflected in the Telegram messages which the Government provided in SECRET//NOFORN discovery, the [REDACTED] states words to the effect that he or she is aware that FCAC Pedicini was just providing this [REDACTED] with information that is available to the public and allegedly asked for documents bearing classification markings.<sup>7</sup>
6. As of 13 February 2024, 54 days have elapsed since the Defense submitted this request.

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<sup>3</sup> Charge Sheet.

<sup>4</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

<sup>5</sup> Attachment A.

<sup>6</sup> See Attachment B.

<sup>7</sup> SECRET//NOFORN discovery that cannot be disclosed in this forum.

7. As of 13 February 2024, the Defense has received no response from the Government to the request for discovery in Attachment A.

## LAW

Parties to a court-martial “shall have equal opportunity to obtain witnesses and other evidence.”<sup>8</sup> Trial counsel’s obligation under Article 46, U.C.M.J., 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.”<sup>9</sup> The Rules for Court-Martial pertaining to discovery aid in the enforcement of Article 46 and “[t] parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate.”<sup>10</sup>

The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2018 “to broaden the scope of discovery, requiring disclosure of items that are “relevant” rather than “material” to defense preparation of a case[...].” App.15-9, Manual for Courts-Martial (2019 ed.). Upon Defense request and after service of charges:

The Government shall permit the defense to inspect any book, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody or control of military authorities and – (i) ***the item is relevant to defense preparation*** [...].<sup>11</sup>

As a threshold matter, discoverable material is “in the possession, custody or control of military authorities.”<sup>12</sup> Generally speaking, items held by an entity outside of the Federal Government does not satisfy this required.<sup>13</sup> However, trial counsel “cannot avoid R.C.M. 701(a)(2)(A) by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.”<sup>14</sup> Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control.<sup>15</sup> Examples 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) prosecution inherits a case from a local sheriff’s office and the object remains in the possession of the local law enforcement.<sup>16</sup>

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<sup>8</sup> 10 U.S.C. §846.

<sup>9</sup> *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)(internal quotations omitted.).

<sup>10</sup> *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

<sup>11</sup> R.C.M. 701(a)(2)(A)(i)(emphasis added).

<sup>12</sup> *Id.*

<sup>13</sup> *Stellato*, 74 M.J. at 484.

<sup>14</sup> *Id.* (internal citations and quotation marks omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 485.

Evidence may still be in the “possession, custody or control of military authorities” even if it does not fit neatly into any of these scenarios, and the determination must rest on the particular facts of each case.<sup>17</sup>

Evidence is material if it is of “such a nature that knowledge of [it] would affect a person’s decision-making process.”<sup>18</sup> Evidence may be relevant and even material despite its inadmissibility at trial.<sup>19</sup> Material evidence includes inadmissible materials “that would assist the defense in formulating a defense strategy.”<sup>20</sup> The standard for determining “relevance” to defense preparation is still broader than that.

If the Government fails to produce evidence that is “of such central importance to an issue that it is essential to a fair trial,” the Court shall abate the proceedings where there is no adequate substitute for the evidence and the party requesting abatement could not have prevented the unavailability of the evidence.<sup>21</sup>

## ARGUMENT

1. The requested identity and contact information for the ██████████ is essential for FCAC Pedicini to defend himself against the allegations in the Charge III Specifications and the Charge IV Specifications because those specifications both hinge on the ██████ identity and the ██████ indicated that he or she was aware that FCAC Pedicini was sending him or her publicly available information.

The Defense requests “[t]he full name, address, phone number, and email address of the individual with whom FCAC Pedicini was allegedly communicating and referred to by the Government in the Article 32 preliminary hearing as the ██████████,”<sup>22</sup> The Defense informed the Government that it needed this information because, “based on the contents of the messages allegedly sent to FCAC Pedicini by the ██████ and provided in the secret discovery, the ██████ clearly had exculpatory evidence to provide as well as evidence that is generally favorable to the defense.”<sup>23</sup> Without this information the Defense is unable to contact and interview this ██████ to find out how he or she knew that FCAC Pedicini was sending him or her publicly available information. All of this is relevant and material to the Defense’s preparation as it tends directly to undermine the Government’s allegations in the Charge III Specifications and the Charge IV Specifications, rendering it exculpatory information.

Based on conversations with the Government, the SECRET//NOFORN discovery, and the allegations in the Charge III Specifications and the Charge IV Specifications, the Defense believes that the Government has access to this information. Regardless of whether the trial team itself personally has that information, the Government still must disclose this information

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<sup>17</sup> See *Stellato*, 74 M.J. 484-85.

<sup>18</sup> Black’s Law Dictionary 1066 (9th ed. 2009).

<sup>19</sup> See *United States v. Luke*, 69 M.J. 309, 320 (CA.A.F. 2011)(internal citations omitted).

<sup>20</sup> *Id.*

<sup>21</sup> R.C.M. 703(f)(2).

<sup>22</sup> Attachment A.

<sup>23</sup> Attachment A.



under *Brady v. Maryland*<sup>24</sup> and *Giglio v. United States*.<sup>25</sup> The Defense seeks this Court to compel its disclosure.

2. The requested information is essential to FCAC Pedicini receiving a fair trial as it is both exculpatory and helpful to the preparation of the Defense. If the Government fails to turn it over then proceeding with trial on the Charge III Specifications and the Charge IV Specifications would violate FCAC Pedicini's right to Due Process and this Court must abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

As explained above, the information sought by the Defense in Attachment A is necessary for the Defense preparation. Additionally, if the [REDACTED] says what the Defense believes that he or she will say then this witness will be a necessary witness for the Defense at trial as he or she provides exculpatory evidence for the Charge III Specifications and the Charge IV Specifications. Denial of access to this information, prevents the Defense from being able to adequately prepare to defend FCAC Pedicini against the Charge III Specifications and the Charge IV Specifications; and it prevents the Defense from being able to present its defense at trial as it pertains to the Charge III Specifications and the Charge IV Specifications. Thus, if the Government fails to provide this information to the Defense then, under R.C.M. 703(f)(2), the Defense requests this Court abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

### **EVIDENCE PRESENTED**

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

- Attachment A: Defense Request for Discovery dtd 21 Dec 23
- Attachment B: Excerpt from PHO Report Supplement dtd 12 Dec 23

### **RELIEF REQUESTED**

The Defense moves this Court to compel disclosure of the following item:

- a. The full name, address, phone number, and email address of the individual with whom FCAC Pedicini was allegedly communicating and referred to by the Government in the Article 32 preliminary hearing as the [REDACTED]

If the Government fails to disclose this information, the Defense moves this Court to abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

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<sup>24</sup> 373 U.S. 83 (1963).

<sup>25</sup> 405 U.S. 150 (1972).

**ORAL ARGUMENT**

The Defense desires to make oral argument on this motion if opposed by the Government.

JESSUP.MA Digitally signed by  
RK.ALAN. N. [REDACTED]  
Date: 2024.02.13  
13:13:22 -08'00'

M. A. JESSUP  
LCDR, JAGC, USN  
Detailed Defense Counsel

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**CERTIFICATE OF SERVICE**

I certify that on 13 February 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.

JESSUP.MA Digitally signed by  
RK.ALAN. N. [REDACTED]  
Date: 2024.02.13  
13:13:41 -08'00'

M. A. JESSUP

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

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<p style="text-align:center"><b>UNITED STATES</b></p> <p style="text-align:center">v.</p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC/E-7</b> <b>U.S. NAVY</b></p>	<p style="text-align:center"><b>DEFENSE MOTION FOR APPROPRIATE RELIEF</b></p> <p style="text-align:center"><b>(Compel Witness on Pre-Sentencing)</b></p> <p style="text-align:center"><b>11 MARCH 2024</b></p>
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**MOTION**

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice [U.C.M.J.], and Rule for Courts-Martial [R.C.M.] 703(a) and 703(b)(3), the Defense moves this Court to compel production of the following witness for presentencing proceedings:

- a. Mr. [REDACTED] Chief Pedicini’s father.

