[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

RAY	SAMUEL	B	[redacted]	E-4
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

USCG STATION MAYPORT	U.S. COAST GUARD	JACKSONVILLE, FL
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by DISTRICT COMMANDER

(Title of Convening Authority)

COAST GUARD DISTRICT SEVEN, MIAMI, FL

(Unit/Command of Convening Authority)

Tried at

LEGAL SERVICE COMMAND, NORFOLK, VA *(Place or Places of Trial)* On 1 JULY 2023 *(Date or Dates of Trial)*

Companion and other cases None

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

[redacted]

CONVENING ORDER

GENERAL COURT-MARTIAL	)	COMMANDER
	)	
	)	COAST GUARD DISTRICT SEVEN
CONVENING ORDER NO. 1-20	)	MIAMI, FL
AMENDMENT NO. 6	)	
	)	MAY 24 2023

COMMANDER
COAST GUARD DISTRICT SEVEN

1. The following members are excused:

CAPT [redacted]
CDR [redacted]
LCDR [redacted]
LT [redacted]
AMTCM [redacted]
OSCM [redacted]
YNCM [redacted]
BMCS [redacted]
BMCS [redacted]
BMC [redacted]
CSC [redacted]
SKC [redacted]
MEC [redacted]
MKC [redacted]
SKC [redacted]
AET1 [redacted]
OS1 [redacted]
YN1 [redacted]

2. The following members are excused only for the court-martial, *United States v. ME3 Samuel Ray, USCG*:

LCDR [redacted]
LCDR [redacted]
LT [redacted]
MK1 [redacted]

[redacted]

Brendan C. McPherson
Rear Admiral, U.S. Coast Guard
Commander, Coast Guard District Seven

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPL ID	3. GRADE OR RANK	4. PAY GRADE
Ray, Samuel, B.	[redacted]	ME3	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
USCG STA Mayport	21 Aug 2018	5 year

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOT[redacted]		
~~2787.90~~ 2914.80	NA	~~2787.90~~ 2914.80	None	N/A

II. CHARGES AND SPECIFICATIONS

10.

See Continuation Page.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	SK1/E-6	DOL

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20221028

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 28th day of October, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

Anthony M. Rodrigues

LCDR/O-4

Grade

Legal Service Command

Commissioned Officer

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

RODRIGUES.ANTHONY.MARIN US.[redacted]

Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted]
Date: 2022.10.28 11:08:08 -04'00'

Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12 On October 31, 2022, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

CG Station Mayport
Organization of Immediate Commander

W3/BOSN
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13 The charges were received at 1330 hours, 3 November, 2022, at Commander, Seventh Coast Guard District
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

Brendan C. McPherson
Typed Name of Officer

FOR THE[1]

Rear Admiral/O-8
Grade

District Commander
Official Capacity of Officer Signing

MCPHERSON.BRENDAN.C.[redacted] Digitally signed by MCPHERSON.BRENDAN.C.[redacted] Date: 2022.11.03 15:41:17 -04'00'
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Seventh Coast Guard District	Miami, Florida	20230124

Referred for trial to the General court-martial convened by General Court-Martial Convening Order No. 1-20, amended by Amendment No. 1 of 6 October 2022, dated 12 November 2020, subject to the following instructions: [2]

By xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
Command or Order

Brendan C. McPherson
Typed Name of Officer

District Commander
Official Capacity of Officer Signing

Rear Admiral/O-8
Grade

MCPHERSON.BRENDAN.C.[redacted] Digitally signed by MCPHERSON.BRENDAN.C.[redacted] Date: 2023.01.24 17:12:12 -05'00'
Signature

15 On 26 January, 2023, I caused to be served a copy hereof on the above named accused.

Anthony M. Rodrigues
Typed Name of Trial Counsel

LCDR/O-4
Grade or Rank of Trial Counsel

RODRIGUES.ANTHONY.MARIN.US.[redacted] Digitally signed by RODRIGUES.ANTHONY.MARIN.US.[redacted] Date: 2023.02.09 13:40:53 -05'00'
Signature

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

DD FORM 458, (BACK), MAY 2000

ATTACHMENT – DD FORM 458
ICO: RAY, Samuel B.

CHARGE I: Violation of the UCMJ, Article 120

Specification (Abusive Sexual Contact): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, touch the shoulder of [redacted] with ME3 Ray's body part to wit: his penis, with an intent to gratify his own sexual desire, without the consent of [redacted]

CHARGE II: Violation of the UCMJ, Article 128

Specification 1 (Assault Consummated by a Battery): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the shoulder and neck with his semen.

Specification 2 (Assault Consummated by a Battery): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the neck with his hand.

CHARGE III: Violation of the UCMJ, Article 92

Specification (Violating a General Order): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place.

TRIAL COURT MOTIONS & RESPONSES

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE CONCERNING THE PRIOR SEXUAL ASSAULT INVESTIGATION OF THE ACCUSED** **7 ARPIL 23**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b) and Military Rules of Evidence (M.R.E.) 401 and 404(b), Maritime Enforcement Specialist Petty Officer Third Class Samuel B. Ray, USCG (ME3 Ray), by and through counsel, respectfully moves the Court to exclude all evidence concerning ME3 Ray's prior sexual assault allegation.

SUMMARY

ME3 Ray was the subject of a sexual assault allegation that was said to have taken place in October of 2019. No charges were preferred against ME3 Ray as a result of the investigation. Defense would like to ensure that no evidence or information concerning the prior investigation is brought into the current case.

BURDEN

The Government bears the burden of proving the admissibility of evidence offered under M.R.E. 404(b). *See United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).

FACTS

1. ME3 Ray is charged with one specification of violating Article 120, UCMJ, two specifications of violating Article 128, UCMJ, and one specification of violating Article 92, UCMJ. All charged misconduct is alleged to have happened on or about 18 March 2022 in a Coast Guard-controlled workplace in Jacksonville, Florida, with [redacted] as the complaining witness. Enclosure A.

2. On 20 January 2021, an unrestricted report of sexual assault was made against ME3 Ray for conduct alleged to have taken place on 17 October 2019. Enclosure B.

3. There is no evidence of the allegation leading to any court-martial charges or disciplinary action.

LAW

A bedrock principal of American Jurisprudence is that a person's character is not on trial, but evidence of conduct amounting to a violation of a criminal code is. Evidence of a person's character or character trait is inadmissible to prove that on a particular occasion the person acted in accordance with the character or trait. M.R.E. 404(a)(1). This prohibition on character evidence also precludes the introduction of prior crimes, wrongs, or other acts committed by a person to prove that the person may have acted in conformity therewith. M.R.E. 404(b)(1). The rule allows for the limited introduction of prior crimes, wrongs, or other acts for "another purpose, such as . . . motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of knowledge." *Id.* The Government may not use M.R.E. 404(b) as a ploy to present character evidence which would otherwise be inadmissible or to demonstrate that the accused is predisposed to commit the alleged criminal acts. *United States v. Rodriguez*, 31 M.J. 150, 155 (C.M.A. 1990).

Non-propensity evidence offered under this rule must still satisfy a three-prong test: (1) that the evidence reasonably supports a finding by the fact-finder that the accused committed the other act; (2) that the evidence makes some fact of consequence more or less probable by the existence of that evidence; and (3) that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109.

"The first and second prongs address the logical relevance of the evidence." *United States v. Barnett*, 63 M.J. 288, 294 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004)). The prior act is only relevant if the members can reasonably conclude that the act occurred and that the accused was the actor. *United States v. Huddleston*, 485 U.S. 681, 685 (1988). The third prong of the Reynolds test is an M.R.E. 403 balancing test. Several factors should be considered in determining whether the evidence is substantially more prejudicial than probative. These include: (1) the strength of proof of the prior act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the prior conduct; (6) the temporal proximity of the prior event; (7) the frequency of the acts; (8) the presence of intervening circumstances; and (9) the relationship between the parties. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (citing *United States v. Wright*, 56 M.J. 476, 482 (C.A.A.F. 2000)).

ARGUMENT

a. The Government has not provided the required notice to allow for the admission of evidence regarding the 17 October 2019 incident, and therefore should be barred from any such admission.

The Government has not provided any notice to allow for the submission of evidence related to the alleged 17 October 2019 incident. As a result of the lack of notice, the Government should be barred *en toto* from admitting any evidence related to the 17 October 2019 allegation and the subsequent investigation.

b. Even if the government gave proper notice, any evidence of the 17 October 2019 incident is propensity evidence that would be inadmissible under M.R.E. 401, 403, and 404.

First, any evidence that ME3 Ray allegedly sexually assaulted another woman on 17 October 2019 is merely propensity evidence, which is inadmissible under M.R.E. 404, unless the Government proves that it should be admitted for one of the reasons under M.R.E 404(b)(2). However, even if the evidence were proffered by the Government for a reason besides propensity, it would fail the three-prong test of *Reynolds*.

Foremost, there is no evidence to allow a fact-finder to find that the prior sexual assault took place. After a full investigation by CGIS, the investigation was closed and no charges were preferred, and no disciplinary or administrative action was taken against ME3 Ray. Any evidence that ME3 Ray allegedly sexually assaulted another woman on 17 October 2019 would only be used to show propensity of ME3 Ray to sexually assault women. The evidence aims to paint ME3 Ray with a broad, character-based brush so that the fact-finder can conclude that he acted with the same propensity regarding the charged offenses.

Additionally, this alleged other act is simply not relevant to the charged offenses. It is purported to have occurred over two years before the alleged offenses and involved penetrative sex after a night of drinking. It would simply be impossible to conclude that the 17 October 2019 event, which is entirely separate in nature, could prove motive, intent, preparation, plan, or any other purported reason. As such, this act is irrelevant under M.R.E. 401, and any probative value is substantially outweighed by the danger of unfair prejudice under M.R.E. 403.

For the third *Reynolds* prong, the aforementioned absence of linkage and relevance to the charged misconduct go to the low probative value of the 17 October 2019 incident. In contrast, the danger of unfair prejudice is significant because the fact-finders will assume the likelihood of an allegation being true is greater if it is being made by a second person. If any evidence regarding 17 October 2019 is admitted at trial, the court-martial would become transformed into a trial of ME3 Ray's character, not on the validity of the discrete charged offenses. Therefore, the Court should enter an Order precluding the Government from introducing any evidence related to 17 October 2019.

RELIEF REQUESTED

For the foregoing reasons, the Defense requests the Court exclude all evidence concerning ME3 Ray's prior sexual assault allegation.

EVIDENCE & ORAL ARGUMENT

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

A. *See* Charge Sheet ICO U.S. v. ME3 Samuel Ray, USCG.
B. Summary of investigation concerning 17 October 2019 sexual assault allegation.

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

LUNCHEON.TREVAUGHN.ATON. [redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON. [redacted] Date: 2023.04.05 14:32:09 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

**********CERTIFICATE OF SERVICE**********

I hereby certify that a true and accurate copy of the above was served on the Military Judge, Trial Counsel, and SVC via electronic mail on 7 April 2023.

LUNCHEON.TREVAUGHN.ATON. [redacted] Digitally signed by [redacted] Date: 2023.04.05 14:32:26 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

Appellate Exhibit XI
Page 4 of 4

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION IN LIMINE TO**
	)	**EXCLUDE EVIDENCE CONCERNING**
	)	**THE PRIOR SEXUAL ASSAULT**
	)	**INVESTIGATION OF THE ACCUSED**
	)	
SAMUEL B. RAY,	)	14 April 2023
ME3/E-4, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States concurs with the Defense motion and will not seek to admit evidence of the prior investigation.

Respectfully submitted,

RODRIGUES.ANTHONY.MARINUS.[redacted] Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted] Date: 2023.04.14 09:04:34 -04'00'

Anthony M. Rodrigues, LCDR
Trial Counsel

Appellate Exhibit XIII
Page 1 of 1

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS** **(Multiplicity and Unreasonable Multiplication of Charges)** **07 APRIL 2023**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 907(b)(3)(B), Article 44(a), UCMJ, and the Fifth Amendment of the U.S. Constitution, the Defense respectfully moves this Court to dismiss Charge I and its sole specification because it is multiplicious with Charge III and its sole specification, or in the alternative to dismiss Charge III and its sole specification.

Pursuant to R.C.M. 906(b)(12), the Defense respectfully moves this Court to dismiss Charge I and its sole specification as it is unreasonably multiplied by Specification 1 of Charge II. In the Alternative the Defense requests that Specification 1 of Charge II be dismissed instead.

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. The Government has charged ME3 Samuel Ray, USCG, with violating Uniform Code of Military Justice (UCMJ), Articles 120, 128, and 92. Charge I consists of one specification of Article 120(d), UCMJ (abusive sexual contact) and Charge II consists of two

specifications of Article 128, UCMJ (assault consummated by a battery). Charges were referred to general court-martial on 24 January 2023. Charge Sheet.

2. Charge I states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, touch the shoulder of [redacted] with ME3 Ray's body part to wit: his penis, with an intent to gratify his own sexual desire, without the consent of [redacted] Charge Sheet.

3. Charge II states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the shoulder and neck with his semen." Charge Sheet.

4. Specification I of Charge III states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place." Charge Sheet.

5. The complaining witness alleges in her interview with CGIS that the accused, ME3 Ray, without consent, placed his penis on her shoulder/neck while he ejaculated onto her. Enclosure 2.

6. An Article 32, UCMJ, preliminary hearing was held on 6 December 2022 in Jacksonville, FL to consider the preferred charges and specifications. Enclosure 2.

7. The preliminary hearing officer found that each Charge and specification properly allege an offense under the UCMJ, jurisdiction over the accused exist, and there is probable cause to support them. Enclosure 2.

8. The preliminary hearing officer while applying the facts to the elements of Charge III stated, "[a]s discussed under Charge I & II above, [redacted] stated that the offenses described above occurred inside the "ME Office" onboard CG Station Mayport." Enclosure 2.

9. At the Article 32 hearing the Government only offered evidence of the alleged non-consensual touching of [redacted] by ME3 Ray. Enclosure 2.

LAW

1. Multiplicity

Multiplicious charges are those that violate the Fifth Amendment and Article 44(a), UCMJ, because they punish an accused twice for the same act or course of conduct. The prohibition against multiplicity is grounded in both "constitutional and statutory restrictions against Double Jeopardy." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). The Fifth Amendment "protects against multiple punishments for the same offense," and it prohibits the Government from obtaining a conviction and punishment "if it would be contrary to the intent of Congress." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997) (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

Like the Fifth Amendment, the UCMJ also protects against multiple prosecutions for the same offense. Article 44(a), UCMJ, 10 U.S.C. § 844(a). As a result of the constitutional and statutory prohibitions on Double Jeopardy, the Government may not use multiplicious court-martial charges to punish an accused twice for the same act. R.C.M. 907(b)(3)(B); *see also United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012) (Stucky, J., concurring) (noting

multiplicity is rooted "in the Constitution's Fifth Amendment Double Jeopardy Clause, which provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb'") (quoting U.S. Const. amend. V). "The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment," and prohibits the Government from "charg[ing] a defendant twice for what is essentially a single crime." *United States v. Forrester*, 76 M.J. 479, 484-85 (C.A.A.F. 2017).

There are two types of multiplicity —single-act/multiple-statutes cases, and multiple-acts/single statute cases. And for each distinct type of multiplicity there are "correspondingly distinct tests to evaluate them. One type arises when the government charges a single act under multiple statutes. Courts assess single-act/multiple-statutes cases 'using the *Blockburger/Teters* analysis.'" *United States v. Hernandez*, 78 M.J. 643, 645 (C.G. Ct. Crim. App 2018) (quoting *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012)). "Thus, unless statutory intent is clear. 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *Hernandez*, 78 M.J. at 645 (quoting *Blockburger*, 284 U.S. at 304).

The multiplicity doctrine demands that "an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments." *Britton*, 47 M.J. at 197 (citations omitted). Although a lesser-included offense "must be determined with reference to the elements defined by Congress for the greater offense," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), the analysis depends neither on exacting statutory language nor the language pled in the specifications. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011) ("The two offenses need not have 'identical statutory

language. . . . Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'") (quoting *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (internal citation omitted)).

Rather than bare statutory language, military courts examine the statutory elements *and* the elements as pled to determine whether one offense includes another. *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995) ("those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test") (emphasis added); *see also Arriaga*, 70 M.J. at 55 ("that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense'") (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2004)) (additional citations omitted).

Thus, in *Arriaga*, the Court of Appeals for the Armed Forces (C.A.A.F.) affirmed a housebreaking conviction as a necessary lesser-included offense of the charged burglary. *Id.* The *Arriaga* court held that, regardless of the government's means of proving the appellant's intent for either offense, housebreaking is included within the burglary because "it is impossible to prove a burglary without also proving a housebreaking." *Id.*

In *United States v. Palagar*, 56 M.J. 294 (C.A.A.F. 2002), the court used the same rationale to reach a converse finding, holding that an officer's Article 121 larceny conviction for using a government credit card for personal purchases *was* multiplicious of his Article 133 conduct unbecoming conviction for using that same card for "unauthorized purchases" when the unauthorized purchases were the personal purchases. 56 M.J. at 297.

Dismissal is the only appropriate remedy. Because conviction on a greater offense necessarily includes conviction of all lesser offenses, the Manual directs that a charge and lesser-

included offense should not appear on the charge sheet. R.C.M. 307(c)(4), Discussion, Manual for Courts-Martial, United States (2019 ed.) ("In no case should both an offense and a lesser included offense thereof be separately charged."); *see also* Article 79, UCMJ, 10 U.S.C. § 879 (2019). An offense is "necessarily included" in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense." Article 79, UCMJ. While the President may designate certain lesser included offenses by regulation, a court may identify an offense as a "necessarily included" offense regardless of whether the offense has been designated a lesser included offense by the President. *Id.*

Further, any demand to retain multiplicious specifications through findings—under the auspice of "alternative" contingencies of proof—implicates the Double Jeopardy holdings of *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994), and *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012). Those cases proscribe simultaneous convictions and acquittals that are in direct conflict with one another.

In *Stewart*, the military judge instructed the members to vote on two separate specifications of sexual assault, but defined each offense identically, placing the members "in the untenable position of finding Stewart both guilty and not guilty of the same offense." 71 M.J. at 43. On review, The Court of Appeals for the Armed Forces held:

> [U]nder the unique circumstances of this case, the principles underpinning the Double Jeopardy Clause as recognized in *United States v. Smith* made it impossible for the [Court of Criminal Appeals] to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts the members found Stewart not guilty of in Specification 1.

Id. (citing *Smith*, 39 M.J. 448).

2. Unreasonable Multiplication of Charges

Under R.C.M. 307(c)(4), one transaction cannot be the basis for an unreasonable multiplication of charges against the accused. If the Defense believes that the charges are unreasonably multiplied, the Defense can seek a remedy at the findings or sentencing stage of the trial. *United States v. Campbell*, 71 M.J. 19, 21 (C.A.A.F. 2012). It is the Court's discretion to decide whether the charges are unreasonably multiplied. R.C.M. 906(b)(12). If they are unreasonably multiplied, the Court has the power to dismiss the unreasonably multiplied charges, merge them for findings, or merge offenses only for sentencing. *See* R.C.M. 906(b)(12) ("[T]he appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification."); *see also United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014) (citing *Campbell*, 71 M.J. at 25) (concluding military judge had discretion to not dismiss or merge specifications for findings but to merge them for sentencing).

The prohibition on unreasonably multiplied charges reflects the principle that "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); see *United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001). In particular, the "prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.* The prohibition's purpose is to permit a military judge to apply "sound judgment" to ensure "prosecutors do not needlessly 'pile on' charges against a military accused" for what is essentially a single alleged course of conduct. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

To determine whether court-martial charges are unreasonably multiplied, a trial court considers four factors (the *Quiroz* factors):

(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?

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).

Charges do not unreasonably increase the accused's exposure to punishment when those charges address separate courses of conduct. *United States v. McDonald*, 78 M.J. 669, 682 (N-M Ct. Crim. App. 2018). But charges can unreasonably increase the accused's exposure to punishment if there is more than a 32% increase in punishment and the Government offers no clear justification of that increase. *United States v. Johnston*, 75 M.J. 563, 572 (N-M Ct. Crim. App. 2016).

These factors are not exhaustive; they are not the only factors the Court may consider. *Campbell*, 71 M.J. at 23. Further, the Defense is not required to satisfy every factor for the Court to determine that the charges were unreasonably multiplied—a single factor can be enough. *Id.* The Court's analysis for what is unreasonable during findings and what is unreasonable during sentencing can vary. *Campbell*, 71 M.J. at 23; *see also United States v. Abbott*, 2018 CCA LEXIS 86 (performing two separate analyses for unreasonable multiplication of charges during sentencing and unreasonable multiplications of charges during findings). Furthermore, in order

to ensure fair results, prosecutors should be prohibited from piling on charges against a military accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

The Government may include multiple specifications for exigency of proof, but the extra specifications must be consolidated or dismissed. *United States v. Elespuru*, 73 M.J. 326, 329-330 (C.A.A.F. 2014); *see also United States v. Thomas*, 74 M.J. 563, 568 (N-M Ct. Crim. App. 2014) (holding that while the Government can charge an individual with more than one crime for contingency of proof, the accused may not stand convicted of more than one offense based on the same act).

ARGUMENT

1. The Government has charged multiplicious charges since the orders violation for sexual intimate behavior has already been charged as an abusive sexual contact.

Charge I and Charge III are multiplicious because the charges expose ME3 Ray to two convictions for what is alleged as a single criminal act – the sexually intimate behavior of placing his penis on [redacted] shoulder.

The type of multiplicity at issue is single act/multiple statutes where the Government has charged an abusive sexual contact and an orders violation for criminal conduct. Article 120(d)'s elements are entirely encapsulated within the Article 92 charge as specified by the Government. Where the proof of fact needed by the Government to prove a charge is the same for both charges, the Court should find that charge multiplicious. *See Campbell*, 71 M.J. at 23. Both charges arise from [redacted] allegation that ME3 Ray touched her shoulder/neck area with his penis while they were in the ME Bay at Annex Mayport on the morning of 18 March 2022. It was this same conduct that the preliminary hearing officer based her findings of probable cause for Charge III as well. Charge III alleges that:

(1) ME3 Ray, USCG, did, at or near Jacksonville, FL, on or about 18 March 2022,

(2) violate a lawful general order,

(3) which was his duty to obey,

(3) by wrongfully engage in sexually intimate behavior

(4) in a Coast Guard-controlled work place.

The Government has not presented any evidence of a consensual sexual interaction which occurred between ME3 Ray and [redacted] on 18 March 2022. Therefore, we have to assume the Government is referring to the alleged non-consensual sexual contact. If that is the case, although the statutory elements may differ, the way the elements were charged show how the abusive sexual contact *is* the "sexually intimate behavior" which was alleged to have been violated. (Emphasis added). When looking at Charge I it alleges:

(1) ME3 Ray, USCG, did, at or near Jacksonville, FL, on or about 18 March 2022,

(2) touch the shoulder of [redacted] with his body part,

(3) with an intent to gratify his own sexual desire,

(4) without consent of [redacted]

The factual component of the charge is the sexually intimate behavior element for the Article 92 charge. Much like in *Arriaga*, the Government must necessarily prove that there was sexually intimate behavior in order to establish an element of the orders violation. The only evidence they have offered of sexual behavior is the abusive sexual contact. The alleged criminal conduct of abusive sexual contact is encapsulated in the sexually intimate behavior element of the orders violation. Without proving the sexually intimate behavior there can be no conviction on either charge. This is also similar to *Palagar* where the Article 133, UCMJ, conduct unbecoming is similar to the orders violation in the present case but instead of "authorized purchases," here we

have sexually intimate behavior, where the sexually intimate behavior is the abusive sexual contact that has also been charged.

If the Government claims specification 1 of Charge II is the sexually intimate behavior it runs into the same issue as Charge I – all of its elements must be met in order to prove there was sexually intimate behavior. And, an assault is not sexually intimate behavior. Therefore, Charge I is multiplicious and should be dismissed.

2. An application of the *Quiroz* factors show how one alleged act has been unreasonably multiplied and charged as both an abusive sexual contact and an assault consummated by a battery.

R.C.M. 307(c)(4) bars the government from using one transaction–ME3 Ray placing his penis on [redacted] shoulder and ejaculating–as the basis for multiple charges if that multiplication would be unreasonable. In this case, the multiplication of the charges falls into the unreasonable category. This Court would not promote fairness if it allowed the Government to be able to use a single act to bring multiple, similar charges. The *Quiroz* test supports this contention because the balance weighs in favor of the Defense.

i. <u>The charges are aimed at indistinct criminal acts.</u>

Charge I and Charge II Specification 1 are derived from the same course of conduct; they are not distinctively separate acts. ME3 Ray is alleged to have placed his penis and ejaculated onto [redacted] shoulder/neck – both charges are for unlawful touching of [redacted] the only difference is what is touching her. The touching of the semen and the touching of the penis occurred during the same act and at the same time. The Government is using one encounter to charge the accused with two crimes. The alleged conduct arose from a single encounter and addresses two different physical contacts with the same person that took place simultaneously. At no point does the Government allege that there was a break between the touching of ME3 Ray's penis and

when he ejaculated. This factor favors the Defense because the charges are not aimed at distinct criminal acts, but at the one act of ME3 Ray touching his penis on [redacted] shoulder while he ejaculated.

ii. The charges exaggerate the accused's actions.

The Government has run into a shortcoming of Article 120(d) where semen is not specified as an item that could unlawfully touch [redacted] under the article. So in an effort to overcome this, the Government charged the alleged semen as an assault consummated by a battery, similar to how spitting on someone is an assault consummated by a battery. But in doing so they exaggerate and misrepresent the criminality of ME3 Ray's alleged actions. The charges as written make it appear that ME3 Ray put his penis on [redacted] shoulder to gratify his sexual desire, then at some separate point in time he ejaculated onto her unlawfully for a different reason. As charged the members will be confused since what is alleged to have occurred is ME3 Ray placed his penis on her shoulder while, or as a result of, ejaculating. There is no separate conduct constituting a separate crime.

Further, if the Government wants to treat this case as a sex crime, then they would be limited to what Congress and the President have authorized them to charge, which would be an abusive sexual contact for the unlawful touching via ME3 Ray's penis on [redacted] shoulder. Charging the assault will confuse and distract members as it misrepresents the criminality they are trying to encapsulate in their charge. If the government wants to characterize the sole act of ME3 Ray placing his penis and ejaculating onto [redacted] as an assault then they cannot also charge the abusive sexual contact. Therefore this factor also weighs heavily in favor of the defense.

iii. The charges unreasonably increase ME3 Ray's exposure to punishment.

ME3 Ray has been unfairly and significantly exposed to criminal liability. The addition of the abusive sexual contact exposes ME3 Ray to seven years of confinement, total forfeitures, and a dishonorable discharge. MCM Part IV. The addition of the assault charge exposes ME3 Ray to six months confinement, total forfeitures, and a bad conduct discharge. *Id.* There is no reasonable justification for why the Government would want to expose ME3 Ray to this additional criminal lability for the same conduct. Additionally concerning is how the members might interpret the charge sheet; either through misunderstanding, error, confusion, neglect, or for some other reason, the members may settle on a compromise verdict, at least in part because of the fact that they see multiple charges for the same conduct. Even if they were able to faithfully apply the law to [redacted] allegation, they may unreasonably punish ME3 Ray for the same conduct. Therefore, dismissing a charge now would avoid the consequences of unreasonable multiplication of charges.

iv. <u>There is no evidence that the prosecution overreached or abused their power when charging the accused.</u>

The final test asks the Court to examine the totality of the situation. The test the Court is applying is designed to cure prosecutorial overreach. *Quiroz*, 55 M.J. at 337. ("[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching the exercise of prosecutorial discretion."). We do not think the Government acted with any intentional prosecutorial abuse in drafting the charges. However, being charged for touching [redacted] with his penis and ejaculating on her when they both happened at the same time is piling on charges so there is a greater possibility of ME3 Ray being found guilty of something.

RELIEF REQUESTED

For the foregoing reasons, the Defense requests that this Court dismiss Charge I for being both multiplicious and unreasonably multiplied. In the alternative, the Defense requests Charge II Specification 1 and Charge III be dismissed for being unreasonably multiplied and multiplicious, respectively.

EVIDENCE AND HEARING

Documents. The Defense offers the following enclosures in support of this motion:

A. *See* Charge Sheet ICO U.S. v. ME3 Ray, USCG.
B. Preliminary Hearing Officer's Report.

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

Respectfully submitted,

RICHARDSON.CHARLES.EDWARD.[redacted] Digitally signed by RICHARDSON.CHARLES.EDWARD[redacted] Date: 2023.04.07 16:43:01 -04'00'

C. E. RICHARDSON
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy, via e-mail, of the above on the Court, SVC, and Government Counsel on 7 April 2023.

RICHARDSON.CHARLES.EDWARD.[redacted] Digitally signed by RICHARDSON.CHARLES.EDWARD[redacted] Date: 2023.04.07 16:41:40 -04'00'

C. E. RICHARDSON
LT, USCG
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
WESTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**MULTIPLICITY AND UMC**
	)	
	)	
	)	
SAMUEL B. RAY,	)	**14 April 2023**
ME3/E-4, USCG	)	

RELIEF SOUGHT

The Government files this response and requests the Court deny the Defense motion to dismiss Charge I and its sole specification, or in alternative, dismiss Charge III and its sole specification because they are not multiplicious. In addition, the Government requests that the Court deny the defense's motion to dismiss Charge I and its sole specification, or in the alternative, dismiss Charge II, Specification 1, as it is not unreasonably multiplied, and the Rules for Court Martial and applicable case law allow the charging scheme utilized by the United States.

HEARING

The United States respectfully requests oral argument on this motion and response.

BURDEN OF PROOF

As the movant, the Defense bears the burden of persuasion and the burden of proof. The burden of proof for any contested factual issues is a preponderance of the evidence. R.C.M. 905(c)(1).

STATEMENT OF FACTS

1. ME3 Ray is charged with one specification of violating Article 120, UCMJ (Abusive sexual contact), two specifications of violating Article 128, UCMJ (Assault consummated by battery), and one specification of violating Article 92 (Violating a general order).

2. At the time of the charged offenses, 18 March 2022, ME3 [redacted] was a member of the Sector Jacksonville Boarding Team and ME3 Ray was a member of Station Jacksonville.

3. On the day of the charged offenses, ME3 Ray and [redacted] were first in the Sector boarding team office together. ME3 Ray sarcastically said, [redacted] in reference to naked pictures he has asked [redacted] for, to which she replied, [redacted] ME3 Ray then stated, [redacted] Enclosure 2 at 09:00.

4. ME3 Ray then positioned himself in front of the door in the Sector boarding team office. Enclosure 2 at 10:20.

5. ME3 Ray then made comments with a sexual connotation of his penis being in her mouth, to which she repeatedly told him [redacted] and [redacted] Enclosure 2 at 10:05 and 11:30.

6. More unwanted banter with sexual connotation continued in the Sector boarding office which included ME3 Ray asking [redacted] to bend over to fix some computer wires and commenting with a [redacted] sound when [redacted] did so, ME3 Ray said, [redacted] Enclosure 2 at 12:58.

7. ME3 Ray then put his hand around ME3 [redacted] throat and said that he missed her and wanted to be in her mouth. She again told him to stop. Enclosure 2 at 10:20-10:30.

8. ME3 [redacted] then transitioned to the ME room. ME3 Ray followed. Enclosure 2 at 13:00.

9. Once ME3 Ray was alone in the room with [redacted] commented again that he [redacted] and stated that he could [redacted] in the ME office. Enclosure 2 at 15:48.

10. At some point later in the ME office ME3 Ray pulled out his penis and said, [redacted] replied, [redacted] Enclosure 2 at 16:39.

11. [redacted] was not looking at ME3 Ray and attempted to ignore him. A short time later, ME3 Ray said [redacted] Enclosure 2 at 17:42.

12. ME3 Ray then pulled [redacted] ponytail and ejaculated on the back of her neck and her hair. At some point his penis also touched [redacted] shoulder and rested there as he ejaculated and afterwards as he grabbed [redacted] neck and wiped semen across her mouth. Enclosure 2 at 18:00-18:55.

EVIDENCE

The United States requests that the Court review and utilize any other filings and corresponding enclosures in support of this response.

Enclosure 1: [redacted] Interview Part 1 (GBS 170) *(The Government will amend with a certified transcript (transcription service requested on April 3, 2023).*

Enclosure 2: [redacted] Interview Part 2 (GBS 171) *(The Government will amend with a certified transcript (transcription service requested on April 3, 2023).*

LEGAL AUTHORITY

Multiplicity

Multiplicity is an issue of law that enforces the Double Jeopardy Clause by protecting the accused from multiple convictions and punishments that arise out of a single criminal transaction, or distinct act, unless Congress intended it. There are two distinct types of multiplicity that are accompanied by distinct tests used to evaluate them. One type of multiplicity arises when the Government charges a single act under multiple applicable statutes; colloquially known as single-act/multiple-statute cases. That "species" of multiplicity is evaluated by applying the tests set forth by the courts in *Blockburger v. U.S.* and *U.S. v. Teters*. *See eg. United States v. Hernandez*, 78 M.J. 643, 645 (C.G. Ct. Crim. App. 2018); *Blockburger v. United States*, 284 U.S. 299, 304 (1932); . The other "species" of multiplicity is known as multiple acts/single statute multiplicity, which is evaluated by applying an alternative legal test. *See United States v. Forrester*, 76 M.J. 479, 484-85 (C.A.A.F. 2017).

Both types of multiplicity turn ultimately on statutory intent and interpretation. When Congressional intent is not clear based on an analysis of the legislative record, it is appropriate to apply the rule of construction found in *Blockburger* to determine Congressional intent. Under the *Blockburger* and *Teters* analysis, the test applied to determine if charges are multiplicious is "whether each provision requires proof of a fact which the other does not." *Blockburger at* 304. The test is applied by examining the elements of the statutes charged to determine if the two charges have at least one separate statutory element from the other. The key question to be answered through this analysis is if there are two offenses present, or only one. *Hernandez* at 645. In the military, when conducting the elements test laid out in *Blockburger/Teters* both the elements required to be alleged in the specification, along with the elements of the statute, must

be compared for the purpose of the elements test. *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995). The elements need not have "identical statutory language" to be subject to dismissal under an analysis for multiplicity, but the meaning of the offenses must demonstrate they are multiplicious under the "normal principles of statutory construction." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Even if Charge I and Charge III are multiplicious, the decision as to what charge to dismiss is left to the Government. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

Unreasonable Multiplication of Charges

Even if offenses are not multiplicious, courts may still apply the doctrine of unreasonable multiplication of charges to prevent what is substantially one transaction from being made the basis for an unreasonable multiplication of charges against one person. R.C.M. 307(c)(4). The defense correctly states that the prohibition against unreasonable multiplication of charges exists to curtail prosecutorial overreach that may occur through needlessly "piling on" charges against the accused.

A four factor test to analyze unreasonable multiplication of charges is set forth in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Trial courts must consider, (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?"; and (4) "Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?" If after considering these factors and finding "the 'piling on' of charges so extreme or unreasonable" an appropriate remedy will be determined on a case-by-case basis. *Id.* At 339.

These factors are not "all-inclusive" nor is the presence or absence of any one factor dispositive. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (citing *Quiroz* 57 M.J. at 338).

Quiroz factor one requires examining each charge and specification to determine if it is aimed at separate criminal acts, or if the charges or specifications in question implicates the same criminal purpose or criminal law interests. *United States v. Johnston*, 75 M.J. 563, 571 (N-M. Ct. Crim. App. 2016). In *U.S. v. Pauling*, the court found that charging a forgery of sixteen checks and four indorsements in two specifications was a fair and reasonable exercise of prosecutorial discretion because forging a check, and falsely indorsing a check represent two distinct and separate criminal acts; although they occur on the same document within only moments of each other. *United States v. Pauling*, 60 M.J. 91, 96 (C.A.A.F. 2004).

Quiroz factor two requires this Court to determine if the charging scheme misrepresents or exaggerates the accused criminality. To address whether or not the accused criminality was unfairly exaggerated, reasonableness must guide the court in "resolving the tension between charging a single course of conduct or breaking out the individual acts that comprise the course of conduct." *Johnston*, 75 M.J. at 571. In *U.S. v. Sturdivant*, the accused was sentenced to three years of confinement and a dishonorable discharge, a severe punishment in light of the fact that he had only been convicted of a single marijuana transaction. *United States v. Sturdivant*, 13 M.J. 323, 329 (C.M.A. 1982). The *Sturdivant* court found that the Government "[exaggerated a] single offense into many seemingly separate crimes," and it was the presence of those many seemingly separate crimes on the charge sheet that induced the court-martial to resolve against him "doubt created by the evidence." *Id.* at 330.

Factor three of the *Quiroz* analysis involves an analysis of the accused potentially increased punitive exposure based on the purported unreasonably multiplicative specifications by

comparing the maximum confinement of the charges and specifications. *See Campbell*, 71 M.J. at 25.

Finally, factor four of the analysis asks if there is any evidence of prosecutorial overreach that should be remedied. Because prosecutors have wide discretion to fashion charges and specifications strategically and often bring two charges directed at the same misconduct to address contingencies of proof, the overreach must be unreasonable in nature and not in opposition to Congressional intent. *See Ball v. United States*, 470 U.S. 856, 865 (1985); *See also United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014).

It is long settled in military case law that the Government may choose to charge alternative theories for the same offense; a practice commonly referred to as charging "exigencies of proof." *United States v. Elespuru*, 73 M.J. 326, 329 (C.A.A.F. 2014) (citing *United States v. Morton*, 69 MJ 12, 16 (C.A.A.F. 2010). CAAF has recognized that cases involving offenses under Article 120, UCMJ, uniquely lend themselves to charging in the alternative and that the nuances and complexity of Article 120 "make charging in the alternative an unexceptional and often prudent decision." *Elespuru* at 329. In *Elespuru*, the accused was charged in the alternative with both abusive sexual contact and wrongful sexual contact based on exigencies of proof. The panel convicted him of both offenses, and CAAF held that the military judge should have dismissed the wrongful sexual contact specification. CAAF, in that case, also outlines that dismissal of one of the charges based on the principle of unreasonable multiplication of charges is appropriate only after findings have been reached. *Id.* Even then, persuasive authority recommends a military judge only conditionally dismiss unreasonably multiplied charges until such as time as appellate review has been completed. *See, e.g. United States v. Hines*, 75 M.J. 734, 736 n.4 (A. Ct. Crim. App. 2016).

ARGUMENT

a. Charge I and Charge III each require proof of an element that the other does not, so they are not multiplicious.

Charge I and Charge three are not multiplicious for double jeopardy purposes. As charged, each specification requires different elements be proven by the Government. The charged elements of Article 120, UCMJ, Abusive sexual conduct are 1) In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, 2) touch the shoulder of [redacted] 3) with ME3 Ray's body part to wit: his penis, 4) with an intent to gratify his own sexual desire, 5) without the consent of [redacted] The charged elements of Article 92, UCMJ, are; 1) In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, 2) violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, 3) by wrongfully engaging in sexually intimate behavior, 4) in a Coast Guard-controlled work place.

In applying the *Blockburger/Teters* analysis to the above charges, it is clear that they are not multiplicious under the test. There are multiple elements of each offense that are different. The violation of Article 120 requires that the government prove a specific *mens rea*, and prove that [redacted] did not consent to the touch of ME3 Ray's penis. The violation of Article 92 requires the Government prove that the location in which ME3 Ray engaged in sexually intimate behavior was a Coast Guard controlled workplace. Contrary to the Defense's assertions, the abusive sexual contact is not the only act that could be seen by the factfinder as sexually intimate behavior that occurred on March 18, 2022. On that day, ME3 Ray made sarcastic comments to [redacted] regarding her not sending him naked pictures after he requested them, made a comment to [redacted] to the effect of [redacted] asked [redacted] for oral sex, pointed out wires under the computer to

her to fix and made a "hmmmm" sound while she was bent over, commented that he could "bend [redacted] over" the desk in the ME office, took his penis out of his pants and masturbated himself, told [redacted] that she should open her mouth, pulled on her pony tail and ejaculated on her neck, shoulder, and shirt, and wiped semen across her mouth. Given that evidence, there is certainly a way that the factfinder could convict on the Article 92, UCMJ violation without finding that the Government has proven the violation of Article 120, UCMJ, beyond a reasonable doubt. In addition, the factfinder could also find that the Government failed in their burden to prove [redacted] lack of consent, or that ME3 Ray had a reasonable mistake of fact as to her consent, but find that ME3 Ray's action still violated the lawful general order in the CG Discipline and Conduct manual.

Because the two offenses have at least one statutory or charged element separate from the other, the offenses are not multiplicious and neither Charge I or Charge III should be dismissed.

b. Charge I and Charge II, Specification 1, do not represent an unreasonable multiplication of charges as the *Quiroz* factors weigh in the Government's favor.

The Government in this case is not utilizing one transaction as the basis for multiple charges, but instead, has charged ME3 Ray with two separate criminal acts—touching [redacted] with his penis, and ejaculating on her. The *Quiroz* factors demonstrate that there is no unreasonable multiplication of charges in this case as an analysis of the factors weighs in the Government's favor.

(1) Is each charge and specification aimed at distinctly separate criminal acts?

Here, each charge is aimed at separate and distinct criminal acts by ME3 Ray, acts that require a different underlying *mens rea*, and acts that are separately and distinctly enumerated as offenses under the UCMJ. In this case, the Government is not using one encounter to charge the accused with two crimes; two separate criminal acts have been committed. The first criminal act

was an abusive sexual contact, which occurred when ME3 Ray touched his penis to [redacted] shoulder, without her consent, to satisfy his own sexual desires. That crime was complete when the discreet prohibited sexual contact occurs; when his penis touched her shoulder, irrespective of any additional contact ME3 Ray may have had with [redacted] The second criminal act was an assault consummated by battery, which occurred when ME3 Ray caused his ejaculate to come into contact with [redacted] that has no underlying specific intent requirement. Causing his penis to touch [redacted] shoulder is not an act intrinsic of ejaculation on [redacted] or vice versa.

While it is true that the two separate and distinct contacts occurred *during* one, ongoing, assault close in time to one another, like in *Pauling*, each contact was a different crime, with different elements, and a different underlying intent required to commit them. For that reason, *Quiroz's* first factor weighs in the Government's favor.

(3) Do the number of charges and specifications misrepresent or exaggerate the criminality?

The two specifications do not unfairly exaggerate ME3 Ray's criminality, in fact, they represent a charging scheme that accurately reflects the level of ME3's criminality. ME3 Ray not only touched [redacted] with his penis in an attempt to gratify his own sexual desire, but he also proceeded to ejaculate on [redacted] shoulder and neck, and then wipe his ejaculate across her mouth. A charging scheme that does not capture those distinct criminal actions (each having a distinct and profound effect on [redacted] would not accurately represent the misconduct he perpetrated on [redacted] Congress specifically enumerated what is defined as "sexual contact" in Article 120, UMCJ, which is a measure only present in a few punitive articles. *See* 10 U.S.C. §§ 877-934. "Sexual contact" means "touching, or causing another person to touch . . . the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade

any person or to arouse or gratify the sexual desire of another person." Per Congress's definition, causing someone to come into contact with ejaculate is not an Article 120 offense, hence, the Government charged that separate, unwanted, contact under Article 128, Assault Consummated by Battery. Both charges are necessary to capture the extent of the criminality of ME3's actions that day.

There are two charges on the charge sheet specifically targeted to capture two distinct acts; this is not a situation like *Sturdivant* where the sheer presence of multiple additional charges on the charge sheet exaggerates the criminal nature of his conduct or make it look like ME3 has "bad character", which might sway the factfinder in evaluating the evidence. The charge sheet accurately captures ME3's actions, and for this reason, this factor weighs in the Government's favor.

(3) Do the number of charges and specifications unfairly increase the punitive exposure?

The number of charges on the charge sheet do not unfairly increase ME3 Ray's punitive exposure; they expose him to punishment that accurately reflects the extent of his misconduct on March 18, 2022. The maximum punishment under Article 120, UCMJ, Abusive sexual contact is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years. The maximum punishment under Article 128, UCMJ, Assault consummated by battery is a bad conduct discharge, forfeiture of all pay and allowances, and confinement for six months. ME3 Ray's total punitive exposure under these two charges is not unfairly exaggerated because both of these charges are present on the charge sheet. Charge II, Specification I adds an additional six months to ME3 Ray's potential punitive exposure, which is less than a 10% increase in total punishment, and with clear and articulable justification of that increase. It is not unfair that ME3 Ray be exposed to additional punishment for Charge II, Specification 1, because Charge I standing

alone does not capture the extent of his criminal conduct. He *not only* put his penis on [redacted] but he also ejaculated on her and wiped his ejaculate across her mouth, an additional act of misconduct that should give rise to additional punishment. This factor weighs in the Government favor.

(4) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

The Defense, in their motion, has not presented any evidence of intentional prosecutorial overreach, instead, posits that the charging scheme standing alone provides evidence of the government "piling on" charges. There is no prosecutorial overreach present and there is no evidence here that through this charging scheme, the Government "piled on" charges. Instead, there is evidence that the Government property utilized prosecutorial discretion and drafted narrowly tailored charges designed to fully capture the extent of ME3 Ray's misconduct while also accounting for contingencies of proof. It is entirely possible that based on the evidence in this case, that the factfinder finds the Government has met their burden to prove only the violation of Article 120, UCMJ, or only the violation of Article 128, UCMJ. This factor also weighs in the Government's favor.

An analysis of the *Quiroz* factors weighs in favor of the Government. Therefore, no unreasonable multiplication of charges exists and the defense requested remedy of dismissal should be denied.

c. Even if this Court finds the specifications multiplicious or an unreasonable multiplication of charges, dismissal of Specification 2 is not an appropriate remedy.

Military judges who seek to dismiss charges for unreasonable multiplication should usually only do so after findings have been reached. Therefore, even if this Court finds the charges are unreasonably multiplicious, dismissal of Charge I, or Charge II, Specification 1, at this time is not an appropriate remedy. The facts in this case do not present the same concern that

was present in *Sturdivant*, where the court found the Government exaggerated the offense into seemingly separate crimes to create the impression the Accused has a "bad character." Dismissal of Charge I at this point in the proceedings is unsupported by case law.

CONCLUSION

In light of the above, the United States respectfully requests the Court deny the defense motion to dismiss as the defense has failed to carry their burden.

REQUESTED RELIEF

The United States respectfully requests that the Court deny the Defense's motion as the charges they request dismissed are neither multiplicious or an unreasonable multiplication of charges.

Respectfully submitted,

GRILLS.KELLY.ELIZABETH[redacted] Digitally signed by GRILLS.KELLY.ELIZABETH.[redacted] Date: 2023.04.14 12:59:11 -04'00'

Kelly E. Grills, LT, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS FOR IMPROPER REFERRAL** **7 ARPIL 23**

MOTION

Pursuant to Rule of Courts-Martial (R.C.M.) 907(b)(2) and Article 25 of the Uniform Code of Military Justice (UCMJ), Maritime Enforcement Specialist Petty Officer Third Class Samuel B. Ray, USCG (ME3 Ray), by and through counsel, respectfully moves the Court to dismiss all charges and specifications due to improper referral.

SUMMARY

This general court-martial concerns conduct alleged on 18 March 2022. It was referred on 24 January 2023 with a convening order from 12 November 2020. The convening order was not signed by the current convening authority and all members are E-6 and above, for an E-4 accused. These facts show that the convening authority did not exercise his duties under Article 25, UCMJ, in selecting qualified members. Therefore, all charges and specifications should be dismissed because the referral was improper.

BURDEN

As the moving party, the Defense bears the burden of establishing improper exclusion of qualified personnel from the selection process. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004). The burden then shifts to the Government to establish beyond a reasonable doubt that no impropriety occurred in the selection process. *Id.* Defense bears the burdens of persuasion and proof by a preponderance of the evidence with regard to every other factual issue necessary for resolution of this motion. R.C.M. 905(c).

FACTS

1. ME3 Ray is charged with one specification of violating Article 120, UCMJ, two specifications of violating Article 128, UCMJ, and one specification of violating Article 92, UCMJ. All charged misconduct is alleged to have happened on or about 18 March 2022 in a Coast Guard-controlled workplace in Jacksonville, Florida, with [redacted] as the complaining witness. Enclosure A.

2. The case was referred to a general court-martial on 24 January 2023. Enclosure A.

3. The convening order was signed on 12 November 2020 by the former Commander, Coast Guard District Seven, RADM E. Jones. Enclosure B.

4. The convening order was amended by the current Commander, Coast Guard District Seven, RADM B. McPherson, and only changed the venue from Miami, Florida to Norfolk, Virginia. Enclosure C.

5. On 6 March 2023, RADM B. McPherson was advised, via memorandum, of his Article 25 duties for the purpose of generating an amended convening order. Enclosure D.

6. On 14 March 2023, a routing slip attached to an undated convening order named "General Court-Martial Convening Order 1-20, Amendment 5" was created. Enclosure E.

LAW

Convening authorities are expected to use the criteria specified in Article 25 to select qualified members to sit on court-martial panels. A military defendant has the right to members who are fair and impartial. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). The Court uses the following factors when evaluating the screening process: "(1) improper motive to "pack" the member pool; (2) systemic exclusion of otherwise qualified members based on an impermissible variable like rank; and (3) good faith efforts to be inclusive so courts-martial are open to all segments of the military community." *United States v. Bartee*, 76 M.J. 141, 144 (C.A.A.F. 2017) (quoting *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004)). A showing of a lack of bad faith or improper motive is not dispositive. *Bartee*, 76 M.J. at 144. The selection process should not systematically exclude any category of members. *Kirkland*, 53 M.J. at 24. All members senior to the accused are eligible to be a part of the selection process. The exclusion of potentially qualified members below a certain grade would be improper. *Id.* at 25.

If a court-martial is not constituted in accordance with the UCMJ, it is a jurisdictional error. *United States v. Adams*, 66 M.J. 255, 255 (C.A.A.F. 2008). C.A.A.F. held "Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred." *Id.* at 258. Article 25, UCMJ, provides for who may serve on courts-martial. Article 25(e)(2) states "when convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Convening authorities must ensure that they "neither consciously nor subconsciously use military grade as a test for court membership." *United States v. Nixon*, 33 M.J. 433, 435 (C.A.A.F. 1991).

While R.C.M. 601(b) permits referral of charges to a court convened by a "predecessor," this does not "eliminate the statutory requirement for selection of members in Article 25[(e)](2)." *United States v. Allgood*, 41 M.J. 492, 496 (C.A.A.F. 1995). In *Allgood*, the C.A.A.F. upheld the jurisdiction of the court because the convening authority had expressly "adopted" the panel selections of his predecessor, thus fulfilling the requirements of Article 25, and the Defense did not object at trial on the basis of Article 25 and present support for a contrary inference. *Id.*

Amendments to convening orders should be kept to a minimum. R.C.M. 505 Discussion, Manual for Courts-Martial, United States, (2019 ed.). If extensive changes have to be made the convening authority has the option of withdrawing the charges and referring them to a new court-martial. *Id.*

ARGUMENT

a. Certain ranks were systematically excluded from the selection process.

The accused is an E-4 in the Coast Guard. That means all members in the rank of E-4 who are senior to the accused and all ranks above E-4 are eligible to serve as members for the general court-martial. The convening order has a list of 30 members and the lowest rank is E6. The convening order itself is proof that E-4s and E-5s are specifically excluded from the pool, whether consciously or subconsciously, because those ranks are eligible to serve, given the rank of the accused.

The fact that the current convening authority, before referral, amended the convening order by changing the venue but took no steps to change any of the members, perpetuates the prejudice against the accused. Even in the undated amending order after referral, the rank composition of the panel did not change. The lowest rank on the panel continues to be E-6.

By the date the new amending order was created, the convening authority was well aware that the accused is an E-4. To personally select members that are E-6 and above is an attempt to pack the member pool with members who are senior to and far removed from the accused in terms of military responsibility and leadership. There are qualified E-4s and E-5s at Coast Guard District Seven but none of them made the list.

b. The current convening authority did not fulfil his responsibility under Article 25.

The convening authority is supposed to ensure the proper selection of members. If he does not do it personally, he has the option of adopting the convening order of a predecessor. The current case was referred with the convening order written in 2020 by RADM Jones. That means the member pool was selected in 2020 by RADM Jones. All convening authorities are responsible for the pool of members concerning the courts-martial that they convene. RADM McPherson is convening the current general court-martial but he is relying on a convening order signed over two years ago. That fact alone is evidence of the fact that he did not consider the criteria in Article 25 to make sure the pool of members is suitable. Within, the last two years members could have retired, E6s could now be E7s, and members could have transferred out of Coast Guard District Seven. The only other document associated with the referral is an amendment that only changed the venue. RADM McPherson has given no indication that he adopted the convening order of his predecessor. Defense is hereby objecting before pleas are entered because the referral was improper.

Even if the undated amendment 5, which was never filed with the court, is accepted, it does not cure the improper referral. None of the members excused on the amendment were on convening order 1-20. As a result, the only effect of the amendment would be to increase the

pool of members from 30 to 60. The memorandum to the convening authority highlights the fact that the Article 25 criteria were not considered when the charges were referred to court-martial using the convening order from 2020. As R.C.M. 505 states, changes to convening orders should be kept to a minimum. The charges should have been withdrawn and referred to a new court-martial.

RELIEF REQUESTED

For the foregoing reasons, the Defense requests that the Military Judge dismiss all charges and specifications due to improper referral.

EVIDENCE & ORAL ARGUMENT

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

A. *See* Charge Sheet ICO U.S. v. ME3 Samuel Ray, USCG.
B. General court-martial convening order 1-20, dated 12 November 2020.
C. General court-martial convening order amendment, dated 6 October 2022.
D. Article 25 advice to the Convening Authority dated 6 March 2023.
E. General court-martial convening order 1-20, Amendment 5, undated.

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

LUNCHEON.TREV AUGHN.ATON. [redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATO N: [redacted] Date: 2023.04.05 14:35:00 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

**********CERTIFICATE OF SERVICE**********

I hereby certify that a true and accurate copy of the above was served on the Military Judge, Trial Counsel, and SVC via electronic mail on 7 April 2023.

LUNCHEON.TREVA UGHN.ATON [redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATO N: [redacted] Date: 2023.04.05 14:35:16 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**IMPROPER REFFERAL**
	)	
	)	
	)	
SAMUEL B. RAY,	)	14 April 2023
ME3/E-4, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this response and asks the Court to deny the defense motion to dismiss the Charges and Specifications, as the Defense has failed to provide the Court any evidence to suggest that referral in this case was improper.

HEARING

The United States respectfully requests oral argument on this motion and response.

BURDEN

As the moving party, the Defense bears the burden of persuasion and the burden of proof. R.C.M. 905(c). The Defense has the burden to establish the improper exclusion of qualified personnel from the selection process; once they meet that burden, it shifts to the Government to show no impropriety occurred. *See United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). There has been no evidence presented by the Defense that the Convening Authority has engaged in any improper exclusion of qualified personnel, thus the burden remains with the Defense. As there is a presumption of regularity in the Convening Authority's action, the Defense's burden is

to present clear and convincing evidence that the Convening Authority violated Article 25. *United States v. McLaughlin*, 27 M.J. 685, 687 (A.C.M.R. 1988).

STATEMENT OF FACTS

1. In October 2020, the District Seven Staff Judge Advocate, CAPT [redacted] submitted a package of material to Rear Admiral Eric Jones to aid RADM Jones in convening the standing General and Special courts-martial for District Seven. [Enclosure 1].
2. That package of material included a digest sheet, memorandum from CAPT [redacted] to RADM Jones detailing Article 25 advice, a copy of Article 25, UMCJ, and spreadsheets listing nominations from local District Seven commanding officers for panel members. [Enclosure 1].
3. CAPT [redacted] specifically advised RADM Jones that the information provided is only to assist him in exercising his independent discretion as Convening Authority. [Enclosure 1].
4. He also stated that he must choose members based on Article 25, UCMJ factors; those who are best qualified by reason of their age, education, training, experience, length of service, and judicial temperament. [Enclosure 1].
5. He told RADM Jones, in writing, that he was not limited to those nominations by local commanding officers. [Enclosure 1].
6. He also told RADM Jones, in writing, that military grade by itself is not a permissible criterion for selection of court-martial panel members. [Enclosure 1].
7. RADM Jones made his selections, and the Convening Order 1-20 was signed on November 12, 2020. [Enclosure 3].

8. RADM Brendan McPherson relieved RADM Jones as the Commander of USCG District Seven and as the Convening Authority.
9. On October 6, 2022, Amendment No. 1 to Convening Order 1-20 was signed by RADM McPherson changing the venue of the general court-martial from Miami, FL to Norfolk, VA. [Enclosure 4].
10. Based on the venue change, DCMS made members available in the Norfolk, VA area for selection to the general court-martial panel. In Amendment No. 2, RADM McPherson excused all members from the original convening order and detailed 30 additional officers. He signed that Amendment on November 8, 2022. [Enclosure 4].
11. On November 16, 2022, in Amendment No. 3, RADM McPherson excused certain members from previous Amendment No. 2 and detailed additional members to the court-martial. [Enclosure 4].
12. On November 21, 2022, in Amendment No. 4, RADM McPherson excused members from previous Amendment No. 3 and detailed additional members to the court-martial. [Enclosure 4].
13. The case of *United States v. Ray* was referred to a general court-martial on January 24, 2023 by RADM McPherson.
14. On March 6, 2023, CAPT [redacted] the current District Seven SJA, provided Article 25 Advice to RADM McPherson via memorandum. In that memorandum, he listed the specific factors RADM McPherson should consider under Article 25. [Defense Enclosure D].
15. CAPT [redacted] also told RADM McPherson that military grade by itself is not a permissible criterion for selection of court-martial panel members. [Defense Enclosure D].

16. CAPT [redacted] and his staff provided RADM McPherson Alpha Rosters of available members for his use in selecting members for Amendment No. 5. [Enclosure 5].

17. The Alpha Rosters contained members EMPLID's, names, paygrade, rank, sex, age, time in service, highest education level obtained, date of rank, rotation date, departments name, a short description of duty location, current billet name, and current billet location. [Enclosure 5].

18. On March 14, 2023, RADM McPherson signed Amendment No. 5 to Convening Order 1-20. This convening order excused all previous panel members detailed from any amendment and selected 20 new officers and 10 enlisted members for the panel. [Defense Enclosure E].

EVIDENCE

The United States offers the following evidence in support of its motion:

Enclosure (1): Routing Package from District 7 Detailing Article 25 Advice to Rear Admiral Eric Jones

Enclosure (2): Affidavit from CAPT [redacted] Assigned District 7 SJA for the Original Convening Order

Enclosure (3): Convening Order 1-20 Signed by RADM Eric Jones on November 12, 2020

Enclosure (4): Amendments to Convening Order 1-20 signed by Rear Admiral McPherson

Enclosure (5): Alpha Rosters Considered with Amendment No. 5

LEGAL AUTHORITY

A court-martial is created by a convening order. R.C.M. 504(a). A convening order for a general court-martial shall designate the type of court-martial and detail the members, if any, in accordance with Rule for Courts Martial 503(a). A convening authority, among other requirements, shall detail qualified persons as members for courts-martial. R.C.M. 503.

Other than certain limitations within Article 25, U.C.M.J., and R.C.M. 503, any commissioned officer on active duty may serve on a court-martial panel. Warrant officers and enlisted members have some qualifying factors (dates of rank, enlisted representation request), though they are broadly eligible to serve on appropriate courts-martial. Article 25(e)(2) and the Discussion under R.C.M. 503(a)(1) list certain individuals who should not be detailed as members, to include the accuser, a witness, the preliminary hearing officer, and counsel in the same case. Article 25(e)(2), U.C.M.J., R.C.M. 503(a)(1), Discussion (2019 ed.). "When convening a court-martial, the convening authority shall detail as members…[who] in his opinion, are the best qualified." Article 25€(2), U.C.M.J. The factors to consider are age, experience, education, training, length of service and judicial temperament. *Id.*

A court-martial is properly convened when an authorized convening authority personally selects the members to sit on a court-martial. The convening authority can convene the court either by selecting the members himself or by adopting the selections of a predecessor convening authority pursuant to R.C.M. 601(b). The predecessor convening authority provision provides for the orderly processing of courts-martial when commanders of units change. *United States v. Delgado*, 2013 WL 3238073 (2013), citing *United States v. Allgood*, 41 M.J. 492 (C.A.A.F. 2006). *See United States v. Vargas*, 47 M.J. 552, 553 (N. M. Ct. Crim. App. 1997). Further, there is a presumption that the convening authority adopts the predecessor's selection of members. *See United States v. Brewick*, 47 M.J. 730, 733 (N. M. Ct. Crim. App. 1997) (holding that "[t]here was no requirement for the referral authority to state that he 'adopted' the members selected by a predecessor in command.") and *United States v. Gilchrist*, 61 M.J. 785, 788 (Army Ct. Crim. App. 2005) ("Absent evidence to the contrary, adoption can be presumed from the convening

authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command.").

The defense shoulders the burden of establishing improper exclusion of qualified personnel from the panel section process, and only once the defense establishes some exclusion must the Government show that no impropriety occurred. *United States v. Roland* 50 MJ 66, 69 (C.A.A.F. 1999). Members may not be selected solely on the basis of their rank. *Id.* In *Roland*, the court found that even in a situation where there was no selection of any member below the grade of E-5, that fact alone was not enough to carry the Defense's burden, as the record of panel selection showed no indication of impropriety. In contrast, in *United States v. Kirkland*, the convening authority improperly excluded qualified personnel from the selection process on the basis of their rank by requesting group commanders nominate officers and enlisted personnel using a chart provided by the convening authority. The chart provided no place to nominate any member lower than the rank of E-7. When nominations were forwarded, there were no enlisted nominees below the grade of E-7. The convening authority only appointed enlisted members to the panel that were included on the nomination list. The convening authority was not found to have improperly used rank as an Article 25 criteria, but potentially qualified enlisted members below the rank of E-7 were excluded from the nomination process by virtue of the chart provided.

When considering Article 25 issues there is a standing presumption of regularity that the Convening Authority was aware of the Article 25 requirements and complied with them. *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999). Overcoming the presumption of regularity requires clear and convincing evidence that the Convening Authority violated Article 25. *United States v. McLaughlin*, 27 M.J. 685, 687 (A.C.M.R. 1988).

ARGUMENT

a. Referral of this case by the Convening Authority was proper.

Case law directly rebuts the Defense's position that Rear Admiral McPherson's reliance on a convening order signed by his predecessor is improper, thus making the referral of this improper. RADM McPherson is permitted to adopt the selection of members completed by Rear Admiral Jones, and his act of referring this case to the "standing" general court martial created by RADM Jones signifies his adoption of the selection of those members. The fact that the original convening order is two years old; meaning that members could have retired or transferred speaks to the reason why the original convening order was amended by RADM McPherson. In addition, when the venue of this case changed from District 7 to Norfolk, VA, the Deputy Commandant of Mission Support made members located within 50-miles of Norfolk, VA available for selection to the panel, which also contributed to the amendments that have taken place throughout this process. Amendment 5 was not completed by the Convening Authority to cure any improper referral issues, and, when reading that Amendment in conjunction with the other three Amendment's that have been completed by the Convening Authority in this case, the pool of members is, at most, if ME3 Ray elects to have enlisted representation on the panel, expanded to 40 members. RADM McPherson has acted well within the bounds of his authority, and, there is no requirement under the Rules for Courts martial that charges be withdrawn and referred to a new court martial if member changes are required; instead, R.C.M. 505(c) gives the Convening Authority wide latitude to change the members before the court martial is assembled without showing cause, and only suggests that it "may be appropriate" for charges to be withdrawn and re-referred if extensive changes are necessary. That language simply does not create a basis to assert that referral in this case was improper.

b. There is no evidence that certain ranks were systematically excluded from selection by the Convening Authority.

The mere fact that no E4's or E5's were selected on the panel is not evidence that the Convening Authority specifically excluded lower ranked members from selection on the panel or evidence of any impropriety in the selection process. This situation looks much different than the case cited by the Defense in support of their argument, *United States v. Kirkland*, as here, the Defense is not able to point to any improper limitations that were placed on the Convening Authority's selection of members. In *Kirkland*, the convening authority requested a list of nominations from subordinate commands to aid him in selected qualified panel members. The request included a chart which listed the number of nominees requested from each rank, but the chart only listed enlisted grades below the rank of E-7. Therefore, in that case, the pool of members was directly limited by rank by the nature of the chart from the convening authority. The Defense has no such evidence in this case before the Court.

In this case, the Government is able to outline the entirety of the selection process for the Court, which indicates no indication of impropriety. To select members for the initial convening order, the Convening Authority, Rear Admiral Jones, solicited nominations based on the Article 25 factors from local units, as is common practice. Nothing in his communications to those units required or implied the nominations be above a specific rank. He received extensive verbal and written Article 25 advice from his SJA and specifically told that member selection cannot be based on rank alone. . He was advised, as is common practice, that he was not limited in his selection to only those members that were nominated. Then, he selected panel members from those nominations, applying the factors enumerated in Article 25 and he handwrote his choices on the document provided to him. He was also provided questionnaires detailing specifics about

the nominees to aid him in selecting a panel when he requested them by making notations on the document.

For Amendment 5, the new Convening Authority, Rear Admiral McPherson, used an Alpha Roster that detailed information about the members age, time in service, education level, active-duty base date, date of rank, and the current position or member department the individual is filling. From that information, the Convening Authority was able to consider and apply the Article 25 factors as required. There is nothing unusual, or improper, about the process in this case that the Defense can point to which amounts to a systematic exclusion of members based on rank. This situation looks nothing like *Kirkland*, which systemically excluded any member ranked lower than E-7 by virtue of the nomination process.

CONCLUSION

The Court should deny the Defense's motion to dismiss the Charges and Specifications in this case. The defense has failed to meet their burden to present any evidence of improper impropriety on behalf of the Convening Authority. The Court should deny the motion in its entirety.

Respectfully submitted,

GRILLS.KELLY.E LIZABETH.[redacted] Digitally signed by GRILLS.KELLY.ELIZABETH.[redacted] Date: 2023.04.14 08:32:16 -04'00'

Kelly E. Grills, LT, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO COMPEL A BILL OF PARTICULARS** **7 ARPIL 23**

MOTION

Pursuant to the Fifth and Sixth Amendments of the U.S. Constitution, and Rule of Courts-Martial (R.C.M.) 906(b)(6), Maritime Enforcement Specialist Petty Officer Third Class Samuel B. Ray, USCG (ME3 Ray), by and through counsel, respectfully moves the Court to compel a bill of particulars concerning Charge III.

SUMMARY

A bill of particulars is necessary to put the accused on notice of the charges against him, allow him to prepare a proper defense, and to protect against double jeopardy. Charge III does not specify the conduct that the Government is charging as sexually intimate behavior. Defense's request for a bill of particulars was met with a negative response from the Government. To cure the lack of specificity, the Court should compel the Government to provide a bill of particulars.

BURDEN

As the moving party, the Defense bears the burdens of persuasion and 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. ME3 Ray is charged with one specification of violating Article 120, UCMJ, two specifications of violating Article 128, UCMJ, and one specification of violating Article 92, UCMJ. All charged misconduct is alleged to have happened on or about 18 March 2022 in a Coast Guard-controlled workplace in Jacksonville, Florida, with [redacted] as the complaining witness. Enclosure A.

2. Charge III alleges that on or about 18 March 2022 at or near Jacksonville, Florida, ME3 Ray failed to obey a lawful general order by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled workplace. Enclosure A.

3. The lawful general order ME3 Ray is charged with violating is contained in paragraph 2.A.2.g of COMDTINST M1600.2, Discipline and Conduct, dated 22 October 2020. Enclosure B.

4. On 6 February 2023, Defense Counsel sent Trial Counsel a request for a bill of particulars concerning the sexually intimate behavior engaged in by the accused. Enclosure C.

5. On 9 February 2023, Trial Counsel responded to Defense Counsel stating that the Government does not intend to issue a bill of particulars. Enclosure D.

LAW

Under the Sixth Amendment, an accused shall "be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. Under the Fifth Amendment, no person shall be "deprived of life, liberty, or property, without due process of law," and no person shall be "subject for the same offence to be twice put in jeopardy." U.S. Const. amend. V. Further, "[t]he military is a notice pleading jurisdiction. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). Based on these protections, for an accused facing court-martial, "each specification will be found constitutionally sufficient only if it alleges, 'either expressly or by necessary implication,' 'every element' of the offense, 'so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted) (quoting R.C.M. 307(c)(3))).

To determine if a specification states an offense, we employ a three-prong test in which the specification must: 1) allege the essential elements of the offense, either expressly or by necessary implication; 2) provide notice to the accused of the offense so he can defend against it; and 3) give sufficient facts to protect against double jeopardy. *United States v. Loniak*, 2017 CCA LEXIS 563, *9-10 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *United States v. Sell*, 3 U.S.C.M.A. 202, 206 (C.M.A. 1953).

When a charge and specification is challenged at trial, courts "'read the wording…narrowly and will only adopt interpretations that hew closely to the plain text.'" *Turner*, 79 M.J. at 403 (citing *Fosler*, 70 M.J. at 230). "Hewing closely to the plain text" means to "consider only the language contained in the specification when deciding whether it properly states the offense in question." *Id.* Where a specification fails to state an offense, it shall be dismissed. R.C.M. 907(b)(2).

"The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes." R.C.M. 906(b)(6) Discussion, Manual for Courts-Martial, United States, (2019 ed.). However, "[a] bill of particulars should not be used to restrict the Government's proof at trial… need not be sworn because it is not part of the specification…cannot be used to repair a specification which is otherwise not legally sufficient." *Id.*

ARGUMENT

a. The charged conduct under Charge III may not be punishable under the lawful general order.

The lawful general order used to charge the alleged misconduct in Charge III states that "Coast Guard policy prohibits ... engaging in sexually intimate behavior ... in any Coast Guard-controlled work place." The fact-finder has to decide whether the alleged conduct falls within the definition of sexually intimate behavior. Not all actions involving a penis are sexually intimate. The lawful general order does not define sexually intimate behavior. However, sexually intimate behavior usually refers to consensual acts involving adults because nonconsensual acts are already covered by Article 120 of the UCMJ. The Government has given no indication of any consensual acts in any discovery that has been provided to the Defense. Specificity is necessary in a charged offense so the accused can be made aware of what he needs to defend against, if the conduct is actually criminal.

b. Charge III fails to meet the low sufficiency bar for notice so the accused can defend against it and it fails to provide enough facts to protect against double jeopardy.

All charges and specifications need to be specific enough to allow the accused to prepare a defense. The Government decides what crime the accused allegedly committed and then it has to be proven beyond a reasonable doubt. The fact-finder does not decide the crime and whether it is proven. That is what the Government is trying to perpetrate in this case. The fact-finder will have to decide at trial, from everything the Government will allege that the accused did, whether anything is sexually intimate behavior, and then decide if it has been proven beyond a reasonable doubt. That is not the job of the fact-finder.

The accused is charged with engaging in sexually intimate behavior in the work place. He has the right to have proper notice of what behavior the Government is charging. Defense's request for a bill of particulars received a negative response. The Government's failure to provide a bill of particulars perpetuates the lack of specificity. The accused should not go to trial and be surprised by what the Government considers sexually intimate behavior.

Additionally, notice is required to protect against double jeopardy. If the accused needs to defend against 10 acts that would be labelled sexually intimate, he needs to know what those are so they cannot be used as the basis of future prosecution.

RELIEF REQUESTED

For the foregoing reasons, the Defense requests that the Military Judge compel a bill of particulars concerning Charge III.

EVIDENCE & ORAL ARGUMENT

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

A. *See* Charge Sheet ICO U.S. v. ME3 Samuel Ray, USCG.

B. Paragraph 2.A.2.g of COMDTINST M1600.2, Discipline and Conduct, dated 22 October 2020.
C. Defense request for a bill of particulars.
D. Government's response to Defense's request for a bill of particulars.

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

LUNCHEON.TREVAUGHN.ATON.[redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON.[redacted] Date: 2023.04.05 14:33:35 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

**********CERTIFICATE OF SERVICE**********

I hereby certify that a true and accurate copy of the above was served on the Military Judge, Trial Counsel, and SVC via electronic mail on 7 April 2023.

LUNCHEON.TREVAUGHN.ATON.[redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON.[redacted] Date: 2023.04.05 14:33:51 -04'00'

T. A. LUNCHEON
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Appellate Exhibit 25
Page 4 of 4

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
WESTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO COMPEL A**
	)	**BILL OF PARTICULARS**
	)	
	)	
	)	
SAMUEL B. RAY,	)	**14 April 2023**
ME3/E-4, USCG	)	

RELIEF SOUGHT

The Government files this response and requests the Court deny the Defense motion to compel a Bill of Particulars for Charge III.

HEARING

The United States respectfully requests oral argument on this motion and response.

BURDEN OF PROOF

As the movant, the Defense bears the burden of persuasion and the burden of proof. The burden of proof for any contested factual issues is a preponderance of the evidence. R.C.M. 905(c)(1).

STATEMENT OF FACTS

1. The Government adopts the Defense's Statement of Facts 1-5 in this responsive motion. [Defense Enclosure A-D].

LEGAL AUTHORITY AND ARGUMENT

R.C.M. 906(b)(6) allows an accused to move for appropriate relief in the form of a bill of particulars to "narrow the scope of the pleadings." The purpose of a bill of particulars is to "inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite." *United States v. Williams*, 40 M.J. 379, 381 n.2 (C.M.A. 1994). A bill of particulars should not be used to conduct discovery, or to force the detailed disclosure of acts underlying a specific charge, and a bill of particulars cannot be used to repair a legally insufficient specification. R.C.M. 906(b)(6) Discussion. Therefore, the analysis for whether or not a bill of particulars should be compelled is different than the analysis for legal sufficiency of the specification. *See Id.*

An examination of federal case law is helpful to understand when a bill of particulars is warranted to narrow the scope of the pleadings, versus a mere a request for the Government to provide a detailed disclosure of acts underlying a charge. A bill of particulars is not a matter of right; and when deciding if a bill of particulars should be compelled, federal criminal procedure suggests that the courts may consider the complexity of the crime charged, clarity of the indictment, and the degree of discovery and other sources of information available to the defense. *United States v. Ellison*, 442 F. Supp. 3d 491, 496 (D.P.R. 2020). In *U.S. v. Vaughn*, the court reasoned that a bill of particulars was unnecessary where the indictment "include[ed] each of the elements of the charged offense, the time and place of the accused's allegedly criminal conduct, and a citation to the applicable statute or statutes...." *U.S. v. Vaughn*, 722 F. 3d. 918, 927 (7th Cir. 2013). The court further explained that a bill of particulars is not required when the information

the defendant sought was readily available through alternate means, such as discovery. *Id.* at 922. A bill of particulars will not normally be compelled to require a detailed preview of the government's trial evidence for a particular charge or require the government to disclose its underlying legal theory or legal conclusions unless the information is necessary to prepare a defense and avoid surprise at trial. *See U.S. v. Leonelli*, 428 F. Supp. 880, 882 (S.D.N.Y. 1977).