**SUMMARY**

On 27 February 2024, the Defense requested the Government produce Mr. [REDACTED] Chief Pedicini’s father who will provide the members with the father’s perspective on the childhood experiences, upbringing, naval service, and rehabilitative potential of Chief Pedicini. On 4 March 2024, the Government responded to the Defense request denying production of [REDACTED]

**BURDEN**

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

**FACTS**

1. FCAC Pedicini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>1</sup>
2. For each of the Charge III Specifications, FCAC Pedicini faces life in prison and a

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<sup>1</sup> Charge Sheet.

dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>2</sup>

3. On 27 February 2024, the Defense sent a request for production of witnesses to the Government, which included the following:

“a. [REDACTED] The Defense requests [REDACTED] for sentencing. [REDACTED] is FCAC Pedicini’s father and will be able to testify at sentencing, if necessary, concerning FCAC Pedicini’s childhood experiences and upbringing, Naval service, and other mitigating factors including rehabilitative potential. [REDACTED] is not cumulative with [REDACTED]<sup>3</sup> because he will offer a different perspective and memories of different facts for consideration of the factfinder.<sup>4</sup>

4. On 4 March 2024, the Government responded to the Defense request for production of witnesses, which included the following:

a. [REDACTED]: is denied as cumulative, per R.C.M. 703(b)(1).<sup>5</sup>

5. This case has garnered significant negative press just based solely on the allegations against FCAC Pedicini.<sup>6</sup>

6. Social media also indicates that Sailors informed of the allegations against FCAC Pedicini have a negative instinct to sentence him based on an emotional response.<sup>7</sup>

## LAW

The Sixth Amendment to the U.S Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI, cl. 7. This right is “well established in military law and has been guarded by [our highest Court].” *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986) (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976; *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial “shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process,” Parties to a court-martial “shall have equal opportunity to obtain witnesses and other evidence.”<sup>8</sup>

In presentencing proceedings, the Court is provided greater latitude than on the merits in determining whether information should be received through alternatives to live testimony.<sup>9</sup> The Manual for Courts-Martial places greater limits on the ability to present live, in-person witnesses by providing that such witnesses may be produced at government expense if: (1) the testimony is

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<sup>2</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

<sup>3</sup> [REDACTED] is Chief Pedicini’s mother who the Government granted. Attachments A & B.

<sup>4</sup> Attachment A.

<sup>5</sup> Attachment B.

<sup>6</sup> Attachment C.

<sup>7</sup> See, e.g., Attachment D.

<sup>8</sup> 10 U.S.C. §846.

<sup>9</sup> R.C.M. 1001(f).

necessary for a matter of substantial significance to determining an appropriate sentence; (2) the weight or credibility is of substantial significance to determining an appropriate sentence; (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness would testify; (4) other forms of testimony or testimony by remote means would be insufficient; and (5) the personal appearance outweighs the difficulties, costs, timing, and potential delay of personal production.<sup>10</sup>

## ARGUMENT

██████ testimony is relevant and necessary for the members to determine an appropriate sentence should FCAC Pedicini be convicted of any offenses.

FCAC Pedicini's father, ██████ will provide testimony that is necessary for the members to consider to determine an appropriate sentence. The nature of this case separates it from the garden variety military justice case because FCAC Pedicini is accused of offenses that violate ground norms of service in the military: That every service member looks out for every other service member and that every service member will support and defend the Constitution against all enemies, foreign and domestic. The wrongful communication of national defense information potentially places the lives of fellow service members at risk. This alleged betrayal of those ground norms are likely to evoke an emotional backlash. That backlash is likely to manifest itself in the form of an unreasonably harsh sentence. The negative press that has already been published, as well as social media reactions, demonstrate the magnitude of this backlash and that is even before any aggravating evidence has been heard.<sup>11</sup>

To offset the likelihood of that backlash, FCAC Pedicini has requested both his mother and his father to testify on his behalf at presentencing proceedings. The Government granted his mother. His mother will provide a nurturing maternal perspective on FCAC Pedicini, his background and early years, through to his time joining the military. Hers is a unique perspective that is inherently different from his father's because of the different roles of a mother and a father. Each balances the other in providing a complete picture of FCAC Pedicini and a more complete picture is necessary in this case to offset the dangers from the negative publicity and the inherent negative attitude against FCAC Pedicini as exemplified by the opinion that he should be "keel haul[ed]."

Not granting ██████ as a pre-sentencing witness increases the danger that the members will not be fair in adjudicating an appropriate sentence. This concomitantly increases the need for the father's perspective in presenting his evidence in mitigation. This testimony cannot come from anyone else as ██████ is his only father; and his in-person testimony is necessary so that the members can properly weigh his sincerity and credibility as he testifies. Additionally, the expense and difficulty in producing him is minimal as he will be able to share a hotel room and conveyance with ██████ his wife. The only expenses for granting ██████ in addition to ██████ are the flight and meals. Weighing that against the danger of prejudice to FCAC Pedicini without his in-person testimony, the Government should be required to produce ██████ in addition to ██████

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<sup>10</sup> R.C.M. 1001(f)(2).

<sup>11</sup> See Attachments C & D.

**EVIDENCE PRESENTED**

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

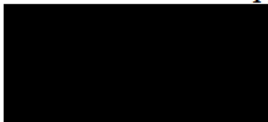
- Attachment A: Defense Request for Witnesses dtd 27 Feb 24
- Attachment B: Government Response dtd 4 March 24
- Attachment C: News Publicity Against FCAC Pedicini
- Attachment D: Social Media Post

**RELIEF REQUESTED**

The Defense requests this Court compel production of [REDACTED] for pre-sentencing proceedings.

**ORAL ARGUMENT**

The Defense desires to make oral argument on this motion if opposed by the Government.



J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

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**CERTIFICATE OF SERVICE**

I certify that on 11 March 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.



J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

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

<p><b>UNITED STATES</b></p> <p>v.</p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC/E-7</b> <b>U.S. NAVY</b></p>	<p><b>DEFENSE MOTION FOR APPROPRIATE RELIEF</b> <b>(Compel Witness or Abate Proceedings)</b></p> <p><b>8 MARCH 2024</b></p>
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**MOTION**

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice [U.C.M.J.], and Rule for Courts-Martial [R.C.M.] 703(a) and 703(b)(3), the Defense moves this Court to compel production of the following witness for trial on the merits:

a. The individual whom FCAC Pedicini was allegedly communicating with and referred to by the Government as the [REDACTED]

Pursuant to R.C.M. 703(b)(3), if the Government fails to produce the [REDACTED] for trial, the Defense respectfully moves this Court to abate the proceedings as they pertain to the specifications in Charge III and Charge IV.

**SUMMARY**

On 27 February 2024, the Defense requested the Government produce the [REDACTED] as the [REDACTED] is relevant and necessary because the [REDACTED] is the individual whom FCAC Pedicini is alleged to have communicated with regarding the charges under Charge III and Charge IV, and the [REDACTED] identified information provided by FCAC Pedicini to the [REDACTED] as being publically available. On 4 March 2024, the Government responded to the Defense request denying production of the [REDACTED]

**BURDEN**

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

**FACTS**

1. FCAC Pedicini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of

violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>1</sup>

2. For each of the Charge III Specifications, FCAC Pedicini faces life in prison and a dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>2</sup>

3. On 19 May 2023, FCAC Pedicini was interrogated by investigators and stated he was originally contacted via Facebook messenger by a person who said they represented a Japanese research group.<sup>3</sup> He stated he never met this individual in person and made assumptions about who this person was.<sup>4</sup> He also told investigators that after he provided opinion articles to the individual, the individual was asking him to provide more detailed information, including non-publically available information and classified information.<sup>5</sup>

4. In the communications allegedly between the [REDACTED] and FCAC Pedicini, reflected in the Telegram messages which the Government provided in SECRET//NOFORN discovery, the [REDACTED] states words to the effect that he or she is aware that FCAC Pedicini was just providing this [REDACTED] with information that is available to the public and allegedly asked for documents bearing classification markings.<sup>6</sup>

5. On 27 February 2024, the Defense sent a request for production of witnesses to the Government, which included the following:

“a. The [REDACTED] referred to at various pages in reference (e), and in reference (d) as a “citizen and employee of a foreign government” and “a person not entitled to receive” the information FCAC Pedicini is alleged to have shared. This individual is relevant and necessary because he or she is the individual with whom FCAC Pedicini is alleged to have communicated information relating to the national defense and this individual identified this information as being publicly available. As explained in *United States v. Harris*, 40 C.M.R. 588, 590 (A.B.M.R. 1969) and *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945), information relating to the national defense does not include information that is from sources that were lawfully accessible to the public who was “willing to take the pains to find, sift and collate it[.]” This is further enshrined in Article 103a, UCMJ, which limits the intent element to providing “information that is not lawfully accessible to the public.” Manual for Courts-Martial, para. 32.c.(1) (2024 ed.)”<sup>7</sup>

6. On 4 March 2024, the Government responded to the Defense request for production of witnesses, which included the following:

a. The [REDACTED] is denied as not necessary, per R.C.M. 703(b)(1). The [REDACTED] production is not necessary because alternative witnesses, including the Accused, can testify about the conversation between the Accused and the [REDACTED]. The [REDACTED] production is not

<sup>1</sup> Charge Sheet.

<sup>2</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

<sup>3</sup> Attachment A at 1.

<sup>4</sup> *Id.* At 2.

<sup>5</sup> *Id.*

<sup>6</sup> SECRET//NOFORN discovery that cannot be disclosed in this forum.

<sup>7</sup> Attachment B.



necessary to identify certain information as publically available. Even if the [REDACTED] production was relevant and necessary, which the Government does not concede, Defense does not have a right to the production of a witness who is unavailable, per R.C.M. 703(b)(3) and M.R.E. 804(a). The [REDACTED] is unavailable, per M.R.E. 804(a)(5)(A) and 804(a)(5)(B), because the Government is not “able, by process or other reasonable means, to procure... the declarant’s attendance... or testimony.” The Government is not able by any reasonable means to contact the [REDACTED] or request his or her presence. Therefore, the [REDACTED] is unavailable as a witness and the Defense is not entitled to production.<sup>8</sup>

## LAW

The Sixth Amendment to the U.S Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI, cl. 7. This right is “well established in military law and has been guarded by [our highest Court].” *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986) (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976; *United States v. Iturrealde-Aponte*, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial “shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process,” Parties to a court-martial “shall have equal opportunity to obtain witnesses and other evidence.”<sup>9</sup> R.C.M. 703(a), and “[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.C.M. 703(b)(1).

Under R.C.M. 703(b)(3), “a party is not entitled to the presence of a witness who is unavailable under the meaning of Mil. R. Evid. 804(a). However, 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’s presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.”<sup>10</sup> Under M.R.E. 804(a), a witness is unavailable if the witness is exempted from testifying due to privilege, refuses to testify despite an order from a military judge, testifies to not remembering the subject matter, cannot be present or testify at trial because of death or infirmity, is absent without the proponent of the statements obtaining certain hearsay statements, or has previously been deposed about the subject matter and is absent due to military necessity, age, imprisonment, non-amenability to process, or other reasonable causes.<sup>11</sup> Trial may proceed in the absence of a relevant and necessary witness if that witness is not amenable to process.<sup>12</sup> Whether or not the prosecution has satisfied its duty to produce a witness is a question of reasonableness.<sup>13</sup>

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<sup>8</sup> Attachment C at 1.

<sup>9</sup> 10 U.S.C. §846.

<sup>10</sup> R.C.M. 703(b)(3).

<sup>11</sup> M.R.E. 804(a).

<sup>12</sup> *United States v. Davis*, 29 M.J. 357, 359 (CMA 1990).

<sup>13</sup> *United States v. Barreto*, 57 M.J. 127, 132 (CAAF 2002).

## ARGUMENT

1. The [REDACTED] testimony is relevant and necessary for FCAC Pedicini to defend himself against the allegations in the Charge III Specifications and the Charge IV Specifications because those specifications both hinge on the [REDACTED] identity and the [REDACTED] indicated that he or she was aware that FCAC Pedicini was sending him or her publicly available information.

First, the [REDACTED] testimony is relevant and necessary because he or she is the individual with whom FCAC Pedicini is alleged to have communicated information relating to the national defense and this individual identified this information as being publicly available. It is necessary for the [REDACTED] to explain how and why he or she knew the information allegedly provided by FCAC Pedicini was publically available and how he or she was already familiar with the information. Additionally, the [REDACTED] testimony is relevant and necessary because the [REDACTED] will testify about who he or she is, including whether or not she is a citizen and employee of a foreign government and a person not entitled to received information relating to the national defense. This is critical evidence, as the Government must prove these facts about the [REDACTED] in order to meet the elements of the Charge III and Charge IV Specifications.

As the [REDACTED] testimony is relevant and necessary to a fair trial, the Government's duty to produce the witness is a question of reasonableness. For example, in *United States v. Barreto*, after the Accused had requested two unknown witnesses in Germany, the Government took steps to determine the identity of the witnesses, including placing advertisements in U.S. and German newspapers. In this case, it is not clear the Government has taken all reasonable steps to locate and either produce or invite the [REDACTED] to appear for trial. The Government's response to the Defense witness request does not indicate what steps have been taken or could be taken.

2. The [REDACTED] testimony is essential to a fair trial and there is no adequate substitute for the testimony. If the [REDACTED] cannot produced for trial this Court must abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

The testimony of the [REDACTED] is essential to a fair trial and there is no adequate substitute for the testimony. The [REDACTED] will testify the information provided by FCAC Pedicini is publicly available and he or she knew it was publically available, which is crucial evidence for the Defense. Even if the Court finds the Defense is able to present this evidence through another means, there is no substitute to the [REDACTED] testimony regarding his or her identity, which is absolutely critical for the Charge III and Charge IV Specifications. Thus, if the Government fails to produce the [REDACTED] for trial then, under R.C.M. 703(b)(3), the Defense requests this Court abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

## EVIDENCE PRESENTED

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

Attachment A: NCIS Summary of Interview dtd 19 May 23

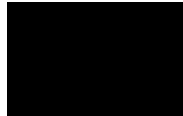
Attachment B: Defense Request for Witnesses dtd 27 February 24

**RELIEF REQUESTED**

The Defense moves this Court to compel production of the [REDACTED] for trial. If the Government fails to do so or the Court finds the [REDACTED] is unavailable, the Defense moves this Court to abate the proceedings as they pertain to the Charge III Specifications and the Charge IV Specifications.

**ORAL ARGUMENT**

The Defense desires to make oral argument on this motion if opposed by the Government.

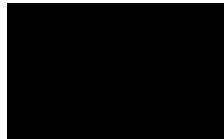


J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

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**CERTIFICATE OF SERVICE**

I certify that on 8 March 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.



J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

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

<p style="text-align:center"><b>UNITED STATES</b></p> <p style="text-align:center">v.</p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC/E-7</b> <b>U.S. NAVY</b></p>	<p style="text-align:center"><b>DEFENSE MOTION TO SUPPRESS STATEMENTS OF THE ACCUSED</b></p> <p style="text-align:center"><b>11 MARCH 2024</b></p>
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**NATURE OF MOTION**

Pursuant to 10 U.S.C. §31, Article 31, Uniform Code of Military Justice [U.C.M.J.], Rule for Courts-Martial [R.C.M.] 905(d)(3), and Military Rules of Evidence [M.R.E.] 304 and 305, the Defense moves to suppress all statements made by FCAC Pedicini on 19 May 2023 to Naval Criminal Investigative Service [“NCIS”] Special Agents (SA) [REDACTED] and [REDACTED] prior to being warned he was suspected of espionage. Additionally, under M.R.E. 106, M.R.E. 304(h)(2) and M.R.E. 403, the Defense moves to suppress all additional statements made by FCAC Pedicini on 19 May 2023 to SA [REDACTED] and SA [REDACTED] that were not recorded.

**SUMMARY**

On 19 May 2023, NCIS took FCAC Pedicini into custody and interrogated him at NCIS spaces in [REDACTED] SA [REDACTED] initially provided Article 31b warnings for unauthorized removal and retention of classified material and FCAC Pedicini waived his rights. Despite questioning that indicated he suspected SA Pedicini of espionage, SA [REDACTED] did not provide additional Article 31b warnings until over an hour into the interrogation. Approximately 10 minutes after the additional Article 31b warnings, the recording device failed and the remainder of the interrogation was not recorded. SA [REDACTED] reported FCAC Pedicini made admissions after the recording device failed. Because FCAC Pedicini was not properly warned he was suspected of espionage, his statements prior to his Article 31b warnings for espionage should be suppressed. Because SA [REDACTED] failed to ensure the recording device was operational, the Defense is deprived of an opportunity to provide context to FCAC Pedicini’s additional statements or otherwise challenge SA [REDACTED] recollection of events, and the additional statements should be suppressed.