In this case, the charged specification states the elements of the charged offense, Article 92, UCMJ. It narrows the charged conduct to a specific date and specific location. It puts ME3 Ray on notice of the specific general order the Government is required to prove he violated on that day, utilizing all of the definitions available in the Coast Guard's Discipline and Conduct Manual. Additionally, the Government has provided expansive, prompt discovery to the Defense and has disclosed via the discovery process all of the information in possession of the Government related to the charged conduct. For those reasons, ME3 Ray has been provided all of the information the Government possesses that will enable him to prepare a defense, and there will be no surprise of the evidence offered to prove this charge at trial. The Defense is aware of all the acts of the accused onboard Station Mayport on 18 March 2022 that were captured by CGIS in their ROI. This is a reasonable scope of facts to defend against.

CONCLUSION

In light of the above, the United States respectfully requests the Court deny the Defense's motion to compel a Bill of Particulars for Charge III.

Respectfully submitted,

GRILLS.KELLY.ELIZABETH.[redacted] Digitally signed by GRILLS.KELLY.ELIZABETH.[redacted] Date: 2023.04.14 08:30:09 -04'00'

Kelly E. Grills, LT, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS TEXT MESSAGES OF THE ACCUSED** **7 APRIL 23**

MOTION

Pursuant to Rule for Courts-Martial 905(b)(3) and Military Rules of Evidence (M.R.E.) 304, 403, and 801, Maritime Enforcement Specialist Petty Officer Third Class Samuel B. Ray, USCG (ME3 Ray), by and through counsel, respectfully requests this Court suppress the text messages between ME3 Ray and [redacted] from 18 March 2022.

SUMMARY

ME3 Ray is charged with one specification of abusive sexual contact under Article 120, Uniform Code of Military Justice (UCMJ), two specifications of assault consummated by a battery under Article 128, UCMJ, and one specification of failure to obey a lawful general order under Article 92, UCMJ. The Government is in possession of a text message conversation between the accused and [redacted] from the day of the alleged misconduct. This evidence should be suppressed because it is not a confession or admission as defined by M.R.E. 304, and the balancing test under M.R.E. 403 weighs in favor of excluding the evidence. Additionally, all statements made by [redacted] would be hearsay without any applicable exception.

BURDEN

As the moving party, the Defense bears the burdens of persuasion and 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. ME3 Ray is charged with one specification of violating Article 120, UCMJ, two specifications of violating Article 128, UCMJ, and one specification of violating Article 92, UCMJ. All charged misconduct is alleged to have happened on or about 18 March 2022 at or near Jacksonville, Florida, with [redacted] as the complaining witness. Enclosure A.

2. On 18 March 2022, ME3 Ray and [redacted] had a conversation over text where they conversed mainly about work. During that conversation, ME3 Ray said [redacted] without explanation or context. Enclosure B.

LAW

M.R.E. 304(a)(1) defines a confession as "an acknowledgment of guilt" and an admission as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." Even if evidence is considered a confession or admission, it still has to be corroborated by independent evidence that would tend to establish its trustworthiness before it can be admitted into evidence. Mil. R. Evid. 304 (c)(1). "When the government seeks to introduce an admission or confession of an accused, it must proffer to the Military Judge evidence that it believes corroborates the accused's statement." *United States v. Whiteeyes*, 82 M.J. 168, 174 (C.A.A.F. 2022).

M.R.E. 401 defines relevant evidence as evidence that (a) 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. Relevant evidence may be excluded by the Military Judge if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403.

Even if this evidence is admissible under the above rules, the Government must still adhere to M.R.E. 801. According to M.R.E. 801, a statement is hearsay if the declarant does not make the statement "while testifying at the current trial or hearing" and the party offering the evidence intends the use of the evidence to "prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c)(1)-(2). Out-of-court statements can be provided for other purposes, such as effect on the listener for context, but those statements have to serve a specific purpose such as clarifying why the accused made certain statements. *United States v. Leach*, 2022 CCA LEXIS 76, at *15.

ARGUMENT

A. The text message should be suppressed under M.R.E. 304 because nothing the accused said amounts to a confession or admission.

In order to admit evidence under M.R.E. 304, the Military Judge must find that it was either a confession or an admission related to the charged offense and that there is also independent corroborating evidence.

At no point during the text conversation did ME3 Ray acknowledge guilt of any offense, so the statements within the texts cannot be deemed a confession. Similarly, there was no admission because there was nothing self-incriminating about the text messages. Close to the end of the conversation, ME3 Ray said [redacted] Different things happened between ME3 Ray and [redacted] that day, and we have no evidence of what he was apologizing for and why he even felt the need to apologize.

Even if a generic apology could be seen as an admission, the Government has failed to proffer independent corroborating evidence. The Government must present other evidence that shows the trustworthiness of the purported admission. The text messages without explanation or other evidence are inadmissible under M.R.E. 304.

B. All text messages sent by [redacted] are inadmissible hearsay under M.R.E. 801.

Hearsay is any statement made by a declarant outside of the current trial that is being offered for the truth of the matter asserted in the statement. If the Government wants to admit any of [redacted] text messages they would be offered for the truth of that statement. The Government would likely say [redacted] statements are being offered to provide context for ME3 Ray's statements. When that exception is used, the statements need to provide clarity. For example, in *Leach*, the accused was awaiting trial for domestic violence and told his father, [redacted] Without explanation we have no idea what the accused was referring to. The court allowed the father's statement for context because he told the accused that there was a law that allows a man to take his wife to the courthouse steps one day a month and beat her. That statement was allowed as effect on the listener to provide clarity of the accused's view on domestic violence. That's not the case here. Here, we have ME3 Ray and [redacted] having a conversation about work and then ME3 Ray apologizing about something that happened that day without explanation. The effect on the listener exception is not applicable in this case because nothing was said to prompt an apology as a response and it was about four hours after the last thing that was said.

C. The balancing test from M.R.E. 403 favors excluding the text messages because they will confuse issues and mislead members.

Even if the statement in the text message was an admission and non-hearsay, it should be excluded due to the balancing test because the statements are more prejudicial than probative. Admitting the text messages is unfairly prejudicial. It paints the accused in a bad light because he apologized to [redacted] for something about which we have no idea.

The text messages will confuse and mislead the members. [redacted] will say she was assaulted and subjected to abusive sexual contact but none of that is corroborated by the text messages. Her testimony would be presented to the members without the understanding of ME3 Ray's *mens rea* which could go toward his mistake of fact as to consent. Asking the members to take an apology out of context or without explained context would be very misleading. Any probative value of ME3 Ray's statement would be substantially outweighed by the confusion and misleading of the members.

RELIEF REQUESTED

For the foregoing reasons, ME3 Ray respectfully requests this Court suppress the text messages between ME3 Ray and [redacted] from 18 March 2022.

EVIDENCE & ORAL ARGUMENT

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

A. *See* Charge Sheet ICO U.S. v. ME3 Samuel Ray, USCG.
B. Text messages between ME3 Ray and [redacted] from 18 March 2022.

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

LUNCHEON.TREVAUGHN.ATON[redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON[redacted] Date: 2023.04.05 14:37:09 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

**************************CERTIFICATE OF SERVICE**************************

I hereby certify that a true and accurate copy of the above was served on the Military Judge, Trial Counsel, and SVC via electronic mail on 7 April 2023.

LUNCHEON.TREVAUGHN.ATON[redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON[redacted] Date: 2023.04.05 14:37:24 -04'00'

T. A. LUNCHEON
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Detailed Defense Counsel

Appellate Exhibit 29
Page 4 of 4

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO SUPPRESS**
	)	**TEXT MESSAGES BETWEEN ME3**
	)	**SAMUEL RAY AND [redacted]**
	)	
	)	
SAMUEL B. RAY,	)	14 April 2023
ME3/E-4, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this response in opposition to the Defense's motion to suppress the text message exchange on March 18, 2022 between the accused, ME3 Samuel Ray, and [redacted] and asks this Court to deny the motion.

HEARING

The United States respectfully requests oral argument on this motion and response.

BURDEN OF PROOF

The prosecution has the burden of establishing the admissibility of the evidence when the Defense has made an appropriate motion under Mil. R. Evid. 304. Mil. R. Evid. 304(6). As the moving party, the Defense bears the burden of persuasion and proof by a preponderance of the evidence with regard to each factual issue necessary to the resolution of this motion. R.C.M. 905(c).

EVIDENCE

Enclosure 1: [redacted] Interview Part 1 (GBS 170) *(The Government will amend with a certified transcript (transcription service requested on April 3, 2023).*

Enclosure 2: [redacted] Interview Part 2 (GBS 171) *(The Government will amend with a certified transcript (transcription service requested on April 3, 2023).*

STATEMENT OF FACTS

1. ME3 Samuel Ray is charged with one specification of violating Article 120, UCMJ, Abusive Sexual Contact, two specifications of violating Article 128, UCMJ, Assault Consummated by Battery, and one specification of violating Article 92, UCMJ, Failure to Obey Order or Regulation.
2. The charged misconduct occurred on March 18, 2022, at USCG Station Mayport, Florida.
3. At the time of the assault, [redacted] was an active-duty member of the Coast Guard serving as a member of the Sector Boarding Team. ME3 Ray was stationed at USCG Station Mayport, FL.
4. [redacted] and ME3 Ray had worked together and served on recreational boarding teams together prior to the assault and ME3 Ray had helped train her as a Coast Guard Law Enforcement Officer. [Enclosure 1 at 2:51].
5. ME3 Ray and [redacted] had previous "physicalities" that stopped in October, 2021. [Enclosure 1 at 3:35].
6. On the morning of March 18, 2022, [redacted] and ME3 Ray exchanged a series of text messages beginning at 0748 relating to work; the subject of those text messages included discussions about patrol dates, work arrival times, logging boardings into MISLE, computer usage, and law enforcement trainings. [Def. Encl. B].

7. Those work-related text messages continued until about 0945 that morning. Included in this exchange are texts from [redacted] about her location, what computer she was working on at Station Mayport, and texts from ME3 Ray stating that he is on his way back to Station Mayport. [Def. Encl. B].
8. The charged conduct took place in the sector room and in the ME Office at Station Mayport. [Def. Encl. B and Enclosure 1 13:00].
9. After the charged conduct occurred, at 1419, ME3 Ray apologized to [redacted] texting [redacted] and included an emoji with a bead of sweat on the side of an emoji face. [Def. Encl. B].
10. A few hours later, ME3 Ray again texted [redacted], at 1926, stating [redacted] [Def. Encl. B].
11. At 2044, ME3 Ray again texted [redacted] asking [redacted] [Def. Encl. B].

LEGAL AUTHORITY

Admissions

A confession is an "acknowledgment of guilt," to the charged conduct and an admission is a "self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." Mil. R. Evid. 304(1)(B-C). The corroboration rule codified in M.R.E. 304 is "designed to ensure that a conviction cannot be based solely on an uncorroborated, out-of-court admission or confession of the accused." *United States v. Whiteeyes*, 82 M.J. 168, 173 (C.A.A.F. 2022). However, the rule only requires independent evidence, direct or circumstantial, "that would tend to establish the trustworthiness of the admission or confession." M.R.E. 304(c)(1). The independent evidence "need raise only an inference of the truth of the admission or confession." M.R.E. 304(c)(4). The requirement to

raise an inference of truth is a "very low standard." *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004). The quantum of evidence necessary to raise an inference of truth is "slight." *United States v. Jones*, 78 M.J. 37 (C.A.A.F. 2018). For example, in *United States v. Delgado*, 2019 WL 345840 (N-M.C.C.A. 2019), the accused's wife's testimony that the family took a trip to Utah and had a family nighttime and showering routine with their children corroborated the accused's confession of sexual abuse of the children, where he admitted to abuse in a three-month period following a trip to Utah, while he was in the shower with his daughter.

Hearsay

The Defense asserts that there is no basis for the admittance of [redacted] text messages under M.R.E. 801, and argues the text messages are inadmissible hearsay. The law supports the admission of [redacted] text messages, as well as the accused's text messages in their entirety, as they are either, (1) not hearsay because the Government's does not intend to offer them for the truth of the matter asserted, or (2) because they fall under an exemption or exception to the hearsay rule.

The hearsay rule proscribes out of court statements from being offered for the truth of the matter asserted. M.R.E. 801, 802. A "statement" is defined as a person's oral assertion, written assertion, or non-verbal conduct, if a person intended that conduct as an assertion. M.R.E. 801. The basis of the hearsay rule is grounded in a concern about the reliability, or lack thereof, of out of court statements. But, as stated in the Military Evidentiary Foundations handbook, the Rule actually "has a relatively narrow scope." Schluter, David et al., *Military Evidentiary Foundations* § 10.1 (7th ed. 2021). The statement must be offered for the truth of the matter asserted to be inadmissible. *Id.* There are many reasons outside of that very narrow scope why a statement may be highly relevant, and probative, but not offered for the truth of the matter asserted. If the

proponent of the evidence can show that statement is logically relevant on another theory, and not offered for the truth, the statement is non-hearsay. *Id.*

Case law supports this core proposition. In *United States v. Leach*, brig phone recordings of four previously recorded conversations between the Appellant and other people were introduced at trial over Defense counsel's hearsay objection. *United States v. Leach*, 2022 WL 325761 at *6 (A.F. Ct. Crim. App. Feb. 3, 2022), review denied, 82 M.J. 355 (C.A.A.F. 2022). The recorded phone conversation included not only the statements of the Appellant, but also included statements made by other individuals on the phone recording, which included in depth readings and passages about emotional abuse and controlling behavior, and statements about the law related to domestic abuse. *Id.* at 2. At trial, the military judge allowed these statements to be admitted as they were not offered for their truth, but for the effect they had on the listener. *Id.* at 6. On appeal, that decision by the trial court judge was upheld, and the appellate court outlined that the recordings were not hearsay at all because none of the other statements on the recording were offered for their truth; but simply offered to explain why the Appellant "said what he did" and that the statements were only considered for that narrow purpose. *Id.*

In *United States v. Vasquez*, the accused challenged the admission of a social media message exchange between the accused and the victim's sister-in-law. *United States v. Vasquez*, 2019 WL 2476075 (N.M.C.C.A. June 13, 2019). The conversation was initiated by the sister-in-law and contained inflammatory accusations that the accused did not deny, including accusing him of being a "rapist." The trial defense counsel objected to most of the messages from the sister-in-law, but eventually conceded that "the bulk of the text provid[ed] proper context to the response by the [accused]." *Id.* at *5. On the grounds of hearsay, the trial judge held that the messages from the sister-in-law were "not being offered for the truth of the matter. It's being

offered to put the accused's statement into context and, therefore, is not hearsay." *Id.* The appellate court agreed with the trial judge that the messages were not hearsay. The portions of the message thread made by the sister-in-law "were not offered to prove the truth of the matters asserted." *Id.* (citing M.R.E. 801(c)(2)).

Likewise, in *United States v. Rivera*, audio recordings between the accused and a witness were admitted at trial. The defense conceded that the remarks made by the accused were admissible but challenged the other witness's part of the conversation as hearsay. *United States v. Rivera*, 780 F.3d 1084, 1090 (11th Cir. 2015). The court concluded that the statements of the other party in the conversation were not hearsay. The defense argued that the second party's statements were hearsay— the court found this argument "unconventional," stating,

if Defendant's position were correct, it would mean that, except for the criminal defendant against whom the statements are being admitted, the voice of any other participant to the taped conversation would have to be removed. Further, any accompanying transcript of the conversation would have to redact any statements not made by the defendant. In other words, the jury would hear only a soliloquy by the defendant, with no knowledge of the substance of any comments by others to whom the defendant was responding. Unable to discern the context of a defendant's remarks, a jury would almost never be able to make much sense of a defendant's statements. In effect, the Defense's argument would cast doubt on a longstanding practice, occurring over decades and in innumerable trials, of permitting the jury to hear a taped conversation between a defendant and another person.

M.R.E. 403 Balancing Test

For evidence to be admissible, the proponent of the evidence must demonstrate its legal relevance under Mil. R. Evid. 403. The core question under Mil. R. Evid. 403 relates to how the

factfinder views the evidence — and it's only when a factfinder might react to the proffered evidence in a way that is separate from its logical, probative force that can result in unfair prejudice to the accused. *United States v. Owens*, 16 M.J. 999, 1002 (A.C.M.R. 1983). Potential prejudice is analyzed by determining to the extent evidence might "mislead, interfere with, or confuse the member in assessing the principal charges." *United States v. Rhodes*, 61 M.J. 445, 456 (C.A.A.F. 2005). The Rule favors admissibility, and only allows a military judge to exclude evidence only if its probative value is *substantially* outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403. The strength of the proof of the prior act offered into evidence, any possible distraction that evidence could pose to the factfinder, the time needed to prove the prior conduct, the conduct's temporal proximity and frequency, the presence of any intervening circumstances, and the relationship between the parties should be considered. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005).

It is difficult to articulate how evidence presented of an accused's spontaneous admission and follow-on text messages demonstrating consciousness of guilt could mislead or confuse panel members or pose any risk of distracting the factfinder, as this type of evidence typically relates directly to the charged offenses. *See Rhodes* at 456-57 (Crawford, J., concurring in part and dissenting in part).

ARGUMENT

a. ME3 Samuel Ray's text messages, specifically, his message stating [redacted] are not admissions, therefore, the Government is not required to produce any evidence of corroboration under Mil. R. Evid. 304 for the text message to be admissible.

First, the Government agrees with the Defense that the text message sent by ME3 Ray on March 18, 2022, stating [redacted] is not a confession or admission under Mil.

R. Evid. 301. In fact, as the Defense described in their filing, no statement by ME3 Ray in the text message acknowledges any guilt related to the charged conduct or stands as a self-incriminating statement. Instead, the text messages that ME3 Ray sends following the charged conduct are statements by the accused that go to consciousness of guilt. Because the statements by the accused in the text message are not confessions or an admissions, Mil. R. Evid. 304 does not govern their admission and no corroboration is required under that Rule.

b. [redacted] statements in the text messages between [redacted] and ME3 Samuel Ray are not hearsay, as they are not offered for the truth of the matter asserted.

All of the text messages between [redacted] and the accused, ME3 Samuel Ray, are admissible either as non-hearsay statements offered for a proper purpose other than the truth of the matter asserted, or under an exemption or exception to the hearsay rule. Mil. R. Evid. 801, 803.

First, the accused statements included in the text exchange are not hearsay, as they are statements of a party-opponent under Mil R. Evid. 801(d)(2). These are all statements of ME3 Ray sent to [redacted] via text message. The Government, through [redacted] or through the investigative agent, will be able to lay the foundation to enter this evidence and demonstrate that these text messages came from ME3 Ray's phone. Because these statements are not hearsay under the Rule, they should not be excluded.

In addition, the statements that indicate a response from [redacted] to ME3 Ray are not offered for their truth, they are offered to show the effect on the listener, provide context, and to demonstrate the general nature of the conversation [redacted] and ME3 Ray were having on the day of the assault. The Government is not intending to use these text messages to show that [redacted] did or did not understand how to log MISLE entries, to prove what time she typically arrives at work, or to prove the status of the computer she was using.

First, this text message conversation on the day of the assault is offered to show that the general nature or topics of [redacted] and ME3 Ray's texts that day were professional in nature. Essentially, to show that there were no text messages exchanged contemplating any sexual activity. Next, the text messages are offered to show that after the assault, [redacted] ceased communicating with ME3 Ray, and does not text him back, even after her apologizes and asks her if she is okay. In addition, the timing of the text messages between ME3 Ray and [redacted] corroborate the timeline and location of the assault provided by [redacted] which is valuable circumstantial evidence of the charged offenses. Finally, the Government is offering these text messages to show the totality of the back-and-forth conversation on the day of the assault to provide context to the inculpatory text messages sent by ME3 Ray after the assault- so the apology and subsequent statements are not read as a one sided "soliloquy" from ME3 Ray.

c. **The text messages detailing an apology from the accused to [redacted] only hours after the charged misconduct have extremely high probative value that is not *substantially* outweighed by any type of unfair prejudice.**

It is useful when considering the probative value of the text messages to address first the text messages from before the assault, and the text messages after the assault, as they are probative for different reasons and offered to serve different purposes. First, to address the probative value of the text messages prior to the assault that lead up to [redacted] and ME3 Ray meeting up in both the Sector room and the ME Office that day; those text messages concerning computer use, MISLE entries, and ME3 Ray and [redacted] location on the day of the assault are probative as they are circumstantial evidence of the charged conduct. These pre-assault text messages provide a basis for the factfinder to understand how ME3 Ray knew of [redacted] location that day, the timeline of the charged conduct, and the location of the charged conduct. It is difficult to determine what, if anything, the Defense believes is unfairly prejudicial about these

text messages, as they simply lay out the logistics of what led [redacted] and ME3 Ray to be at Station Mayport together that day.

Next, to address the probative value of the text messages from ME3 Ray that were sent to [redacted] after the charged conduct; these text messages have extremely high probative value. Specifically, the text message concerning the apology from ME3 Ray to [redacted] within hours of the charged conduct speaks directly to both [redacted] consent to the conduct, and any mistake of fact that ME3 Ray may have had. A spontaneous apology from ME3 Ray, without any communication from [redacted] to precede it, goes directly to the core issue in this case — as it's unlikely ME3 Ray would offer an unprompted apology after having a consensual sexual encounter with [redacted] In addition, the text message from ME3 Ray later that evening asking [redacted] if she is okay demonstrates consciousness of ME3 Ray's guilt. As the court in *United States v. Meling* surmised, evidence of consciousness of guilt of the charged crime is "second only to a confession in terms of probative value." *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1994). These text messages are a unique look into ME3 Ray's mind in the hours after the charged conduct and for that reason, are extremely probative to central issues in this case.

Next, to address any potential unfair prejudice. This is best analyzed under the factors laid out by the court in *Berry*, most of which weigh heavily in the Government's favor. The proof of the messages is strong, as the Government has a screenshot of the actual text messages at issue. There is little, if any, risk of any possible distraction the evidence of the text messages presents to the factfinder. These text messages occur between ME3 Ray and [redacted] and take place throughout the day on March 18, 2022, the day of the assault. The text message exchange first establishes how they both came to be at Station Mayport that day, the time they were at Station Mayport, and what led to their being in both the Sector room, and the ME storage room on the

day of the charged conduct. The text messages are not distracting; they serve as circumstantial evidence to corroborate the timeline and location of the assault presented by [redacted] The time needed to prove the conduct is de minimis; either [redacted] or the lead CGIS agent on the case will be able to lay the foundation for the admission of these text messages—adding little additional time to the [redacted] or the agent's anticipated testimony. The conduct's temporal proximity is extremely close to, and again, intertwined with, the charged offenses. All of the text messages occurred on the day of the charged conduct, with the only intervening circumstance being the assault, that [redacted] asserts occurred during the day on March 18, 2022. The *Berry* factors weigh heavily in the Government's favor.

Some of the evidence the Government seeks to admit through these text messages, specifically, ME3 Ray's own statement of apology and subsequent text messages asking [redacted] if she is okay are certainly prejudicial—that is why the Government seeks their admission. Almost all evidence the Government seeks to introduce in a court-martial is intended and offered to prejudice the Defense—if it was not prejudicial, there would be little value in introducing the evidence. But mere prejudice is not the standard under Mil. R. Evid. 403. The rule looks only at unfair prejudice and compares that potential prejudice to the evidence's probative value. ME3 Ray's text messages have extremely high probative value to the Government in its case in chief to prove [redacted] lack of consent to the charged conduct, and provide evidence useful to rebut any mistake of fact theory. The evidence though, is not unfairly prejudicial, and its high probative value is not substantially outweighed by that risk. Therefore, the evidence of ME3 Ray's text messages should not be excluded, and this Court should deny the Defense's motion.

CONCLUSION

Because ME3 Ray's statements in the text messages to [redacted] are not a confession or admission and therefore not subject to the corroboration analysis in Mil. R. Evid. 304(c), and because the text messages are not hearsay or are admissible under an exception or exemption to the hearsay rule, and are not unfairly prejudicial, the text messages between ME3 Ray and [redacted] should not be excluded.

REQUESTED RELIEF

The United States respectfully requests that the Court deny the Defense's motion to suppress the text messages between the Accused and [redacted]

Respectfully Submitted,

GRILLS.KELLY.ELIZA[redacted] Digitally signed by [redacted] KELLY.ELIZABETH [redacted] BETH.[redacted] Date: 2023.04.14 12:35:53 -04'00'

Kelly E. Grills, LT, USCG
Trial Counsel

Appellate Exhibit 31
Page 12 of 12

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES SUPPLEMENTAL**
v.	)	**FILING IN RESPONSE TO DEFENSE**
	)	**MOTION TO DISMISS FOR**
	)	**IMPROPER REFFERRAL**
	)	
	)	
SAMUEL B. RAY,	)	28 April 2023
ME3/E-4, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States respectfully submits this supplemental filing in response to the Court's request for additional evidence and asks this Court to deny the defense motion to dismiss the Charges and Specifications in this case as referral in this case was proper.

STATEMENT OF FACTS

1. On 03 November 2022, in contemplation of a different case, *United States v. LT Lloyd Banks*, the Convening Authority, RADM Brendan C. McPherson was advised by his Staff Judge Advocate, CAPT [redacted] that based on the change of venue of the Court Martial to Norfolk, VA and available members, that the Convening Order be amended.
2. With that, CAPT [redacted] also routed written Article 25 advice, which detailed information about the need for an amendment. Because Amendments Nos. 2-4 were completed in contemplation of a specific Court Martial, the SJA advised only members senior to LT [redacted] be selected.

3. An Alpha roster detailing those members of rank LT or above available for selection was also provided to the Convening Authority.
4. With that Alpha roster, the Convening Authority, RADM McPherson, selected members for Amendments Nos. 2 and eventually 3.
5. Amendment 4 operated only to excuse members from previous selection in Convening Order 1-20 as subsequently amended.
6. Following the completion of the case *U.S. v. Banks*, and in contemplation of the case before the Court, *U.S. v. Ray*, the Staff Judge Advocate routed Article 25 advice and a new Alpha roster without the rank exclusions present for Amendments Nos. 2 and 3. The information provided to the Convening Authority during the process of selecting members for Amendment No. 5 was provided to the Court in the Government's initial filing.
7. Amendment No. 5 selected entirely new officers and enlisted members for the panel based on that new Alpha roster and Article 25 advice.

EVIDENCE

The Government provides the following enclosures in support of this supplemental filing while carrying over the numbering convention from the reply motion to which this motion supplements:

Enclosure 6: Routing Slips (Amendments 2, 3)

Enclosure 7: Previous Art 25 Advice dtd 03NOV22

Enclosure 8: Previous Alpha Roster (Amendments 2-4)

Enclosure 9: Affidavit of CAPT [redacted] (D7 SJA)

LEGAL AUTHORITY & ARGUMENT

Not all errors on a charge sheet or errors which concern the appointment of court members are jurisdictional in nature. *United States v. Sparks*, 29 M.J. 52, 58 (C.M.A. 1989). The Court of

Military Appeals has clearly laid out in its interpretation of R.C.M. 601(a) that although the "order of a convening authority that charges against an accused will be tried by a specific court martial" is a jurisdictional requirement, it is the order that is the jurisdictional prerequisite, not the form of that order. *See United States v. Wilkins,* 29 M.J. 421, 424 (C.M.A. 1990). It is the actions by a convening authority showing an intent to refer a particular charge to trial that satisfies the jurisdictional requirements of the Rules. Here, the Convening Authority's intent was to refer the case to the standing Convening Order 1-20 and create a new amendment (Amendment 5) in response to the case. Enclosure 9. The interceding amendments do not change this intent.

The fact that that Amendment 1 is written in the referral block in the instant case is non-jurisdictional surplusage. In *U.S. v. Hall*, an incorrect date in the referral block of the Charge Sheet as well as a missing signature on the Convening Order from the Staff Judge Advocate were found to be non-jurisdictional, harmless errors, as the members detailed to the specific case were listed on the convening order. *United States v. Hall*, No. ACM 34833, 2002 WL 1822209 at *1 (A.F. Ct. Crim. App. July 24, 2002). In the instant case, Block V, the referral block, specifically refers the charges in the case of *U.S. v. Samuel Ray* to standing General Court Martial 1-20. That lays out the intent of the Convening Authority for these charges to be tried by that standing General Court Marital Panel. The addition of an amendment number to that block is not jurisdictional, as Convening Authorities have wide discretion to amend convening orders and change the member composition on a panel without showing cause before assembly. R.C.M. 505(c)(1)(A). This is particularly persuasive in this case because Amendment Nos. 2-4 were completed in contemplation of a specific general court marital, *U.S. v. LT Lloyd Banks*.

In addition, the supplemental enclosures included in this filing further details the Convening Authority's process for selecting members for Amendments 2-4. On 03 November

2022, RADM McPherson received written Article 25 advice from the Staff Judge Advocate which included a specific instruction that rank may not be the sole basis for member selection. In making selections through the application of Article 25 factors for Amendments 2 and 3, the Convening Authority used an Alpha Roster provided by his staff, included as Enclosure (8) to this motion. Amendment 4 operated only to excuse members, so the Admiral did not apply Article 25 factors. Based on this information, the presumption of regularity in the application of Article 25 factors applies, particularly because the Defense has raised no evidence of any systematic exclusion in the member selection process.

The Government has demonstrated that the language specific to Amendment 1 dtd 06 October 2022 on the Charge Sheet was mere non-jurisdictional and does not make referral to standing General Court Martial 1-20 convened by RADM Eric Jones improper as not all errors on the charge sheet are jurisdictional in nature. In addition, through these supplemental enclosures, the Government has outlined the entirety of the process of member selection for Convening Order 1-20 that has occurred thus far and demonstrated that there was nothing improper in the Convening Authority's actions in applying the Article 25 factors. Finally, even if this Court should find that the language included in Block V of the Charge Sheet does amount to a jurisdictional error, the proper remedy in this case is to permit the Government to make a pen-and-ink change to Block V of the Charge Sheet, or, at most, withdrawal charges and re-refer the charges to Convening Order 1-20 without any reference to a specific amendment or to the latest amendment.

CONCLUSION

The Court should deny the Defense's motion to dismiss the Charges and Specifications in this case as referral in this case was proper. In addition, even if this Court should find that

referral in this case was improper due to the surplusage language, the proper remedy at this time is not dismissal of the charges.

Respectfully submitted,

RODRIGUES.ANTHONY.MARINUS.[redacted]
Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted]
Date: 2023.04.28 21:20:34 -04'00'

Anthony M. Rodrigues, LCDR
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**DEFENSE RESPONSE TO GOVERNMENT SUPPLEMENTAL FILING IN RESPONSE TO DEFENSE MOTION TO DISMISS FOR IMPROPER REFERRAL** **2 MAY 23**

MOTION

Pursuant to Rule of Courts-Martial (R.C.M.) 907(b)(2) and Article 25 of the Uniform Code of Military Justice (UCMJ), Maritime Enforcement Specialist Petty Officer Third Class Samuel B. Ray, USCG (ME3 Ray), by and through counsel, respectfully moves the Court to dismiss all charges and specifications due to improper referral. This is a response to the Government's supplemental response.

FACTS

1. On 3 November 2022, CAPT [redacted] Seventh Coast Guard District SJA, routed Article 25 advice to the convening authority and Amendment 2 was signed on 8 November 2022. When referring to convening order 1-20. in his advice he stated that "most if not all of the nominated panel members identified in that convening order have transferred from the Seventh District." Amendment 2 excused all members from convening order 1-20 and detailed new members. Government Enclosures 6, 7 and 9.

2. On 15 November 2022, CAPT [redacted] advised the convening authority that 16 members from amendment 2 should be replaced. As a result of that replacement, amendment 3 was signed on 16 November 2022. Government Enclosures 6 and 9.

3. On 21 November 2022, the convening authority signed amendment 4 excusing members from amendment 3. Government Enclosure 9.

4. On 28 April 2023, CAPT [redacted] signed an affidavit detailing his role as SJA concerning the amendments to convening order 1-20. When speaking about the referral of charges against ME3 Ray, he stated that he "understood that the charges and specifications, if referred to a GCMCA, would be referred to that standing general court-martial as amended and that all amendments to the General Court-Martial Convening Order 1-20 apply as Amendment Nos. 1-4 were not strictly limited to *United States v. LT Lloyd Banks III*." Government Enclosure 9.

DISCUSSION

a. Convening Order 1-20 cannot stand alone because it was canceled by amendment 2.

Amendment 2 dismissed all the members from convening order 1-20. That means that convening order 1-20 was just a shell of its former self and should not have been used for any stand-alone purpose. By the execution of amendment 2, there were no members on convening order 1-20. The referral of a court-martial using a specific convening order is not just a rubber stamp that is always remedied by issuing amending orders. If that was the case, there would be no need to detail any members to the original convening order, with the knowledge that all members will be detailed on amendments. Instead, the reality is that a court-martial should be ready to be convened with the original convening order. As stated in R.C.M. 505, changes to the members panel should be kept to a minimum.

b. The convening authority did not choose the best qualified members.

The convening authority did not fulfil his responsibility under Article 25 when he convened the present court-martial. He knew from 3 November 2022 that most or all of the members on convening order 1-20 had transferred out of District Seven, and were no longer under his control. He knew that because his SJA told him exactly that. He still chose to refer the present court-martial to convening order 1-20. The members on convening order 1-20, by definition, cannot be the best qualified members at the command if they are not at the command. The convening authority has to detail members that, in his opinion, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. *United States v. Allgood*, 41 M.J. 492, 496 (C.A.A.F. 1995).

c. Amendment 4 was the controlling amendment at the time of referral.

In his affidavit, CAPT [redacted] let us know that all amendments are applicable to the present court-martial when he stated "that all amendments to the General Court-Martial Convening Order No. 1-20 apply as Amendment Nos. 1-4 were not strictly limited to *United States v. LT Lloyd Banks III*." The affidavit is evidence, contrary to argument from the Government where they stated that "Amendments Nos. 2-4 were completed in contemplation of a specific general court marital [sic], *U.S. v. LT Lloyd Banks*." When this case was referred on 24 January 2023, amendment 4 was the latest and controlling amendment. At a minimum, the present court-martial should have been referred to that amendment. Instead, the only amendment referenced was amendment 1, which only changed the venue. It was not a scrivener's error because the date of amendment 1 is correctly written as 6 October 2022. The Government made a deliberate choice to refer the present court-martial to convening order 1-20, amended only by amendment 1.

d. The Government needs to prove beyond a reasonable doubt that improper criteria was not used for member selection.

Defense is not asking the Court to decide whether this issue is jurisdictional. At this point, Defense is not concerned about whether the issue is waivable because it is being raised at the appropriate time to ensure it is not waived. "Objections based on defects in preferral,

forwarding, investigation, or referral of charges must be made before pleas are entered. *United States v. Brewick*, 47 M.J. 730, 732 (N-M.C.C.A. 1997). Whether it is jurisdictional or not, improper member selection can constitute unlawful command influence, which cannot be waived. *United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018). CAPT [redacted] said no one told the convening authority to select members based on rank and the convening authority did not say that he used rank as a selection criteria. Similar to *Riesbeck*, where Article 25 advice was given but the gender of every person was on the roster used and the panel was 70% female for a sexual assault trial, here Article 25 advice was given but the roster was ordered by rank and no E5s or E4s were selected. Whether conscious or unconscious, impermissible criteria like rank cannot be used for member selection. CAPT [redacted] said that "RADM McPherson made no indication that he selected or excluded members based solely on their rank." The law says nothing about "solely;" it only says no improper panel selection criteria shall be used. If rank was used along with all the other proper criteria under Article 25, it is still improper. The Government needs to prove beyond a reasonable doubt that improper panel selection criteria was not used. *Id.* at 162.

RELIEF REQUESTED

Defense requests that the Military Judge dismiss all charges and specifications due to improper referral.

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T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY

GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **USCG**	**DEFENSE MOTION FOR APPROPRIATE RELIEF (Unlawful Command Influence)** **26 JUNE 2023**

MOTION

The Defense requests appropriate relief based upon evidence of unlawful command influence via influencing the independent discretion of the Military Judge. The defense requests this case be dismissed with prejudice, in the alternative the defense asks the military judge to recuse themself, the Convening Authority (CA) be disqualified from post-trial action, or for the defense to receive additional peremptory challenges of members, and/or any other remedy this court sees fit to protect the presumption of innocence, and preserve the public perception of fairness in the military justice system.

BURDEN

As the moving party the Defense has the burden to present some evidence, beyond mere speculation, which if true, constitutes unlawful influence. If some evidence is presented, "the appearance or existence of unlawful command influence creates a rebuttable presumption of prejudice." *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). Once the Defense raises the issue of unlawful influence, the Government must prove, beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings. *See United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004) (quoting *Biagase,* 50 M.J. at 151).

FACTS

1. ME3 Samuel Ray, USCG has been charged by the Government with violating Uniform Code of Military Justice (UCMJ), Articles 120, 128, and 92 for conduct which allegedly occurred on 18 March, 2022. Charge Sheet.

2. In accordance with the Trial Management Order, trial was scheduled for 26 June through 30 June, 2023. Trial Management Order.