**BURDEN**

Upon motion by the Defense to suppress statements of the Accused under M.R.E. 304, the prosecution has the burden of establishing the admissibility of the statement. M.R.E. 304(f)(6).

The military judge must find by a preponderance of the evidence that the Accused's statement was made voluntarily before the statement may be admitted into evidence. M.R.E. 304(f)(7).

## FACTS

1. FCAC Pedicini is charged, *inter alia*, with eight specifications of violating Article 103a (espionage and attempted espionage) (the Charge III Specifications) and seven specifications of violating Article 134 (alleging a violation of 18 U.S.S. 793(d), an offense not capital) (the Charge IV Specifications).<sup>1</sup>
2. For each of the Charge III Specifications, FCAC Pedicini faces life in prison and a dishonorable discharge. For each of the Charge IV Specifications, FCAC Pedicini faces 10 years in prison and a dishonorable discharge.<sup>2</sup>
3. On 19 May 2023, SA [REDACTED] Reporting Agent, and SA [REDACTED] Participating Agent, interrogated FCAC Pedicini at NCIS spaces in [REDACTED] after FCAC Pedicini was taken into custody.<sup>3</sup> The interrogation was initially video and audio recorded with a Sound Laboratory Zoom portable video recorder.<sup>4</sup>
4. The recording of the interrogation lasts for 1 hour, 20 minutes and 40 seconds.<sup>5</sup>
5. Approximately 13 minutes and 10 seconds into the recording, SA [REDACTED] executes the first Article 31b rights warning of the interrogation, and FCAC Pedicini is verbally warned that he is suspected of violating 18 U.S.C. section 1924, unauthorized removal and retention of classified material.<sup>6</sup> FCAC Pedicini's waiver was memorialized with a written rights waiver.<sup>7</sup>
6. 15 minutes and 20 seconds into the interrogation, SA [REDACTED] asks FCAC Pedicini if he has any idea why he is there. FCAC Pedicini responds that its "classified material disclosure" and describes how he has pictures of the front page of two classified documents on his phone.<sup>8</sup>
7. 17 minutes and 35 seconds into the interrogation, SA [REDACTED] asks FCAC Pedicini who he took the pictures for. FCAC Pedicini responds that he had been creating research papers for someone who claimed to be from a Japanese research company. SA [REDACTED] does not stop the interview to read additional rights warnings. FCAC Pedicini continues to discuss how he does not know the name of the company, and how he wrote his opinion articles using Wikipedia and Google.<sup>9</sup>

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<sup>1</sup> Charge Sheet.

<sup>2</sup> Appendix 12, Manual for Courts-Martial (2019 ed.).

<sup>3</sup> Attachments A at 1 and B at 1.

<sup>4</sup> Attachment B at 1.

<sup>5</sup> Attachment E.

<sup>6</sup> *Id.*

<sup>7</sup> Attachment C.

<sup>8</sup> Attachment E.

<sup>9</sup> *Id.*

8. From the initial rights warning until the agents leave for a break, the questioning predominantly focuses on FCAC Pedicini's actions regarding the Japanese research company, not removal of classified material.<sup>10</sup>
9. At 43 minutes and 42 seconds into the interrogation, both SAs leave the room and do not return until 1 hour, 4 minutes and 45 seconds into the recording.<sup>11</sup>
10. Approximately 1 hour, 9 minutes and 31 seconds into the interrogation, SA [REDACTED] provides FCAC Pedicini a verbal Article 31b cleaning warning for espionage, specifically advising him that any prior illegal admissions cannot be used against him at trial.<sup>12</sup> FCAC Pedicini's waiver of his rights was again memorialized in writing.<sup>13</sup>
11. At 1 hour and 15 minutes into the interrogation, FCAC Pedicini describes his thought process to the SAs, stating that he believed the individual he was communicating with may be from a Japanese research company, and that if he was sending the information he located by searching on Google it was "fine."<sup>14</sup>
12. At 1 hour, 20 minutes and 40 seconds, the video of the interrogation abruptly ends.<sup>15</sup> According to SA [REDACTED] they learned the batteries had failed but did not notice until reviewing the recording after the interrogation had ended.<sup>16</sup>
13. The Reporting Agent provides a "summary" of the remaining segment in his report, which was not captured on the video recording.<sup>17</sup> According to this summary: "*S/Pedicini agreed the information contained in the manuals and possibly the information he provided could be used to harm the United States government. S/Pedicini states his contact had been requesting classified information for the past year. S/Pedicini advised his contact gave him instructions to not use the base wifi or wifi in the area of the base to send documents or photographs. . . S/Pedicini stated he was unsure of the nationality or affiliation of the individual/ group who he was communicating with, but he was sure they were not who they said they were and surmised they could be Japanese working for the Chinese. When asked if he felt the information he provided could be used to the detriment of the U.S. government, S/Pedicini replied 'absolutely.'*"<sup>18</sup>

## LAW

Article 31 prohibits a person subject to the U.C.M.J. from interrogating or eliciting a 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,

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Attachment D.

<sup>14</sup> Attachment E.

<sup>15</sup> *Id.*

<sup>16</sup> Attachment B at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

and (3) advising them that anything they say may be used against them later at court-martial. 10 U.S.C. §31(b). These rights warnings are required when (1) a person subject to the U.C.M.J. (2) interrogates or requests any statement (3) from an accused or person suspected of an offense, and (4) the statements pertain to the offense of which the person is suspected or accused. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). “No statement obtained from any person in violation of this Article [...] may be received in evidence against him in a trial by court-martial.” 10 U.S.C. §831(d). M.R.E. 304 and 305 implement the Code’s prescription.

**a. Who Must Warn? Rights advisements pursuant to Article 31(b) must be provided by any person subject to the Uniform Code of Military Justice, including NCIS SAs.**

For the purposes of Article 31 and M.R.E. 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.” M.R.E.305; *see also* 10 U.S.C. §31(b).

**b. When Must They Warn? Military questioners must warn a servicemember who is suspected of or accused of an offense when the questioner is participating in an official law enforcement or disciplinary investigation or inquiry.**

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.” *Jones*, 73 M.J. at 361 (internal quotation marks omitted)(citations omitted). 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.” *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted).

**c. How Must They Warn? The warning must sufficiently inform the suspect of the nature of the accusation against him or her.**

An adequate rights advisement under Article 31(b) must include “informing the accused or suspect of the nature of the accusation.” M.R.E.305(c)(1)(A). The purpose of informing a suspect of the nature of the accusation “is to orient him to the transaction or incident in which he is allegedly involved.” *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960)(internal citations omitted). While “technical nicety” is not required in this regard, *id.*, 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.” *Simpson*, 54 M.J. at 284.

Among the factors to be considered in reviewing 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. *Id.*(internal citations omitted). “Necessarily, in questions of this type, each case must turn on its own facts.” *United States v. Pipkin*, 58 M.J. 358, 361(CA.A.F. 2003)(quoting *United States v. Nitschke*, 12 C.M.A. 489, 492 (1961)).

For example, in *Nitschke*, 12 U.S.C.M.A. 489, the accused was suspected of having caused a traffic accident resulting in the death of another. The court held that orientation to the traffic accident itself, even without notice that he was suspected of the homicide, was sufficient to orient the accused to the suspicion because it referred to the relevant transaction. *Id.*

**d. A statement obtained in violation of Article 31 is involuntary and inadmissible against an Accused at court-martial pursuant to M.R.E. 304 and 305.**

Under M.R.E.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,” subject to a handful of exceptions. M.R.E.305(c)(1). The Government bears the burden to establish compliance with the rights warning requirements by a preponderance of the evidence. M.R.E.304(e); *see also United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000).

“Where an earlier statement was involuntary only because the accused had not been properly warned of his Article 31(b) [] rights, the voluntariness of the second statement is determined by the totality of the circumstances.” *United States v. Gardinier*, 65 M.J. 60, 64 (C.A.A.F. 2007). A “cleansing warning” or the absence of such a warning prior to the subsequent statement is not dispositive as to the voluntariness of the subsequent statement, but it is factor. *Id.*

**e. The Government has a duty to preserve evidence.**

The duty of the Government to disclose evidence implies a duty to preserve the evidence. In *United States v. Kern*, the Court of Military Appeals stated, “[t]he Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.” 22 M.J. 49, 51 (C.M.A. 1986).