3. On the morning of 26 June, the Military Judge detailed to this case and RDML Randall shared an elevator on the way up to the Coast Guard offices where the courtroom is located. During the ride RDML Randall stated [redacted] - or something to that affect. Enclosure 1.

4. Defense counsel was proffered by LCDR Stiehl, an attorney for the District 7 Staff Judge Advocate's (SJA) office and a member of the trial team in this case, that sometime during the week of 19 June RDML Randall spoke with him. During their conversation it came to light that LCDR Stiehl was present in Norfolk for the ME3 Ray trial. RDML Randall was able to recall the specific facts of the case to LCDR Stiehl. LCDR Stiehl also noted that RDML Randall seemed surprised the matter did not end in a guilty plea.

5. RDML Randall was the Chief of Staff of RADM McPherson, District 7 commander and the Convening Authority in this case, during the year starting summer 2021 and ending July 2022. In this role he worked closely with RADM McPherson. Enclosure 1.

6. RDML Randall was briefed by the D7 SJA on military justice matters and would discuss cases with RADM McPherson based on those briefings. He would also give advice to RADM McPherson on cases when asked by RADM McPherson. *Id.*

7. RDML Randall did discuss the ME3 Ray case with RADM McPherson while he was his Chief of Staff. And he also has made this flippant comment to others in the past. *Id.*

LAW

To start, Article 37, UCMJ states, "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." And "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused."

The Defense has the initial burden of raising "some evidence" more than mere allegations or speculation that UCI exists. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The Defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* Once the issue is raised, the burden shifts to the Government to show beyond a reasonable doubt that either (1) the predicate facts do not exist, (2) the facts do not constitute UCI, or (3) any purported UCI will not affect the findings or sentence. *Id.* at 150-51. The analysis is the same with regard to public perception and the appearance of prejudice to the accused and the proceedings, otherwise known as apparent UCI. See *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002). Dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings. *United States v. Spykerman*, 81 M.J. 709, 728 (N.M.C.C.A. 2021)(quoting *United States. v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010)).

Actual unlawful influence arises when actions are undertaken and result in a prejudicial effect on the findings or sentencing. *Douglas*, 68 M.J. at 354. The presence of actual influence creates a presumption of prejudice to the accused. *Id.* While the effect of actual unlawful influence

is straightforward, apparent unlawful influence is slightly different. Apparent unlawful influence will be found when the Government cannot: 1) disprove the facts offered by the Defense; 2) demonstrate that the facts do not constitute unlawful influence; or 3) "prove beyond a reasonable doubt that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, would not harbor a significant doubt about the fairness of the proceeding." *Spykerman*, 81 M.J. at 728(quoting *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020)). To affirm a conviction after UCI has been raised at trial, a reviewing court must be convinced beyond a reasonable doubt that the UCI had no prejudicial effect on the court-martial. *United States v. Gattis*, 81 M.J. 748 (N-M. Ct. Crim. App.). In *United States v. Lewis*, CAAF explained that the "objective test for the appearance of UCI is similar to the tests we apply in reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of a conflict of interest." 63 M.J. at 415 (internal citations omitted).

ARGUMENT

A. Actual and Apparent unlawful influence has directly impacted these proceedings.

The defense burden has been met, there is some evidence of UCI. Actual and apparent unlawful influence exists in the statements made by RDML Randall to the Military Judge in this case. The former Chief of Staff to the Convening Authority told the Military Judge in this case that the defendant should be executed by electric chair. Regardless of the flippant nature of those statements they are still untoward and categorically inappropriate for a flag officer to be making to a Military Judge on the eve of trial.

RDML Randall knew when he walked onto that elevator that the ME3 Ray case was getting underway at the Coast Guard facilities. When he spoke to the Military Judge he knew he was a Judge and likely was able to conclude that this was the Judge presiding over the ME3 Ray case. Within that private space, RDML Randall let the Military Judge know what he believed should be the appropriate remedy for this case. Here RDML Randall, whether or not he intended to do so, attempted to improperly manipulate the criminal justice system. If the Military Judge is influenced by RDML Randall's words, his actions can easily negatively affect the fair handling and/or disposition of this case. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). Further, there is the matter that this was not the first time he has made this reference while discussing military justice matters. If in his frequent discussions with RADM McPherson he used such language to describe ME3 Ray, he could have influenced the CA.

An intolerable strain has been placed on the public's perception of fairness in the military justice system. *Spykerman*, 81 M.J. at 728. Any objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of this proceeding after learning what was said to the Military Judge. *See Boyce*, 76 M.J. at 249. RDML Randall had control over the flow of information to the CA as it pertains to this case around the time of its preliminary investigation. RDML Randall would have been briefed by the district SJA about the investigation of this case. And just last week he was, unprompted, able to recall specific facts of this case. By the time RDML Randall departed in July 2022, the complaining witness had already been interviewed twice and the majority of the Government's witnesses had been interviewed. See Enclosure 2. Further, the DNA evidence of the case had been collected, analyzed and USACIL had already reported back to CGIS as to the DNA test results. *Id.* Clearly, based on the investigation RDML Randall had come to his conclusion as to the guilt of ME3 Ray.

B. ME3 Ray has been materially prejudiced.

In light of relatively recent changes to Article 37 the defense has been required to find that their clients have been materially prejudice to be granted relief under that same article. *See* 10 U.S.C. 837(c). *See also* National Defense Authorization Act 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).

Next, 10 U.S.C. 837(c) does not create a requirement that all apparent UCI result in material prejudice. Only UCI where the court has made a "finding or sentence" and then subsequently found it to be "incorrect" due to the UCI. Here, we have caught the UCI before it could continue to infect the remainder of the Court-Martial. An appropriate remedy by the military judge to address the apparent UCI can still be implemented which does not lead to a finding or a sentence by the Military Judge, such as recusal.

Lastly, 10 U.S.C. 837(c) does not apply to apparent UCI. Apparent UCI exists separate from actual UCI. The underling factor which makes apparent UCI different from the actual UCI is the framework requirement where the government needs to prove that "the UCI will not affect these specific proceedings." *Biagase*, 50 M.J. at 151. Where apparent UCI looks at the impact on the public's perception. To say that apparent UCI needs to include material prejudice would be to declare the doctrine void. If there is material prejudice then the UCI would be affecting the specific proceeding and therefore would be actual UCI. Apparent UCI would cease to exist under this framework as it would just be actual UCI with the additional factor of showing its impact on the public perception – which will always be present in actual UCI.

RELIEF REQUESTED

The Defense moves to dismiss all charges and specifications pending against ME3 Ray with prejudice. In the alternative the defense requests the military judge to recuse themself, the

Convening Authority be disqualified from post-trial action, or for the defense to receive additional peremptory challenges of members.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits/testimony and incorporates all other Defense filings and enclosures by reference:

1) Enclosure A: LN1 Guest Affidavit of interview of RDML Randall.
2) Enclosure B: Report of Investigation of CGIS ICO ME3 Ray.

Defense requests the following individuals be produced as witnesses in support of the motion and provides the following pursuant to R.C.M. 703 and *Rockwood*:

A. RDML Jeffery Randall, contact information known to the government.

B. LCDR Tanner Stiehl, contact information known to the government.

Unless the Government concedes the motion, this Court grants the relief on the basis of pleadings alone, or the case is otherwise dismissed, the Defense requests oral argument.

RICHARDSON.CHARLES.EDWARD.[redacted] Digitally signed by RICHARDSON.CHARLES.EDWARD.[redacted] Date: 2023.06.27 00:10:34 -04'00'

C. E. RICHARDSON
LT, USCG
Detailed Defense Counsel

I hereby certify that on 26 June 2023 a copy of this motion was served on the Court and Trial Counsel.

RICHARDSON.CHARLES.EDWARD.[redacted] Digitally signed by RICHARDSON.CHARLES.EDWARD.[redacted] Date: 2023.06.27 00:12:43 -04'00'

C. E. RICHARDSON
LT, USCG
Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. SAMUEL RAY ME3/E-4 U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (Unlawful Influence) 27 June 2023

RESPONSE

The Court must deny the Defense's Motion to Dismiss as the Government has shown beyond a reasonable doubt that the UCI will not affect the fairness of the proceedings. The Government requests oral argument.

FACTS

1. The Coast Guard Investigative Service ("CGIS") became aware of the alleged actions that ME3 Samuel Ray brought upon [redacted] on 18 March 2022 in Jacksonville, FL. Def. Encl. 2 at 5.

2. At that time then-CAPT [redacted] was the U.S. Coast Guard Seventh District ("District Seven") Chief of Staff and RADM Brendan McPherson was the District Seven Commander. District Seven is located in Miami, FL. Enclosure 1.

3. Then-CAPT [redacted] received the initial report of the alleged criminal actions on 18 March 2022 via a conference call. He was responsible for ensuring a checklist of items were briefed to the first Flag Officer, his supervisor, RADM McPherson. Enclosure 1.

4. RDML J.R. does not recall any specific conversations about the investigation after the above-detailed initial actions. However, RDML J.R., by way of process, imagines the case status was briefed during his monthly meeting to discuss military justice matters. Enclosure 1.

5. Then-CAPT [redacted] departed the District Seven Chief of Staff role in mid-July 2022 to effect a Permanent Change of Station to the Council on Foreign Relations in New York, NY. Enclosure 2.

6. The District Seven Legal Office received the completed CGIS Report of Investigation on 02 September 2022. Enclosure 3.

7. Charges were preferred against ME3 Samuel Ray on 28 October 2022. Charge Sheet.

8. LCDR [redacted] District Seven Legal staff attorney, was detailed to this case on 03 November 2022 by the Staff Judge Advocate CAPT [redacted] LCDR [redacted] ATC Detailing Letter.

9. An Article 32 Preliminary Hearing was held on 6 December 2022. The Preliminary Hearing Officer's report was issued on 13 December 2022 where the hearing officer found probable cause for all charges and specifications and recommended that the charges be disposed of at a General Court-Martial. Enclosure 4.

10. Article 34 pretrial advice was provided to RADM McPherson (the applicable convening authority) by CAPT [redacted] the District Seven Staff Judge Advocate, on 24 January 2023. RADM McPherson notated his decision to refer all charges and specifications to a General Court-Martial. Enclosure 5.

11. The charges were referred by RADM McPherson to the General Court-Martial convened by General Court-Martial Convening Order 1-20 on 24 January 2023. Charge Sheet.

12. A Trial Management Order was signed by Judge Cronin on 17 February 2023 which set the date of trial as 26-30 June 2023 and the location as Norfolk, VA. TMO.

13. On 09 June 2023, District Seven held a Change of Command where RADM Douglas Schofield relieved RADM Brendan McPherson as the District Commander. Enclosure 6.

14. On 21 June 2023, U.S. Coast Guard Force Readiness Command ("FORCECOM") held a Change of Command where RDML J.R. relieved RADM Joe Raymond as Commander of FORCECOM. This command is located in Norfolk, VA. Enclosure 7.

15. On 23 June 2023, LCDR Tanner T.S. had arrived to the Norfolk, VA, are to begin preparing for trial with the other Trial Counsel stationed in Main Street Tower, Norfolk, VA. LCDR T.S. heard that RDML J.R. was now station in the building so he reached out to RDML J.R. to talk about fishing. They met that same day. Enclosure 8.

16. The discussion between LCDR T.S. and RDML J.R. was largely about different fishing lures and fish. LCDR T.S. told RDML J.R. that he was in the area for the trial of U.S. v. ME3 Ray. Enclosure 1.

17. On 26 June 2023, RDML J.R. was riding an elevator with a fellow Officer whom introduced himself as CDR Tim Cronin, a Military Judge. RDML J.R. jokingly made a comment, "[redacted]" or words to that effect. *Id.*

18. RDML J.R. did not intend to influence the Military Judge with his comment. He was referencing a line from a pop-culture show. *Id.*

19. Trial Counsel conducted *voir dire* of the Military Judge on the record. The Judge answered that he did feel pressure to steer the trial to any certain outcome based on the interaction. The

Judge answered that he did not feel any career worries or pressure from the interaction. Audio Record.

20. The accused selected a trial by members with enlisted representation. Audio Record.

21. RDML J.R. did not use the joking comment or any other method to improperly influence anyone at District Seven during his time there. Enclosure 1.

BURDEN

The burden of proof rests with the Defense to present some evidence beyond mere allegation or speculation that unlawful command influence (UCI) exists and that it is logically connected to the present case in terms of its potential to cause unfairness in the proceedings. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). If unlawful command influence has been sufficiently raised, the burden shifts to the Government to prove, beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings. *See United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004) (quoting *Biagase*, 50 M.J. at 151).

For claims of actual UCI, the defense bears the initial burden to produce evidence demonstrating "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Biagase*, 50 M.J. at 150. For claims of apparent UCI, the defense bears the initial burden to demonstrate that the alleged unlawful command influence "placed an 'intolerable strain' on the public's perception of the military justice system because 'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017), quoting *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

LAW

The concept of Unlawful Command Influence (UCI) derives from Article 37, UCMJ. The recent changes to Article 37, UCMJ are applicable to <u>any allegations of UCI that are committed on or after December 2019</u>. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019). Unlike the previous Article 37, the current Article 37 requires that *actual prejudice* to the accused exist in order for there to be UCI: "[n]o finding or sentence of a court-martial may be held incorrect on the ground of violation of this section unless the violation materially prejudices the substantial rights of the accused." 10 U.S.C. § 837(c).

The change to Art. 37 and the requirement to show material prejudice to the accused's substantial rights has effectively eradicated the notion of "apparent UCI." Apparent UCI relied on the perception of unfairness but required no showing of prejudice. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Apparent UCI existed under the old Article 37 because it did not require a showing of prejudice for UCI to exist. The recent change to Article 37 does away with the apparent UCI of *Boyce*. *United States v. Gattis*, 81 M.J. 748, 754 (N-M. Ct. Crim. App. 2021), review denied, 82 M.J. 123 (C.A.A.F. 2021) ("As our sister court recently observed in *United States v. Alton*, the change to article 37, UCMJ, at issue seems to vitiate the prior

apparent UCI 'intolerable strain / disinterested observer' jurisprudence in favor of Judge Ryan's approach in her dissent in *Boyce)*. In her dissent in *Boyce*, Judge Ryan dismissed the notion of apparent UCI and the "disinterested observer" standard, noting that without prejudice to the accused there is no actual unlawful influence, and therefore, it is difficult to understand how a disinterested and informed observer would doubt the fairness of the military proceedings. *United States v. Boyce*, 76 M.J. 242, 255 (C.A.A.F. 2017) (Ryan, dissenting). Thus, moving forward, only the concept of *actual* UCI is applicable.

Although the Coast Guard Court of Criminal Appeals has not yet evaluated a case that involves a claim of apparent UCI after the change in the law took effect. However, this does not change the fact that Congress has intentionally and purposely amended the statute codifying the change to Article 37. At the very least, if the doctrine of apparent UCI *does* still exist, there can be no successful claim of apparent UCI without a showing of prejudice.

ARGUMENT

The Defense has failed to meet their low burden regarding any implied reference to then-CAPT [redacted] committing UCI at District Seven as they have only presented mere allegations and speculation.

The Defense has met their burden by presenting some evidence beyond mere allegation or speculation that UCI exists from the exchange between RDML J.R. and Judge Cronin in the elevator on 26 JUNE 2023.

Under the three-step process outline in *Biagase*, the Government has multiple avenues to prevail on a motion alleging actual UCI: (1) prove the facts alleged by the Defense do not exist; (2) persuade the Court that those facts do not constitute UCI; or (3) prove beyond a reasonable doubt that the UCI will not affect the fairness of the proceedings. In the case of an allegation of apparent UCI, step (3) instead requires the Government to show the apparent UCI does not place "an intolerable strain upon the public's perception of the military justice system" using the disinterested observer standard articulated above. *Boyce* at 244.

1. **The Defense has not met their burden to produce "some evidence" beyond mere allegations or speculation that RDML J.R. committed UCI while stationed at District Seven.**

Defense's argument is not supported by the evidence provided in the enclosures to their motion. Thus, they have failed to meet even the low burden of "some evidence" to shift the burden to the Government. The Defense simply states "if" RDML J.R. used similar language at District Seven then he could have influenced the CA. Def. Motion at 5. This is mere speculation and is not a showing of some evidence.

Though a relatively low threshold, the defense burden to produce "some evidence" has actual teeth; the "evidence presented must consist of more than 'mere allegation or speculation.'" *Boyce*, 76 M.J. at 249, citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013); see also, *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) ("Proof of [command influence] in the

air, so to speak, will not do." (internal quotation marks omitted) (citation omitted)).

The Government still offers sufficient facts and enclosures for the record to show that RDML J.R. had departed District Seven before the command received the finished investigation. Further, District Seven used all of the proper processes to get to the referral of charges in this matter. Enclosures 4, 5.

2. **The Defense has met their burden by presenting some evidence beyond mere allegation or speculation that UCI exists from the exchange between RDML J.R. and Judge Cronin in the elevator on 26 JUNE 2023. However, there will be no effect on the current proceedings and no prejudice to the substantial rights of the accused.**

As detailed, RDML J.R.'s comments were not made in the presence of any detailed members or counsel of the pending court-martial. No potential or named witnesses in this case were in attendance. To the extent the Defense argues that RDML J.R.'s comments somehow may influence the Military Judge, this has already been ameliorated on the record through *voir dire* of the Judge. The Military Judge clearly stated he felt no influence on the outcome of this case and felt no pressure on his career from the comment by RDML J.R. in the elevator. The judge also stated he can be fair and impartial. In fact, Coast Guard policy insulates who evaluates members of the Judiciary by having either the Chief Trial Judge or TJAG perform evaluation reports. Enclosure 9.

As the Defense notes in their motion, there must be some prejudice to the accused in order to warrant a remedy. In this case, the Defense has not made any showing that there is any prejudice, let alone prejudice to the "substantial rights" of the accused. The proceedings have been fair and ordinary, with the accused being appointed two qualified defense counsel, opportunities to file and argue motions, and funding for an expert consultant. The accused has not been hindered in any way from exercising his substantial rights. Absent prejudice, there should be no remedy for UCI under the new statutory framework.

In this case, while the comment was inappropriate, the Government has made a record, and has proven through *voir dire* of the judge, that the Military Judge is still fair and impartial. Thus, the trial may proceed and will not be tainted or unfair due to RDML J.R.'s comment to the military judge.

3. **Even if this Court finds that apparent UCI is possible without showing prejudice, there is no "intolerable strain" on the public's perception of the military justice system regarding the alleged acts.**

As argued above, the Government's position is that the Court need not reach this issue, as there has been no prejudice to the accused which is now required for a finding of UCI. However, even if the Court disagrees with the Government and the NMCCA's interpretation of the change to Article 37, there is no "intolerable strain" on the military justice system as a result of RDML J.R.'s comment to the military judge. For this inquiry,

> [w]e focus upon the perception of fairness in the military justice

> system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

United States v. Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006).

In this case, a disinterested observer would see all of the facts and enclosures of this motion in addition to what has been discussed on the record. The observer would see that RDML J.R. left District Seven before any disposition decisions were made in this case. The observer would understand that, after leaving, RDML J.R. was stationed in New York for a year before taking command of FORCECOM. Then the Observer would see that there was a quick meeting between LCDR [redacted] and RDML J.R. to talk about fishing where a quick exchange about why LCDR [redacted] was here occurred. The disinterested observer may be concerned by the comments RDML J.R. said to the Military Judge. However, the privacy of the elevator and clarification from the Military Judge that he was not influenced would quell any concern. Further, that this occurred before member *voir dire* had even begun and the process was paused to litigate this issue shows that the process is working.

4. Even if the Court finds UCI in this case, dismissal is not an appropriate remedy.

Dismissal is a drastic remedy reserved only for the rarest situations; "courts must look to see whether alternative remedies are available," and tailor such remedies to the "injury suffered." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). "If and only if the trial judge finds that command influence exists . . . and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed." *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990). In this case, the amount of influence, if any, is so minor that dismissal would be grossly incongruent with any alleged harm. If this Court desires remedies, either from a finding of UCI or as a precaution, the Government recommends the Court craft specific *voir dire* questions for individual potential members whose commands fall under FORCECOM to understand any interaction the potential members have had with RDML J.R. since he assumed command a week or so ago.

RELIEF REQUEST

The Court must deny the Defense's Motion to Dismiss as the Government has shown beyond a reasonable doubt that the UCI will not affect the fairness of the proceedings. The Government requests oral argument.

ENCLOSURES

The Government hereby incorporates and requests this Court consider all enclosures referenced in this Motion. The Government also submitted the following evidence:

1. Affidavit of RDML J.R.

2. PCS Orders Redacted
3. CGIS Email to D7L
4. Page from PHO Report
5. Article 34 Advice
6. D7 CoC News
7. FORCECOM CoC News
8. Email from LCDR [redacted] and RDML J.R.
9. Pages from MJM

RODRIGUES.ANTHONY.MARINUS.[redacted]

Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted]
Date: 2023.06.27 12:48:09 -04'00'

Anthony M. Rodrigues
LCDR, USCG
Trial Counsel

Appellate Exhibit 70
Page 7 of 7

REQUESTS

THERE ARE NO REQUESTS

NOTICES

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **SAMUEL B. RAY** **ME3** **U.S. COAST GUARD**	**SPECIAL VICTIMS' COUNSEL NOTICE OF APPEARANCE** **13 FEB 2023**

COMES NOW LCDR Nabil Hemmati, Special Victims' Counsel (SVC) for [redacted], a victim specified in the charges, and respectfully submits the following notice of appearance.

Ms. [redacted] CG-LMA, detailed the undersigned to represent [redacted] as her SVC. I am a member in good standing of the Texas Bar, certified under 27(b) of the Uniform Code of Military Justice (UCMJ), and sworn under 42(a) of the UCMJ. I have been certified by The Judge Advocate General (TJAG) of the United States Coast Guard to serve as a Special Victims' Counsel. I have not acted in any manner that would tend to disqualify me from representing my client in the instant case.

Respectfully submitted this 13th day of February 2023.

HEMMATI.NABIL.JUSTIN TAVAKOLI [redacted]
Digitally signed by HEMMATI.NABIL.JUSTIN TAVAKOLI [redacted]
Date: 2023.02.13 15:30:13 -05'00'

Nabil J. Hemmati
LCDR, U.S. Coast Guard
U.S. Coast Guard Headquarters
[redacted]

****

Appellate Exhibit VI
Page 1 of 2

Certificate of Service

I hereby certify that an electronic copy of this filing has been served on all parties and the Court via e-mail on 13 February 2023.

HEMMATI.NABIL.JUSTIN TAVAKOLI.[redacted]

Digitally signed by HEMMATI.NABIL.JUSTIN TAVAKOLI.[redacted]
Date: 2023.02.13 15:30:32 -05'00'

Nabil J. Hemmati
LCDR, U.S. Coast Guard
U.S. Coast Guard Headquarters
[redacted]

Appellate Exhibit V
Page 2 of 2

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**NOTICE OF PLEAS AND FORUM** **08 JUN 23**

In accordance with the Trial Management Order entered in this case, ME3 Samuel B. Ray, through counsel, notifies the Court of his intent to plead NOT GUILTY to all Charges and Specifications thereunder. ME3 Samuel B. Ray also gives notice of his intent to elect trial by a panel of MEMBERS with ENLISTED representation.

RICHARDSON.CHARLES.EDWARD.[redacted]
Digitally signed by RICHARDSON.CHARLES.EDWARD.[redacted]
Date: 2023.06.08 12:00:31 04'00'

C. E. RICHARDSON
LT, USCG
Detailed Defense Counsel

Appellate Exhibit 45
Page 1 of 1

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. SAMUEL RAY ME3/E-4, USCG	GOVERNMENT NOTICE OF EXPECTED USE OF ELECTRONIC MEDIA 15 JUNE 2023

The Government hereby provides notice of its expected use of electronic media at the above-captioned court-martial. The Government intends to display photographic evidence via a smart-television screen.

Respectfully Submitted,

GRILLS.KELLY.ELIZABETH [redacted] Digitally signed by GRILLS.KELLY.ELIZABETH [redacted] Date: 2023.06.15 16:21:24 -04'00'

LT Kelly Grills, USCG
Trial Counsel

Appellate Exhibit 47
Page 1 of 1

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **SAMUEL B. RAY** **ME3/E-4** **U.S. COAST GUARD**	**NOTICE OF INTENT TO USE SMART COURTROOM TECHNOLOGY** **15 JUNE 23**

The Defense respectfully provides notice that it intends to use smart courtroom technology during the trial.

LUNCHEON.TREVAUGHN.ATON.[redacted] Digitally signed by LUNCHEON.TREVAUGHN.ATON.[redacted] Date: 2023.06.15 09:38:00 -04'00'

T. A. LUNCHEON
LT, JAGC, USN
Detailed Defense Counsel

Appellate Exhibit 48
Page 1 of 1

UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES v. SAMUEL RAY ME3/E-4, USCG	GOVERNMENT NOTICE OF EXPECTED EXHIBITS 23 June 2023

In accordance with the Court's trial management order, the Government hereby provides notice of the following exhibits the Government may seek to admit at trial:

1. PE 1: Bates 164-168 18 March 2022 Text Messages
2. PE 2: Bates 160, 162 Sector Annex office photos
3. PE 3: Bates 154, 157, 158-159 Station Mayport ME Office photos
4. PE 4: Bates 675-682 NAS Jacksonville Hospital Patient Record
5. PE 5: MISLE Activity Summary 7414314 & 7414205
6. PE 6: [redacted] and Ray text message scroll PDF
7. PE 7: SANE Report Excerpt
8. PE 8: Bates 175 Picture of Hair
9. PE 9: T-Shirt (or picture of)
10. PE 10: USACIL Report Excerpt

Respectfully Submitted,

RODRIGUES.ANTHONY.MARINUS.[redacted] Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted] Date: 2023.06.23 17:34:12 -04'00'

LCDR Anthony Rodrigues, USCG
Trial Counsel

Appellate Exhibit LeØ
Page 1 of 1

UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES v. SAMUEL RAY ME3/E-4, USCG	GOVERNMENT SECOND NOTICE OF EXPECTED EXHIBITS 25 June 2023

In accordance with the Court's trial management order, the Government hereby provides notice of the following exhibits the Government may seek to admit at trial. This notice supersedes any previous notice:

1. PE 1: Bates 164-168 18 March 2022 Text Messages
2. PE 2: Station Mayport Diagram
3. PE 3: Bates 160, 162 Sector Annex office photos
4. PE 4: Bates 154, 157, 158-159 Station Mayport ME Office photos
5. PE 5: Station to NASJAX Hospital Diagram
6. PE 6: Bates 675-682 NAS Jacksonville Hospital Patient Record
7. PE 7: [redacted] and Ray text message scroll PDF
8. PE 8: Bates 175 Picture of Hair
9. PE 9: Bates 177 Picture of Shirt
10. PE 10: MISLE Activity Summary 7414314 & 7414205

Respectfully Submitted,

RODRIGUES.ANTHONY.MARINUS.[redacted]
Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted]
Date: 2023.06.25 18:49:39 -04'00'

LCDR Anthony Rodrigues, USCG
Trial Counsel

Appellate Exhibit 61
Page 1 of 1

COURT RULINGS & ORDERS

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS (MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES) 12 May 2023

RELIEF SOUGHT

The Defense moved this Court, pursuant to R.C.M. 907(b)(3)(B), to dismiss the Sole Specification of Charge I because it is multiplicious with the Sole Specification of Charge III, or alternatively, to dismiss the Sole Specification of Charge III. The Defense also moved this Court, pursuant to R.C.M. 906(b)(12), to dismiss the Sole Specification of Charge I for being unreasonably multiplied by Specification 1 of Charge II, or alternatively to dismiss Specification 1 of Charge II. A.E. XV, XVI. The government opposes the motion. A.E. XVII, XVIII. An Article 39(a) session was held on 21 April 2023.

ISSUES PRESENTED

1. Is the Sole Specification of Charge I multiplicious with the Sole Specification of Charge III?

2. Is the Sole Specification of Charge I unreasonably multiplied by Specification 1 of Charge II?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs and attachments thereto. The Court finds the following facts by a preponderance of the evidence:

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. The Sole Specification of Charge I states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL,

on or about 18 March 2022, touch the shoulder of [redacted], with ME3 Ray's body part to wit: his penis, with an intent to gratify his own sexual desire, without the consent of [redacted]

3. Specification 1 of Charge II states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the shoulder and neck with his semen."

4. The Sole Specification of Charge III states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place."

5. During the summer of 2021, ME3 [redacted] and ME3 Ray were stationed in the Jacksonville, FL area as maritime enforcement (ME) petty officers.

6. On 18 March 2022, ME3 Ray and ME3 [redacted] exchanged text messages about meeting at the sector to assist each other with MISLE entries.

7. ME3 [redacted] arrived to the Sector enforcement room first, and ME3 Ray met her there.

8. ME3 [redacted] described to investigators the events of 18 March 2022 as follows:

   a. While in the Sector enforcement room, ME3 Ray sarcastically said, [redacted] To which she replied, [redacted] ME3 Ray then stated, [redacted]

   b. ME3 Ray then made comments with a sexual connotation of his penis being in her mouth to which she repeatedly told him [redacted] and [redacted]

   c. After additional statements with sexual connotation, ME3 Ray said, [redacted]

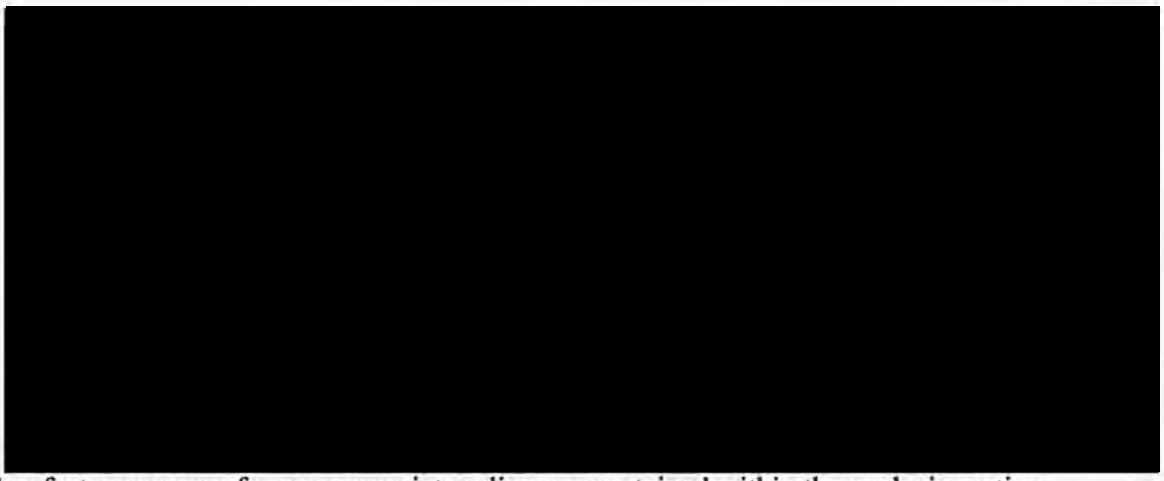
   d. ME3 Ray then put his hand around ME3 [redacted] throat and said that he missed her and wanted to be in her mouth. She again told him to stop.

   e. ME3 [redacted] then transitioned to the ME room, and ME3 Ray followed.

   f. While in the ME room, ME3 [redacted] alleges that she was sitting at the computer inputting MISLE entries.

   g. She describes the remainder of their interactions in the ME room as follows:

[redacted]



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

PRINCIPLES OF LAW

Multiplicity

A specification may be dismissed upon timely motion "[w]hen the specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice." R.C.M. 907(b)(3)(B). "A charge is multiplicious if proof of such charge also proves every element of another charge." *Id.* In reviewing potentially multiplicious charges, restraint is required. The Discussion section of R.C.M. 907(b)(3)(B) cautions against dismissing a specification prior to trial unless it clearly alleges the same legal offense. The section goes on to say that "[i]t may be appropriate to dismiss the less serious of any multiplicious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification." Discussion, R.C.M. 907(b)(3)(B).

Multiplicity is rooted in the Fifth Amendment's Double Jeopardy Clause, which precludes a court from "impos[ing] multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Teeters,* 37 M.J. 370, 373 (C.M.A. 1993). The *Teeters* Court applied the test established by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932) and provided the framework to determine whether charges are multiplicious:

> Our initial inquiry in this regard is: How does Congress express its intent concerning multiple convictions at a single trial for different statutory violations arising from the same act or transaction? It could do so expressly in the pertinent statutes violated or in their legislative histories. Absent such an overt expression of legislative intent, it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other. *See Blockburger v. United States*, 284 U.S. at 304. Finally, other recognized guidelines for

> discerning congressional intent may then be considered to determine whether the above presumption of separateness is overcome by clear indications of a contrary legislative intent.

Id. at 376-77 (some internal citations omitted).

United States v. Coleman clarified that when "there is no overt expression of congressional intent, we must seek to infer Congress's intent based on the elements of the violated statutes and their relationship to each other." 79 M.J. 100, 103 (C.A.A.F. 2019) (citing *Teeters,* 37 M.J. at 376–77.) "Specifically, if each statute requires proof of an element not contained in the other, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute." *Id.* (internal citations omitted.)

There are two ways to assess whether the elements of one statute are necessarily included in another charge. The first is by a comparison of the statutory definitions for the charges. *United States v. Armstrong*, 77 M.J. 465, 469-70 (C.A.A.F. 2018). If each element of a charged offense is necessarily an element of another charged offense, it is a lesser included offense of the other. *Id.* The second way is to compare the specifications. "An offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense." *Id.* (citations omitted).

Unreasonable Multiplication of Charges

R.C.M. 307(c)(4) directs that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges is a policy pronouncement by the courts to address the abuse of prosecutorial discretion in instances where multiplicity does not exist. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). The longstanding principle prohibiting unreasonable multiplication of charges promotes fairness and addresses those unique features of the military justice system that increase the potential for prosecutorial overreaching. *Id.*

By its very nature, the proper exercise of prosecutorial discretion cannot be reduced to a formula. Absent direct evidence of abuse, however, a number of non-exclusive factors may circumstantially show that the Government abused its discretion and is "piling on." *See Quiroz*, 55 M.J. at 338.

For a trial court, the *Quiroz* factors include, but are not limited to the following:

> (1) whether each charge and specification is aimed at distinctly separate criminal acts,
>
> (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality,

(3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, or

(4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012)(*citing Quiroz*, 55 M.J. at 338).

The government may properly charge the same sexual act as separate offenses for exigencies of proof. *See United States v. Elespuru*, 73 M.J. 326, 329 (C.A.A.F. 2014)(quoting *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010); *United States v. Thompson*, 74 M.J. 563, 568 (N.M.C.C.A. 2014). In such cases, if there is a guilty finding for both specifications, the military judge must either consolidate or dismiss a specification. *Elespuru*, 69 M.J. at 329-330.

ANALYSIS

Multiplicity

The Government charged ME3 Ray with abusive sexual contact in the Sole Specification of Charge I and with violating a lawful general order in the Sole Specification of Charge III.

To prove the Sole Specification of Charge I, the government must prove at trial:

1. That at or near Jacksonville, FL, on or about 18 March 2022, ME3 Ray committed sexual contact upon ME3 [redacted] by touching the shoulder of [redacted] with ME3 Ray's body part to wit: his penis; and

2. That ME3 Ray did so without the consent of ME3 [redacted]

To prove the Sole Specification of Charge III, the government must prove at trial:

1. That there was in effect a certain lawful general order, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020;

2. That the accused had a duty to obey such order; and

3. That at or near Jacksonville, FL, on or about 18 March 2022, the accused failed to obey this lawful general order by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place.

The Defense argues that these specifications are multiplicious because the charges expose ME3 Ray to two convictions for a single criminal act – the sexually intimate behavior of placing his penis on ME3 [redacted] shoulder. After applying the

Blockburger/Teeters analysis, the Court disagree and finds that these specifications are not multiplicous. Each element of the Sole Specification of Charge I for abusive sexual contact is not necessarily an element of the Sole Specification of Charge III for violating a lawful general order and vice versa. *See Armstrong*, 77 M.J. at 469-70. Article 120 for abusive sexual contact without consent requires the government to prove a specific intent and that the sexual contact occurred without the consent of the charged victim; elements not required by Article 92. As charged, the specification of Article 120 for abusive sexual contact requires the government to prove different and additional elements than the charged Article 92 violation, including a specific mens rea and that ME3 [redacted] did not consent to the touch of ME3 Ray's penis.

Similarly, each element of the Sole Specification of Charge III for violating a lawful general order is not an element of the Sole Specification of Charge I for abusive sexual contact. Article 92(1) requires the government to prove an act in violation of a lawful general order that the accused had a duty to obey; elements not required by Article 120. As charged, the specification of Article 92 requires the government to prove different and additional elements than the Article 120 specification for abusive sexual contact, including that the accused wrongfully engaged in sexually intimate behavior in a Coast Guard controlled work space and that the behavior violated the Coast Guard's Discipline and Conduct Manual.

In order to accept the Defense's argument, the Court would have to find that the Government charged the abusive sexual contact specified in the Sole Specification of Charge I as the overt act underlying the lawful general order violation specified in the Sole Specification of Charge III. The Government, however, by the plain language of the specifications, did not charge the case in such a manner. Instead, the overt act specified in the Sole Specification of Charge III is "wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place." As the Government has proffered, such wrongful, sexually intimate behavior could be proven by various other evidence than the crime charged in the Sole Specification of Charge I. In this way, the situation here differs from *United States v. Palagar*, cited by the Defense. *See Palagar,* 56 M.J. 294, 297 (C.A.A.F. 2002) (holding conviction of larceny was multiplicious with the conviction of conduct unbecoming an officer by making "unauthorized purchases" with a government credit card, where the "unauthorized purchases" were the same items accused was convicted of stealing). The specific offense of abusive sexual contact has not been charged as the predicate act for committing the Article 92 violation.

Because the two offenses have at least one statutory or charged element separate from the other, the offenses are not multiplicious and neither the Sole Specification of Charge I nor the Sole Specification of Charge III should be dismissed.

Unreasonable Multiplication of Charges

The Court applies the *Quiroz* factors as follows:

1. Are the specifications aimed at distinctly separate criminal acts?

The Government argues the abusive sexual contact charged in the Sole Specification of Charge I is distinct from the assault consummated by a battery charged in Specification 1 of Charge II. While the Government concedes that the two separate and distinct contacts occurred during one, ongoing assault close in time, the Government maintains that each alleged contact was a distinct act and crime. The Government further cites the different mens rea required for each offense. The Defense counters that ME3 [redacted] statements to investigators reveal that the two distinct acts occurred simultaneously – ME3 Ray's penis allegedly touched ME3 [redacted] shoulder at the same time that he allegedly ejaculated on her. In this way, the Defense argues, they are the same.

The acts charged in the Sole Specification of Charge I and Sole Specification of Charge II clearly occurred close in time to each other, but the Court is unable to completely assess this factor prior to trial. There is the potential for subtle but important clarifications to emerge from ME3 [redacted] testimony concerning these two alleged acts. Additionally, the Government is permitted to charge multiple theories of the case, contingent upon exigencies of proof. For these reasons, and given the different mens rea required by the two charges, the Court finds that this factor does not weigh in favor of granting relief at this stage of the trial.

2. Do the number of charges and specifications misrepresent or exaggerate the accused's criminality?

At this stage of trial, the Sole Specification of Charge I and Specification 1 of Charge II are fairly charged. Given possible exigencies of proof at trial and the different mens rea required by each charge, the decision to charge two specifications here does not misrepresent or exaggerate the accused's criminality. *See Elespuru*, 73 M.J. at 329-330.

3. Do the number of charges and specifications unreasonably increase the accused's punitive exposure?

The maximum punishment under Article 120, UCMJ, abusive sexual contact is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years. The maximum punishment under Article 128, UCMJ, assault consummated by battery is a bad conduct discharge, forfeiture of all pay and allowances, and confinement for six months. At this stage of the trial, given possible exigencies of proof at trial, and the different mens rea required by each charge, the charges for these two offenses do not unreasonably increase the accused's punitive exposure.

4. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

No. The defense does not allege prosecutorial abuse or overreaching, outside of unreasonable multiplication, and the Court does not find evidence of any.

Having assessed the factors above, the Court finds that at this stage of the trial the evidence does not warrant the dismissal of a specification for an unreasonable

multiplication of charges.

CONCLUSIONS OF LAW

1. The Sole Specification of Charge I is not multiplicious with the Sole Specification of Charge III.

2. Dismissal of either the Sole Specification of Charge I or Specification 1 of Charge II is not warranted prior to trial.

RULING

The defense motion is DENIED. However, the Court will reconsider this motion and ruling after findings are announced but prior to sentencing.

So ordered this 12th day of May, 2023.

CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N [redacted] Date: 2023.05.12 13:22:06 -04'00'

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

Appellate Exhibit XIX
Page 8 of 8

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR IMPROPER REFERRAL 12 May 2023

RELIEF SOUGHT

The Defense moves this Court to dismiss the charges and specifications due to the Convening Authority's failure to comply with Article 25, UCMJ and for an improper referral. A.E. XX, 21, 44. The Government opposes the motion. A.E. 22, 23, 42, 43. The Court held oral arguments on 21 April 2023.

ISSUE PRESENTED

1. Did the Convening Authority's selection of members violate Article 25, UCMJ?

2. Were the charges in the case improperly referred?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the defense and government briefs and attachments. The Court finds the following facts by a preponderance of the evidence:

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. General Court-Martial Convening Order (GCMCO) 1-20 was signed on 12 November 2020 by RADM Eric Jones, former Commander, Coast Guard Seventh District.

3. RADM Brendan McPherson, the current Commander, Coast Guard Seventh District, signed Amendment 1 to GCMCO 1-20 on 6 October 2022. Amendment 1 changed the venue from Miami, Florida to Norfolk, Virginia but made no changes to the members.

4. Charges were preferred against ME3 Ray on 28 October 2022.

5. On 3 November 2022, CAPT [redacted] Staff Judge Advocate (SJA), Seventh District, provided to RADM McPherson written advice on member selection in connection with a different court-martial, United States v. LT Lloyd Banks III. He advised RADM McPherson to select members using only the criteria provided in Article 25, UCMJ.

6. CAPT [redacted] advice stated, in part:

> You are free to select anyone whom you feel is "best qualified" to serve on court-martial panels. However, throughout the selection process you must follow the guidance as to the qualifications of panel members as detailed in references (a) [Article 25, UCMJ] and (b) [RCM 501-505]. Specifically, individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service and judicial temperament. Military grade by itself is not a permissible criteria for selection of court-martial panel members. However, all selected members must be commissioned officers senior to LT Banks. It is not appropriate to select members to achieve a particular result on findings or sentence.... All members should be given equal consideration in light of the above factors and those factors only.

7. With that advice, CAPT [redacted] included an alpha roster of Coast Guard personnel under the authority of the Deputy Commandant for Mission Support (DCMS) in Norfolk, Virginia. The DCMS has authorized those personnel to be used by any convening authority who chooses to convene a court-martial in Norfolk, VA. CAPT [redacted] advised RADM McPherson to not select any member junior to LT [redacted] The alpha roster accompanying the amendment was limited to members of the rank of Lieutenant and above.

8. After RADM McPherson selected members, CAPT [redacted] prepared Amendment No. 2 to GCMCO 1-20 for his signature. RADM McPherson signed Amendment No. 2 on 8 November 2022.

9. Still in contemplation of United States v. LT Banks and due to a number of excusal requests by the members, CAPT [redacted] recommended to the GCMCA to nominate additional members using solely the Article 25, UCMJ, criteria. RADM McPherson used the same alpha roster that included members with a rank of Lieutenant and above.

10. RADM McPherson identified additional members by highlighting their names. CAPT [redacted] prepared Amendment No. 3 for his signature, and RADM McPherson signed Amendment No. 3 on 16 November 2022.

11. Again, still in contemplation of United States v. LT Banks, CAPT [redacted] prepared Amendment No. 4 to excuse additional members who had requested to be excused. RADM McPherson signed this amendment on 21 November 21 2022. No additional members were named in Amendment No. 4.

12. On 24 January 2023, CAPT [redacted] provided RADM McPherson advice pursuant to Article 34, UCMJ, related to charges preferred against ME3 Ray. CAPT [redacted] recommended referral of all charges and specifications to a general court-martial.

13. Since a standing general court-martial convening order existed and had recently been amended by RADM McPherson, CAPT [redacted] understanding was that the charges and specifications, if referred, would be referred to GCMCO 1-20 as amended. Further, he understood this to be the case because Amendments Nos. 1-4 were not strictly limited to United States v. LT Banks but would apply to all courts-martial convened using GCMCO 1-20..

14. RADM McPherson referred charges on 24 January 2023. Block 14 of the charge sheet notes that charges were "referred for trial to the general court-martial convened by General Court-Martial Convening Order No. 1-20, amended by Amendment No 1. of 6 October 2022."

15. On 6 March 2023, CAPT [redacted] provided RADM McPherson written advice regarding member selection for the court-martial, United States v. ME3 Samuel Ray. Once again, CAPT [redacted] advised RADM McPherson to select new members using only the Article 25, UCMJ, criteria.

16. This advice states, in part:

> You are free to select anyone whom you feel is "best qualified" to serve on court-martial panels. However, throughout the selection process you must follow the guidance as to the qualifications of panel members as detailed in references (a) [Article 25, UCMJ] and (b) [RCM 501-505]. Specifically, individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service and judicial temperament. Military grade by itself is not a permissible criteria for selection of court-martial panel members. However, all selected members must be senior in rank or grade to ME3 Ray. It is not appropriate to select members to achieve a particular result on findings or sentence.... All members should be given equal consideration in light of the above factors and those factors only.

17. CAPT [redacted] provided RADM McPherson a new alpha roster, which contained commissioned officers, warrant officers, and petty officers with no members below the pay grade of E-3. These members were under the authority of DCMS and located in the Norfolk, VA area.

18. RADM McPherson selected members by highlighting their names on the alpha roster. CAPT [redacted] prepared Amendment No. 5 to GCMCO 1-20 with those names, and RADM McPherson signed it on 14 March 2023.

19. In his signed affidavit, CAPT [redacted] indicated that neither his staff nor him requested that a certain number of members of a specific rank be selected to the panel for

Amendment No. 5 and that RADM McPherson made no indication that he selected or excluded members based solely on their rank and had no questions about the Article 25,

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

PRINCIPLES OF LAW

Jurisdictional requirements to properly convene a court-martial

Jurisdictional error occurs when a court-martial is not constituted in accordance with the Uniform Code of Military Justice. *See United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008) (*citing United States v. Colon*, 6 M.J. 73, 74 (C.M.A.1978)). Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. *Adams*, 66 M.J. at 258 (citing Article 25, UCMJ; R.C.M. 201(b); R.C.M. 503; R.C.M. 504; R.C.M. 505).

Article 25, UCMJ

Article 25(d)(2), UCMJ, requires the convening authority to "detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25, UCMJ, 10 U.S.C. § 825 (2019) [UCMJ]. A convening authority must personally select the court and has "significant discretion" to select panel members when using the Article 25, UCMJ, factors. *United States v. Riesbeck*, 77 M.J. 154, 163 (C.A.A.F. 2018). However, a convening authority may not use factors outside of those enumerated in Article 25. *Id.* Specifically, convening authorities must ensure that they "neither consciously nor subconsciously use military grade as a test for court membership." *United States v. Nixon*, 33 M.J. 433, 435 (C.A.A.F. 1991).

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). Pursuant to R.C.M. 912(b)(2), to challenge the improper selection of members under Article 25, the defense must make an "offer of proof of matters which, if true, would constitute the improper selection of members". But "[o]nce the issue of improper member selection has been raised . . . the burden shifts to the government to demonstrate beyond a reasonable doubt that improper selection methods were not used, or, that the motive behind the use and selection criteria was benign." *Riesbeck*, 77 M.J. at 164.

A convening authority may rely on subordinates and the staff judge advocate to assist in compiling a group of individuals from which to choose the court-martial panel. *United States v. Dowty*, 60 M.J. 163, 169-170 (C.A.A.F. 2004). This assistance is permissible provided the convening authority's subordinates adhere to the Article 25 criteria and do not improperly exclude potential members. *United States v. Bartee*, 76 M.J. 141, 143-144 (C.A.A.F. 2017). Additionally, it is permissible for subordinates to provide a convening authority a random selection of prospective members from a master

personnel file. *United States v. Kemp*, 22 C.M.A.152, 46 C.M.R. 152 (1973); *United States v. Crawford*, 15 C.M.A. 31, 35 C.M.R. 3 (1963).

In evaluating the member selection process, the courts use the following non-exhaustive list of factors: "(1) Improper motive to "pack" the member pool; (2) Systematic exclusion of otherwise qualified members based on an impermissible variable like rank; and (3) Good faith efforts to be inclusive so courts-martial are open to all segments of the military community." *Bartee*, 76 M.J. at 144 (citing *Dowty*, 60 M.J. at 171). Concerning the third factor, the Court of Appeals for the Armed Forces limited these attempts to efforts to reflect the accused's gender or race. *Riesbeck* 77 M.J. at 163.

Additionally, a convening authority and his or her subordinates are prohibited from assigning members to a panel to "achieve a particular result as to findings or sentence." Article 37, UCMJ, 10 U.S.C. § 837; *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997). This type of "stacking" or "court packing" is a form of unlawful command influence. *Lewis*, 46 M.J. at 341. "Even though an accused is not entitled to a panel of members that represents a fair cross-section of the military community, it is well-settled that "court packing" is not permissible." *Id.* (*quoting United States v. McClain*, 22 M.J. 124, 132 (CMA 1986)).

Some evidence of improper motive must be shown to raise the issue of unlawful court stacking. *See Riesbeck*, 77 M.J. at 164 (citing *United States v. White*, 48 M.J. 251, 255 (C.A.A.F. 1998) ("It is true that bare statistical evidence showing over selection of a particular group, without other supporting facts, is generally not sufficient to raise the issue of court stacking.). When "the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998). Without contrary indication, the convening authority is presumed to have acted in accordance with the U.C.M.J. and R.C.M.s under the presumption of regularity. *See United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2020)("a fact that is unknown, even when combined with other anecdotal allegations…does not establish a prima facie case of exclusion based on race.").

Under R.C.M. 912(b)(a) a party may move to stay the proceedings on the basis of improper member selection. Under this process, the proponent and any other party "shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members." R.C.M. 912(b)(2). If improper selection is found, "the military judge shall stay any proceedings requiring the presence of members until members are properly selected." *Id.*

ANALYSIS

Defense Counsel argues that (1) certain ranks were systematically excluded from the Convening Authority's selection process and (2) the referral was improper.

The Defense has failed to meet its initial burden to show evidence of either court stacking, actual, or apparent UCI based on the percentage of junior enlisted detailed by the Convening Order.

The Court finds that the Defense has failed to meet its initial burden to show some evidence of either court stacking, actual or apparent unlawful command influence based on the percentage of junior enlisted personnel. The Defense's argument is that the Convening Authority's failure to select members holding the rank of E-4 or E-5 is sufficient to demonstrate an Article 25, UCMJ violation. On 12 November 2020, RADM Jones selected 1 O-6, 2 O-5's, 1 O-4, 3 LT's, 1 LTJG, 2 CWO's, 3 E-9's, 2 E-8's, 2 E-7's, and 3 E-6's as the panel's primary members in a case including enlisted representation. On 14 March 2023, RADM McPherson elected 2 O-6's, 7 O-5's, 4 O-4's, 3 LT's, 1 E-9, 1 E-8, 5 E-7's, and 3 E-6's as the panel's primary members in a case including enlisted representation. As an initial matter, these percentages concerning enlisted representation are significantly less concerning than other cases on point. *Cf. United States v. Bertie*, 50 M.J. 489, 491 (C.A.A.F. 1999) (Accused did not establish that the convening authority stacked his court-martial panel with senior officers and noncommissioned officers, based on solely on fact the panel contained no junior officers, no warrant officers, and no junior enlisted persons, and on statistics showing that for a year, no general court-martial tried at the installation included a company grade officer, warrant officer, or enlisted soldier below the rank of sergeant first class). Absent some other evidence, the absence of E-4's and E-5's, even unexplained, is neither an "offer of proof of matters which, if true, would constitute the improper selection of members" nor "some evidence" of unlawful command influence. *See Lewis*, 46 M.J at 342; *Riesbeck*, 77 M.J. at 164. Likewise, this fact alone is insufficient to prove a systematic attempt to influence a trial result. *Cf. Bess*, 80 M.J. 1 at 8 ("The absence of minorities on a single panel does not make out a prima facie case of systematic exclusion.").

Further, there is no presumption that the statistical composition of a court-martial suggests that improper considerations of grade and rank were utilized. *Bertie*, 50 M.J. at 492. Instead, "a statistical showing supporting such an argument must be relevant, and other evidence in the record must be considered to determine whether an intent to stack the court actually existed." *Id.* (*citing United States v. Nixon*, 33 MJ 433, 434–35 (CMA 1991).

There is simply no other evidence in the record of the use of an improper selection criteria or that the Convening Authority acted with an improper motive to stack the court. Both CAPT [redacted] and CAPT [redacted] the prior and current SJAs to the Seventh District Commander, explicitly stated in their written advice "that military grade was not a permissible criterion" for selection of members under Article 25.

Further, both CAPT [redacted] advice to RADM Jones, the GCMCA who signed CMCO 1-20, and CAPT [redacted] advice to RADM McPherson, the GCMCA who signed Amendments 1-5 to CMCO 1-20 were proper. Their written advice was explicit that "individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament;" that military grade was not a permissible criteria; and that the Convening Authority could not select a panel to achieve a particular result in the case. Both CAPT [redacted] and CAPT [redacted] also stated in their affidavits that neither admirals had any questions about the Article 25, UCGM, factors. Additionally, the Court's review of

CAPT [redacted] and CAPT [redacted] affidavits, the alpha rosters used, the nominations of members by subordinate commanders, and the other evidence associated with the SJA's Article 25 advice provides no suggestion of an improper selection method or improper motive by the Convening Authority.

Assuming, arguendo, that the Defense raised the issue of court stacking, the Government has proven beyond a reasonable doubt that improper selection methods were not used; that the motive behind the use and selection criteria was benign; and that there was no actual or apparent unlawful command influence.

The Court finds that the Defense's claims concerning improper selection and unlawful command influence are disproven beyond a reasonable doubt by the evidence. As mentioned, the prior and current SJA's advice was proper. The SJA's written advice was explicit that "individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament;" that military grade was not a permissible criterion; and that the Convening Authority could not select a panel to achieve a particular result in the case. There is no evidence that the Convening Authority or Acting Convening Authority misunderstood the advice or relied on other criteria outside of those listed in Article 25.

Further, the Court's review of the alpha roster, the nominations of members by subordinate commanders, and the other evidence associated with the Article 25 advice provides no suggestion of an improper selection method or improper motive by the Convening Authority.

Based on the evidence detailed above and the absence of evidence to the contrary, the Court finds that the panel members were properly selected.

The Court finds that there were no violations of the UCMJ or Rules for Courts-Martial concerning the referral process that warrant relief.

Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. *See Adams*, 66 M.J. at 258 (citing Article 25, UCMJ; R.C.M. 201(b); R.C.M. 503; R.C.M. 504; R.C.M. 505). First, the Defense does not contend, and there is no dispute, that RADM Jones, who signed GCMCO 1-20, and RADM McPherson, his successor who signed Amendments 1- 5, are proper convening authorities. Second, the court-martial convened by GCMCO 1-20 and subsequently amended represents a properly convened court. Both RADM Jones and RADM McPherson were advised by their SJAs concerning their Article 25, UCMJ, responsibilities, and both were provided alpha rosters of those in in their command. The Defense does not contend that any of the members detailed in either the original GCMCO or in any of the amendments were ineligible in any way from being detailed to the court-martial, and the Court has found that there was no violation of Article 25, UCMJ or UCI in the member selection process.

The Defense's remaining argument concerns how the charges were referred. The charges against ME3 Ray were referred by the Convening Authority on 24 January 2023 to "the General court-martial convened by General Court-Martial Convening Order No. 1-20 amended by Amendment No. 1 of 6 October 2022." As of 24 January 2023, however, the Convening Authority had previously signed Amendments 2, 3, and 4 to GCMCO 1-20. The effect of these amendments was to excuse all of the members originally listed on GCMCO 1-20 and replace them with different members. The Defense argues that, as a result, the Convening Authority effectively referred the charges to a court-martial that did not contain any members because the Convening Authority did not include Amendments 2, 3, and 4 in block 14a of the charge sheet. The Government counters that this was an administrative error; the intent of the Convening Authority was to refer the charges to the general court-martial convened by GCMCO 1-20 as amended by Amendments Nos. 1-4 and then to excuse and replace all of those members via Amendment No. 5.

The Court finds that there were no errors in the referral process. The SJA attested in a signed affidavit that his understanding of the Convening Authority's intent was that RADM McPherson referred the charges against ME3 Ray to the court-martial convened by GCMCO 1-20 as amended. As of the time of referral, this included Amendments 1-4 to GCMCO 1-20 vice Amendment 1 only, which is the only amendment specified on the charge sheet. This understanding matches RADM McPherson's actions. The changes to GCMCO 1-20 made through Amendments 1-4 are not limited to LT Banks's court-martial. There is no limiting language, for instance, that makes the modifications to the composition of that panel for that trial alone. Instead, the changes reflected in Amendments 1-4 permanently modified GCMCO 1-20. Thus, as of the date of referral, there was no GCMCO 1-20 as it had originally been drafted. There was only GCMCO 1-20, as amended. Amendment 5 further supports this intent by excusing all of the members that were at one point referred to the court-martial convened by GCMCO 1-20, as amended, and detailing new members. Amendment 5 also adds enlisted representation, which was not required for the court-martial of LT Banks. While the reference to Amendment No. 1 on the charge sheet was unnecessary, the reference to Amendment No. 1 without reference to the other amendments did not invalidate the referral.

CONCLUSIONS OF LAW

1. The Convening Authority's selection of members did not violate Article 25, UCMJ, or constitute unlawful command influence.

2. The Court finds that there were no violations of the UCMJ or Rules for Courts-Martial concerning the referral process that warrant relief.

RULING

The defense motion to dismiss is DENIED consistent with the above conclusions of law.

So ordered this 12th day of May, 2023

CRONIN.TIMOTHY.N[redacted] Digitally signed by CRONIN.TIMOTHY.N[redacted] Date: 2023.05.12 13:53:52 -04'00'

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

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION FOR APPROPRIOATE RELIEF: BILL OF PARTICULARS 12 May 2023

RELIEF SOUGHT

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(6), the Defense moved this Court to order a bill of particulars for the Sole Specification of Charge III. AE 25, 26. The Government opposed the motion but provided additional notice regarding the Sole Specification of Charge III during the motions hearing. AE 27. An Article 39(a) hearing was held on 21 April 2023.

ISSUE PRESENTED

Does the Sole Specification of Charge III warrant a bill of particulars?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the defense and government briefs and attachments. The Court finds the following facts by a preponderance of the evidence:

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. The Sole Specification of Charge III states: "In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place."

3. During the summer of 2021, ME3 [redacted] and ME3 Ray were stationed in the Jacksonville, FL area as maritime enforcement (ME) petty officers.

4. On 18 March 2022, ME3 Ray and ME3 [redacted] exchanged text messages about meeting at the sector to assist each other with MISLE entries.

5. ME3 [redacted] arrived to the Sector enforcement room first, and ME3 Ray met her there.

6. ME3 [redacted] described to investigators the events of 18 March 2022 as follows:

   a. While in the Sector enforcement room, ME3 Ray sarcastically said, [redacted] ME3 Ray then stated, [redacted]

   b. ME3 Ray then made comments with a sexual connotation of his penis being in her mouth to which she repeatedly told him [redacted] and [redacted]

   c. After additional statements with sexual connotation, ME3 Ray said, [redacted]

   d. ME3 Ray then put his hand around ME3 [redacted] throat and said that he missed her and wanted to be in her mouth. She again told him to stop.

   e. ME3 [redacted] then transitioned to the ME room, and ME3 Ray followed.

   f. While in the ME room, ME3 [redacted] alleges that she was sitting at the computer inputting MISLE entries.

   g. She describes the remainder of their interactions in the ME room as follows:

[redacted]

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

PRINCIPLES OF LAW

Pursuant to R.C.M. 307, a specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. R.C.M. 906(b)(6) permits the defense to request a bill of particulars "to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution." R.C.M. 906(b)(6), Discussion. A Bill of Particulars "should not be used to conduct discovery of the [g]overnment's theory of the case, to force a detailed disclosure of acts underlying a charge, or to restrict the [g]overnment's proof at trial." *Id.* The decision to order a Bill of Particulars is within the discretion of the military judge. *United States v. Williams*, 40 M.J. 379, fn 4 (C.A.A.F. 1994).

ANALYSIS

The Sole Specification of Charge III expressly alleges every element of the charged offense as required by R.C.M. 307. It provides notice of the place, time, specific section and name of the general order allegedly violated, and acts alleged to have violated that general order.

In addition to being legally sufficient, the Sole Specification of Charge III, after incorporating the additional notice provided by Trial Counsel at the motions hearing, provides "sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense." *See* R.C.M. 906(b) Discussion. The Defense's argument is that the accused is unaware of what "wrongful sexually intimate behavior" is being referenced by the specification. The Government provided notice that it considers all acts by ME3 Ray that occurred in either the Sector enforcement room or ME room on 18 March 2022 that may constitute "wrongful sexually intimate behavior" to be encompassed by the specification. The Government stated that the acts may include the both the statements and actions of ME3 Ray that ME3 [redacted] recalls occurring on 18 March 2022. This description provides sufficient precision for R.C.M. 906(b) purposes. The acts at issue allegedly occurred between only ME3 Ray and ME3 [redacted] in a specific location, and over the course of a short period of time on 18 March 2022. The Government further indicated that it has provided to the Defense all discovery describing and identifying these acts. By ordering further specificity, the Court would risk unnecessarily "[forcing] a detailed disclosure of [the] acts underlying [the] charge, or [restricting] the [g]overnment's proof at trial." R.C.M. 906(b)(6), Discussion.

CONCLUSIONS OF LAW

1. A bill of particulars for the Sole Specification of Charge III is not required.

RULING

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

So ordered this 12th day of May, 2023

CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N [redacted] Date: 2023.05.12 12:25:26 -04'00'

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

Appellate Exhibit 28
Page 4 of 4

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION TO SUPPRESS TEXT MESSAGES 25 April 2023

RELIEF SOUGHT

The Defense moved pursuant to Military Rule of Evidence (M.R.E.) 304, 403, and 801 to suppress the text messages between ME3 Ray and [redacted] from 18 March 2022 AE 29, 30. The Government opposes the motion. AE 31, 32. An Article 39(a) session was held on 21 April 2023.

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

ISSUES PRESENTED

1. Should the text messages exchanged between ME3 [redacted] and ME3 Ray be suppressed under M.R.E. 304?

2. Are the text messages logically and legally relevant?

3. Do the text messages constitute inadmissible hearsay?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs and attachments thereto, and the argument of counsel on 21 April 2023. The Court finds the following facts by a preponderance of evidence.

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. During the summer of 2021, ME3 [redacted] and ME3 Ray were stationed in the Jacksonville, FL area as maritime enforcement (ME) petty officers.

3. On 18 March 2022, ME3 Ray and ME3 [redacted] exchanged text messages about meeting at Sector Jacksonville to assist eachother with inputting entries into the Marine Information for Safety and Law Enforcement (MISLE) database.

4. ME3 [redacted] arrived to the Sector enforcement room first, and ME3 Ray met her there.

5. ME3 [redacted]. related the events of 18 March 2022 to special agents of the Coast Guard Investigative Service as follows:

a. While in the Sector enforcement room, ME3 Ray made comments with a sexual connotation of his penis being in her mouth to which she repeatedly told him [redacted] and [redacted]

b. After additional statements with sexual connotation, ME3 Ray said, [redacted]

c. ME3 Ray then put his hand around ME3 [redacted] throat and said that he missed her and wanted to be in her mouth. She again told him to stop.

d. ME3 [redacted] then transitioned to the ME room, and ME3 Ray followed.

e. While in the ME room, ME3 [redacted] alleges that she was sitting at the computer inputting MISLE entries.

f. She describes the remainder of their interactions in the ME room as follows:

[redacted]

6. Later on 18 March 2022, text messages were exchanged between ME3 Ray and ME3 [redacted] Relevant to this motion, ME3 Ray texted ME3 [redacted] at 1414 stating, [redacted] and included an emoji showing a sweating smiley face. ME3 [redacted] did not respond to this text message.

7. At 1925, ME3 Ray texted ME3 [redacted] stating, [redacted] ME3 [redacted] did not

respond.

8. At 2044, ME3 Ray texted ME3 [redacted] stating [redacted]

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

PRINCIPLES OF LAW

Corroboration requirements for admissions and confessions

M.R.E. 304(a)(1) defines a confession as "an acknowledgment of guilt" and an admission as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." Confessions and admissions must be corroborated by independent evidence that would tend to establish their trustworthiness before they can be admitted into evidence. Mil. R. Evid. 304 (c)(1). "When the government seeks to introduce an admission or confession of an accused, it must proffer to the Military Judge evidence that it believes corroborates the accused's statement." *United States v. Whiteeyes*, 82 M.J. 168, 174 (C.A.A.F. 2022). The corroboration rule codified in M.R.E. 304 is "designed to ensure that a conviction cannot be based solely on an uncorroborated, out-of-court admission or confession of the accused." *United States v. Whiteeyes*, 82 M.J. 168, 173 (C.A.A.F. 2022). The independent evidence "need raise only an inference of the truth of the admission or confession." M.R.E. 304(c)(4). The requirement to raise an inference of truth is a "very low standard." *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004); *see also United States v. Jones*, 78 M.J. 37 (C.A.A.F. 2018).

Hearsay

"Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. M.R.E. 801(c). Hearsay is prohibited at courts-martial. Mil. R. Evid. 802. "Out-of-court statements offered for other purposes, such as their effect on the listener to provide context, may be admitted as non-hearsay statements." *United States v. Leach*, 2022 WL 325761 at *6 (A.F. Ct. Crim. App. 2022)(citing persuasive caselaw); *see also United States v. Vasquez*, 2019 WL 2476075 (N.M. Ct. Crim. App. 2019).

ANALYSIS

ME3 Ray's statement "Really sorry about today" and "You okay" are admissions that have been sufficiently corroborated.

The Court first finds that ME3 Ray's statements "really sorry about today" and "you okay?" are "self-incriminating statement[s] falling short of an acknowledgment of guilt." M.R.E. 304(a)(1)(C). The Government intends to use these statements precisely because

they are self-incriminating and specifically to demonstrate ME3 Ray's consciousness of guilt. Further, the Court finds that corroboration is required. The Government is not offering the texts under M.R.E. 404(b) or other rule of evidence, and none of the other exceptions to the corroboration requirement apply. *See* M.R.E. 304(c)(3). They are not, however, confessions; ME3 Ray does not acknowledge his guilt to any of the charged offenses.

Finally, the Court finds that the Government has offered sufficient evidence to corroborate the admissions. ME3 [redacted] statements to investigators "raise an inference of truth of the admission[s]." *See* M.R.E. 304(c)(3). Assuming that ME3 Ray's statements are an admission to each of the charges and their specifications, ME3 [redacted] statements to CGIS allege that on 18 March 2021 in Jacksonville, FL ME3 Ray rested his penis on ME3 [redacted] shoulder after ejaculating on her (Sole Specification, Charge I); ejaculated on her shoulder and neck area while in the ME room (Specification 1, Charge II); grabbed her throat while in the Sector enforcement room (Specification 2, Charge II); and engaged in various sexually intimate behavior while in both the Sector enforcement and ME rooms (Sole Specification, Charge III). ME3 [redacted] also alleges that she did not consent to any of this conduct and that ME3 Ray was attempting to get her to give him oral sex, which supports the specific intent required by Charge I.

The Court preliminarily finds that the texts messages exchanged between ME3 Ray and ME3 [redacted] are not hearsay and are logically and legally relevant.

The text messages at issue involve a back and forth conversation between ME3 Ray and ME3 [redacted] on the day of the charged offenses. The statements allegedly made prior to the charged conduct largely involve a discussion about their duties for the day and meeting at the sector to input MISLE entries. The statements allegedly made after the charged conduct are limited to statements by ME3 Ray. ME3 [redacted] does not respond to any of them.

While the Court withholds its final ruling on the admissibility of the evidence, the Court finds that the text messages between ME3 Ray and ME3 [redacted] are relevant for their tendency to show how the general nature of their discussion may have changed throughout the course of the day. *See* M.R.E. 401, 402. In the Government's view, the change in ME3 Ray's statements before and after the charged conduct and ME3 [redacted] lack of responses to his apologetic statements indicates consciousness of guilt. They are also relevant to the Defense's proffered theories of consent and mistake of fact as to consent, in that they may show that ME3 Ray perceived the texts about MISLE as indicating ME3 [redacted] desired to engage in sexual activity at Sector Jacksonville. As to consent, they may also show the absence of any agreement by ME3 [redacted] to meet at Sector Jacksonville to engage in sexual activities.

The Court next finds that neither ME3 Ray nor ME3 [redacted] statements are hearsay. As acknowledged by the Defense and if offered by the Government, ME3 Ray's statements to ME3 [redacted] in the text messages are not hearsay because they are statements by a party opponent. M.R.E. 801(d)(2)(A).

Regarding ME3 [redacted] statements, the Court further finds that her statements to ME3 Ray would not be hearsay, if offered for the limited, non-hearsay purpose of their tendency to show their effect on the listener and for context. "[T]hat is, what prompted [ME3 Ray's] various responses." *Leach*, 2022 WL 325761 at *6. The Government has proffered that they do not intend to use the statements to demonstrate the truth of anything being asserted by ME3 [redacted] such as whether she understood how to input MISLE entries, but only for the relevant, non-hearsay purposes discussed above.

Finally, based on the evidence currently before the Court, the Court finds that the probative value of these text messages is not substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. M.R.E. 403. The strength of the proof of the prior act is high; the statements are supported by recorded text messages. The probative value, described above, of the evidence is high relative to the negligible prejudicial impact. The text messages do not include any accusatory statements by ME3 [redacted] and there is nothing in them that might inflame the passions of the fact-finder. There is no potential or need to present less prejudicial evidence. Finally, the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties all weigh in favor of admitting the text messages. There are no risks of distraction posed by admitting them. They occurred on the date of and close in time to the charged offenses and occurred between the accused and complaining witness in the case.

CONCLUSIONS OF LAW

1. ME3 Ray's statements in the text messages are admissions that have been sufficiently corroborated by independent evidence, as required by M.R.E. 304.

2. The text messages are not hearsay and are logically and legally relevant.

3. The text messages are not hearsay.

RULING

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

The Defense may also request the Court reconsider this ruling at trial should the evidence elicited at trial change the analysis above.

So ordered.

5 May 2023

CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N. [redacted] Date: 2023.05.05 20:13:22 -04'00'

CDR Timothy Cronin, USCG

Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR UNLAWFUL COMMAND INFLUENCE 21 July 2023

RELIEF SOUGHT

The Defense moved this Court to dismiss the charges and specifications due to the influence of unlawful command influence. The Government opposed the motion. The Court held oral arguments on 27 June 2023, made an oral ruling on the record on 27 June 2023, and indicated on the record that the oral ruling would be supplemented with a written ruling.

ISSUE PRESENTED

1. Has the Defense raised the issue of actual UCI?
2. If the Defense has raised the issue of actual UCI, has the Government disproved the predicate facts on which the allegation of unlawful command influence is based; shown there was no UCI; or shown that the UCI will not affect the proceedings?
3. Has the Defense raised the issue of apparent UCI?
4. If the Defense has raised the issue of apparent UCI, has the Government shown the predicate facts raised by the Defense do not exist or do not constitute unlawful command influence, or that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the defense and government briefs and attachments. The Court finds the following facts by a preponderance of the evidence:

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. General Court-Martial Convening Order (GCMCO) 1-20 was signed on 12 November 2020 by RADM Eric Jones, former Commander, Coast Guard Seventh District.

3. At that time, RADM Jones's deputy was then CAPT Jeffrey Randall. RDML Jeffrey Randall has since promoted to the rank of O-7.

4. RDML Randall reported to the Seventh District in July of 2020.

5. ME3 [redacted] the alleged victim in this case, made a report of sexual assault against ME3 Ray stemming from an interaction on 18 March 2022.

6. The Coast Guard Investigative Service commenced an investigation.

7. RDML Randall discussed the ME3 Ray case with the Seventh District Staff Judge Advocate (SJA).

8. RDML Randall briefed RADM Brendan McPherson, the Convening Authority and successor to RADM Jones, on the ME3 Ray case during the preliminary investigation phase.

9. RDML Randall frequently relayed UCMJ issues from the Seventh District SJA's office to RADM McPherson during his tenure as Chief of Staff.

10. RDML Randall also made recommendations on cases when RADM McPherson would ask for them.

11. When interviewed by the Defense, RDML Randall was able to recall specific details of the ME3 Ray case.

12. RDML Randall transferred from the Seventh District in July of 2022.

13. RADM McPherson, the Convening Authority, signed Amendment 1 to GCMCO 1-20 on 6 October 2022. Amendment 1 changed the venue from Miami, Florida to Norfolk, Virginia but made no changes to the members.

14. Charges were preferred against ME3 Ray on 28 October 2022.

15. RADM McPherson signed Amendment No. 2 to GCMCO 1-20 on 8 November 2022.

16. Amendments Nos. 3-8 to GCMCO 1-20 were signed after 8 November 2022.

17. During the week of 19 June 2023, RDML Randall spoke with LCDR Stiehl, Assistant Trial Counsel. RDML Randall knew LCDR Stiehl from his time at the Seventh District.

18. The majority of their discussion focused on non-military justice matters. RDML Randall was made aware that the ME3 Ray case was going to trial the week of 26 June 2023, which was the reason for LCDR Stiehl's presence in Norfolk.

19. LCDR Stiehl previously attended a district morale event at RDML Randall's house while RDML Randall was assigned to the Seventh District.

20. On 26 June 2023, CDR Cronin, the military judge, stepped into the elevator and RDML Randall was already in the elevator.

21. CDR Cronin said good morning and indicated that he was one of the Coast Guard's military judges.

22. RDML Randall asked if CDR Cronin was related to another Cronin in the Coast Guard, to which CDR Cronin replied [redacted]

23. RDML Randall then stated something to the effect of [redacted]

24. CDR Cronin replied [redacted] or words to that effect.

25. CDR Cronin departed the elevator after the door opened, and there was no additional communication.

26. RDML Randall stated he has made this "flippant reference" to others before. RDML Randall, however, did not make the same comment that he made to the military judge to any individual involved with the ME3 Ray case, including the Convening Authority and Staff Judge Advocate.