**f. The Defense is permitted to introduce portions of an Accused’s statement not introduced by the Government.**

M.R.E. 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

M.R.E. 304(h)(2) provides:

If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

In discussing the differences between M.R.E 106 and M.R.E. 304(h)(2), the Court in *United States v. Rodriguez* wrote “Rule 106 provides the military judge with discretion to determine whether the additional material “ought in fairness” be considered with the original matter, whereas



Rule 304(h)(2) requires admission of the “remaining portions of the statement” if such material falls within the criteria set forth under the rule and applicable case law.” *United States v. Rodriguez*, 56 M.J. 336, 342 (C.A.A.F. 2002).

M.R.E. 403 provides:

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

## ARGUMENT

FCAC Pedicini was not properly warned that he was suspected of espionage and therefore all statements made prior to his second Article 31b rights warning should be suppressed.

FCAC Pedicini was taken into custody by NCIS agents and transported to NCIS office spaces for an interrogation. At the time they questioned FCAC Pedicini, SA [REDACTED] and SA [REDACTED] were acting in their official role as investigators for a suspected violation of the U.C.M.J. After the initial data collection and pleasantries, SA [REDACTED] and SA [REDACTED] initially provided FCAC Pedicini a rights warning only for unauthorized removal and retention of classified material. They initially ask FCAC Pedicini if he knows why he is there, and he responds it is because he had two pictures of the front page of classified documents. SA [REDACTED] asks FCAC Pedicini why he took the pictures, and he responded that he had been writing opinion articles for a Japanese research company. At that point, if they had not already suspected FCAC Pedicini of espionage, it is clear they do suspect him of espionage and focus their questioning almost entirely on what FCAC Pedicini was doing for the Japanese research company. They ask him how much he had been paid, what types of things the company was asking for, if he met with them in person, and other details. Only a small portion of the questioning is related to FCAC Pedicini’s alleged removal of classified material. It is clear from FCAC Pedicini’s responses to the questions that he believes the two pictures on his phone are the reason he is being questioned.

Only after a break, approximately 1 hour and 9 minutes into the interrogation, does SA [REDACTED] issue a second Article 31b rights warning to FCAC Pedicini. In the cleansing warning, he specifically puts FCAC Pedicini on notice that he is suspected of espionage and tells him that prior illegal admissions cannot be used against him. In other words, SA [REDACTED] explains to FCAC Pedicini that this is a new Article 31b rights waiver and his previous statements cannot be used against him.

The initial rights advisement provided by SA [REDACTED] failed to adequately inform FCAC Pedicini of the nature of the suspect offense of espionage. Removal and retention of classified material is a distinct act from espionage. It is clear from FCAC Pedicini’s statements during the interrogation that he believes he is being interrogated due to taking the pictures, which is qualitatively different from being suspected of committing espionage by writing opinion papers. The questions asked by SA [REDACTED] indicate that he suspected FCAC Pedicini of espionage

immediately after FCAC Pedicini answered his initial question, however, he chose not to provide a second rights advisement for over an hour. SA [REDACTED] clearly believed he should have advised FCAC Pedicini of espionage, because he eventually does so after taking a break. Because the initial rights advisement was inadequate to inform FCAC Pedicini he was suspected of espionage, all statements prior to the second rights advisement should be suppressed.

NCIS failed to properly record the entire interrogation of FCAC Pedicini and unrecorded statements of FCAC Pedicini should be suppressed.

Despite interrogating FCAC Pedicini at NCIS office spaces in [REDACTED] SA [REDACTED] recorded FCAC Pedicini's interrogation with a battery powered portable video camera. During the initial 1 hour and 10 minutes of the interrogation, SA [REDACTED] keeps the camera on including during an approximately 30 minute break. After returning from the break, and reading FCAC Pedicini Article 31b rights for espionage, an offense that carries a potential sentence of life in prison, neither SA [REDACTED] nor SA [REDACTED] check the video camera. According to SA [REDACTED] FCAC Pedicini made damaging admissions after the video stopped recording, including stating "absolutely" when asked if information he provided could be used to the detriment of the United States.

The Government has a duty to preserve and produce evidence for the Defense, however, in this case NCIS failed to properly check and maintain their recording equipment to ensure an interrogation was properly captured. Normally, if the Government introduced FCAC Pedicini's statements during his interrogation, the Defense could invoke M.R.E. 106 and M.R.E. 304(h)(2) to introduce the entire statement in order to provide context and ensure the portions testified to by SA [REDACTED] are not misleading. The Defense is now deprived of that opportunity with no way to dispute the characterization of FCAC Pedicini's by SA [REDACTED]. Additionally, because there is no recording of the final part of FCAC Pedicini's interrogation, there is no way to determine all of FCAC Pedicini's statements after the second Article 31b rights warning were voluntary by looking at a totality of the circumstances. As such, the probative value of the non-recorded statements is substantially outweighed by unfair prejudice to FCAC Pedicini under M.R.E. 403 and the statements should be suppressed.

### **EVIDENCE PRESENTED**

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

- Attachment A: NCIS Results of Apprehension dtd 19 May 23
- Attachment B: NCIS Results of Interrogation dtd 19 May 23
- Attachment C: Military Rights Waiver (Unauthorized Removal) dtd 19 May 23
- Attachment D: Military Rights Waiver (Espionage) dtd 19 May 23
- Attachment E: Video Recording of Interrogation

## RELIEF REQUESTED

The Defense moves the Court to suppress all statements made by FCAC Pedicini on 19 May 2023 to NCIS SA [REDACTED] and SA [REDACTED] prior to being warned he was suspected of espionage, and all additional statements that were not recorded during the same interrogation.

## ORAL ARGUMENT

The Defense desires to make oral argument on this motion if opposed by the Government.

[REDACTED]

J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

## CERTIFICATE OF SERVICE

I certify that on 11 March 2024 I served a true copy of the above on the Court and opposing counsel by electronic means.

[REDACTED]

J. T. COLE  
LCDR, JAGC, USN  
Detailed Defense Counsel

ORIGINAL

CHARGE SHEET

1. NAME OF ACCUSED (Last, First, MI) PEDICINI, Bryce, S.				2. SSN [REDACTED]		3. RANK/RATE FCAC		4. PAY GRADE E-7	
5. UNIT OR ORGANIZATION [REDACTED]						6. CURRENT SERVICE			
						a. INITIAL DATE 29 Nov 18		b. TERM 6 years	
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED			9. DATE(S) IMPOSED			
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	PTC			19 May 23 - Current			
\$5,113.50	\$725.00	\$5,838.50							

II. CHARGES AND SPECIFICATIONS

10.  
**CHARGE I: VIOLATION OF UCMJ, ARTICLE 80**

**Specification 1** (Attempted violation of a lawful general order): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, from on or about 8 May 2023 to 13 May 2023, at or near [REDACTED] attempt to violate a lawful general order which was his duty to obey, to wit: SECNAVINST 5510.36B, Enclosure (2), paragraph 20(o), dated 12 July 2019, by wrongfully transporting information he believed to be classified.

**Specification 2** (Attempted violation of a lawful general order): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 8 May 2023 to 13 May 2023, at or near [REDACTED] attempt to violate a lawful general order which was his duty to obey, to wit: SECNAVINST 5510.36B, Enclosure (3), paragraph 4(c)(5), by wrongfully processing material he believed to be classified on a system that was not approved for classified material.

\*SEE CONTINUATION PAGE\*

11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]		b. GRADE LNI	c. ORGANIZATION OF ACCUSER Office of Special Trial Counsel
d. SIGNATURE [REDACTED]		e. DATE 16 JAN 24	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 16th day of January, 2024, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

\_\_\_\_\_  
 Alling B. Remsen  
*Typed Name of Officer*

\_\_\_\_\_  
 LT, JAGC, USN  
 [REDACTED]

\_\_\_\_\_  
 Region Legal Service Office Southwest  
*Organization of Officer*

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

ORIGINAL

CONTINUATION PAGE 3 OF 4 OF DD FORM 458 ICO U.S. V. PEDICINI, BRYCE, S.  
CHARGE II: VIOLATION OF UCMJ, ARTICLE 92

**Specification 1 (Violation of a lawful general order):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on divers occasions from about November 2022 to about January 2023, at or near Hampton Roads, Virginia and [REDACTED] fail to obey a lawful general order, which was his duty to obey, to wit: SECNAVINST 5510.36B, Enclosure (3), paragraph 4(c)(5), by wrongfully processing classified material on a system that was not approved for classified material.

**Specification 2 (Failure to obey a lawful order):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, [REDACTED] to wit: Enclosure (1), paragraph 7.a.(6), HIGGINST 5510.2C, dated 12 January 2015, an order which it was his duty to obey, did, on board [REDACTED] on or about 25 April 2023, fail to obey the same by wrongfully failing to report a foreign contact.

**Specification 3 (Failure to obey a lawful order):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, [REDACTED] to wit: paragraph Enclosure (1), paragraph 2, HIGGINST 5510.2C, dated 12 January 2015, an order which it was his duty to obey, did, on board [REDACTED] on or about 25 April 2023, fail to obey the same by wrongfully failing to report solicitation of classified information by an unauthorized person.

**Specification 4 (Violation of a lawful general order):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 8 May 2023, on board [REDACTED] fail to obey a lawful general order, which was his duty to obey, to wit: SECNAVINST 5510.36B, Enclosure (2), paragraph 20(u), dated 12 July 2019, by wrongfully taking a personally owned electronic device into an open storage room (secure room).

CHARGE III: VIOLATION OF UCMJ, ARTICLE 103a

**Specification 1 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 22 November 2022, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver classified information to wit: a document titled "article 1112," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 2 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 3 December 2022, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver information to wit: a document titled "Article 1112 add on 2," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 3 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, USS HIGGINS (DDG 76), on active duty, did, in about December 2022, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver classified information to wit: a document titled, "article 1112 add on 3," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 4 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, in January 2023, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver information to wit: a document titled "Article 1223," relating to the national defense, to a citizen and employee of a foreign government.

CONTINUATION PAGE 3 OF 4 OF DD FORM 458 ICO U.S. V. PEDICINI, BRYCE, S.

**Specification 5 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, in January 2023, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver information to wit: a document titled "Article 1223 add on 1," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 6 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 5 February 2023, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver information to wit: a document titled "Article 1223 add on 2," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 7 (Espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 19 February 2023, at or near Hampton Roads, Virginia, with reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, deliver information to wit: a document titled "1223 Updates," relating to the national defense, to a citizen and employee of a foreign government.

**Specification 8 (Attempted espionage):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, from about 8 May 2023 to about 17 May 2023, at or near [REDACTED] with reason to believe it would be used to the injury of the United States and to the advantage of a foreign nation, attempt to communicate information relating to the national defense, to wit: photographs including images of a SIPR computer screen to a citizen and employee of a foreign government.

#### CHARGE IV: VIOLATION OF UCMJ, ARTICLE 134

**Specification 1 (Communicating Defense Information):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 22 November 2022, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "article 1112," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**Specification 2 (Communicating Defense Information):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 3 December 2022, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "Article 1112 add on 2," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**Specification 3 (Communicating Defense Information):** In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about December 2022, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled, "article 1112 add on 3," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

ORIGINAL

CONTINUATION PAGE 3 OF 4 OF DD FORM 1581 CO U.S. N. PEDICINI, BRYCE, S.

**Specification 4** (*Communicating Defense Information*): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about January 2023, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "Article 1223," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**Specification 5** (*Communicating Defense Information*): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about January 2023, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "Article 1223 add on 1," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**Specification 6** (*Communicating Defense Information*): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 5 February 2023, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "Article 1223 add on 2," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**Specification 7** (*Communicating Defense Information*): In that Chief Petty Officer Fire Controlman (AEGIS) Bryce S. Pedicini, U.S. Navy, [REDACTED] on active duty, did, on or about 19 February 2023, at or near Hampton Roads, Virginia, having lawful access to information relating to the national defense of the United States, which information he had reason to believe could be used to the injury of the United States and to the advantage of a foreign nation, knowingly and willfully communicate information relative to the national defense to wit: a document titled "1223 Updates," to a person not entitled to receive said information in violation of Title 18, United States Code, Section 793(d), an offense not capital.

**\*AND NO OTHERS\***

ORIGINAL

12 On 18 January, 20 24, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Typed Name of Immediate Commander

Commander, Naval Surface Force, U.S. Pacific Fleet

Organization of Immediate Commander

E-6/1N1

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1545 hours, 17 January 20 24 at Commander, Naval Surface Force, U.S. Pacific Fleet

Designation of Command or

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

FOR THE

Typed Name of Officer

CHIEF OF STAFF

Official Capacity of Officer Signing

O-6/CAPT

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

NAVAL SURFACE FORCE U.S. PACIFIC FLEET

SAN DIEGO

18 JAN 24

Referred for trial to the GENERAL court-martial convened by GENERAL COURT-MARTIAL

CONVENING ORDER #01-24

Dated 18 JANUARY 20 24, subject to the following instructions: None.

by of

Command or Order

B. R. McLANE

COMMANDER

Typed Name of Officer

Official Capacity of Officer Signing

VADM IISN

Signature

15. On 18 January, 20 24, (caused to be) served a copy hereof on (each of) the above named accused.

LT ALLING REMSEN

O3

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

FOOTNOTES

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

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



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

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<p><b>UNITED STATES</b></p> <p>v.</p> <p><b>BRYCE S. PEDICINI</b> <b>FCAC/E-7                  USN</b></p>	<p><b>GOVERNMENT SECOND SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF (PRE- ADMISSION OF EVIDENCE)</b></p> <p><b>9 April 2024</b></p>
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**NATURE OF MOTION**

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13), the Government moves for a preliminary ruling admitting the following documents into evidence: (1) the Accused’s Navy Federal Credit Union banking account records; and (2) the Accused’s PayPal transaction records.

**BURDEN**

As the moving party, the Government bears the burden of persuasion on the factual issues of this motion by a preponderance of the evidence. R.C.M. 905(c)(1) and (2).

**FACTS**

a. The Accused is charged, *inter alia*, with two specifications of failing to obey a command instruction, in violation of Article 92, Uniform Code of Military Justice (UCMJ), and eight specifications of espionage, in violation of Article 103a, UCMJ. (Charge Sheet).

b. On 4 March 2024, the Government provided notice to Defense, pursuant to Mil. R. Evid. 404(b), of its intent to offer evidence of the Accused’s financial banking records to provide motive by showing the Accused had a financial need for the money Individual #1 provided to him after he submitted the documents Individual #1 requested. (Enclosure 1).

c. The Government received the Accused's Navy Federal Credit Union account records in response to a National Security Letter drafted by Special Agent (SA) [REDACTED] in a single pdf file that contained 517 pages of financial records. (Enclosures 2, 3).

d. Accompanying the financial records from Navy Federal Credit Union was a certification statement from an authorized custodian of records, Jeniffer Gomez, stating that the enclosed records were prepared by the bank in the ordinary course of business and made at or near the time of the act, condition or event. (Enclosure 4).

e. In the single pdf file were the Accused's Navy Federal account records compiled in Enclosure (3), which were enclosed to Ms. [REDACTED]'s business record certification.

f. In exchange for national defense information, the Accused sought and received monetary payment from Individual #1. (Enclosure 5).

g. Individual #1 sent payments to the Accused via PayPal to the Accused's PayPal account. (Enclosure 6).

h. After receiving the Accused's records from PayPal, which the Government received in response to a subpoena request sent by SA [REDACTED], [REDACTED], the custodian of records for PayPal, sent an affidavit stating that the records associated with the Accused's account were gathered and stored by PayPal in the routine course of business and made at or near the time of the occurrence by, or from, information transmitted by a person with knowledge of those matters. (Enclosure 7).

i. Ms. [REDACTED]'s business record affidavit specifically references the Accused's account and SA [REDACTED]'s request in the documents compiled in Enclosure (6).

## LAW

R.C.M. 906(b)(13) permits parties to request a preliminary ruling on the admissibility of evidence. Pursuant to Mil. R. Evid. 402, all relevant evidence is admissible unless otherwise inadmissible by law. Evidence is relevant if: (1) it makes a fact more or less probable; and (2) the fact is consequential in determining the action. M.R.E. 401. However, courts may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, confusion, or waste of time. M.R.E. 403.

An out of court statement offered to prove the truth of the matter asserted is considered hearsay and is inadmissible unless excluded or excepted from the rule. M.R.E. 801, 802, 803. One exception to the rule against hearsay is for records of regularly conducted activity. M.R.E. 803(6). Under this exception, a record of an act can be admitted if: “(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a [business, organization, or occupation,] whether or not conducted for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [M.R.E.] 902(11) or with a statute permitting certification in a criminal proceeding in a court of the United States; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” *Id.*

Under Mil. R. Evid. 902(11), certified domestic records of a regularly conducted activity are self-authenticating, meaning they require no extrinsic evidence of authenticity to be admitted. For evidence to be self-authenticating, the original or copy of the record must meet M.R.E. 803(6)(A)-(C) requirements, “as shown by a certification of the custodian or another qualified

person . . . [b]efore the trial or hearing . . . .” M.R.E. 902(11). “The proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them.” *Id.*

## DISCUSSION

### **A. The requested documents should be pre-admitted because they are relevant.**

#### **1. The Accused’s Navy Federal Credit Union account records are relevant to all charges.**

The Government moves to pre-admit the Accused’s Navy Federal Credit Union account records that are compiled in Enclosure (3). As stated within the Government’s Mil. R. Evid. 404(b) notice it provided Defense on 4 March 2024, this evidence is relevant to prove the Accused’s motive for committing the charged offenses. These records show the Accused had a financial need for the money he sought and received from Individual #1 after he submitted Individual #1 the documents he/she requested. From the bank records, the financial need is evident in the months leading up to the Accused’s first communication with Individual #1 and throughout the time the Accused’s provided Individual #1 national defense information. In pages 18 through 28 of the Navy Federal account records, it shows the loans the Accused applied for and received for in the months leading up to the Accused’s first communication with Individual #1 and throughout the time the Accused’s provided Individual #1 national defense information. The loan documents and images of the checks provide context for the large sums of money that is sporadically deposited into the Accused’s account. Furthermore, the loan documents further establish the Accused’s financial need for the money Individual #1 sent because it shows the amount and frequency of the loans the Accused received and relied on.

**2. The Accused's PayPal account records are relevant to all charges.**

The Government moves to pre-admit the Accused's PayPal account records compiled in Enclosure (6). This evidence is relevant because as an incentive for the Accused completing Individual #1's requests, Individual #1 sent the Accused money to the Accused's PayPal account. The PayPal account records show every time Individual #1 provided the Accused money in exchange for information. To be clear, the Government is only requesting the Court consider the payments provided to the Accused by Individual #1. Any other transactions listed in the PayPal records are irrelevant on the merits.

**B. The requested documents should be pre-admitted because they satisfy Mil. R. Evid. 803(6) and are self-authenticating.**

The Navy Federal and PayPal account records the Government is attempting to pre-admit all qualify as exceptions to the rule against hearsay because they are records of a regularly conducted activity, pursuant to Mil. R. Evid. 803(6), and are self-authenticating. All records are referenced by declarations/affidavits from custodians of record due to their position with the business.

Regarding the Navy Federal account records, SA [REDACTED] submitted a National Security Letter to the bank requesting it provide all of the Accused's account records with Navy Federal Credit Union. As a result of that request, SA [REDACTED] later received a pdf file that contained 517 financial records enclosed to Ms. [REDACTED]'s business record attestation. In the pdf were the relevant Navy Federal account documents compiled in Enclosure (3).

Regarding the Accused's PayPal transaction records, SA [REDACTED] submitted PayPal a subpoena requesting it provide all of the Accused's financial records. As a result of that request, SA [REDACTED] received an excel file which the relevant sections are compiled in Enclosure (6). SA

██████ later received a business record attestation from PayPal that referenced the compiled original excel spreadsheet and SA ██████'s request.

Each custodian of record certified that based on their positions and knowledge of the business' practices and procedures, they could attest that the records were made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters." They also certified that it is the regular practice of their businesses to make and keep their respective records in the ordinary course of business or regularly conduct activities. Accordingly, all the records satisfy the requirements of a self-authenticating record of a regularly conducted activity under M.R.E. 902(11).

### **RELIEF REQUESTED**

The Government respectfully requests the Court pre-admit: (1) the Accused's Navy Federal Credit Union banking account records; and (2) the Accused's PayPal transaction records, admissible evidence pursuant to R.C.M. 906(b)(13).

### **ORAL ARGUMENT**

The Government is prepared to make oral argument on this motion.

### **EVIDENCE**

Enclosure 1: Government's M.R.E. 404(b) Notice (In Record as Defense Attachment A to Mot. to Exclude M.R.E. 404(b))

Enclosure 2: Affidavit of Special Agent ██████, NCIS

Enclosure 3: Accused's Navy Federal Credit Union account records (In Record as Government Enclosure 4 to Supplemental Mot. to Pre-Admit)

Enclosure 4: Declaration of ██████ (In Record as Government Enclosure 5 to Supplemental Mot. to Pre-Admit)

Enclosure 5: Facebook Messages between Accused and Individual #1 Notice (In Record as Government Enclosure 6 to Supplemental Mot. to Pre-Admit)

Enclosure 6: Accused's PayPal account records

Enclosure 7: Affidavit of [REDACTED]

[REDACTED]  
C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served upon Defense Counsel and the Court in the above captioned case on 9 April 2024.

[REDACTED]  
C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel

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

<p><b>UNITED STATES</b></p> <p>v.</p> <p><b>BRYCE S. PEDICINI</b> FCAC/E-7                  USN</p>	<p><b>GOVERNMENT SUPPLEMENTAL MOTION FOR APPROPRIATE RELIEF (PRE-ADMISSION OF EVIDENCE)</b></p> <p><b>3 April 2024</b></p>
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**NATURE OF MOTION**

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13), the Government moves for a preliminary ruling admitting the following documents into evidence: (1) the Accused’s signed security briefing acknowledgement form and classified information non-disclosure form; (2) the Accused’s Navy Federal Credit Union banking account records; (3) Facebook messages between the Accused and Individual #1; and (4) the Accused’s PayPal transaction records.

**BURDEN**

As the moving party, the Government bears the burden of persuasion on the factual issues of this motion by a preponderance of the evidence. R.C.M. 905(c)(1) and (2).

**FACTS**

a. The Accused is charged, *inter alia*, with two specifications of failing to obey a command instruction, in violation of Article 92, Uniform Code of Military Justice (UCMJ), and eight specifications of espionage, in violation of Article 103a, UCMJ. (Charge Sheet).

b. After arriving at [REDACTED], the Accused was provided a classified information non-disclosure agreement and security briefing form on 25 April 2023 from the Security Manager for the command via the Security Petty Officer. (Enclosure 1).



c. The security briefing sheet is an enclosure to the command's security manual instruction; identified as HIGGINSINST 5510.2C. (Enclosure 1).

d. On 25 April 2023, the Accused signed the security briefing form acknowledging he was aware of the orders within the instruction. (Enclosure 1).

e. The instruction, *inter alia*, required the Accused to report: (1) foreign contacts; and (2) any solicitations of classified information by an unauthorized person. (Enclosure 1).

f. Lieutenant Junior-Grade (LTJG) [REDACTED], who has been appointed as the command's Special Security Officer and Assistant Security Manager, provided a certification stating that the Accused's signed security briefing acknowledgement form was made and kept by [REDACTED] in the ordinary course of a regularly conducted activity and made at or near the time of the occurrence by a person with knowledge of those matters. (Enclosure 2).

g. On 4 March 2024, the Government provided notice to Defense, pursuant to Mil. R. Evid. 404(b), of its intent to offer evidence of the Accused's financial banking records to provide motive by showing the Accused had a financial need for the money Individual #1 provided to him after he submitted the documents Individual #1 requested. (Enclosure 3).

h. The Government received the Accused's Navy Federal Credit Union account records in response to a subpoena. (Enclosure 4).

i. Accompanying the records from Navy Federal Credit Union was a certification statement from an authorized custodian of records, [REDACTED], stating that the enclosed records were prepared by the bank in the ordinary course of business and made at or near the time of the act, condition or event. (Enclosure 5).

j. Individual #1 initially reached out to the Accused on Facebook by sending him a message on 24 October 2022, and the communication between the two on Facebook lasted until on or about 5 July 2023. (Enclosure 6).

k. Throughout the entirety of the Facebook messages, the Accused and Individual #1 discuss the Accused providing Individual #1 national defense information and shows the Accused sent the “white papers” described in Specification 1 through 7 of Charge III and Charge IV. (Enclosure 6).

l. Accompanying the Facebook messages from Meta Platforms, Inc. was a declaration from their custodian of records, ██████████, stating that the records of Facebook messages were made and kept by Meta in the ordinary course of regular conducted activity and made at or near the time the information was transmitted by the Meta user, which in this case was the Accused. (Enclosure 7).

m. In exchange for national defense information, the Accused sought and received monetary payment from Individual #1. (Enclosure 6).

n. Individual #1 sent payments to the Accused via PayPal to the Accused’s PayPal account. (Enclosure 8).

o. Accompanying the Accused’s records from PayPal, which the Government received in response to a subpoena request, was a affidavit from a custodian of records for PayPal, ██████████, stating that the enclosed records were gathered and stored by PayPal in the routine course of business and made at or near the time of the occurrence by, or from, information transmitted by a person with knowledge of those matters. (Enclosure 9).

## LAW

R.C.M. 906(b)(13) permits parties to request a preliminary ruling on the admissibility of evidence. Pursuant to Mil. R. Evid. 402, all relevant evidence is admissible unless otherwise inadmissible by law. Evidence is relevant if: (1) it makes a fact more or less probable; and (2) the fact is consequential in determining the action. M.R.E. 401. However, courts may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, confusion, or waste of time. M.R.E. 403.

An out of court statement offered to prove the truth of the matter asserted is considered hearsay and is inadmissible unless excluded or excepted from the rule. M.R.E. 801, 802, 803. One exception to the rule against hearsay is for records of regularly conducted activity. M.R.E. 803(6). Under this exception, a record of an act can be admitted if: “(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a [business, organization, or occupation,] whether or not conducted for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [M.R.E.] 902(11) or with a statute permitting certification in a criminal proceeding in a court of the United States; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” *Id.*

Under Mil. R. Evid. 902(11), certified domestic records of a regularly conducted activity are self-authenticating, meaning they require no extrinsic evidence of authenticity to be admitted. For evidence to be self-authenticating, the original or copy of the record must meet M.R.E. 803(6)(A)-(C) requirements, “as shown by a certification of the custodian or another qualified

person . . . [b]efore the trial or hearing . . . .” M.R.E. 902(11). “The proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them.” *Id.*

## DISCUSSION

### A. The requested documents should be pre-admitted because they are relevant.

1. **The Accused’s security briefing acknowledgement form to the HIGGINSINST 5510.2C is relevant to Charge II, Specifications 2 and 3, and his classified information nondisclosure agreement is relevant to Charge III, Specification 8.**

The Government moves to pre-admit the Accused’s security briefing acknowledgement form to the HIGGINSINST 5510.2C and classified information nondisclosure form, which he signed on 25 April 2023. To prove the Accused’s failure to obey the lawful order, HIGGINSINST 5510.2C, which was issued by the Commanding Officer [REDACTED], the Government must show the Accused first knew of said order. The lawful orders alleged in Charge II, Specifications 2 and 3, respectively, requires the Accused to report foreign contacts as well as solicitations of classified information by unauthorized persons. The acknowledgement form is relevant because it establishes that the Accused was aware of those orders; an element of the offense.

Additionally, the Accused’s classified information nondisclosure form is relevant to Charge III, Specification 8. The agreement states, *inter alia*, that “the unauthorized disclosure . . . of classified information could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation.” To prove Charge III, Specification 8, the Government is required to prove the Accused had reason to believe the information he attempted to communicate to Individual #1 could be used to the injury of the United States and to the

advantage of a foreign nation. This evidence is relevant because it will assist the Government in proving that element.

**2. The Accused's Navy Federal Credit Union account records are relevant to all charges.**

The Government moves to pre-admit the Accused's Navy Federal Credit Union account records that are compiled in Enclosure 4. As stated within the Government's Mil. R. Evid. 404(b) notice it provided Defense on 4 March 2024, this evidence is relevant to prove the Accused's motive for committing the charged offenses. These records show the Accused had a financial need for the money he sought and received from Individual #1 after he submitted Individual #1 the documents he/she requested. From the bank records, the financial need is evident in the months leading up to the Accused's first communication with Individual #1 and throughout the time the Accused's provided Individual #1 national defense information.

**3. Facebook messages between the Accused and Individual #1 are relevant to Charges II, III, and IV.**

The Government moves to pre-admit the Accused's Facebook messages between him and Individual #1. The Facebook messages are relevant because they show how the Accused's and Individual #1's communications started. Individual #1 initially reached out to the Accused on 24 October 2022 where, in his/her first message, offered the Accused money for information. Additionally, Specifications 1 through 7 of Charge III and Charge IV requires the Government to prove the Accused sent national defense information, "white papers," to a citizen and employee of a foreign government or a person not entitled to receive such information, Individual #1. The Accused sent the "white papers," the names of which are listed in Specification 1 through 7 of Charge III and Charge IV, which are shown in these Facebook messages.

**4. The Accused's PayPal account records are relevant to all charges.**

The Government moves to pre-admit the Accused's PayPal account records compiled in Enclosure 8. This evidence is relevant because as an incentive for the Accused completing Individual #1's requests, Individual #1 sent the Accused money to the Accused's PayPal account. The PayPal account records show every time Individual #1 provided the Accused money in exchange for information.

**B. The requested documents should be pre-admitted because they satisfy Mil. R. Evid. 803(6) and are self-authenticating.**

The documents the Government is attempting to pre-admit all qualify as exceptions to the rule against hearsay because they are records of a regularly conducted activity, pursuant to Mil. R. Evid. 803(6), and are self-authenticating. All records were accompanied by declarations/affidavits from custodians of record or a person qualified to make such a declaration due to their position with the business or command. Each custodian of record or qualified person certified that based on their positions and knowledge of the business or command's practices and procedures, they could attest that the records were made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters." They also certified that it is the regular practice of their businesses or command to make and keep their respective records in the ordinary course of business or regularly conduct activities. Accordingly, all the records satisfy the requirements of a self-authenticating record of a regularly conducted activity under M.R.E. 902(11).

**RELIEF REQUESTED**

The Government respectfully requests the Court pre-admit: (1) the Accused's signed security briefing acknowledgement form and classified information non-disclosure form; (2) the Accused's Navy Federal Credit Union banking account records; (3) Facebook messages between

the Accused and Individual #1; and (4) the Accused's PayPal transaction records, admissible evidence pursuant to R.C.M. 906(b)(13).

**ORAL ARGUMENT**

The Government is prepared to make oral argument on this motion.

**EVIDENCE**

- Enclosure 1: Accused's Security Briefing Acknowledgement Form and Nondisclosure Agreement
- Enclosure 2: Declaration of LTJG [REDACTED]
- Enclosure 3: Government's M.R.E. 404(b) Notice (In Record as Defense Attachment A to Mot. to Exclude M.R.E. 404(b))
- Enclosure 4: Accused's Navy Federal Credit Union account records
- Enclosure 5: Declaration of [REDACTED]
- Enclosure 6: Facebook Messages between Accused and Individual #1
- Enclosure 7: Declaration of [REDACTED]
- Enclosure 8: Accused's PayPal account records
- Enclosure 9: Affidavit of [REDACTED]

[REDACTED]

C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this motion was served upon Defense Counsel and the Court in the above captioned case on 3 April 2024.

[REDACTED]

C. E. MORGAN III  
LCDR, JAGC, USN  
Trial Counsel

# CONVENING ORDER



# CHARGE SHEET

# **TRIAL COURT MOTIONS & RESPONSES**

**THERE ARE NO TRIAL COURT MOTIONS  
AND RESPONSES**

# REQUESTS

**THERE ARE NO REQUESTS**

# NOTICES

**THERE ARE NO NOTICES**

# **COURT RULINGS & ORDERS**



**THERE ARE NO COURT RULINGS  
AND ORDERS**

# STATEMENT OF TRIAL RESULTS

# CONVENING AUTHORITY'S ACTIONS

# ENTRY OF JUDGMENT

# APPELLATE INFORMATION

**THERE IS NO APPELLATE  
INFORMATION AT THIS TIME**

# REMAND

**THERE WERE NO REMANDS**



**NOTICE OF COMPLETION OF  
APPELLATE REVIEW**