27. Following his departure from the Seventh District, RDML Randall did not have any further discussions with the Convening Authority about the case.

28. RDML Randall took command of Force Readiness Command (FORCECOM) on 23 June 2023.

29. FORCECOM is headquartered in Norfolk, VA.

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

PRINCIPLES OF LAW

Unlawful Command Influence (UCI)

UCI has often been referred to as "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22

M.J. 388, 393 (C.M.A. 1986)). Two types of unlawful command influence can arise in the military justice system: actual unlawful command influence and the appearance of unlawful command influence. From the outset, actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2016). In contrast, apparent UCI exists when "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done and would perceive an appearance of command influence." *Id*. (quoting *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994)).

Generally speaking, UCI involves the improper use, or perception of such use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, *Court-Martial Procedure* § 18-28.00 (4th ed. 2015). Military judges are charged with serving as "sentinels" to identify and address any instances of UCI that come to their attention. *Boyce*, 76 M.J. at 253 n.9 (citations omitted). Once UCI is raised, it is "incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Stoneman*, 57 M.J. 35, 43 (C.A.A.F. 2002) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

Actual UCI

The initial burden regarding actual UCI is on the defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Second, the defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. The defense is required to present "some evidence" of unlawful command influence. *Id*. (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). Third, if the defense has made the requisite showing, the burden shifts to the Government to:

(1) disprove "the predicate facts on which the allegation of unlawful command influence is based";

(2) persuade the military judge "that the facts do not constitute unlawful command influence"; or

(3) prove at trial "that the unlawful command influence will not affect the proceedings."

Id. at 151. "Whichever tactic the Government chooses, the quantum of proof is beyond a reasonable doubt." *Biagase*, 50 M.J. at 151. This standard is set high because unlawful command influence "tends to deprive servicemembers of their constitutional rights." *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).

Congress enacted changes to Article 37, UCMJ, that were effective on 20 December 2019 and clarified the bounds of UCI. Article 37, UCMJ mandates, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial . . . in reach the findings or sentence in any case . . ." 10 U.S.C. § 837(a)(3).

Apparent UCI

Apparent UCI is a judicially created construct. Under the previous versions of Article 37, UCMJ, and in contrast to actual UCI, a meritorious claim of the appearance of UCI does not require prejudice to the accused. *Boyce,* 76 MJ at 248. Instead, the prejudice is what is done to the "public's perception of the fairness of the military justice system as a whole." *Id.* A significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system is whether "appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the UCI was later cured." *Id.* at 248 n.5.

An accused who asserts there was an appearance of UCI bears the initial burden of showing "some evidence" that UCI occurred. *Bergdahl,* 80 MJ at 234; *Boyce,* 76 MJ at 249. Although this is a low burden, the evidence presented by the accused to establish his prima facie case must consist of more than "mere allegation or speculation." *Id.* If the accused presents "some evidence" of UCI, "the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the 'predicate facts proffered by the appellant do not exist,' or (b) 'the facts as presented do not constitute UCI." *Id.* If the government fails to rebut the accused's factual showing, it may still prevail if it proves:

> [B]eyond a reasonable doubt that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

Id.

Congress amended Article 37, UCMJ, to require a showing of material prejudice to the substantial rights of the accused before a finding or sentence of a court-martial may be held incorrect on the ground of a violation of that section. "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." 10 U.S.C. 837(c). The effective date of this amendment to Article 37, UCMJ, was 20 December 2019. *See* National Defense Authorization Act 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).

Accordingly, the Navy Marine Corps and Army Courts of Criminal Appeals have held that the revised Article 37, UCMJ, requires a showing of material prejudice to the

substantial rights of the accused, while still engaging in an apparent UCI analysis. *United States v. Gattis,* 81 M.J. 748, 757 (N.M. Ct. Crim. App. 2021) and *United States v. Alton*, 2021 WL 2232100, at *5 n.5 (A.Ct. Crim. App. 2021)(unpublished). Further, under the revised Article 37, UCMJ, appellate courts are statutorily barred from holding the findings or sentence of the case to be incorrect on the grounds of apparent UCI without a showing of material prejudice to the substantial rights of the accused. *Id.* The Coast Guard Court of Criminal Appeals has not directly confronted the issue, as its recent UCI rulings have involved acts committed prior to 20 December 2019. *See Tucker*, 82 M.J. at 567; *United States v. Leal,* 81 M.J. 613 (C.G. Ct. Crim. App. 2021).

Remedies for UCI

If the defense meets its initial burden, then UCI is raised at the trial level, and consequentially, a presumption of prejudice is created. *See United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010)(citing *Biagase*, 50 M.J. at 150). To overcome this presumption, the trial court must be convinced beyond a reasonable doubt that the UCI will have no prejudicial effect on the court-martial. *Id.*

A court finding either actual or apparent UCI "has broad discretion in crafting a remedy to remove the taint of unlawful command influence." *Douglas*, 68 MJ at 354 (quoting *United States v. House*r, 36 M.J. 392, 397 (C.M.A. 1993)). The court should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial. *Id.* CAAF has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004)(internal citations omitted).

Dismissal of charges is a drastic remedy, and courts must look to see whether alternative remedies are available. *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992). "Dismissal is appropriate if and only if the trial judge finds that command influence exists . . . and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt. . . ." *Villareal v. Ramsey*, 1995 WL 935024 at *5.

Recusal of Military Judge

Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." The Discussion to R.C.M. 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily."

On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

ANALYSIS

Actual Accusatory UCI

The Defense did not raise the issue of actual, accusatory UCI.

The Court finds that the Defense has not met its burden to demonstrate some evidence of actual, accusatory UCI. RDML Randall was briefed on the case during the initial report up to the first flag in the chain of command. He did not, however, have any involvement with the case following that brief, other than a case update in the context of a monthly military justice meeting with the SJA. He does not recall discussing the case after that point, and there is no evidence suggesting that he did. RDML Randall then transferred out of the Seventh District approximately two months prior to preferral. After his departure, he did not have any further discussions with the Convening Authority about the case. Finally, RDML Randall did not make the same comment that he made to the military judge to any individual involved with the ME3 Ray case, including the Convening Authority and Staff Judge Advocate.

Even if RDML Randall's remarks constituted actual, accusatory UCI, the Government has proven beyond a reasonable doubt the actual, accusatory UCI will not affect the proceedings.

The government has proved beyond a reasonable doubt that the comments made by RDML Randall will not impact the proceedings. As detailed above, RDML Randall had no involvement in any decisions concerning the case, including the decision to prefer and refer charges.

Actual Adjudicative UCI

The Defense raised the issue of actual, adjudicative UCI.

The Court finds that the Defense has met its burden. The Defense offered RDML Randall's comment to the military judge as some evidence of an attempt to influence the independent discretion of the military judge. The initial burden regarding actual UCI is on the defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Second, the defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. Here, RDML Randall made a comment to the presiding military judge that suggested the guilt of the accused. There is also a logical connection to the court-martial, given RDML Randall's former position as the deputy to the Convening Authority. This is "some evidence" sufficient to shift the burden.

The Government has proven beyond a reasonable doubt the actual, adjudicative UCI will not affect the proceedings.

The Court finds that the comment by RDML Randall was inappropriate. This

finding notwithstanding, the government has proved beyond a reasonable doubt that the comment made by RDML Randall will not impact the proceedings. RDML Randall was neither intending nor attempting to influence the military judge with the comment, and no one else was present in the elevator when the comment was made. He intended the comment as a joke. Moreover, the military judge stated on the record that there is no risk that the comment will influence his decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. The military judge does not know RDML Randall and has never interacted with him in even a professional capacity. Based on that evidence, the government has proved beyond a reasonable doubt that the comments made by RDML Randall will not impact the proceedings.

Apparent UCI

Defense raised some evidence of apparent UCI.

For the reasons stated above, the Court finds the defense satisfied the burden of presenting "some evidence" which, if true, would constitute apparent accusatory and apparent adjudicative UCI. Specifically, the Defense argues that RADM Randall's comment suggests that he harbors a significant bias in favor of the government and a preference that the accused be found guilty and punished severely. This comment and his potential to impact the case while he was the Chief of Staff to the Seventh District could cause an objective, disinterested observer to harbor a significant doubt about the fairness of the proceedings. *Boyce*, 76 M.J. at 249. Similarly, the Defense argues that RDML Randall's comment to the military judge could be viewed as an intent to influence the military judge.

The government has proven beyond a reasonable doubt that the apparent, accusatory and adjudicative UCI will not place an intolerable strain upon the public's perception of military justice.

The Court finds that RDML Randall's comments will not place an intolerable strain upon the public's perception of military justice. As detailed in the findings above, RDML Randall had no involvement in any decisions concerning the case, including the decision to prefer and refer charges.

Further, the Court finds that there is no evidence suggesting any of the prospective or seated members in the case have been impacted. Following RDML Randall's departure from the Seventh District, RADM McPherson signed Amendment 1 to the convening order, which shifted the venue to Norfolk, VA. Additionally, RADM McPherson opted to detail members from the pool of Coast Guard personnel within the Norfolk, VA area rather than those from the Seventh District. RDML Randall took command of FORCECOM - a command in the Norfolk, VA area - on 23 June 2023, three days before the start of trial. Additionally, as detailed further below, the Court granted expanded general and individual voir dire as judicial remedies to ensure that none of the members have been influenced by RDML Randall. General and individual voir dire revealed that the only member who had anything but a purely professional interaction with RDML Randall was LCDR [redacted] who was challenged for cause and

excused.

Similarly, as detailed above in the findings regarding the comment to the military judge, there is no risk that the comment will influence the military judge's decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. Accordingly, the government has proved beyond a reasonable doubt that the comment will not place an intolerable strain upon the public's perception of military justice. A disinterested observer, fully informed of all the facts, would not harbor a significant doubt regarding the military judge's impartiality.

Finally, as detailed above, the Government has proven beyond a reasonable doubt that there is no prejudice to the accused. RDML Randall's comment was inappropriate, but it has not impacted the case. RDML Randall was not the Convening Authority, and the Government proved beyond a reasonable doubt that the Convening Authority's decisions in the case were not influenced by RDML Randall. To the extent he made similar comments in the past, those comments were made to others unassociated with the case. Further, there is no evidence that any of the members or the military judge were influenced by RDML Randall.

For those reasons, the Court finds a disinterested observer, fully informed of all the facts, would not harbor a significant doubt over the fairness of the proceedings based on RDML Randall's actions.

Assuming the government has not proven beyond a reasonable doubt that the apparent UCI will not place an intolerable strain upon the public's perception of military justice, judicial remedies are available to cure the apparent UCI.

Before granting the drastic remedy of dismissal of the charges, the Court must look to whether alternative remedies are available. As a threshold matter, the Court finds dismissal of the charges is not appropriate because to the extent there was prejudice suffered by the accused, it did not materially or irreparably prejudice his substantive rights in the proceedings. There has been no suggestion or evidence presented suggesting that RDML Randall's comment denied the accused's Sixth Amendment rights to present a defense or right to counsel or otherwise resulted in prejudice to his substantive rights.

The Court finds that recusal of the military judge is not required. Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." The Discussion to R.C.M. 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily." Even broadly construing the grounds for the Defense's challenge, the military judge was clear on the record that there is no risk that the comment will influence his decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. Further, the military judge does not have any other relationship with RDML Randall that would suggest an appearance of impropriety. The Court finds that a disinterested observer, fully informed of all the facts, would not harbor a significant doubt over the fairness of the military judge presiding over the case.

The Court further finds that the Defense's proposed alternative remedies are not appropriate. The Defense argues that the evidence of apparent UCI impacted the military judge and potentially the Convening Authority during the referral process. Disqualifying the current Convening Authority, RADM Schofield, does not address the apparent UCI in any discernible way. RADM Schofield just reported to the Seventh District and had no role in the referral process. Similarly, additional peremptory challenges do not address the particular risks of UCI found here.

The Court previously found that the government proved beyond a reasonable doubt that RDML Randall did not impact or influence the Convening Authority in any way. Although unlikely, the only other potential impact to the case would be concerning a member, if for example, the member transferred from the Seventh District to the Norfolk area or the member has interacted with RDML Randall in the past. The Court finds that an appropriate alternative remedy in the case is to ensure that no prospective member is impaneled that has been in any way influenced by RDML Randall or could be viewed by a third party observer as having been influenced by him. To this end, the Court granted additional general voir dire; expanded individual voir dire; and liberally granted challenges for cause based on possible interactions with RDML Randall. To the extent any exists, this remedy removed the taint of UCI from the proceedings and ensured the accused's right to a fair trial and the preservation of the integrity of the military justice system.

CONCLUSIONS OF LAW

1. The Defense did not raise the issue of actual, accusatory UCI.
2. Even if RDML Randall's remarks constituted actual, accusatory UCI, the Government has proven beyond a reasonable doubt the actual, accusatory UCI will not affect the proceedings.
3. The Defense raised the issue of actual, adjudicative UCI.
4. The Government has proven beyond a reasonable doubt that the actual, adjudicative UCI will not affect the proceedings.
5. The Defense raised the issue of apparent UCI.
6. The Government has proven beyond a reasonable doubt that the that the apparent UCI will not place an intolerable strain upon the public's perception of military justice.
7. Assuming the Government has not proven beyond a reasonable doubt that the apparent UCI will not place an intolerable strain upon the public's perception of military justice, judicial remedies are available to cure the apparent UCI.

RULING

The defense's motion for appropriate relief is GRANTED, in part, and DENIED, in part, consistent with the above conclusions of law.

So ordered this 21st day of July, 2023

CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N.[redacted] Date: 2023.07.21 13:36:46 -04'00'

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

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ME3 SAMUEL B. RAY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR UNLAWFUL COMMAND INFLUENCE 21 July 2023

RELIEF SOUGHT

The Defense moved this Court to dismiss the charges and specifications due to the influence of unlawful command influence. The Government opposed the motion. The Court held oral arguments on 27 June 2023, made an oral ruling on the record on 27 June 2023, and indicated on the record that the oral ruling would be supplemented with a written ruling.

ISSUE PRESENTED

1. Has the Defense raised the issue of actual UCI?
2. If the Defense has raised the issue of actual UCI, has the Government disproved the predicate facts on which the allegation of unlawful command influence is based; shown there was no UCI; or shown that the UCI will not affect the proceedings?
3. Has the Defense raised the issue of apparent UCI?
4. If the Defense has raised the issue of apparent UCI, has the Government shown the predicate facts raised by the Defense do not exist or do not constitute unlawful command influence, or that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the defense and government briefs and attachments. The Court finds the following facts by a preponderance of the evidence:

1. The accused, ME3 Ray, is charged with violations of Article 120 (Abusive Sexual Contact), Article 128 (Assault Consummated by a Battery), and Article 92 (Failure to Obey Lawful General Order).

2. General Court-Martial Convening Order (GCMCO) 1-20 was signed on 12 November 2020 by RADM Eric Jones, former Commander, Coast Guard Seventh District.

3. At that time, RADM Jones's deputy was then CAPT Jeffrey Randall. RDML Jeffrey Randall has since promoted to the rank of O-7.

4. RDML Randall reported to the Seventh District in July of 2020.

5. ME3 A.A., the alleged victim in this case, made a report of sexual assault against ME3 Ray stemming from an interaction on 18 March 2022.

6. The Coast Guard Investigative Service commenced an investigation.

7. RDML Randall discussed the ME3 Ray case with the Seventh District Staff Judge Advocate (SJA).

8. RDML Randall briefed RADM Brendan McPherson, the Convening Authority and successor to RADM Jones, on the ME3 Ray case during the preliminary investigation phase.

9. RDML Randall frequently relayed UCMJ issues from the Seventh District SJA's office to RADM McPherson during his tenure as Chief of Staff.

10. RDML Randall also made recommendations on cases when RADM McPherson would ask for them.

11. When interviewed by the Defense, RDML Randall was able to recall specific details of the ME3 Ray case.

12. RDML Randall transferred from the Seventh District in July of 2022.

13. RADM McPherson, the Convening Authority, signed Amendment 1 to GCMCO 1-20 on 6 October 2022. Amendment 1 changed the venue from Miami, Florida to Norfolk, Virginia but made no changes to the members.

14. Charges were preferred against ME3 Ray on 28 October 2022.

15. RADM McPherson signed Amendment No. 2 to GCMCO 1-20 on 8 November 2022.

16. Amendments Nos. 3-8 to GCMCO 1-20 were signed after 8 November 2022.

17. During the week of 19 June 2023, RDML Randall spoke with LCDR Stiehl, Assistant Trial Counsel. RDML Randall knew LCDR Stiehl from his time at the Seventh District.

18. The majority of their discussion focused on non-military justice matters. RDML Randall was made aware that the ME3 Ray case was going to trial the week of 26 June 2023, which was the reason for LCDR Stiehl's presence in Norfolk.

19. LCDR Stiehl previously attended a district morale event at RDML Randall's house while RDML Randall was assigned to the Seventh District.

20. On 26 June 2023, CDR Cronin, the military judge, stepped into the elevator and RDML Randall was already in the elevator.

21. CDR Cronin said good morning and indicated that he was one of the Coast Guard's military judges.

22. RDML Randall asked if CDR Cronin was related to another Cronin in the Coast Guard, to which CDR Cronin replied "No, sir."

23. RDML Randall then stated something to the effect of "so you are the one that makes sure he gets the chair?"

24. CDR Cronin replied "No, sir. I'm here to help the members hear the evidence" or words to that effect.

25. CDR Cronin departed the elevator after the door opened, and there was no additional communication.

26. RDML Randall stated he has made this "flippant reference" to others before. RDML Randall, however, did not make the same comment that he made to the military judge to any individual involved with the ME3 Ray case, including the Convening Authority and Staff Judge Advocate.

27. Following his departure from the Seventh District, RDML Randall did not have any further discussions with the Convening Authority about the case.

28. RDML Randall took command of Force Readiness Command (FORCECOM) on 23 June 2023.

29. FORCECOM is headquartered in Norfolk, VA.

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

PRINCIPLES OF LAW

Unlawful Command Influence (UCI)

UCI has often been referred to as "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22

M.J. 388, 393 (C.M.A. 1986)). Two types of unlawful command influence can arise in the military justice system: actual unlawful command influence and the appearance of unlawful command influence. From the outset, actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2016). In contrast, apparent UCI exists when "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done and would perceive an appearance of command influence." *Id*. (quoting *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994)).

Generally speaking, UCI involves the improper use, or perception of such use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, *Court-Martial Procedure* § 18-28.00 (4th ed. 2015). Military judges are charged with serving as "sentinels" to identify and address any instances of UCI that come to their attention. *Boyce*, 76 M.J. at 253 n.9 (citations omitted). Once UCI is raised, it is "incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Stoneman*, 57 M.J. 35, 43 (C.A.A.F. 2002) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

Actual UCI

The initial burden regarding actual UCI is on the defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Second, the defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. The defense is required to present "some evidence" of unlawful command influence. *Id*. (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). Third, if the defense has made the requisite showing, the burden shifts to the Government to:

(1) disprove "the predicate facts on which the allegation of unlawful command influence is based";

(2) persuade the military judge "that the facts do not constitute unlawful command influence"; or

(3) prove at trial "that the unlawful command influence will not affect the proceedings."

Id. at 151. "Whichever tactic the Government chooses, the quantum of proof is beyond a reasonable doubt." *Biagase*, 50 M.J. at 151. This standard is set high because unlawful command influence "tends to deprive servicemembers of their constitutional rights." *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).

Congress enacted changes to Article 37, UCMJ, that were effective on 20 December 2019 and clarified the bounds of UCI. Article 37, UCMJ mandates, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial . . . in reach the findings or sentence in any case . . ." 10 U.S.C. § 837(a)(3).

Apparent UCI

Apparent UCI is a judicially created construct. Under the previous versions of Article 37, UCMJ, and in contrast to actual UCI, a meritorious claim of the appearance of UCI does not require prejudice to the accused. *Boyce,* 76 MJ at 248. Instead, the prejudice is what is done to the "public's perception of the fairness of the military justice system as a whole." *Id.* A significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system is whether "appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the UCI was later cured." *Id.* at 248 n.5.

An accused who asserts there was an appearance of UCI bears the initial burden of showing "some evidence" that UCI occurred. *Bergdahl,* 80 MJ at 234; *Boyce,* 76 MJ at 249. Although this is a low burden, the evidence presented by the accused to establish his prima facie case must consist of more than "mere allegation or speculation." *Id.* If the accused presents "some evidence" of UCI, "the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the 'predicate facts proffered by the appellant do not exist,' or (b) 'the facts as presented do not constitute UCI." *Id.* If the government fails to rebut the accused's factual showing, it may still prevail if it proves:

> [B]eyond a reasonable doubt that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

Id.

Congress amended Article 37, UCMJ, to require a showing of material prejudice to the substantial rights of the accused before a finding or sentence of a court-martial may be held incorrect on the ground of a violation of that section. "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." 10 U.S.C. 837(c). The effective date of this amendment to Article 37, UCMJ, was 20 December 2019. *See* National Defense Authorization Act 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).

Accordingly, the Navy Marine Corps and Army Courts of Criminal Appeals have held that the revised Article 37, UCMJ, requires a showing of material prejudice to the

substantial rights of the accused, while still engaging in an apparent UCI analysis. *United States v. Gattis,* 81 M.J. 748, 757 (N.M. Ct. Crim. App. 2021) and *United States v. Alton*, 2021 WL 2232100, at *5 n.5 (A.Ct. Crim. App. 2021)(unpublished). Further, under the revised Article 37, UCMJ, appellate courts are statutorily barred from holding the findings or sentence of the case to be incorrect on the grounds of apparent UCI without a showing of material prejudice to the substantial rights of the accused. *Id.* The Coast Guard Court of Criminal Appeals has not directly confronted the issue, as its recent UCI rulings have involved acts committed prior to 20 December 2019. *See Tucker*, 82 M.J. at 567; *United States v. Leal,* 81 M.J. 613 (C.G. Ct. Crim. App. 2021).

Remedies for UCI

If the defense meets its initial burden, then UCI is raised at the trial level, and consequentially, a presumption of prejudice is created. *See United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010)(citing *Biagase*, 50 M.J. at 150). To overcome this presumption, the trial court must be convinced beyond a reasonable doubt that the UCI will have no prejudicial effect on the court-martial. *Id.*

A court finding either actual or apparent UCI "has broad discretion in crafting a remedy to remove the taint of unlawful command influence." *Douglas*, 68 MJ at 354 (quoting *United States v. House*r, 36 M.J. 392, 397 (C.M.A. 1993)). The court should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial. *Id.* CAAF has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004)(internal citations omitted).

Dismissal of charges is a drastic remedy, and courts must look to see whether alternative remedies are available. *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992). "Dismissal is appropriate if and only if the trial judge finds that command influence exists . . . and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt. . . ." *Villareal v. Ramsey*, 1995 WL 935024 at *5.

Recusal of Military Judge

Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." The Discussion to R.C.M. 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily."

On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

ANALYSIS

Actual Accusatory UCI

The Defense did not raise the issue of actual, accusatory UCI.

The Court finds that the Defense has not met its burden to demonstrate some evidence of actual, accusatory UCI. RDML Randall was briefed on the case during the initial report up to the first flag in the chain of command. He did not, however, have any involvement with the case following that brief, other than a case update in the context of a monthly military justice meeting with the SJA. He does not recall discussing the case after that point, and there is no evidence suggesting that he did. RDML Randall then transferred out of the Seventh District approximately two months prior to preferral. After his departure, he did not have any further discussions with the Convening Authority about the case. Finally, RDML Randall did not make the same comment that he made to the military judge to any individual involved with the ME3 Ray case, including the Convening Authority and Staff Judge Advocate.

Even if RDML Randall's remarks constituted actual, accusatory UCI, the Government has proven beyond a reasonable doubt the actual, accusatory UCI will not affect the proceedings.

The government has proved beyond a reasonable doubt that the comments made by RDML Randall will not impact the proceedings. As detailed above, RDML Randall had no involvement in any decisions concerning the case, including the decision to prefer and refer charges.

Actual Adjudicative UCI

The Defense raised the issue of actual, adjudicative UCI.

The Court finds that the Defense has met its burden. The Defense offered RDML Randall's comment to the military judge as some evidence of an attempt to influence the independent discretion of the military judge. The initial burden regarding actual UCI is on the defense to "show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Second, the defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. Here, RDML Randall made a comment to the presiding military judge that suggested the guilt of the accused. There is also a logical connection to the court-martial, given RDML Randall's former position as the deputy to the Convening Authority. This is "some evidence" sufficient to shift the burden.

The Government has proven beyond a reasonable doubt the actual, adjudicative UCI will not affect the proceedings.

The Court finds that the comment by RDML Randall was inappropriate. This

finding notwithstanding, the government has proved beyond a reasonable doubt that the comment made by RDML Randall will not impact the proceedings. RDML Randall was neither intending nor attempting to influence the military judge with the comment, and no one else was present in the elevator when the comment was made. He intended the comment as a joke. Moreover, the military judge stated on the record that there is no risk that the comment will influence his decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. The military judge does not know RDML Randall and has never interacted with him in even a professional capacity. Based on that evidence, the government has proved beyond a reasonable doubt that the comments made by RDML Randall will not impact the proceedings.

Apparent UCI

Defense raised some evidence of apparent UCI.

For the reasons stated above, the Court finds the defense satisfied the burden of presenting "some evidence" which, if true, would constitute apparent accusatory and apparent adjudicative UCI. Specifically, the Defense argues that RADM Randall's comment suggests that he harbors a significant bias in favor of the government and a preference that the accused be found guilty and punished severely. This comment and his potential to impact the case while he was the Chief of Staff to the Seventh District could cause an objective, disinterested observer to harbor a significant doubt about the fairness of the proceedings. *Boyce*, 76 M.J. at 249. Similarly, the Defense argues that RDML Randall's comment to the military judge could be viewed as an intent to influence the military judge.

The government has proven beyond a reasonable doubt that the apparent, accusatory and adjudicative UCI will not place an intolerable strain upon the public's perception of military justice.

The Court finds that RDML Randall's comments will not place an intolerable strain upon the public's perception of military justice. As detailed in the findings above, RDML Randall had no involvement in any decisions concerning the case, including the decision to prefer and refer charges.

Further, the Court finds that there is no evidence suggesting any of the prospective or seated members in the case have been impacted. Following RDML Randall's departure from the Seventh District, RADM McPherson signed Amendment 1 to the convening order, which shifted the venue to Norfolk, VA. Additionally, RADM McPherson opted to detail members from the pool of Coast Guard personnel within the Norfolk, VA area rather than those from the Seventh District. RDML Randall took command of FORCECOM - a command in the Norfolk, VA area - on 23 June 2023, three days before the start of trial. Additionally, as detailed further below, the Court granted expanded general and individual voir dire as judicial remedies to ensure that none of the members have been influenced by RDML Randall. General and individual voir dire revealed that the only member who had anything but a purely professional interaction with RDML Randall was LCDR [redacted] who was challenged for cause and

excused.

Similarly, as detailed above in the findings regarding the comment to the military judge, there is no risk that the comment will influence the military judge's decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. Accordingly, the government has proved beyond a reasonable doubt that the comment will not place an intolerable strain upon the public's perception of military justice. A disinterested observer, fully informed of all the facts, would not harbor a significant doubt regarding the military judge's impartiality.

Finally, as detailed above, the Government has proven beyond a reasonable doubt that there is no prejudice to the accused. RDML Randall's comment was inappropriate, but it has not impacted the case. RDML Randall was not the Convening Authority, and the Government proved beyond a reasonable doubt that the Convening Authority's decisions in the case were not influenced by RDML Randall. To the extent he made similar comments in the past, those comments were made to others unassociated with the case. Further, there is no evidence that any of the members or the military judge were influenced by RDML Randall.

For those reasons, the Court finds a disinterested observer, fully informed of all the facts, would not harbor a significant doubt over the fairness of the proceedings based on RDML Randall's actions.

Assuming the government has not proven beyond a reasonable doubt that the apparent UCI will not place an intolerable strain upon the public's perception of military justice, judicial remedies are available to cure the apparent UCI.

Before granting the drastic remedy of dismissal of the charges, the Court must look to whether alternative remedies are available. As a threshold matter, the Court finds dismissal of the charges is not appropriate because to the extent there was prejudice suffered by the accused, it did not materially or irreparably prejudice his substantive rights in the proceedings. There has been no suggestion or evidence presented suggesting that RDML Randall's comment denied the accused's Sixth Amendment rights to present a defense or right to counsel or otherwise resulted in prejudice to his substantive rights.

The Court finds that recusal of the military judge is not required. Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." The Discussion to R.C.M. 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily." Even broadly construing the grounds for the Defense's challenge, the military judge was clear on the record that there is no risk that the comment will influence his decisions in the case; that he feels any risk to his career by the comment; or that he is in any way biased. Further, the military judge does not have any other relationship with RDML Randall that would suggest an appearance of impropriety. The Court finds that a disinterested observer, fully informed of all the facts, would not harbor a significant doubt over the fairness of the military judge presiding over the case.

The Court further finds that the Defense's proposed alternative remedies are not appropriate. The Defense argues that the evidence of apparent UCI impacted the military judge and potentially the Convening Authority during the referral process. Disqualifying the current Convening Authority, RADM Schofield, does not address the apparent UCI in any discernible way. RADM Schofield just reported to the Seventh District and had no role in the referral process. Similarly, additional peremptory challenges do not address the particular risks of UCI found here.

The Court previously found that the government proved beyond a reasonable doubt that RDML Randall did not impact or influence the Convening Authority in any way. Although unlikely, the only other potential impact to the case would be concerning a member, if for example, the member transferred from the Seventh District to the Norfolk area or the member has interacted with RDML Randall in the past. The Court finds that an appropriate alternative remedy in the case is to ensure that no prospective member is impaneled that has been in any way influenced by RDML Randall or could be viewed by a third party observer as having been influenced by him. To this end, the Court granted additional general voir dire; expanded individual voir dire; and liberally granted challenges for cause based on possible interactions with RDML Randall. To the extent any exists, this remedy removed the taint of UCI from the proceedings and ensured the accused's right to a fair trial and the preservation of the integrity of the military justice system.

CONCLUSIONS OF LAW

1. The Defense did not raise the issue of actual, accusatory UCI.
2. Even if RDML Randall's remarks constituted actual, accusatory UCI, the Government has proven beyond a reasonable doubt the actual, accusatory UCI will not affect the proceedings.
3. The Defense raised the issue of actual, adjudicative UCI.
4. The Government has proven beyond a reasonable doubt that the actual, adjudicative UCI will not affect the proceedings.
5. The Defense raised the issue of apparent UCI.
6. The Government has proven beyond a reasonable doubt that the that the apparent UCI will not place an intolerable strain upon the public's perception of military justice.
7. Assuming the Government has not proven beyond a reasonable doubt that the apparent UCI will not place an intolerable strain upon the public's perception of military justice, judicial remedies are available to cure the apparent UCI.

RULING

The defense's motion for appropriate relief is GRANTED, in part, and DENIED, in part, consistent with the above conclusions of law.

So ordered this 21st day of July, 2023

CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N. [redacted] Date: 2023.07.21 13:36:46 -04'00'

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

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
RAY, SAMUEL, B	Coast Guard	E-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
SEVENTH COAST GUARD DISTRICT	General	Enlisted Members	Jul 1, 2023

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Not adjudged	None	None	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-2	○ Yes ◉ No	◉ Yes ○ No	◉ Yes ◉ No	○ Yes ◉ No	60 Days

20. PERIOD AND LIMITS OF RESTRICTION

60 Days at Station Mayport, Jacksonville, FL

SECTION D - CONFINEMENT CREDIT

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

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

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

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

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

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

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

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
CRONIN, TIMOTHY, N	Coast Guard	O-5	Jul 1, 2023	CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N.[redacted] Date: 2023.07.01 17:05:55 -04'00'

37. NOTES

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I:	120	Specification	Not Guilty	Not Guilty			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
Charge II:	128	Specification 1	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 2	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
Charge III:	92	Specification	Not Guilty	Guilty			092-A0
		Offense description	Violation of a lawful general order				

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
RAY, SAMUEL B.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
CG STA MAYPORT	August 21, 2018	5 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
CGD SEVEN	General	Enlisted Members	01-Jul-2023

Post-Trial Matters to Consider

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

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

On 10 July 2023, Petty Officer Ray, through his detailed defense counsel, requested suspension of the portion of the sentence that imposed 60 days of hard labor without confinement.

24. Convening Authority Name/Title	25. SJA Name
DOUGLAS M. SCHOFIELD, REAR ADMIRAL Commander, Seventh Coast Guard District	[redacted] CDR

26. SJA signature	27. Date
[redacted]	Jul 13, 2023

SECTION B - CONVENING AUTHORITY ACTION

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

I take no action.

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

30. Convening Authority's signature	31. Date
[redacted]	14 JUL 23

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

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

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

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

CHARGE I: Violation of the UCMJ, Article 120 (Abusive Sexual Contact); Plea: Not Guilty, Finding: Not Guilty

Specification: In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, touch the shoulder of [redacted] with ME3 Ray's body part to wit: his penis, with an intent to gratify his own sexual desire, without the consent of [redacted] Plea: Not Guilty, Finding: Not Guilty.

CHARGE II: Violation of the UCMJ, Article 128 (Assault Consummated by a Battery) Plea: Not Guilty, Finding: Not Guilty.

Specification 1: In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the shoulder and neck with his semen. Plea: Not Guilty, Finding: Not Guilty.

Specification 2: In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, unlawfully touch [redacted] on the neck with his hand. Plea: Not Guilty, Finding: Not Guilty.

CHARGE III: Violation of the UCMJ, Article 92 (Violating a General Order); Plea: Not Guilty, Finding: Guilty

Specification (Violating a General Order): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place. Plea: Not Guilty, Finding: Guilty

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

The sentence to be entered is; Reduction in Rank to E-2, 60 days of Hard Labor, and 60 days of restriction to be served at Station Mayport in Jacksonville, FL.

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

N/A

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

N/A

37. Judge's signature:	38. Date judgment entered:
CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N[redacted] Date: 2023.08.01 12:17:28 -04'00'	01 August 2023

39. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

34. Sentenced (Continued)

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

33. Findings (Continued)

APPELLATE MOTIONS

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	23 May 2024 CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, Petty Officer Third Class Samuel B. Ray (Appellant), through counsel, respectfully moves for a thirty-day enlargement of time to file matters until 1 July 2024. The current due date is 1 June 2024. This is Appellant's first enlargement of time. The Government consents to this motion.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a thirty-day enlargement of time.

DATE: 23 May 2024

SAVIANO.JENNIFER.SUE.[redacted]
Digitally signed by SAVIANO.JENNIFER.SUE.[redacted]
Date: 2024.05.23 15:57:36 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

24 May 2024

APPELLANT'S MOTION FOR FIRST ENLARGEMENT OF TIME, FILED 23 MAY 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellant's Motion, it is, by the Court, this 24th day of May, 2024,

ORDERED:

That Appellant's Motion for Enlargement of Time is hereby granted, up to and including 01 July 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P.[redacted]
Digitally signed by VALDES.SARAH.P[redacted]
Date: 2024.05.24 08:16:17 -04'00'

Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	24 June 2024 CONSENT MOTION FOR SECOND ENLARGEMENT OF TIME Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, Petty Officer Third Class Samuel B. Ray (Appellant), through counsel, respectfully moves for a thirty-day enlargement of time to file matters until 31 July 2024. The current due date is 1 July 2024. This is Appellant's second enlargement of time. The Government consents to this motion.

There is good cause to grant this motion. Over the last month, Counsel submitted an Assignment of Error and Brief in *United States v. Taylor* and assisted in the preparation for oral argument in *United States v. Lopez*. Additionally, Counsel has completed a variety of other tasks, as the Chief of Defense, including but not limited to providing legal advice to members facing administrative and state board investigations, managing the detailing of counsel for courts-martial and Boards of Inquiry, orchestrating travel fund approval and transfer in support of Coast Guard courts-martial proceedings with the Navy, and managing the administrative and training requirements for departing and inbound Coast Guard defense counsel at Navy Defense Service Offices.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a thirty-day enlargement of time.

DATE: 24 June 2024

SAVIANO.JENNIFER.SUE.[redacted] Digitally signed by SAVIANO.JENNIFER.SUE[redacted] Date: 2024.06.24 14:41:38 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 24 June 2024.

SAVIANO.JENNIFER.SUE.[redacted]
Digitally signed by SAVIANO.JENNIFER.SUE[redacted]
Date: 2024.06.24 14:42:24 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

24 June 2024

APPELLANT'S CONSENT MOTION FOR SECOND ENLARGEMENT OF TIME, FILED 24 JUNE 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellant's Consent Motion for Second Enlargement of Time, it is, by the Court, this 24th day of June, 2024,

ORDERED:

That Appellant's Motion is hereby granted, up to and including 31 July 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P. [redacted]
Digitally signed by VALDES.SARAH.P. [redacted]
Date: 2024.06.24 15:21:27 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	24 July 2024 CONSENT MOTION FOR THIRD ENLARGEMENT OF TIME Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, Petty Officer Third Class Samuel B. Ray (Appellant), through counsel, respectfully moves for a thirty-day enlargement of time to file matters until 30 August 2024. The current due date is 31 July 2024. This is Appellant's third enlargement of time. The Government consents to this motion.

There is good cause to grant this motion. Over the last month, Counsel received copies of the sealed materials in this case for review, assisted in the review of other filings submitted before this Court in other cases, managed the detailing of counsel for courts-martial and administrative separation boards, and provided legal advice to several senior members facing administrative investigations and administrative proceedings. Additionally, Counsel completed a Permanent Change of Station on 12 July 2024, including a several day pass-down of all Chief of Defense duties followed by the procurement of new duties and responsibilities pertaining to the new assignment.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a thirty-day enlargement of time.

DATE: 24 July 2024

SAVIANO.JENNIFER.SUE.[redacted] Digitally signed by SAVIANO.JENNIFER.SUE[redacted] Date: 2024.07.24 15:01:35 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 24 July 2024.

SAVIANO.JENNIFER.SUE.[redacted] Digitally signed by SAVIANO.JENNIFER.SUE.[redacted] Date: 2024.07.24 15:05:33 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, Appellant	25 July 2024 APPELLANT'S CONSENT MOTION FOR THIRD ENLARGEMENT OF TIME, FILED 24 JULY 2024 CGCMG 0403 DOCKET NO. 1498 ORDER

On consideration of Appellant's Consent Motion for Third Enlargement of Time, it is, by the Court, this 25th day of July, 2024,

ORDERED:

That Appellant's Motion is hereby granted, up to and including 30 August 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted]
Date: 2024.07.25 09:24:15 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	22 August 2024 CONSENT MOTION FOR FOURTH ENLARGEMENT OF TIME Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, Petty Officer Third Class Samuel B. Ray (Appellant), through counsel, respectfully moves for a thirty-day enlargement of time to file matters until 30 September 2024. The current due date is 30 August 2024. This is Appellant's fourth enlargement of time. The Government consents to this motion.

There is good cause to grant this motion. During the prior enlargement period, new counsel, LT [redacted] USCG, was detailed to this case. LT [redacted] completed the basic lawyer course and the Military Justice Orientation Course at the Naval Justice School and returned to duty on August 5, 2024. Although LT [redacted] has had less than 30 days to review this case, he has reviewed a substantial portion of the Record and has consulted with co-counsel. If granted, he will utilize the next enlargement to finish reviewing the record, consult with supervisory counsel, and draft the Assignment of Error brief. LT [redacted] has also assisted with other matters pending before this Court.

During this enlargement period, co-counsel was also working several environmental law

cases and issues and was out of the office on approved leave for approximately two-weeks.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a thirty-day enlargement of time.

DATE: 22 August 2024.

ALLEN.JUSTIN.SETH.[redacted] Digitally signed by ALLEN.JUSTIN.SETH[redacted] Date: 2024.08.22 13:02:50 -04'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

SAVIANO.JENNIFER.SUE.[redacted] Digitally signed by SAVIANO.JENNIFER.SUE.[redacted] Date: 2024.08.22 13:28:46 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 22 August 2024.

ALLEN.JUSTIN.SETH. [redacted] Digitally signed by ALLEN.JUSTIN.SETH [redacted] Date: 2024.08.22 13:03:22 -04'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

23 August 2024

APPELLANT'S CONSENT MOTION FOR FOURTH ENLARGEMENT OF TIME, FILED 22 AUGUST 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellant's Consent Motion for Fourth Enlargement of Time, it is, by the Court, this 23rd day of August, 2024,

ORDERED:

That Appellant's Motion is hereby granted, up to and including 30 September 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.08.23 09:19:06 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

23 August 2024

APPELLANT'S CONSENT MOTION FOR FOURTH ENLARGEMENT OF TIME, FILED 22 AUGUST 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellant's Consent Motion for Fourth Enlargement of Time, it is, by the Court, this 23rd day of August, 2024,

ORDERED:

That Appellant's Motion is hereby granted, up to and including 30 September 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.08.23 09:19:06 -04'00'
Sarah P. Valdes
Clerk of the Court

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

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 23 May 2024.

SAVIANO.JENNIFER.SUE.[redacted]
Digitally signed by SAVIANO.JENNIFER.SUE[redacted]
Date: 2024.05.23 15:58:08 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. RAY ME3 / E4 U.S. Coast Guard, *Appellant*	03 October 2024 CONSENT MOTION FOR LEAVE TO FILE CORRECTED BRIEF OUT OF TIME Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23 of this Court's Rules of Appellate Procedure, Maritime Enforcement Specialist Third Class Samuel B. Ray ("Appellant"), through counsel, respectfully moves this Court for leave to file a corrected brief out of time. Through undersigned counsel, Appellant mistakenly filed a draft copy of his brief at 2354 on 30 September 2024 through email. Counsel from the Office of Military Justice alerted Appellant to this mistake and recommended recalling the email. Appellant then recalled the email and refiled a version without editorial markings on 1 October 2024 at 0011, approximately eleven minutes past the filing date deadline.

Appellant recognizes that additional corrections are needed to assist this Court in its review. These changes, however, are editorial in nature only. No new arguments are raised, and Appellant has not added any supplemental authorities. Appellant has removed extraneous language, changed erroneous language, and corrected typographical errors.

At the Government's request, Appellant has provided to the Government a red-lined (track changes) version showing all proposed changes to be made, and if desired by the Court in

consideration of this Motion, Appellant can also provide the Court with a red-lined version showing all changes made.

Appellant's Corrected Assignments of Error and Brief is dated 3 October 2024 and is included as Appendix A to this motion. Counsel has coordinated with the Government, and the Government has consented to all changes and this Motion.

WHEREFORE, Appellant respectfully requests that this Court grant this Motion.

DATE: 3 October 2024.

ALLEN.JUSTIN.SE[redacted]
TH[redacted]
Digitally signed by ALLEN.JUSTIN.SETH[redacted]
Date: 2024.10.03 13:45:21 -04'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 3 October 2024.

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

03 October 2024

APPELLANT'S CONSENT MOTION FOR LEAVE TO FILE CORRECTED BRIEF OUT OF TIME, FILED 03 OCTOBER 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellant's Consent Motion for Leave to File Corrected Brief, it is, by the Court, this 3rd day of October, 2024,

ORDERED:

That Appellant's Motion is hereby granted.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted]
Date: 2024.10.03 15:17:13 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. SAMUEL B. RAY Maritime Law Enforcement Specialist (E-4) U.S. Coast Guard *Appellant*	22 October 2024 CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE A BRIEF ON BEHALF OF THE UNITED STATES Dkt. 1498 Case. No. CGCMG 0403 Before McClelland, Brubaker, and Parker Tried at Norfolk, VA by a General Court-Martial convened by Commander, U.S. Coast Guard District Seven on 26 June 2023 to 01 July 2023.

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

Pursuant to Rule 23.2 of the Court's Rules of Appellate Procedure, the United States, through undersigned counsel, hereby moves for a thirty-day enlargement of time to file an answer to Appellant's assignment of errors in the above-captioned case, which is currently due Monday, 04 November 2024.[1] This is the Government's first request for an enlargement of time. Appellant, through counsel, consents to the motion.

There is good cause to grant this motion. Since Appellant's filing, undersigned counsel has reviewed Appellant's arguments and begun review of the voluminous 3,037-page record of trial. Although counsel has made significant progress, further time is required to fully review all

[1] The Government calculates 04 November 2024 as thirty days from Appellant's filing of a corrected brief on 03 October 2024. The Government respectfully requests the Court clarify whether the thirty days should instead run from Appellant's original filing on 30 September 2024 or Appellant's subsequent filing on 01 October 2024.

pertinent portions of the record, carefully research the issues Appellant raises, and draft a comprehensive answer.

Accordingly, the Government respectfully requests an enlargement of time up to, and including, Wednesday, 04 December 2024, to file its Answer.

Respectfully submitted,

HAMERSKY.CHRISTOPHER.JAMES[redacted] Digitally signed by HAMERSKY.CHRISTOPHER.JAMES[redacted] 24.10.22 18:34:16 -04'00'

DATE: 22 October 2024

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and Special Victims' Counsel via email on 22 October 2024.

HAMERSKY.CHRISTOPHER.JAMES[redacted] Digitally signed by HAMERSKY.CHRISTOPHER.JAMES[redacted] Date: 2024.10.22 18:34:41 -04'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

23 October 2024

APPELLEE'S CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE A BRIEF, FILED 22 OCTOBER 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Appellee's Consent Motion for First Enlargement of Time, it is, by the Court, this 23rd day of October, 2024,

ORDERED:

That Appellee's Motion is hereby granted, up to and including 04 December, as requested by Appellee.

For the Court,
VALDES.SARA H.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] 024.10.23 10:43:16 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. SAMUEL B. RAY Maritime Law Enforcement Specialist (E-4) U.S. Coast Guard *Appellant*	26 November 2024 CONSENT MOTION FOR SECOND ENLARGEMENT OF TIME TO FILE A BRIEF ON BEHALF OF THE UNITED STATES Dkt. 1498 Case. No. CGCMG 0403 Before McClelland, Brubaker, and Parker Tried at Norfolk, VA by a General Court-Martial convened by Commander, U.S. Coast Guard District Seven on 26 June 2023 to 01 July 2023.

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

Pursuant to Rule 23.2 of the Court's Rules of Appellate Procedure, the United States, through undersigned counsel, hereby moves for a seven-day enlargement of time to file an answer to Appellant's assignment of errors in the above-captioned case, which is currently due Wednesday, 04 December 2024. This is the Government's second request for an enlargement of time. Appellant, through counsel, consents to the motion.

There is good cause to grant this motion. Since the last enlargement, undersigned counsel has completed review of the record and nearly completed drafting the Government's Answer. However, where observance of the coming holiday is expected to abbreviate the available time for review and editing, a seven-day enlargement would allow for complete review by supervisory counsel and revision by the undersigned.

Accordingly, the United States respectfully requests an enlargement of time up to, and including, Wednesday, 11 December 2024, to file its Answer.

Respectfully submitted,

HAMERSKY.CHRISTOPHER.JAMES [redacted]
Digitally signed by HAMERSKY.CHRISTOPHERJAMES.[redacted]
Date: 2024.11.26 13:53:44 -05'00'

DATE: 26 November 2024

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and Special Victims' Counsel via email on 26 November 2024.

HAMERSKY.CHRISTOPHER.JAMES [redacted]
Digitally signed by HAMERSKY.CHRISTOPHERJAMES [redacted]
Date: 2024.11.26 13:54:44 -05'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, *Appellant*	19 March 2024 MOTION FOR LEAVE TO FILE MOTION FOR ENLARGEMENT OF TIME TO PRODUCE ORDERED TRANSCRIPT Dkt. No. 1498 Case No. CGCMG 0403 Before McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June through 1 July 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard District Seven.

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

In accordance with Rule 23(d) of this Court's Rules, the United States, through undersigned counsel, hereby moves for a five-day enlargement of time in which to produce a verbatim transcript in the above captioned case. On 12 February 2024 the Court ordered the Government to produce a transcript within 45 days. The transcript is currently due by 28 March 2024.

Following the Court's order, quotes were obtained on 12 February 2024 and a vendor was selected. The request to authorize the expenditure of funds started on 14 February 2024 and received final approval on 21 February 2024. On 7 March 2024, the Government contacted the vendor for an update on the expected completion date. The vendor then indicated the transcript should be provided to the Government on 28 March 2024, which is the same date the transcript is due to this Court. Accordingly, the Government is filing the instant motion in the event that the

transcript is received late in the day or the vendor fails to produce a transcript in accordance with the terms of the contract.

Accordingly, the United States respectfully requests a five-day extension of time to produce the required transcript.

Respectfully submitted,

FOWLES.TED.R[redacted] Digitally signed by FOWLES.TED.ROBERT[redacted]
OBERT.[redacted]
[redacted] Date: 2024.03.19 18:27:42 -04'00'

DATE: 19 March 2024

Ted Fowles
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to this Honorable Court, opposing counsel, and Special Victims' Counsel on 19 March 2024.

FOWLES.TED.ROBERT.[redacted]
Digitally signed by FOWLES.TED.ROBERT[redacted]
Date: 2024.03.19 18:28:06 -04'00'

Ted Fowles
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	24 June 2024 MOTION FOR EXAMINATION OF SEALED MATERIALS Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.3 of this Court's Rules of Appellate Procedure, Petty Officer Third Class Samuel B. Ray (Appellant), through counsel, respectfully moves this Court to allow for the examination of the following sealed portions of the Record of Trial and related transcripts in this case:

1. Appellate Exhibit 34-38
2. Appellate Exhibit 41
3. Appellate Exhibit 57
4. Appellate Exhibit 69

Undersigned counsel respectfully requests authorization to examine these sealed materials in the Record of Trial under R.C.M. 1113(b)(3)(B). The examination is reasonably necessary for the undersigned counsel to properly fulfill her duties and responsibilities under the Coast Guard's

Legal Rules of Professional Conduct ("Rules").[1]

Rules 1.1 and 1.3 require the undersigned counsel to provide Appellant competent and diligent representation.[2] The Rules further require attorneys to represent clients thoroughly and do all preparation necessary for the representation.[3] It is reasonably necessary for the proper fulfillment of the undersigned counsel's obligations to Appellant under the Rules to examine the sealed materials in this case.[4] It is reasonably necessary because Appellate Defense Counsel must review the entire Record of the Trial in order to thoroughly determine if there is any prejudicial error that may have prevented Appellant from receiving a fair trial. All materials undersigned counsel is requesting to examine are critical in determining the factual and legal sufficiency of Appellant's convictions and the adequacy of his trial defense representation.

R.C.M. 1113(b)(4) defines "examination" to include "reading, inspecting, and reviewing." At this time, the undersigned counsel's request is limited to examining all requested materials and the related transcription.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for the examination of sealed materials.

DATE: 24 June 2024

SAVIANO.JENNIFE R.SUE. [redacted] Digitally signed by SAVIANO.JENNIFER.SUE [redacted] Date: 2024.06.24 14:38:14 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel

[redacted]

[1] COAST GUARD LEGAL RULES OF PROFESSIONAL CONDUCT, COMDTINST M5800.1 (2005).
[2] *Id.*
[3] *Id.*, Rule 1.3.
[4] *Id.*, Rule 1.1, 1.3.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 24 June 2024.

SAVIANO.JENNIFER.SUE.[redacted] Digitally signed by SAVIANO.JENNIFER.SUE.[redacted] Date: 2024.06.24 14:38:45 -04'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Samuel B. RAY**, ME3 / E4 U.S. Coast Guard, *Appellant*	29 April 2025 APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY Docket No.: 1498 Case No.: CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rule 23.4 of the Coast Guard Court of Criminal Appeals Rules of Practice and Procedure, Maritime Enforcement Specialist Third Class (ME3) Samuel B. Ray, through counsel, respectfully moves this Court to permit Appellant to cite the following court opinion as a supplemental authority during oral argument:

United States v. Campos, ____ M.J. ____ (C.A.A.F. 2025).

While the Appellant did cite to *Campos* in his Reply[1], at the time Appellant submitted his Reply, the Court of Appeals for the Armed Forces (CAAF) had not yet issued its opinion in this case. The CAAF's opinion is relevant to the second issue to be discussed during oral argument. This Court should consider this supplemental authority because it provides the Court the opportunity to further develop and focus the parties' positions on Issue II.

[1] Appellant's Reply at 5.

This Court granted oral argument on whether the military judge erred by allowing this crime victim statement to be presented during sentencing under R.C.M. 1001(c)(5) when the accused was convicted of a crime with no victim. The CAAF's opinion in *Campos* is relevant to the granted issue related to unsworn crime victim statements because the CAAF outlines what may be included in a victim's impact statement,[2] the differences between a victim's impact statement and evidence in aggravation[3], and the prejudice factors in determining if relief can be granted.[4]

In *Campos*, the appellant was convicted of three specifications, in accordance with his pleas, of violating Article 128, UCMJ.[5] In the victim's unsworn statement, the victim referenced several incidents of misconduct which included turning off the internet, having her phone taken, yelling, and additional instances of violence for which the appellant was not convicted.[6] The victim ended her unsworn statement stating that "I am standing here telling all of you what type of person [the Appellant] is and how he impacted me. I want to ensure he never does this to anyone else when he is released."[7]

The appellant in *Campos* objected to these portions of the unsworn victim impact statement as these statements were improper allegations of misconduct with "no direct relation" to the offenses to which he had pleaded guilty.[8] The Military Judge overruled the objection stating that these portions of the unsworn statement showed a continuous course of conduct regarding similar crimes, against the same victim, in the same location, and in a close

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[2] *Campos*, ___ M.J. at *4.
[3] *Id*. at *6.
[4] *Id*. at *4.
[5] *Id*. at *2.
[6] *Id*. at *2-3.
[7] *Id*. at *3.
[8] *Id*.

timeframe.[9] The CAAF rejected these arguments and found that the Military Judge abused his discretion when he admitted these portions of the unsworn statement.[10]

The CAAF reiterated that R.C.M. 1001(c) states that the content of these statements may only include victim impact and matters in mitigation and the victim impact includes financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.[11] The CAAF also stated the definition of "victim impact" in R.C.M. 1001(c)(2)(B) includes two distinct elements: *the offenses of which the accused has been found guilty* and the impacts of those offenses on the victim.[12]

The CAAF further stated the court will grant relief only if the military judge abused his discretion in rejecting objections to a victim's unsworn statement if the improper portion of the victim impact statement "substantially influenced the adjudged sentence."[13] To determine if the improperly admitted evidence substantially influenced the sentence, the court considers four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question."[14]

The CAAF reasoned that the accusations of uncharged misconduct addressed neither the offenses of which Appellant was found guilty nor the impact of those offenses; therefore, these accusations of uncharged conduct were not "victim impact" within the meaning of R.C.M. 1001(c)(2)(B) and including these accusations in the unsworn statement violated R.C.M. 1001(c)(3).[15] The CAAF also stated that the victim description of the uncharged misconduct

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[9] *Id*.
[10] *Id*. at *4.
[11] *Id*. (emphasis added).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

appears to be relevant only to understand Appellant's character which, again, is not "victim impact" as defined in R.C.M. 1001(c)(2)(B).[16]

Lastly, when analyzing the four factors to assess prejudice, the CAAF found that the strength of the government's case and the strength of the defense's case did not weigh in the appellant's favor because he pleaded guilty and made a stipulation of fact.[17] Concerning the third factor, the materiality of the evidence, the CAAF stated the materiality was low because it added little to the more egregious violent conduct in which the appellant pleaded guilty to committing.[18] Finally, the CAAF found the quality of the accusations to be low quality accusations because they were not sworn, not tested by cross-examination, very brief, and contained little or no detail about the harm they may have caused.[19] After weighing these four factors, the CAAF found there was no prejudice and that the findings and sentence must be affirmed.

This supplemental authority will aid this Court in its review of Issue II for oral argument.

WHEREFORE, Appellant respectfully requests that this Court grant this motion.

Respectfully submitted.

ALLEN.JUSTIN.SE[redacted]
TH[redacted]
Digitally signed by ALLEN.JUSTIN.SETH[redacted]
Date: 2025.04.29 16:58:23 -04'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

[16] *Id.* at *5.
[17] *Id.* at *6.
[18] *Id.*
[19] *Id.* at *7.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and the special victim's counsel via email on 29 April 2025.

ALLEN.JUSTIN.SETH[redacted]
Digitally signed by ALLEN.JUSTIN.SETH[redacted]
Date: 2025.04.29 16:58:58 -04'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, Appellant	07 May 2025 APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY, FILED 29 APRIL 2025 CGCMG 0403 DOCKET NO. 1498 ORDER

On consideration of Appellant's Motion to Cite Supplemental Authority, it is, by the Court, this 7th day of May, 2025,

ORDERED:

That Appellant's Motion is hereby granted.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] 5.07 11:58:46 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. SAMUEL B. RAY Maritime Law Enforcement Specialist (E-4) U.S. Coast Guard *Appellant*	9 May 2025 UNITED STATES' MOTION TO CITE SUPPLEMENTAL AUTHORITIES Dkt. 1498 Case. No. CGCMG 0403 Before McClelland, Brubaker, and Parker Tried at Norfolk, VA by a General Court-Martial convened by Commander, U.S. Coast Guard District Seven on 26 June 2023 to 01 July 2023.

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

Pursuant to Rule 23.4 of the Court's Rules of Practice and Procedure, the United States herein moves this Court to permit the Government to cite the following cases as supplemental authorities during oral argument:

1. *United States v. Hamilton*, 82 M.J. 530 (A. Ct. Crim. App. 2022), *review denied*, 82 M.J. 423 (C.A.A.F. 2022).

2. *United States v. Helems*, No. 202100278, 2023 WL 1879324 (N-M. Ct. Crim. App. Feb. 10, 2023).

3. *United States v. Taylor*, No. ACM 40371, 2024 WL 3597025 (A.F. Ct. Crim. App. July 31, 2024), *review granted in part*, No. 24-0234/AF, 2024 WL 5077705 (C.A.A.F. Nov. 20, 2024).

4. *United States v. Cortez*, No. 202300166, 2024 WL 5162766 (N-M. Ct. Crim. App. Dec. 19, 2024).

These four cases are relevant because they either: (1) pertain to the Court's direction at the 7 May 2025 Pre-Oral Argument Counsel Meeting to be prepared to discuss the standards of

review on Issue I in light of *United States v. Shafran*, No. 24-0134, 2025 WL 1132747 (C.A.A.F. Apr. 15, 2025) and *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004); or (2) comprise newly decided law by a sister Court of Criminal Appeals (CCA) pertinent to Issue II.

Although *Hamilton*, *Helems*, and *Taylor* contain no extensive analysis of Rule for Courts-Martial 905 (2019 ed.) (R.C.M.) like in this Court's decision in *United States v. Shafran*, 84 M.J. 548 (C.G. Ct. Crim. App. 2024), they are nonetheless relevant because they illustrate how the Army, Navy-Marine Corps, and Air Force CCAs all continued reviewing specifications challenged after trial for plain error.[1] Each case involved specifications for offenses when the 2019 edition of R.C.M. 905 seemingly applied. *See Hamilton*, 82 M.J. at 531-533; *Helems*, 2023 WL 1879324, at *1-2; *Taylor*, 2024 WL 3597025, at *1-2, 16. These contrast with this Court's decision in *Shafran*, wherein this Court found the applicable R.C.M. required de novo review. 84 M.J. at 556.[2] The Government maintained in its briefing at CAAF that plain error was the appropriate standard[3] but CAAF found resolution of the question to be unnecessary at the time.[4] Accordingly, where the Government recognizes that the Court's en banc decision in *Shafran* is binding but CAAF has also acknowledged this as a live issue, the Government would cite the above three cases, the Court's highlighting of *Quinn*, and already-cited precedent from CAAF to help inform the discussion on the standard of review.

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[1] The Court of Appeals for the Armed Forces (CAAF) has granted partial review of *Taylor*, but strictly regarding the involuntary ordering of reservists onto active duty for trial by court-martial, not the Air Force CCA's standard for failure to state an offense. *See Taylor*, 2024 WL [redacted]

[2] The Air Force *Taylor* decision is therefore especially notable because it actually cited this Court's original *Shafran* decision when discussing standards for specification sufficiency, suggesting they were fully aware that this Court utilized a de novo standard when reviewing claims of failure to state an offense but nonetheless continued using the plain error standard themselves. *Taylor*, 2024 WL 3597025, at *17 n.25.

[3] United States' Answer at 5 n.1.

[4] *Shafran*, 2025 WL 1132747, at *2.

Additionally, highly relevant to Issue II, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *Cortez* one day after Appellant submitted his reply brief. *Cortez*, 2024 WL 5162766, at *1. There, an enlisted Marine was convicted in part of violating Article 92, UCMJ, 10 U.S.C. § 892 for fraternizing with a female officer in violation of Navy regulations. *Cortez*, 2024 WL 5162766, at *1. The two had "an intimate relationship" over several months that ended when the officer reported herself to her commanding officer. *Id.* Over the defense's objection that the officer was "a willing participant in . . . the fraternization offense" and so should not qualify as a crime victim, the military judge found that the officer indeed qualified as a victim and was entitled to present a victim impact statement. *Id.* at *2. On review, the NMCCA found that the military judge did not abuse his discretion, relying on *United States v. Da Silva*,[5] the same case that the military judge here utilized to determine that [redacted] was a qualifying crime victim. *See Cortez*, 2024 WL 5162766, at *4; United States' Answer at 18-19. Accordingly, where Appellant asserts the victim's impact statement was improper in part due to her "possible" consent, *Cortez* is squarely on point and relevant to Issue II.

[SPACE INTENTIONALLY LEFT BLANK]

[5] No. ACM 39599, 2020 WL 3468282, at *17 (A.F. Ct. Crim. App. June 25, 2020).

CONCLUSION

For all the reasons set forth above, the United States respectfully requests this Court grant this motion to cite supplemental authorities.

DATE: 9 May 2025

HAMERSKY.CHRISTOPHER.JAMES [redacted] Digitally signed by CHRISTOPHER.JAMES [redacted] 05.09 17:22:53 -04'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

ULAN.ELIZABETH.MARIE [redacted] Digitally signed by ULAN.ELIZABETH.MARIE [redacted] Date: 2025.05.09 17:26:16 -04'00'

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was delivered to the Court, opposing counsel, and Special Victims' Counsel via e-mail on 9 May 2025.

DATE: 9 May 2025

HAMERSKY.CHRISTOPHER.JAMES [redacted] Digitally signed by HAMERSKY.CHRISTOPHER.JAMES [redacted] 5.09 17:23:17 -04'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

12 May 2025

APPELLEE'S MOTION TO CITE SUPPLEMENTAL AUTHORITY, FILED 09 MAY 2025

CGCMG 0403

DOCKET NO. 1498

ORDER

Appellee moves to cite supplemental authorities during oral argument, including three cases from other courts of criminal appeals illustrating that those courts have reviewed specifications challenged after trial for plain error. These three cases either predate the most recent change to Rule for Courts-Martial (R.C.M.) 905, mentioned in *United States v Shafran*, No. 24-0134 (C.A.A.F. Apr. 15, 2025), or do not discuss R.C.M. 905 at all. Therefore, they are not useful in analyzing the standard of review for Issue I as it may be affected by the recent change to R.C.M. 905.

Accordingly, it is, by the Court, this 12th day of May, 2025,

ORDERED:

That Appellee's Motion is granted as to United States v Cortez, and denied as to all others.

For the Court,
VALDES.SA RAH.P. [redacted] Digitally signed by [redacted] Date: 2025.05.12 1:53:14 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. Ray ME3 / E4 U.S. Coast Guard, *Appellant*	9 February 2024 NOTICE OF APPEAL Dkt. Case No. _____ Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven.

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

Maritime Enforcement Specialist Third-Class Samuel B. Ray, U.S. Coast Guard (Appellant), hereby notifies the Court that he appeals the findings and sentence of the general court-martial convened by Commander, U.S. Coast Guard District Seven that concluded on 1 July 2023. This Court has jurisdiction over this appeal pursuant to 10 U.S.C. 866(b)(1) (effective Dec. 23, 2022). Appellant was notified of his right to appeal on 16 January 2024. This notice is therefore timely.

Respectfully submitted:

DATE: 9 February 2024

SAVIANO.JENNIFER.SUE.[redacted]
Digitally signed by SAVIANO.JENNIFER.SUE.[redacted]
Date: 2024.02.09 16:41:12 -05'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to the U.S. Coast Guard Appellate Government Office and Special Victim's Counsel on 9 February 2024.

SAVIANO.JENNIFER.SUE[redacted]
Digitally signed by SAVIANO.JENNIFER.SUE[redacted]
Date: 2024.02.09 16:41:47 -05'00'

Jennifer S. Saviano
CDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, Appellant	12 February 2024 ORDER FOR TRANSCRIPT; BRIEFING SCHEDULE CGCMG 0403 DOCKET NO. 1498 ORDER

The Court having received Appellant's Notice of Appeal, it is, by the Court, this 12th day of February 2024,

ORDERED:

That the Government, consistent with Coast Guard Rule of Appellate Procedure 6.3, produce a verbatim transcript within 45 days of this order.

Appellant's Brief and Assignments of Error are due 60 days from when a complete record of trial, including verbatim transcript, has been provided to the Court and a copy has been provided to Appellate Defense Counsel.

The Government's Answer is due 30 days after the filing of such brief.

Appellant may file a Reply Brief no later than 7 days after the filing of such answer.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted]
Date: 2024.02.12 14:53:45 -05'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, Appellant	11 March 2025 SUA SPONTE ORDER FOR TRANSCRIPT CGCMG 0403 DOCKET NO. 1498 ORDER

The transcript, at line 19 of page 1050, indicates in brackets that Appellate Exhibit LXXXV was read to the court-martial. However, that indication is shown to be false when the audio recording of the proceeding is compared with Appellate Exhibit 85.

In accordance with Rule of Appellate Procedure 6(c), it is, by the Court, this 11th day of March, 2025,

ORDERED:

That the Government shall correct the omission in the transcript by producing a transcription of the content of the audio recording that occurred after line 18 and before line 20 of page 1050 of the transcript. The transcript shall be provided to the Court within 15 days of this order.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] Date: 2025.03.11 10:15:09 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Samuel B. RAY
Maritime Enforcement Specialist
Third Class (E-4)
U.S. Coast Guard,
Appellant

22 March 2024

GOVERNMENT'S MOTION FOR LEAVE TO FILE MOTION FOR ENLARGEMENT OF TIME TO PRODUCE TRANSCRIPT, FILED 19 MARCH 2024

CGCMG 0403

DOCKET NO. 1498

ORDER

On consideration of Government's Motion, it is, by the Court, this 22nd day of March, 2024,

ORDERED:

That the Motion for Leave to File is hereby denied as unnecessary.

That the Motion for Enlargement of Time is hereby granted, up to and including 2 April 2024.

For the Court,
VALDES.SARAH.P. [redacted]
Digitally signed by VALDES.SARAH.P. [redacted]
Date: 2024.03.22 10:01:57 -04'00'
Sarah P. Valdes
Clerk of the Court

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

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. RAY ME3 / E4 U.S. Coast Guard, *Appellant*	18 December 2024 APPELLANT'S REQUEST FOR ORAL ARGUMENT Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Pursuant to Rules 23 and 25 of the Joint Rules of Appellate Procedure, Maritime Enforcement Specialist Third Class (ME3) Samuel B. Ray, through counsel, hereby requests this Court order oral argument for the following assignments of error:

I.

WHETHER CHARGE III FAILS TO STATE AN OFFENSE WHERE IT FAILS TO ALLEGE SPECIFIC CONDUCT PROHIBITED BY THE ORDER.

II.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING A CRIME VICTIM STATEMENT TO BE PRESENTED DURING SENTENCING UNDER R.C.M. 1001(C)(5) WHEN THE ACCUSED WAS CONVICTED OF A CRIME WITH NO VICTIM.

This Court should order oral argument because oral argument would provide the opportunity to develop and focus the parties' positions on these issues.

WHEREFORE, Appellant respectfully requests that this Court grant the instant motion.

Respectfully submitted,

ALLEN.JUSTIN.[redacted]
SETH.[redacted]

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Date: 2024.12.18 20:06:59 -05'00'

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and the special victim's counsel via email on 18 December 2024.

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IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Samuel B. RAY Maritime Enforcement Specialist Third Class (E-4) U.S. Coast Guard, Appellant	20 March 2025 APPELLANT'S REQUEST FOR ORAL ARGUMENT, FILED 18 DECEMBER 2024 CGCMG 0403 DOCKET NO. 1498 ORDER

On consideration of Appellant's Request for Oral Argument, it is, by the Court, this 20th of March, 2025,

ORDERED:

That Appellant's Request for Oral Argument is hereby granted as to the following issues.

I. Whether Charge III fails to state an offense where it fails to allege specific conduct prohibited by the order.

II. Whether the military judge erred by allowing a crime victim statement to be presented during sentencing under R.C.M. 1001(c)(5) when the accused was convicted of a crime with no victim.

The Court will hear argument on **13 May 2025 at 1300** hours. The Oral Argument will take place at the Court of Criminal Appeals Courtroom, [redacted]

For the Court,
VALDES.SARAH.P[redacted]
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Date: 2025.03.20 10:08:42 -04'00'
P. Valdes
Clerk of the Court

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IN THE UNITED STATES
COAST GUAR-*D COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. RAY ME3 / E4 U.S. Coast Guard, *Appellant*	18 December 2024 APPELLANT'S REPLY Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

COMES NOW, Maritime Enforcement Specialist Third Class Samuel B. Ray, in Reply to the Government's Answer.

While the Government's Answer provides additional citations to sister courts for non-binding authority, it overlooks much of this Court's decision in *Richard*.[1] Broadly, this Court held that a person is deprived of constitutionally required notice when he is found guilty of a specification that fails to identify an *actus reus*.[2] The lack of a specific act in the relevant Specification, coupled with multiple allegations in multiple locations, created a deficient specification which deprived Appellant of his constitutionally required notice.

[redacted] the complaining witness, was not a victim of the offense for which Appellant was convicted. But even if this Court finds the Military Judge did not abuse his discretion in allowing [redacted] to submit a victim impact statement, the contents of [redacted] victim impact statement fell outside of the scope outlined in R.C.M. 1001(c)(2).

A. The Sole Specification of Charge III is Deficient, as it Fails to State an Offense because it Fails to Allege a Specific Act.

The Government incorrectly asserts that the sole specification of charge III (hereafter referred to as the "Specification") is proper because it includes all elements of a violation under Article 92, UCMJ. [3] The Government buttresses this point by citing to *Fosler*, stating a specification's notice is sufficient if it contains the elements of the offense charged, fairly informs a defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.[4] The Government goes on to list the

[1] *United States v. Richard*, 84 M.J. 586 (C.G. Ct. Crim. App. 2024).
[2] *See Richard*, 84 M.J. at 589.
[3] Government's Answer at 4-5.
[4] *See* Government's Answer at 5 (quoting *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing *United States v. Sell*, 11 C.M.R. 202, 206 (1953)).

three elements of a violation of Article 92, UCMJ, and then proceeds to mistakenly conclude that the Specification is not deficient.[5]

The Government is mistaken for several reasons. First, the Government falls victim to the "necessary but not sufficient" fallacy. The Government mistakenly assumes that certain requirements that are necessary for a valid Article 92, UCMJ, specification are themselves sufficient to guarantee a properly drafted Article 92, UCMJ specification.[6]

According to the 2019 edition of the *Manual for Courts-Martial* (MCM), the elements of a violation of a general lawful order or regulation are that there was in effect a certain lawful order or regulation, that the accused had a duty to obey it, and that the accused violated or failed to obey the order or regulation.[7] The sample specification in the MCM is as follows:

> In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (violate) (fail to obey) a lawful general (order) (regulation) which was (his)(her) duty to obey, to wit: paragraph __ (Army) (Air Force) Regulation, dated ____) (Article, U.S. Navy Regulations, dated __) (General Order No.__, U.S. Navy, dated ____) (_____), by (wrongfully_____).[8]

The Sole Specification of Charge III: Violation of the UCMJ, Article 92 was charged as follows:

> Specification (Violating a General Order): In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place.[9]

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[5] *See* Government's Answer at 6-7.
[6] *Id.*
[7] MCM, pt. IV, para. 18b.(1) (2019 ed).
[8] MCM, pt. IV, para. 18e.(1) (2019 ed).
[9] Appellate Ex. 46 (emphasis added).

Appellant concedes that the drafted specification in question tracks closely with the sample specification found in the MCM.[10] However, as in *Richard*, the Government missed the point of the model specifications requiring a specific act. In *Richard*, this Court stated that the Government "missed the point: the model specification calls for alleging that the accused murdered someone by doing a specific thing—like 'by means of shooting him with a rifle'."[11] This Court went on to reference the Military Judges' Benchbook and how the Benchbook urges more precision than the drafted specification.[12] The Government in its Answer states that the Appellant conflated the model specification with the model findings instructions; however, this was not a conflation of ideas, it was an intentional adherence to this Court's opinion in *Richard*.[13]

More precision was required when drafting the Specification in question because of multiple allegations of conduct that could be considered sexually intimate behavior that was alleged to have occurred in multiple rooms over the course of several hours. Here, just like in *Richard*, the Government refused to confine itself to any particular acts and in essence, "blocked potential cures to the lack of notice."[14]

The Government concedes that sexually intimate behavior is not specifically defined within U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020) (hereafter referred to as "Commandant Instruction").[15] If sexually intimate behavior is not specifically defined within the Commandant

[10] *Compare* MCM, pt. IV, para. 18e.(1) (2019 ed) *with* Appellate Ex. 46.
[11] *Richard*, 84 M.J. at 590.
[12] *Id.*
[13] Government's Answer at 6.
[14] *Richard*, 84 M.J. at 590.
[15] Government's Answer at 8.

Instruction, the Government must be more precise in its drafting of the Specification regarding what specific conduct qualifies as sexually intimate behavior.[16]

If the Government had alleged specific conduct, the Appellant could have tailored his defense to the specific conduct alleged. Instead, and in light of the other alleged specifications, Appellant was forced to use a combination of defenses, which ultimately led to a guilty finding on the Specification in question. Furthermore, the Government needed to enumerate specific conduct because without specifying what specific conduct the Members found the Appellant guilty of, this Court cannot successfully perform its legal or factual review of the conviction.

B. The Sole Specification of Charge III was Sufficiently Challenged at Trial, and therefore, the Specification Should be Viewed Narrowly and Not Liberally.

At the trial level, Appellant challenged the sufficiency of the Sole Specification of Charge III by moving the court to compel a bill of particulars.[17] In denying Appellant's motion, the Military Judge ruled the challenged specification was legally sufficient.[18] As such, because Appellant first challenged this specification at trial, it should be narrowly construed on appeal.[19]

In addition, to the extent the Government in its Answer implies that this Court should apply a plain error standard, Appellant disagrees. This Court correctly applied a *de novo* standard in *Shafran*.[20] The Government did not certify an issue relating to the standard of review before the Court of Appeals for the Armed Forces (CAAF) nor did the CAAF grant review on the issue of applying the correct standard of review.[21] CAAF granted review on an entirely different matter.[22]

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[16] Government's Answer at 10.
[17] Appellate Ex. 25.
[18] Appellate Ex. 28 at 3.
[19] *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020).
[20] Order Granting Petition for Review, *United States v. Shafran*, No. 24-0134/CG (Sept. 19, 2024).
[21] *Id.*
[22] *Id.*

Currently, the law is when a specification is challenged for sufficiency, the court uses a *de novo* standard of review.[23]

C. The Military Judge Abused his Discretion Both When He Allowed the Complaining Witness to Submit a Victim Impact Statement and When he Allowed the Statement's Contents to Exceed the Scope of the Charge to which the Appellant was Found Guilty.

Under R.C.M. 1001(c)(2)(a), a crime victim is "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." In this case, the offense is an Article 92, UCMJ violation (Violating a General Order).[24] Because [redacted] was not named in any crime the Appellant was convicted of, did not suffer impacts from any crime the Appellant was convicted of, and because an Article 92, UCMJ violation is not a crime that requires a victim [redacted] is not a crime victim under R.C.M. 1001(c)(2)(a).

Furthermore, victim impact statements are not evidence and, therefore, not subject to the protective limitations of the evidentiary rules.[25] Consequently, victim impact statements are policed solely by the definitional parameters of R.C.M. 1001(c), which military judges have a strict obligation to enforce.

Currently, before the CAAF is *United States v. Campos*, where the court is asked to consider if the military judge abuse his discretion by admitting and considering, over defense objection, allegations of additional misconduct relating to domestic violence in the unsworn victim impact statement.[26]

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[23] *See Turner*, 79 M.J at 404.
[24] Charge Sheet at 3.
[25] *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021).
[26] Order Granting Petition for Review, *United States v. Campos*, No. 24-0138/MC (Argued Dec. 11, 2024).

Similarly, in this case the military judge did not ensure the victim impact statement complied with the parameters of a victim impact statement as defined by R.C.M. 1001(c). Over the trial defense counsel's objection, the Military Judge allowed [redacted] to discuss her social, psychological, and medical state which did not "directly relat[e] to or aris[e] from the offense of which the accused [was] found guilty."[27]

In her unsworn statement, [redacted] stated that she is "still dealing with the embarrassment of having my hair shorn off because it was so caked with semen and the humiliation of having my body swabbed and medically examined."[28] [redacted] also stated that she was "still dealing with the effects of the [redacted] medication on my [redacted] system causing me lots of pain and problems, including four ER visits due to severe lymphatic swelling in my right breast…" and "I am still recovering from the pain I felt when I fell to the ground after what happened, where I fractured my wrist and had to wear a cast for nearly ten weeks."[29] These claimed impacts are directly related to offenses for which the Appellant was found not guilty – the very opposite condition of what R.C.M. 1001(c) limits.

CONCLUSION

The lack of alleging a specific act in the sole specification of Charge III rendered this Specification defective. Charging Appellant with engaging in sexually intimate behavior in violation of the Commandant Instruction — without alleging any specific act, failed to adequately notice the Appellant of the conduct he had to defend against. Furthermore, the Military Judge did not ensure the complaining witness, was a crime victim under R.C.M. 1001(c)(2), and the Military Judge erred when he allowed the contents of the victim impact

[27] R.C.M. 1001(c)(2)(B).
[28] Appellate Ex. 84.
[29] *Id.*

statement to exceed the scope of R.C.M. 1001(c)(2). For these reasons Appellant respectfully requests this Court set aside the findings as to the sole specification of Charge III and reinstate Appellant's Rank to E4.

Respectfully Submitted,

ALLEN.JUSTIN.SETH[redacted]
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Date: 2024.12.18 20:00:19 -05'00'

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and the special victim's counsel via email on 18 December 2024.

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Justin Allen
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Appellate Defense Counsel
[redacted]

APPELLATE BRIEFS

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Samuel B. RAY ME3 / E4 U.S. Coast Guard, *Appellant*	30 September 2024 APPELLANT'S ASSIGNMENTS OF ERROR AND BRIEF Docket No. 1498 Case No. CGCMG 0403 Before: McClelland, Brubaker, Parker Tried at Norfolk, VA on 26 June 2023 through 1 July 2023 before a General Court Martial convened by Commander, U.S. Coast Guard District Seven

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

Justin Allen
LT, USCG
Appellate Defense Counsel
[redacted]

ISSUES PRESENTED

I.

WHETHER CHARGE III FAILS TO STATE AN OFFENSE WHERE IT FAILS TO ALLEGE SPECIFIC CONDUCT PROHIBITED BY THE ORDER.

II.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING A CRIME VICTIM STATEMENT TO BE PRESENTED DURING SENTENCING UNDER R.C.M. 1001(C)(5) WHEN THE ACCUSED WAS CONVICTED OF A CRIME WITH NO VICTIM.

Statement of Statutory Jurisdiction

This case is within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1) (effective 23 December 2022), as Appellant was provided notice of his right to appeal on 16 January 2024 and timely filed this appeal on 9 February 2024.[1]

Statement of the Case

A general court-martial consisting of a panel of members convicted Appellant, contrary to his pleas, of violating Article 92, UCMJ (Violating a General Order).[2] Appellant was acquitted of violating Article 120, UCMJ (Abusive Sexual Contact) and Article 128, UCMJ (Assault Consummated by a Battery).[3]Appellant was sentenced to a reduction to E-2, 60 days of hard labor, and 60 days of restriction.[4] The Convening Authority approved the findings and sentence, which the Military Judge entered into judgment.[5]

[1] Notice of Rights of Appeal.
[2] Statement of Trial Results at 2.
[3] Statement of Trial Results at 2.
[4] Post Trial Action at 2, 5.
[5] Post Trial Action at 2.

Statement of Facts

In March of 2022, Appellant was assigned to U.S. Coast Guard Station Mayport, while [redacted] was assigned nearby to Sector Jacksonville, Florida.[6] [redacted] and Appellant, whom previously shared an intimate relationship, occasionally worked together when [redacted] came to the Station for training or to finish other work.[7] Their romantic relationship escalated to sexual activities which, at times, occurred in the Station's Maritime Enforcement (ME) [redacted][8]

On 18 March 2022, while working in the Mayport Sector Room (a room used to store ME gear) Appellant entered the room wearing basketball shorts.[9] [redacted] claims Appellant blocked the door and thanked her for sending him nude pictures, which she claimed she never sent [10] [redacted] claims Appellant made additional sexual comments alluding to receiving oral sex like "I know you want me to be in your mouth," and "I can hear you swallowing."[11] [redacted] stated she rebuffed his request for oral sex, then Appellant put his hand on her neck and stated, "open your mouth".[12]

After a period of time, [redacted] and Appellant relocated to the ME Bay which was occupied by several non-rate members.[13] The non-rates soon left and [redacted] claims Appellant then made more comments alluding to oral sex.[14] [redacted] then claims Appellant took out his erect penis and again repeated "[o]pen your mouth. I'm going to fucking do it."[15] [redacted] claims that Appellant

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[6] R. at 2470-72
[7] R. at 2473.
[8] R. at 2473.
[9] R. at 2489.
[10] R. at 2495.
[11] R. at 2496.
[12] R. at 2497-98.
[13] R. at 2500, 2505.
[14] R. at 2508-09.
[15] R. at 2509-10

pulled her hair down with his left hand and placed his penis on her shoulder to ejaculate.[16] A DNA match to Appellant's semen was determined to be on [redacted] shirt, shoulder, back, and hair.[17]

After the ejaculation [redacted] noted Appellant wiped the residual semen from his right hand across her mouth, then Appellant "wiped off quite a bit of his semen [from her mouth]. And threw it in the trash can."[18] Shortly thereafter, the non-rates returned to the ME3 [redacted] for training.[19] [redacted] claims the entire interaction with Appellant was without her consent.[20]

Appellant was charged with one violation of Article 120, Abusive Sexual Contact, for touching [redacted] shoulder with his penis for sexual gratification without her consent; two violations of Article 128, Assault Consummated by a Battery, for unlawfully touching [redacted] shoulder and neck with his semen, and unlawfully touching [redacted] neck with his hand; and one violation of Article 92, a violation of a Lawful General Order for wrongfully engaging in sexually intimate behavior in a Coast Guard controlled work place.[21]

The Coast Guard Discipline and Conduct Manual provides the following as it pertains to Charge III:[22]

[16] R. at 2510.
[17] R. at 2606.
[18] R. at 2512.
[19] R. at 2512.
[20] R. at 2512.
[21] Charge Sheet at 3.
[22] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020).

2.A.2.g. Prohibited Relationships, Communications, Conduct, and Contact

(1) Policy. Coast Guard policy prohibits the following relationships, communications, conduct, or contact regardless of rank, grade, or position of the persons involved:

(a) Engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled work place,

(b) Romantic relationships outside of marriage between commissioned officers and enlisted personnel. For the purposes of this paragraph, Coast Guard Academy (CGA) cadets and officer candidates (both OCS and ROCI) are considered officers.

(c) Personal and romantic relationships between instructors at entry level accession programs and other training commands, and students.

The Manual then proceeds to list Subparts (d) – (f) as more prohibited *relationships* and includes a punitive note in Section (2) stating these provisions are a punitive general regulation which is punishable under Article 92, UCMJ.[23] In contrast, Charge III notes that Appellant violated a lawful general order, paragraph 2.A.2.g. of the Discipline and Condict (manual), "by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place."[24]

After reviewing the Charges, Trial Defense Counsel requested a Bill of Particulars, noting "[w]ithout more particular notice as to these matters, [Appellant] faces significant challenges in adequately preparing his defense."[25] The breakdown of the Charges is as follows:

	Charge I	Charge II Specification 1	Charge II Specification 2	Charge III
Personal Jurisdiction	In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard,	In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard,	In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard,	In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard,

[23] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020).
[24] Charge Sheet at 3.
[25] Appellate Ex. 26 at 6.

Date and Location of the Alleged Offense	did, at or near Jacksonville, FL, on or about 18 March 2022,	did, at or near Jacksonville, FL, on or about 18 March 2022,	did, at or near Jacksonville, FL, on or about 18 March 2022,	did, at or near Jacksonville, FL, on or about 18 March 2022,
Words of criminality		unlawfully	unlawfully	violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully
Sufficient Specificity of Essential Facts	touch the shoulder of [redacted] with ME3 Ray's body part to wit: his penis.	touch [redacted] on the shoulder and neck with his semen.	touch [redacted] on the neck with his hand."	engaging in sexually intimate behavior.
Additional Elements				in a Coast Guard-controlled work place.

When the Government refused to provide a Bill of Particulars,[26] Defense Counsel filed a Motion to Compel alleging Charge III did not specify the conduct the Government was charging as sexually intimate behavior, and "a bill of particulars is necessary to put the [Appellant] on notice of the charges against him, allow him to prepare a proper defense, and to protect against double jeopardy."[27] In their response, the Government noted they had outlined all the elements of the charged offense, provided robust discovery, and narrowed the scope to a specific date and location "utilizing all the definitions available in the Coast Guard's Discipline and Conduct Manual[28]." At the Article 39(a) hearing, Defense Counsel, listed nine different actions, which included communications, non-contact conduct, and contact conduct, that could qualify as

[26] Appellate Ex. 26 at 8.
[27] Appellate Ex. 25 at 1.
[28] Appellate Ex. 27 at 3.

"sexually intimate behavior."[29] The Government stated they "believe that all of that conduct, as a whole, is inextricably intertwined and can be considered by fact finder to qualify as sexually intimate behavior."[30]

The Military Judge denied the Bill of Particulars,[31] finding that "notice provided by Trial Counsel at the motions hearing, provides 'sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense.'"[32] The Military Judge's ruling also stated "[t]he Government provided notice that **it considers all acts by ME3 Ray** that occurred in either the Sector enforcement room or ME room on 18 March 2022 **that may constitute 'wrongful sexually intimate behavior' to be encompassed by the specification**. The Government stated that the **acts may include both the statements and actions of ME3 Ray** …. By ordering further specificity, the Court would risk unnecessarily '[forcing] a detailed disclosure of [the] acts underlying [the charge, or [restricting] the [g]overnment's proof at trial.'".[33]

The Members acquitted Appellant of Charge I and Charge II, yet found him guilty of Charge III, the Article 92 offense. In other words, the Members did not find that Appellant touched the shoulder of [redacted] without her consent with his penis, or that he touched [redacted] shoulder with his semen or her neck with his hand. However, even with these finding of not

[29] R. at 1832-33.
[30] R. at 1837.
[31] Appellate Ex. 28 at 4.
[32] Appellate Ex. 28 at 3.
[33] Appellate Ex. 28 at 3 (emphasis added).

guilty, the Military Judge, over the Trial Defense Counsel's objections, still allowed [redacted] to present an unsworn crime victim impact statement for Member consideration.[34]

[34] R. at 2828, 2842.

Summary of Argument

Charge III is fatally defective because it does not allege any specific act by Appellant. The relied upon policy in the Discipline and Conduct manual prohibits "relationships, communications, conduct, or contact" yet the specification in Charge III fails to note what act was committed. The Charge merely notes that Appellant engaged in sexually intimate behavior.

This defect in the specification failed to provide notice to Appellant of what conduct he had to defend against. When Defense Counsel sought a Bill of Particulars, they were denied by both the Government and the Miliary Judge. This inadequate specification created a prejudice that was not harmless. Additionally, without knowing what act(s) the Members based their verdict on, this Court cannot properly evaluate the legal and factual sufficiency of the evidence to support the conviction.

Lastly, the Military Judge erred in allowing a Crime Victim Impact Statement to be presented during sentencing by the complaining witness. Without additional evidence, it is possible the Members believed the relationship, communications, conduct, and/or contact between Appellant and [redacted] on 18 March 2022 was consensual. If this is the case, as evident at least to the acquittal of Charge I, then [redacted] is not a victim for these purposes.

Argument

I.

THE SOLE SPECIFICATION OF CHARGE III, A VIOLATION OF ARTICLE 92, FAILS TO STATE AN OFFENSE AS IT FAILS TO ALLEGE SPECIFIC CONDUCT PROHIBITED BY THE ORDER.

Standard of Review

Whether a specification is defective is a question of law, which is reviewed *de novo* on appeal.[35]

Discussion

Under Supreme Court precedent, a charge is constitutionally required to contain "the elements of the offense charged *and* fairly inform a defendant of the charge against which he must defend."[36] A charged specification will be found constitutionally sufficient only if it alleges "every element" of the offense, "so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy."[37]

Moreover, this Court recently issued an opinion on point in *Richard*.[38] There, this Court stated that a specification's failure to adequately allege an act or omission is not harmless beyond a reasonable doubt and is sufficient to set aside the finding of guilty and dismiss the specification.[39] The charged violation of Article 92 (violating a lawful general order), UCMJ, in

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[35] *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Crafter*, 64 M.J. 209, 212 (C.A.A.F. 2006).
[36] *United States v. Resendiz-Ponce*, *549 U.S.* 102, 108 (2007) (emphasis added and citation omitted).
[37] *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted)); *see also* R.C.M. 307(c)(3); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter*, 64 M.J. at 212.
[38] *United States v. Richard*, 84 M.J. 586 (C.G. Ct. Crim. App. 2024).
[39] *Richard*, 84 M.J. at 593.

this case similarly is not harmless and fails to adequately allege an act or an omission, and; therefore, should be dismissed.

A. The specification was defective as it failed to sufficiently apprise the Appellant of what he needed to be prepared to meet at trial.

The Supreme Court in *Russell* reiterated the two criteria by which the sufficiency of an indictment is measured: (1) "whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet"; and (2) "in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."[40] And in *Russell*, despite the Government using the statutory language, the Court found that "the indictments failed to sufficiently apprise the defendant of what he must be prepared to meet."[41] The Court reasoned that "[w]here guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."[42]

Charge III, which Appellant was convicted of reads as follows:

> In that Maritime Enforcement Specialist Third Class Samuel B. Ray, United States Coast Guard, did, at or near Jacksonville, FL, on or about 18 March 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 2.A.2.g. of COMDTINST M1600.2, Discipline and Conduct, dated 22 Oct 2020, by wrongfully engaging in sexually intimate behavior in a Coast Guard-controlled work place.[43]

The essential elements of violating a general lawful order under Article 92, UCMJ, are:

> (1) That there was in existence a certain lawful general (order) (regulation) in the following terms: (state the date and specific source of the alleged general order or regulation and quote the order or regulation or the specific portion thereof);
> (2) That the accused had a duty to obey such (order) (regulation); and

[40] *Russell v. United States*, 369 U.S. 749, 751–52, (1962).
[41] *Russell*, 369 U.S. at 764, 782.
[42] *Russell* 369 U.S. 369 U.S. at 764.
[43] Appellate Ex. 46.

(3) That (state the time and place alleged), the accused (violated) (failed to obey) this lawful general (order) (regulation) by (**here the military judge should enumerate the specific acts** and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation).[44]

The relevant portions of the regulation are as follows:

> **2.A.2.g. Prohibited Relationships, Communications, Conduct, and Contact**
>
> (1) Policy. Coast Guard policy prohibits the following relationships, communications, conduct, or contact regardless of rank, grade, or position of the persons involved:
>
> (a) Engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled work place,

To state an offense under Article 92, UCMJ for violating a lawful general order, the specification must **enumerate the specific acts** that constituted a violation of paragraph 2.A.2.g.[45] But the sole Specification of Charge III only made a broad and vague allegation of engaging in sexually intimate behavior.[46]

Here, the Government in the sole specification of Charge III, failed to sufficiently apprise the Appellant of what he must be prepared to meet.[47] The Government charged in accordance with the statute but omitted specific identification of essential facts. Furthermore, in *Richard*, this Court noted that both the M.C.M. and the Military Judges' Bench book urged more precision than the specification drafted by the Government, and this Court specifically stated "[t]he shortcoming of the specification charged is not that charging authorities omitted the words 'by means of.' It is that they missed the point: the model specification calls for alleging that the accused murdered someone by doing a specific thing—like 'by means of shooting him with a

[44] *See* Dept. of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook.
[45] *See* Dept. of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook.
[46] Appellate Ex. 46.
[47] Charge Sheet at 3.

rifle…'"[48] Similar to *Richard*, the Government here missed the point by failing to allege what the Appellant did to violate the lawful order against "sexually intimate behavior."

B. The specification did not provide notice of the theory of criminality against which Appellant had to defend.

The requirement to allege every element expressly or by necessary implication ensures a defendant understands against what he must defend. The Supreme Court has held that a charge fails "to inform the defendant of the nature of the accusation against him" if it leaves the prosecution "free to roam" and "shift its theory of criminality" throughout a trial.[49] The U.S. Court of Appeals for the Armed Forces (CAAF) reiterated that principle in *Medina, Miller,* and *Jones,* stressing that "the due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted."[50] Here, this right was circumvented because there was no way for Appellant to determine the Government's theory of criminality from the words of the specification.

The Supreme Court explained that "where the definition of an offense . . . includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it . . . must descend to particulars."[51] Here, the Government did not provide particulars. Charge III merely states that Appellant wrongfully engaged "in sexually intimate behavior in a Coast Guard-controlled work place."[52]

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[48] *Richard*, 84 M.J. at 590.
[49] *Russell v. United States*, 369 U.S. 749, 767-68 (1962).
[50] *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (2008)); *see United States v. Miller*, 67 M.J. 389 (C.A.A.F. 2009).
[51] *Russell*, 369 U.S. at 765 (internal quotations and citation omitted). This same reasoning is found in *Jones*, 68 M.J. at 472 ("[A]lthough the terms Congress chose for [Article 134] are broad, . . . what is general is made specific through the language of a given specification. The charge sheet itself gives content to that general language thus providing the required notice of what an accused must defend against.")).
[52] Charge Sheet at 3.

In *Richard*, this Court stated that the specification alleging that the child was murdered by asphyxia without further identifying an act or omission "deprived [appellant] of constitutionally required notice" as "by asphyxia" describes a medical cause of death, not what act or omission brought about that cause of death.[53]Additional, the Government's expert testified asphyxia is a broad term that can have a wide variety of causal factors and the Government Trial Counsel conceded that asphyxia "clearly may result from a wide array of actions or circumstances…." [54]

Here, in the same vein, the specification alleged the Appellant engaged in sexually intimate behavior without further identifying an act which similarly deprived him of his constitutionally required notice.[55] Just like asphyxia, sexually intimate behavior is a broad term that can be used to describe many actions but is not an action itself. This is further highlighted in the regulation itself which prefaces the six identified prohibited provisions with either being a relationship, communication, conduct, or contact.

Sexually intimate behavior fails to consider the various forms of prohibited behavior as outlined in the regulation which supports Appellant's request and need for a Bill of Particulars. The lack of any particulars makes the specification illogical and transmutable because the offense charged, engaging in sexually intimate behavior, is extremely vague. This vague specification allowed the Government to free to roam, shift, and transform its theory throughout trial as the specific communication, conduct, or contact that constituted wrongful sexually intimate behavior. The specification here failed to provide the constitutionally required notice

[53] *Richard*, 84 M.J. at 590.
[54] *Id.*
[55] Charge Sheet at 3.

that would allow a defendant to properly prepare a defense at trial and is therefore fatally defective.

C. The element regarding an act by the accused is not alleged expressly or by necessary implication.

When the sufficiency of a specification is challenged "at trial, [courts] read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text."[56] This means courts "will consider only the language contained in the specification when deciding whether it properly states the offense in question."[57] A specification fails to state an offense if it does not allege every element of the charged offense expressly or by necessary implication.[58]

i. The element regarding an act of the accused is not expressly alleged.

Charge III failed to allege an act that constituted "sexually intimate behavior."[59] Specifically, Charge III failed to denote, as listed in the regulation, whether Appellant engaged in a relationship, communication, conduct, and/or contact on 18 March 2022 while in a Coast Guard controlled workplace. Furthermore, when Appellant sought clarity, it was denied by both the Government and Military Judge. Knowing what act was committed is an essential element of a general order for which he was charged, and ultimately convicted of violating.[60]

According to paragraph 2.A.2.(1), the policy is designed to prohibit certain types of relationships, communications, conduct and contact.[61] The sexually intimate behavior can manifest in the form of a prohibited relationship, prohibited communications, prohibited conduct,

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[56] *Turner*, 79 M.J. at 403 (quoting *Fosler*, 70 M.J. at 230).
[57] *Turner*, 79 M.J. at 403 (citing *United States v. Sutton*, 68 M.J. 445 (C.A.A.F. 2010)).
[58] *Fosler*, 70 M.J. at 229.
[59] Appellate Ex. 46.
[60] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020).
[61] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020).

or prohibited contact.[62] Therefore, several different actions could constitute sexually intimate behavior. For example, a person could violate paragraph 2.A.2.g(1)(a) by making sexually intimate comments in a Coast Guard work place, by engaging in some form of sexual conduct in a Coast Guard work place, or by making sexual contact with a person in a Coast Guard work place.

This distinction is consequential because [redacted] and Appellant had a known relationship, and [redacted] alleged that Appellant had made numerous comments and conduct on 18 March 2022 that could possibly qualify as sexually intimate behavior.[63]

ii. The specification fails to allege the element regarding an act or omission by necessary implication.

Although a court may find a specification states an offense where an element is "necessarily implied," "interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored."[64] Particularly here where the sufficiency of the specification was challenged before and at trial, which requires the reviewing court to "read the wording . . . narrowly and . . . only adopt interpretations that hew closely to the plain text."[65] Under such a reading, the alleged offense does not necessarily imply any act of the Appellant.

In reviewing whether a specification addresses every statutory element of an offense, the plain meaning of the terms in the specification will control the interpretation.[66] As discussed above, the specification's statement that ME3 Ray engaged in "sexually intimate behavior" does

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[62] U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT MANUAL art. 2.A.2.g.: (22 Oct. 2020).
[63] R. at 2495-98, 2542-43, 2497, 2498, 2533, 2535-36, and 2546-47.
[64] *United States v. Shields*, 77 M.J. 621, 625-26 (N-M. Ct. Crim. App. 2018).
[65] *Turner*, 79 M.J. at 403 (quoting *Fosler*, 70 M.J. at 230).
[66] *See Sutton*, 68 M.J. at 458-59 (comparing the elements to the charging language and finding the act charged failed to allege the required element).

not imply any act done by the Appellant. The offense alleged, therefore, fails to state an offense by necessary implication.

D. The Military Judge's failure to ensure the charged offense was enumerated specific acts created prejudice that was not harmless beyond a reasonable doubt.

The Military Judge denied the Defense's requests to adequately remedy the deficiency of the offense alleged.[67] The court denied the Defense's Motion for a Bill of Particulars, stating the Government did not need to provide any specificity as to any act by ME3 Ray.[68]

In his ruling, the Military Judge stated:

> The Sole Specification of **Charge Ill expressly alleges every element of the charged** offense as required by R.C.M. 307. It provides notice of the place, time, specific section and name of the general order allegedly violated, and acts alleged to have violated that general order….The Government provided notice that **it considers all acts by ME3 Ray that occurred in either the Sector enforcement room or ME room on 18 March 2022 that may constitute "wrongful sexually intimate behavior"** to be encompassed by the specification. The Government stated that the acts may include the both the statements and actions of ME3 Ray that ME3 [redacted] recalls occurring on 18 March 2022. (emphasis added)

The military Judge failed to compel the government to enumerate the specific acts and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation.[69] It is not an onerous burden on the Government to expressly allege each element of a charged offense, provide a bill of particulars, or clarify their theory of criminality. The Government's failure to specify the alleged criminal act or omission, or provide a consistent theory deprived Appellant of his right to notice as to the basis of the Charge and violated his Fifth Amendment Due Process right to a fair trial.[70]

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[67] Appellate Ex. 28 at 3.
[68] Appellate Ex. 24 at 5.
[69] Appellate Ex. 28 at. 3.
[70] *See United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) (where the military judge's error in failing to instruct on lesser-included offense of negligent homicide required reversal of involuntary

E. The sole Specification under Charge III does not adequately provide Appellant his constitutional right to be protected from being put twice in jeopardy for the same offense.

"The Fifth Amendment provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'"[71] Criminal defendants may not be punished multiple times for the "same offense,"[72] or be harassed through "multiple prosecutions for the same misconduct."[73] In *Blockburger v. United States*, the Supreme Court created a test that governs whether a successive prosecution is barred.[74] It asks "whether each provision requires proof of an additional fact which the other does not."[75]

Because the sole specification under Charge III did not allege a specific act by Appellant, there is no way for him to definitively claim the double jeopardy protection for which he is entitled. This is particularly important here, as he was acquitted of all other charges and specifications where specific conduct was alleged.[76] It is entirely possible the Government might want to try again, and it could likely survive a double-jeopardy challenge simply by alleging a specific act in a new charge.

F. Without knowing what act(s) the Members based their verdict on, the ability of the Court to perform a legal sufficiency or factual sufficiency review is substantially frustrated.

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manslaughter conviction, where error prevented court members from addressing whether appellant's negligence in any form – not attaching the vehicle seatbelt to an infant car seat, not properly fastening the straps to car seat, or negligently shaking the infant – was the cause of the child's injuries and death).

[71] U.S. Const. amend. V.

[72] *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020) (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

[73] *Rice*, 80 M.J. at 41 (quoting *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 78 (2016) (Ginsburg, J., with whom Thomas, J., joined, concurring)).

[74] *Rice*, 80 M.J. at 40 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

[75] *Blockburger*, 284 U.S. at 304.

[76] Statement of Trial Results.

An "important corollary purpose" of the requirement to set out facts and circumstances is to inform an appellate court "of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."[77] "Viewed in this context, the rule is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task."[78]

This Court in *Richard* stated the since the specification failed to allege an act or omission, it "frustrates [this Courts] ability to weigh the sufficiency of the evidence."[79] This Court went on to state that the members "acquitting Appellant of the charged offense of murder but convicting her for doing or failing to do something that was culpably negligent and resulted in death by asphyxia—combined with the wide-ranging evidence presented at trial leaves us guessing as to what act(s) or omission(s) they based their verdict on."[80]

Similarly in this case, this Court is unable to properly perform an appellate review for factual or legal sufficiency review because the Government chose not to allege specific facts and not to issue a Bill of Particulars.[81] Because of this deficiency and the instructions given to the Members fails to mention any specific act, it is impossible for Appellant to know what he was specifically convicted of. This issue compounds during appellate review since it is unclear if the conviction was based on Appellant and [redacted] having a relationship, Appellant communicating

[77] *Russell* 369 U.S. at 768, (quoting United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588 (1875)).
[78] *Id.* at 769, 82 S.Ct. 1038.
[79] *Richard*, 84 M.J. at 591.
[80] *Richard*, 84 M.J. at 593.
[81] Appellate Ex. 26 at 8.

something to [redacted] or a conduct or other contact Appellant may have made with [redacted] on 18 March 2022.

G. The appropriate remedy is dismissal of this specification because the constitutional error was not harmless.

"If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt."[82] To determine harmlessness, "we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'"[83]

Conclusion

Charge III is fatally defective because it failed to state an offense. Because of this defect, ME3 Ray was denied the due process principle of fair notice, did not know against what offense he must defend, and under what legal theory he would be prosecuted. This was not rectified before trial, during trial, or after trial. Because of the deficient specification, and because ME3 Ray was found not guilty on all other charges and specifications, it remains unclear what act ME3 Ray allegedly did (or the members agreed was proven beyond a reasonable doubt) which constituted his conviction. Accordingly, Appellant respectfully requests this Court set aside the findings as to the sole specification of Charge III with prejudice.

Argument

II

THE MILITARY JUDGE ABUSED HIS DISCRETION BY IMPROPERLY ALLOWING AN UNSWORN STATEMENT TO BE PRESENTED BY THE ACCUSER DURING SENTENCING

[82] *Turner*, 79 M.J. at 403.
[83] *United States v. Humphries*, 71 M.J. 209, 215–16 (C.A.A.F. 2012).

Standard of Review

Whether a military judge accepted a victim impact statement that does not comply with Rule for Courts-Martial (R.C.M.) 1001(c) is reviewed for abuse of discretion.[84]"A ruling based on an erroneous view of the law constitutes an abuse of discretion."[85] Errors not objected to at trial are reviewed for plain error, which occurs when there is error, it is clear or obvious, and it results in material prejudice to a substantial right.[86]

Discussion

The victim of an offense under the UCMJ has the "right to be reasonably heard" at a "sentencing hearing related to the offense."[87]This right includes the right to submit an unsworn "victim impact statement" for consideration by the sentencing authority.[88] The contents of such statements are limited to matters in mitigation and "victim impact," defined as "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty."[89]

A. The Military Judge abused his discretion by allowing [redacted] to submit a victim impact statement during the Appellant's sentencing

Here the Military Judge did not ensure the complaining witness, [redacted] was a crime victim under R.C.M. 1001(c)(2). A crime victim is an individual who has suffered direct physical,

[84] *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019).
[85] *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)).
[86] *Powell*, 49 M.J. at 463-65.
[87] Article 6b(a)(4)(B), UMCJ.
[88] R.C.M. 1001(c)(5).
[89] R.C.M. 1001(c)(3).

emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty…..[90]

[redacted] submitted an unsworn statement into evidence for consideration by the Members.[91] This unsworn statement was an alleged recount of the emotional and physical toll the Appellant's action had on [redacted][92] Relevant portions of [redacted] unsworn statement are as follows:

[redacted]

The Military Judge allowed the Members to consider this statement as a victim impact statement from a crime victim; however, [redacted] was not a crime victim under R.C.M. 1001(c)(2)(A), and thus was not eligible to submit an unsworn statement to be considered by the Members.[94]

The Appellant was convicted of a violation of Article 92, UCMJ, violation a lawful general order. [95] The sole specification of which the Appellant was found guilty mentions no

[90] R.C.M. 1001(c)(2)(A) (emphasis added).
[91] Appellate Ex. 84.
[92] Appellate Ex. 84.
[93] Appellate Ex. 84.
[94] R.C.M. 1001(c)(2)(A)
[95] Statement of Trial Results.

named victim and is a not violation of the UCMJ in which a victim is inherit.[96] To the contrary, the Members acquitted the Appellant of all charges and all specifications in which [redacted] was an alleged victim.[97] Moreover, it is entirely possible that with member instructions regarding consent and prior inconsistent statement relating to [redacted] testimony, that the Members could have found that [redacted] consented to all alleged actions further taking credence from the belief that [redacted] was a victim.[98]

In re [redacted] the accused pleaded guilty to extramarital sexual conduct, but the petitioner sought to include an allegation of sexual assault in her victim impact statement, arguing that otherwise her victim impact statement "would lack context."[99] The Court disagreed, explaining that "[n]either *Terlep* nor *Hayes* supports that victim impact statements must be admitted where a purported victim describes impact that falls outside the scope of 'victim impact' as defined under R.C.M. 1001(c)(2)(B)."[100]And under that definition, victim impact "is restricted to impact 'directly relating to or arising from the offense *of which the accused has been found guilty*.'" *Id.* at 744 (emphasis added).

In this case, the military judge abused his discretion by allowing [redacted] to submit a victim impact statement. Victim impact statements are policed solely by the definitional parameters of R.C.M. 1001(c), which Military Judges have a strict obligation to enforce.[101] The submitted

[96] Statement of Trial Results.
[97] Statement of Trial Results.
[98] Appellate Ex. 88 at 4, 8-9.
[99] *In re A.J.W.*, 80 M.J. 737, 741 (N-M. Ct. Crim. App. 2021) (citing *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002) (allowing the Government to elicit victim testimony about sexual assault as evidence in aggravation where the accused had pleaded guilty to lesser offenses) and *United States v. Hayes*, NMCCA 200600910, 2008 CCA LEXIS 505 (N-M. Ct. Crim. App. Dec. 11, 2008) (unpublished) (same)).
[100] *Id.* at 743.
[101] *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021).

victim impact statement alludes to a non-consensual sexual assault taking place. [102] However, there is no contextual exception to R.C.M. 1001(c)(2)(B) that broadens the definition of "victim impact" to encompass a or any other conduct not "directly relating to or arising from the offense[s] of which the accused has been found guilty."[103]

B. This error materially prejudiced Appellant's substantial rights.

These errors by the military judge materially prejudiced Appellant's substantial rights to a fair sentencing hearing that comported with the limitations contained in R.C.M. 1001(c)(2)(B).[104] "When there is error in the admission of sentencing evidence, the test for prejudice is whether the error substantially influenced the adjudged sentence."[105] This determination looks at (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.[106]

Here, the military judge's erroneous interpretation of R.C.M. 1001(c)(2)(B) substantially influenced the evidence he allowed the Members to consider. While military judges are ordinarily presumed to know and apply the law correctly to filter out inadmissible evidence from their consideration.[107] In this case the Military Judge gave sentencing instructions to the Members to consider [t]he impact of the offense on the financial, social, psychological, or medical well-being of any victim of the offense; and the mission, discipline, or efficiency of the command of the accused and any victim of the offense."[108] This ruling leaves little doubt that, at

[102] Appellate Ex. 84.
[103] R.C.M. 1001(c)(2)(B).
[104] R.C.M. 1001(c)(2)(B).
[105] *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018).
[106] *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017).
[107] *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000),
[108] Appellate Ex. 89 at 1.

the behest of the Military Judge, the Members did consider [redacted] statements both reliable and material to his sentencing determination.

And much of the Government's case was premised on [redacted] statements, particularly for the most serious offenses. As such, [redacted] alleged impacts in her victim impact statement provided ammunition against Appellant from the Government's key witness, which the military judge and the Government Trial Counsel shoehorned in. That is the very definition of prejudice as [redacted] received 60 days of hard labor, 60 days of restriction, and reduction to E2.[109] The victim impact statement undoubtedly contributed to the Members' imposed punishment.

C. The Court should remedy the errors by granting sentencing relief.

Upon finding such prejudicial error, this Court has "broad discretion" to reassess the sentence, provided it can "reliably determine what sentence would have been imposed at trial" had the error not occurred.[110] In doing so, the Court must be confident that (1) "absent any error, the sentence adjudged would have been of at least a certain severity"; (2) the reassessed sentence must not only "be purged of prejudicial error [but] also must be 'appropriate' for the offense[s] involved"; and (3) for errors of constitutional magnitude, the court "should be persuaded beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial."[111]

Here, all three factors support remedying the military judge's errors by reducing Appellant's term of confinement to the minimum provided under the plea agreement: 60 months. First, since this minimum term of confinement was agreed to by the parties, the Court can be confident that the confinement adjudged at trial would have been of at least that severity.

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[109] Statement of Trial Results.
[110] *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013).
[111] *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Without knowing precisely how much weight the Members gave to the victim impact statement, and since the Appellant has already completed the imposed hard labor, reinstatement of Appellant's Rank to E4 is the only effective way the Court can ensure "beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial."[112]

Conclusion

Because evidence was improperly admitted during the Appellant's sentencing, the Court should reinstate Appellants Rank.

Respectfully submitted,

[redacted]

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[redacted]

[112] *Id.* at 307.

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 30 September 2024.

[redacted]

Justin Allen
LT, USCG
Appellate Defense Counsel

[redacted]

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW