[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

TRUE	MICHAEL	A.	[redacted]	CPL
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

[redacted]	USMC	MCBH
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by COMMANDING GENERAL

(Title of Convening Authority)

[redacted]

(Unit/Command of Convening Authority)

Tried at

[redacted] On 15 MAR 2021

(Place or Places of Trial) *(Date or Dates of Trial)*

Companion and other cases _____

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

This volume contains

DD FORM 490, MAR 2019 The previous version of this form may be used until no longer required.

CONVENING ORDER

UNITED STATES MARINE CORPS
[redacted]

5800
CG

16 JAN 2019

GENERAL COURT-MARTIAL CONVENING ORDER 1-19

Pursuant to Article 23 of the Uniform Code of Military Justice and section 0120 of the Manual of the Judge Advocate General, a general court-martial is hereby convened by order of the commanding officer, Brigadier General [redacted] with the following members and is directed to try any and all cases of service members brought before it.

Members

Colonel [redacted], U.S. Marine Corps, President;
Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Major [redacted] U.S. Marine Corps; and
Major [redacted] U.S. Marine Corps.

[redacted]

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2	3. RANK/RATE	4. PAY GRADE
TRUE, MICHAEL, A.	[redacted]	CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
[redacted]	10 AUG 15	5 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,713.50 ~~$2,555.40~~	NONE	$2,713.50 ~~$2,555.40~~	PRE-TRIAL CONFINEMENT	15 OCT 19 - PRESENT

TC ATW 15MAR21

II. CHARGES AND SPECIFICATIONS

10.

CHARGE I: Violation of the UCMJ, Article 120b

Specification 1 (Rape of a Child who has not Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ ★ the island of Oahu, Hawaii, between on or about 15 January 2019 and on or about 29 September 2019, on divers occasions, commit a sexual act upon [redacted] a child who had not attained the age of 12 years, by penetrating [redacted] vulva with the said Cpl True's penis. 20200224 [redacted]

Specification 2 (Rape of a Child who has not Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ ★ the island of Oahu, Hawaii, between on or about 15 January 2019 and on or about 29 September 2019, on divers occasions, commit a sexual act upon [redacted] a child who had not attained the age of 12 years, by penetrating [redacted] with the said Cpl True's penis. 20200224 [redacted]

(See Supplemental Page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-3	[redacted] MCBH, KANEOHE BAY, HI

d. SIGNATURE OF ACCUSER	e. DATE
[redacted]	20191206

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 6th day of December, 2019, 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.

J. L. AMELL
Typed Name of Officer

CAPTAIN, U.S. MARINE CORPS

[redacted]

[redacted] MCBH, KANEOHE BAY, HI
Organization of Officer

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

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

12. On 12 December, 20 19, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

[redacted]
Organization of Immediate Commander

FIRST LIEUTENANT, U.S. MARINE CORPS
Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1600 hours, 6 December 20 19 at [redacted]
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] COMMANDING OFFICER
LEGAL OFFICER
Official Capacity of Officer Signing

[redacted]
Typed Name of Officer

FIRST LIEUTENANT, U.S. MARINE CORPS
[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	Okinawa, Japan	MAR 0 4 2020

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-19

Dated 16 January 20 19, subject to the following instructions: [2] To be tried in Conjunction with the additional charges preferred on 9 January 2020 and the additional charge preferred on 24 February 2020.

By _____ of _____
Command or Order

[redacted]
Typed Name of Officer

COMMANDING GENERAL
Official Capacity of Officer Signing

BRIGADIER GENERAL, U.S. MARINE CORPS
[redacted]

15. On 6 MAR, 2020, I (caused to be) served a copy hereof on (each of) the above named accused.

G. F. CURLEY
[redacted]ial Counsel

MAJOR, U.S. MARINE CORPS
Grade or Rank of Trial Counsel

[redacted]
[redacted]ignature

[1] *When an appropriate commander signs personally, inapplicable words are stricken.*

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

DD FORM 458 (BACK), MAY 2000 S/N 0102-LF-000

ORIGINAL

Supplemental Page 1 of 4
Accused: Corporal Michael A. True
EDIPI: [redacted]

on divers occasions, on the island of Oahu, between

Specification 3 (Rape of a Child who has not Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, ~~between on board Marine Corps Base~~ Hawaii, on or about 15 January 2019 and on or about 29 September 2019, commit a sexual act upon [redacted] a child who had not attained the age of 12 years, by intentionally touching, not through the clothing, the genitalia of [redacted] with an intent to abuse, humiliate, harass, and degrade [redacted] and arouse and gratify the sexual desire of any person.

Specification 4 (Sexual Abuse of a Child (Lewd Act)): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, ~~on board Marine Corps Base~~ Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, commit a lewd act upon [redacted] a child who had not attained the age of 16, by touching, the anus of [redacted] with the said Cpl True's finger, with an intent to abuse, humiliate, harass, and degrade [redacted] and arouse and gratify the sexual desire of any person.

on divers occasions, on the island of Oahu,

Specification 5 (Rape By Force of a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ Hawaii, between on or about 1 August 2019 and on or about 7 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating [redacted] vulva with the said Cpl True's penis, by using force against [redacted] to wit:

the island of Oahu,

a. Using parental authority;
b. Abusing parental authority;
c. Using a similar authority to parental authority; and,
d. Abusing a similar authority to parental authority.

Specification 6 (Sexual Assault of a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ Hawaii, between on or about 1 August 2019 and on or about 7 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating [redacted] vulva with the said Cpl True's penis.

the island of Oahu,

Specification 7 (Rape By Force of a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 8 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating [redacted] vulva with the said Cpl True's penis, by using force against [redacted] to wit:

a. The use of physical strength and violence sufficient to overcome, restrain, and injure [redacted]
b. Inflicting physical harm;
c. Using parental authority;
d. Abusing parental authority;
e. Using a similar authority to parental authority; and,
f. Abusing a similar authority to parental authority.

20200224 [redacted]

20200224 [redacted]

20200224 [redacted]

20200224 [redacted]

Specification 8 (Rape By Force of a Child who has Attained the Age of 12): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating [redacted] vulva with the said Cpl True's penis, by using force against [redacted] to wit:

a. The use of a weapon;
b. The use of physical strength and violence sufficient to overcome, restrain, and injure [redacted]
c. Inflicting physical harm;
d. Using parental authority;
e. Abusing parental authority;
f. Using a similar authority to parental authority; and,
g. Abusing a similar authority to parental authority.

Specification 9 (Rape by Force of a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by causing contact between [redacted] mouth with the said Cpl True's penis, by using force against [redacted] to wit:

a. Using parental authority;
b. Abusing parental authority;
c. Using a similar authority to parental authority; and,
d. Abusing a similar authority to parental authority.

Specification 10 (Rape by Force of a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by causing contact, not through the clothing, between the said Cpl True's mouth and [redacted] vulva. by using force against [redacted] to wit:

a. The use of a weapon;
b. The use of physical strength and violence sufficient to overcome, restrain, and injure [redacted]
c. Inflicting physical harm;
d. Using parental authority;
e. Abusing parental authority;
f. Using a similar authority to parental authority; and,
g. Abusing a similar authority to parental authority.

Specification 11 (Rape by Threatening or Placing in Fear a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating [redacted] vulva with the said Cpl True's penis by placing [redacted] in fear.

Specification 12 (Rape by Threatening or Placing in Fear a Child who has Attained the Age of 12 Years): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a sexual act upon [redacted] a child who had attained the age of 12 years but had not attained the age of 16 years, by causing contact between [redacted] mouth and the said Cpl True's penis by placing [redacted] in fear.

Specification 13 (Sexual Abuse of a Child (Lewd Act)): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, commit a lewd act upon [redacted] a child who had not attained the age of 16, by touching the breasts of [redacted] with the said Cpl True's hand, with an intent to abuse, humiliate, harass, and degrade [redacted] and arouse and gratify the sexual desire of any person.

Charge II: Violation of the UCMJ, Article 115

Specification 1 (Communicating Threats): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, wrongfully communicate to [redacted] threats, to wit:

a. To kill [redacted] and,
b. To kill [redacted] mother,

if J.E.H. disclosed the said Cpl True's sexual assaults and other abuses to any person.

Specification 2 (Communicating Threats): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, wrongfully communicate to [redacted] threats, to wit:

* the island of Oahu,

a. To kill [redacted]
b. To kill [redacted] and,
c. To injure [redacted] property (pets),

if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person.

Specification 3 (Communicating Threats): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, wrongfully communicate to [redacted] threats to wit:

* the island of Oahu,

a. To kill [redacted]
b. To kill [redacted] and
c. injure [redacted] property (pets),

if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person.

~~**CHARGE III: Violation of the UCMJ, Article 119b**~~

~~**Specification 1 (Child Endangerment by Design):** In that Corporal Michael A. True, U.S. Marine Corps, on active duty, on board Marine Corps Base Hawaii, on or about 29 September 2019, was responsible for the care of [redacted] a child under the age of 16 years, and did endanger the physical health, mental health, safety, and welfare of said [redacted] by making [redacted] eat seven sleep inducing gummies and that such conduct was by design.~~ W/D WITHOUT PREJUDICE

~~**Specification 2 (Child Endangerment by Design):** In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, was responsible for the care of [redacted] a child under the age of 16 years, and did endanger the physical health, mental health, safety, and welfare of said [redacted] by failing to exercise due care expected of a parent or individual possessing similar authority, after discovering the said [redacted] attempting self-harm with a knife, and that such conduct was by design.~~ W/D WITHOUT PREJUDICE

ORIGINAL

Charge IV: Violation of the UCMJ, Article 127

Specification 1 (Extortion): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, with intent to unlawfully obtain an advantage or immunity, to wit: preventing the Government from obtaining knowledge and evidence of crimes, wrongfully communicate to [redacted] a threat to kill [redacted] and [redacted] if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person.

Specification 2 (Extortion): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * the island of Oahu, Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, with intent to unlawfully obtain an advantage or immunity, to wit: preventing the Government from obtaining knowledge and evidence of said Cpl True's sexual assault of children, wrongfully communicate to [redacted] threats to kill [redacted] and unlawfully injure their property (pets), if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person. 20200224 [redacted]

Specification 3 (Extortion): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * the island of Oahu, Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, with intent to unlawfully obtain an advantage or immunity, to wit: preventing the Government from obtaining knowledge and evidence of said Cpl True's sexual assault of children, wrongfully communicate to [redacted] threats to kill [redacted] and unlawfully injure their property (pets), if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person. 20200224 [redacted]

Charge V: Violation of the UCMJ, Article 131b

Specification 1 (Obstructing Justice): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, wrongfully threatened to kill [redacted] and [redacted] if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person, with intent to influence, impede, and obstruct the due administration of justice in the case of said Cpl True, when the accused had reason to believe that there would be criminal proceedings pending.

Specification 2 (Obstructing Justice): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * the island of Oahu, Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, wrongfully threaten to kill [redacted] and injure their property, to wit: Pets, if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person, with intent to influence, impede, and obstruct the due administration of justice in the case of said Cpl True, when the accused had reason to believe that there would be criminal proceedings pending. 20200224 [redacted]

Specification 3 (Obstructing Justice): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ * the island of Oahu, Hawaii, between on or about 15 January 2019 to on or about 29 September 2019, on divers occasions, wrongfully threaten to kill [redacted] and [redacted] and injure their property, to wit: Pets, if [redacted] disclosed the said Cpl True's sexual assaults and other abuses to any person, with intent to influence, impede, and obstruct the due administration of justice in the case of said Cpl True, when the accused had reason to believe that there would be criminal proceedings pending. 20200224 [redacted]

Specification 4 (Obstructing Justice): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Hawaii, on or about 29 September 2019, wrongfully directed [redacted] to shower, with intent to impede and obstruct the due administration of justice in the case of said Cpl True, when the accused had reason to believe that there would be criminal proceedings pending.

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDI[redacted]	3. RANK/RATE	4. PAY GRADE
TRUE, MICHAEL, A.		CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	10 AUG 15	5 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$2,634.60~~ $2,713.50	NONE	~~$2,634.60~~ $2,713.50	PRE-TRIAL CONFINEMENT	15 OCT 19 - PRESENT

TC ATW 15 MAR 21

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE: Violation of the UCMJ, Article 128

Specification (Assault consummated by battery upon a spouse): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on the island of Oahu, Hawaii, between on or about 1 August 2019 and on or about 29 September 2019, unlawfully strangle [redacted] the spouse of the accused, with the said Cpl True's hand.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-3	[redacted] MCBH, KANEOHE BAY, HI

d. SIGNATURE OF ACCUSE[redacted]	e. DATE
	20200224

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 24th day of FEBRUARY, 2020, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

J. P. TURNER
Typed Name of Officer

CAPTAIN, U.S. MARINE CORPS
Grade and Service

TURNER.JOHNATHON.PAUL.III[redacted]
Digitally signed by TURNER.JOHNATHON.PAUL.III[redacted]
Date: 2020.02.24 14:30:55 -10'00'
Signature

[redacted] MCBH, KANEOHE BAY, HI
Organization of Officer

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

DD FORM 458

S/N 0102-LF-000-4580

ORIGINAL

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

[redacted]
Typed Name of Immediate Commander | *Organization of Immediate Commander*

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, _____ 20 20 at [redacted]
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] COMMANDING OFFICER

[redacted]
Typed Name of Officer | LEGAL OFFICER
Official Capacity of Officer Signing

Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	MAR 0 4 2020

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-19

Dated 16 January 20 19, subject to the following instructions: [2] To be tried in Conjunction with the charges preferred on 6 December 2019 and the additional charge preferred on 9 January 2020.

By _____ of _____
Command or Order

[redacted]
Typed Name of Officer | COMMANDING GENERAL
Official Capacity of Officer Signing

BRIGADIER GENERAL, U.S. MARINE CORPS

[redacted]

15. On 6 MAR, 2020, I (caused to be) served a copy hereof on (each of) the above named accused.

G. F. CURLEY | MAJOR, U.S. MARINE CORPS
[redacted] Counsel | Grade or Rank of Trial Counsel

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 S/N 0102-LF-000

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
TRUE, MICHAEL, A.	[redacted]	CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
[redacted]	10 AUG 15	5 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,713.50 ~~$2,634.60~~	NONE	$2,713.50 ~~$2,634.60~~	PRE-TRIAL CONFINEMENT	15 OCT 19 - PRESENT

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE I: Violation of the UCMJ, Article 120

[redacted] the island of Oahu,

Specification (Abusive Sexual Contact): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ Hawaii, between on or about 1 August 2019 and on or about 29 September 2019, touch the groin, breast, and buttocks of [redacted] with the said Cpl True's hand with an intent to abuse, humiliate, harass, and degrade [redacted] and to arouse and gratify the sexual desire of any person without the consent of [redacted]

ADDITIONAL CHARGE II: Violation of the UCMJ, Article 128b

the island of Oahu,

Specification (Domestic Violence): In that Corporal Michael A. True, U.S. Marine Corps, on active duty, did, on ~~board Marine Corps Base~~ Hawaii, between on or about 1 August 2019 and on or about 29 September 2019, wrongfully strangle [redacted] Cpl True's spouse, with the said Cpl True's hand.

[redacted]

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-3	[redacted] MCBH, KANEOHE BAY, HI

d. SIGNATURE OF ACCUSER	e. DATE
[redacted]	20200109

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 9th day of January, 2020, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

J. L. AMELL
Typed Name of Officer

CAPTAIN, U.S. MARINE CORPS
Grade and Service

AMELLJEFFREY.LANIER [redacted] Digitally signed by AMELLJEFFREY.LANIER [redacted] Date: 2020.01.09 16:29:45 -10'00'
Signature

[redacted] MCBH, KANEOHE BAY, HI
Organization of Officer

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

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

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

[redacted] — Typed Name of Immediate Commander

[redacted] — Organization of Immediate Commander

FIRST LIEUTENANT, U.S. MARINE CORPS

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1024 hours, 20 February 20 20 at [redacted] — Designation of Command or

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

FOR THE[1] COMMANDING OFFICER

[redacted] — Typed Name of Officer

LEGAL OFFICER — Official Capacity of Officer Signing

FIRST LIETUENANT, U.S. MARINE CORPS

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	MAR 0 4 202

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-19

Dated 16 January 20 19 ,subject to the following instructions: [2] To be tried in Conjunction with the charges preferred on 6 December 2019 and the additional charge preferred on 24 February 2020.

By _____ of _____
Command or Order

[redacted] — Typed Name of Officer

COMMANDING GENERAL — Official Capacity of Officer Signing

BRIGADIER GENERAL, U.S. MARIN[redacted]

[redacted]

15. On 6 MAR , 2020 , I (caused to be) served a copy hereof on (each of) the above named accused.

G. F. CURLEY — Typed Name of Trial Counsel

MAJOR, U.S. MARINE CORPS — Grade or Rank of Trial Counsel

[redacted]

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.

ORIGINAL

TRIAL COURT MOTIONS & RESPONSES

DEPARTMENT OF THE NAVY
U.S. NAVY-MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	DEFENSE MOTION FOR APPROPRIATE RELIEF (Docketing Request) Date: 4 March 2020

1. **Nature of Motion**. The defense moves the court to docket trial dates and set judicial deadlines in the above-captioned case.

2. **Trial Dates and Deadlines**. The defense respectfully requests that the court order the following dates and deadlines in this case:

Event	Date
a. **Arraignment**	**16 Mar 2020**
b. Defense Discovery Due:	18 March 2020
c. Government Disclosure Obligations	25 March 2020
b. Defense Reciprocal discovery due:	26 March 2020
c. Defense Expert Consultant Request/Witness Request:	2 Apr 2020
d. Government M.R.E. 404(b), 413(b), 414(b) notices:	9 Apr 2020
e. Government Responses to Expert Consultant/witness request	9 Apr 2020
f. Motions and M.R.E. 412 notice due	16 Apr 2020
g. Responses to Motions Due	23 Apr 2020
f. **ARTICLE 39(a) MOTIONS DATE:**	**4 May 2020**
g. Required notice of certain defenses (alibi, etc.) due:	7 May 2020
h. Motions filed, second session	14 May 2020
i. Responses filed, second session	21 May 2020
j. **Article 39(a), second session**	**28 May 2020**
g. Written notice of pleas and forum due:	8 June 2020
i. Final Pretrial Matters:	6 July 2020
j. **TRIAL DATES**:	**13-17 July 2020**

3. **Excludable Delay.** The defense specifically agrees that all delay from the date of this request until the date of trial is excludable under Rule for Courts-Martial 707, Article 10, UCMJ and any other applicable speedy trial authorities.

[redacted]
[redacted]B. LARKIN
Captain, U. S. Marine Corps
Defense Counsel

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Motion Response

1. Trial Counsel, in response to the above motion:

✓ Does not oppose it and agrees to the trial and pretrial dates proposed.

_____ Opposes the dates proposed and requests a 39(a) session on _____, 2020

4 Mar, 2020
Date

[redacted]
G. F. CURLEY
Major, U. S. Marine Corps
Trial Counsel

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Court Ruling

It is hereby ordered, all parties shall comply with the trial deadlines set forth above and shall appear before the Court at on:

4 May, 2020 for a Article 39(a) session; and

13 July, 2020 for commencement of trial.

9 March, 2020
Date

[redacted]
Military Judge

Appellate Exhibit 1
Page 2 of 2

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

UNITED STATES **v.** **MICHAEL A. TRUE** **CORPORAL** **USMC**	**MINOR CHILDREN VICTIMS' MOTION FOR REMOTE LIVE TESIMONY** **16 APR 2020**

MOTION

Pursuant to RCM 914A and Mil. R. Evid. 611, two of the alleged victims in this case, minor children [redacted] and [redacted], move this court to allow the minor children to testify out of the presence of the Accused, preferably by remote live testimony in accordance with RCM 914A. The minor children victims request an Article 39(a) session to present additional evidence and argument on this motion.

SUMMARY

This case involves various offenses under the UCMJ, including violations of Article 120b (Charge I, Specifications 1-13), Article 115 (Charge II, Specifications 1-3), Article 127 (currently numbered Charge IV, Specifications 1-3), Article 131b (currently numbered Charge V, Specifications 1-4), and additional charges related to the Accused's spouse. The sole issue addressed by this Motion is whether the minor child should be allowed to testify outside the presence of the Accused in accordance with RCM 914A.

FACTS

1. This case involves allegations of child sexual abuse against minor children [redacted] and [redacted] (Charge Sheet; BS01-104 through BS01-105; BS01-0087 through BS01-0090; BS11-0005; BS01-0001 through BS01-0005)

2. Minor child [redacted] will be [redacted] when she provides testimony in this court-martial. (BS01-0002; Trial Management Order)

3. Minor child [redacted]. will be [redacted] when she provides testimony in this court-martial. (BS01-0002; Trial Management Order)

4. During one alleged incident of abuse by the Accused, the Accused held minor child [redacted] neck with his hand, [redacted], and told her, "I will kill you if you tell the secret," or words to that effect. (BS01-0030)

5. During one alleged incident of abuse by the Accused, the Accused struck minor child [redacted] and threatened to kill her if she told anyone about the abuse. (BS01-0008; BS01-0087 through BS01-0090)

6. The actions of minor children [redacted] and [redacted] indicate that they believed the Accused's threats. (BS01-0066 through BS01-0068)

7. The minor children's 801(a)(6) designee has spoken to the children about the possibility of testifying in front of the Accused. Minor child [redacted] "immediately began to cry" upon hearing the Accused's name, said that she never wanted to see the Accused again, and tearfully recalled the Accused threatening her life should she ever tell someone about what he did to her. After merely hearing about the Accused, minor child [redacted]. hardly speaks, eats, or smiles during the days that follow. (Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted])

8. When the minor children's 801(a)(6) designee spoke to minor child [redacted] about the possibility of testifying in front of the Accused, she made it clear that she cannot do that, feels embarrassed and ashamed of what the Accused did to her, expressed fear at being in the same vicinity as the Accused, and would likely suffer emotional trauma if she is forced to do so. (Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted].)

9. The minor children have indicated that they are so afraid of the Accused that they are unable to speak in his presence about the abuse they suffered. (BS01-0066 through BS01-0068; BS01-0087 through BS01-0090; Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted] Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted])

BURDEN

10. The burden of proof and persuasion rests on the minor children victims for this motion. The standard as to any factual issue necessary to resolve this motion is a preponderance of the evidence. RCM 905(c)(1).

LAW

11. Per RCM 914A, "A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied." The minimum procedures that must be observed for such testimony are set forth in RCM 914A (a)(1)-(5).

12. Per Mil. R. Evid. 611(d)(3), Remote live testimony will be used only where the military judge makes the following three findings on the record:

    (A) that it is necessary to protect the welfare of the particular child witness;

(B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the accused; and
(C) that the emotional distress suffered by the child witness in the presence of the accused is more than de minimis.

13. Per Mil. R. Evid. 611(d)(5), "In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem."

ARGUMENT

14. RCM 914A makes it clear that once the requirements of Mil. R. Evid. 611(d)(3) have been satisfied, the military judge must allow the minor children victims to testify outside the Accused's presence. While the military judge may question the minor children in order to determine whether the requirements have been met, there currently exists sufficient evidence to satisfy the requirements without such an inquiry. As set forth in the Facts section above, the Accused threatened to kill the children if they disclosed the abuse he had perpetrated against them. It is clear the children believed the Accused because they kept the abuse secret until the night of 29 September 2019, when the minor children's mother returned home, noticed that one of the children was crying and the other child appeared scared, and prompted the children to explain what had happened. Only after the Accused left the room were the children able to tell their mother even some of what happened. The children disclosed more details only after escaping the house to go to a hospital while the Accused was at home. (BS01-0066 through BS01-0068).

15. The evidence makes it clear that allowing the minor children to testify outside the presence of the Accused is necessary to protect their welfare. The children show signs of trauma at the mere mentioning of the Accused' name and as recently as 15 April 2020 have shown extreme signs of trauma when confronted with the possibility of testifying in front of the Accused. It is also clear that they would be traumatized, not by the courtroom generally, but by the presence of the accused. As set forth in the Fact section above, the children have indicated that the death threats the Accused made against them and extreme trauma they experienced at the hands of the Accused would greatly affect them if they are forced to be in his presence. The evidence also shows that the emotional distress they would suffer in the presence of the accused is more than de minimis. Minor child [redacted] hardly speaks, eats, or smiles for days after merely hearing about the Accused. Minor child [redacted] made it clear that she cannot testify in front of the Accused and expressed fear at the possibility of being in the same vicinity as the Accused. Therefore, based on the cited evidence, the requirements of Mil. R. Evid. 611(d)(3) have been satisfied and the military judge should allow the minor children to testify outside the presence of the Accused per RCM 914A.

16. Additionally, minor child [redacted] indicated to her 801(a)(6) designee that she "wishes that she not be put to testify the horrors she endured in front of her accused *or many strangers*."

(Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted] "*emphasis* added") While the requirements of Mil. R. Evid. 611(d)(3) do not contemplate the child's traumatization by the courtroom generally, but only by the presence of the accused, the minor children would prefer to testify by remote live testimony in accordance with the procedures set forth in RCM 914A so that the number of strangers in front of whom they must testify is minimized.

RELIEF REQUESTED

17. Minor children [redacted] and [redacted] request that this Court allow them to testify via live remote testimony pursuant to RCM 914A.

18. Understanding that the military judge may to desire a colloquy with the minor children to gather additional evidence before ruling on this Motion, we request that such an inquiry be delayed until 13 July 2020, the first day for which trial is scheduled, to ease the burden of travel for the victims.

19. The minor children victims request an Article 39(a), UCMJ, hearing to present additional evidence and argument on this motion.

Respectfully submitted,

/s/Lauren E. Neal
L. E. NEAL
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

/s/Thomas Camden Shealy
T. C. SHEALY
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

I certify that I have served a true copy (via e-mail) of the above on Lieutenant Colonel Wilbur Lee, Captain Shannon B. Hillery, and Major Gregg F. Curley on 16 Apr 20.

/s/Thomas Camden Shealy
T. C. SHEALY
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO VICTIM LEGAL COUNSEL MOTION FOR MINOR CHILDREN VICTIMS' MOTION FOR REMOTE LIVE TESIMONY 23 APR 2020

1. Nature of the Response.

The Minor Victims have moved this court to allow for remote live testimony pursuant to R.C.M. 914A and M.R.E. 611. The Government joins the Victims' request for live testimony by alternate means.

2. Summary of the Facts.

For purposes of this motion, the Government adopts the facts in the Victim Legal Counsels' motion.

3. Discussion.

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. However, the Supreme Court has rejected a literal reading of this clause in favor of a "preference for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case" Maryland v. Craig, 497 U.S. 836, 855 (1990). The requirements outlined in Craig also apply to the military. United States v. McCollum, 58 M.J. 323, 329 (C.A.A.F. 2003).

M.R.E. 611(d) requires that the military judge permit a child victim to testify remotely if the court finds the following: (1) that it is necessary to protect the welfare of the particular child witness; (2) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis. The Victim Legal Counsels' motion and enclosures establish the above. The minor children are requesting remote testimony given the layout of the courtroom. While reasonable accommodations could be made in the courtroom aboard Joint Base Pearl Harbor Hickam, the minor children would still be forced to walk within 3 feet of the accused and would be forced to testify from a seat that is no more than 8 feet from him. Regardless of the accommodations set up in the courtroom, the email enclosures from the minor children's R.C.M. 801(a)(6) designee make it clear that the proximity of the witness chair and the accused in the JBPHH courtroom would have a chilling effect on the testimony of both [redacted] and [redacted]. In those emails, Ms. [redacted] the R.C.M. 801(a)(6) designee for both [redacted] and [redacted] recounts her conversation with each minor child.

Ms. [redacted] wrote about her conversation with [redacted] and stated, "I then asked her if she would want to testify in front of him (Michael True), while in tears she said no that she never wanted to see him again. She has stated that Michael threatened her life while holding her in the air by her neck he threatened to kill her if she ever told on him. She has shut down while talking about him on more than one occasion. When confronted with any topic that makes her uncomfortable, she completely shuts down. She will not speak to anyone; this is her defense mechanism." Ms. [redacted] wrote about her conversation with [redacted]. and in that email she said, "I had a conversation with [redacted]. tonight 15 April 2020 on how she would feel if she had to testify in front of Michael and she immediately said that she would not want to do that. She without

hesitation expressed her fear to be in same vicinity as him." Based on these two conversations, forcing these minor children to testify in the courtroom within 8 feet of the accused would traumatize each of them and the emotional distress suffered by each would be more than de minimis.

If the court is not persuaded that remote testimony is warranted by the facts, the Government would request the court allow for reasonable accommodation during the testimony of [redacted] and [redacted] The reasonable accommodations requested would be to move the witness chair into the well in front of the Military Judge's Bench such that it is further from the accused's table as well as it would prevent each minor victim from being forced in any way to look at the accused.

This reasonable accommodation would be more analogous to United States v. Thompson (31 M.J. 168 (CMA 1990). In Thompson, the trial counsel proposed having the minor children testify from a chair in the middle of the courtroom—a position that did not require the witnesses to have the defendant in their line of sight. This procedure is a smaller deviation from the Sixth Amendment preference for face-to-face. The Court upheld the procedure. The court did note that the placement of the witnesses could impact the presumption of innocence in the eyes of the members but since the case was judge alone, the court did not rule on that issue.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers no additional evidence.

b. The Government and Minor Victims as the moving parties, bear the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(l).

5. Relief Requested.

The Government requests this court allow [redacted] and [redacted] testify live via remote means.

6. Oral Argument.

The Government requests oral argument.

/S/

G. F. CURLEY
Major, U.S. Marine Corps
Complex Trial Counsel

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

UNITED STATES V. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	DEFENSE RESPONSE TO VLC's MOTION FOR REMOTE LIVE TESTIMONY 24 April 2020

1. Nature of the Response. The Defense hereby responds to the joint motion filed by the Victims Legal Counsel (VLCs) for [redacted] and [redacted] for remote live testimony pursuant to Rules for Courts-Martial (R.C.M.) 914A and Military Rules of Evidence (Mil. R. Evid.) 611. The Defense seeks leave of Court to file a substantive response to the subject motion, following discovery under Mil. R. Evid. 513 and consultation with its expert. The Defense further requests that the Court delay hearing argument on this motion until it has the information necessary to substantively respond.

2. Summary of Relevant Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. Of these 26 specifications, 23 involve allegations by two minor complaining witnesses [redacted] (currently [redacted]) and [redacted] (currently [redacted] and 3 involve allegations made by their mother [redacted]. *See* Charge Sheets.

c. [redacted] met Cpl True in April 2018 through social media. [redacted] had three children: [redacted] (female, then [redacted]), [redacted] (female, then [redacted]), and [redacted] (male, [redacted]). [redacted] and [redacted] shared the same biological father. It appears that at the time they met, [redacted] was married to a U.S. Army soldier, [redacted], the biological father of [redacted] and [redacted] and was living with him onboard Joint Base Pearl Harbor Hickham. Enclosures 1 and 2.

d. [redacted] had been physically and sexually abusive toward [redacted] during the course of their marriage and [redacted] had borne witness to some of these incidents in the house. Enclosures 2 and 3.

e. At some point between April 2018 and 31 December 2018, [redacted] and [redacted] were divorced.

f. On 31 December 2018 Cpl True married [redacted] Enclosure 1.

g. In early March 2019, Cpl True, [redacted] and the three children moved into housing onboard Marine Corps Base Hawaii. Enclosure 4.

h. On 13 September 2019, [redacted] was convicted of unknown criminal offense(s). [redacted] wrote a victim impact statement, and [redacted] had testified against [redacted] during the course of his court proceeding. Enclosure 3.

i. According to [redacted] at some point after 2120 on 29 September 2019, she saw [redacted] crying and [redacted]. comforting her; [redacted] said that she was tired of secrets and told [redacted] that when [redacted] went to work Cpl True "puts his penis inside her butt"; [redacted] asked if the same had happened to [redacted] and [redacted] nonverbally affirmed. Enclosure 1.

j. At some point thereafter, [redacted] took all three of her children to the emergency room (ER) at [redacted]. According to [redacted] en route to [redacted] she asked [redacted] and [redacted] questions in the car. Both [redacted] and [redacted] told her that they did not say anything because Cpl True had threatened to kill them and their pets. [redacted] told her that she had fought Cpl True with a knife when he attempted for force oral copulation that night. [redacted] said that she had been assaulted three times by Cpl True in the past and [redacted] said that she had been assaulted multiple times. [redacted] mentioned that she had been taken to the master bedroom, that Cpl True would watch "dirty movies" while penetrating her, and he would normally tell her to take showers after assaulting her. At [redacted], NCIS appears to have conducted its initial interview with [redacted] in a private room at [redacted] with a Victim Advocate from the Family Advocacy Program (FAP) present at some point prior to 0000. During this initial interview, [redacted] described the disclosures made by [redacted] and [redacted] earlier that evening. Enclosure 1.

k. From TAMC, [redacted] took her children to [redacted] for Women and Children where they underwent sexual assault forensic examinations (SAFEs) on 30 September 2019. Enclosure 1. [redacted] was present in the room with each during the course of their SAFEs. According to notes taken during the course of the SAFEs, both [redacted] and [redacted] made disclosures to the examiner. [redacted] described the alleged incident the night prior and noted two other incidents that had occurred within the past month. [redacted] apparently described the incident that had occurred the night prior but was unable to discuss any other incidents. Enclosure 5.

l. That evening, [redacted] took her children to the Children's Justice Center where they each underwent a child forensic interview (CFI). During the course of [redacted] CFI she read from, and referenced, a note she had allegedly drafted on her cell phone when describing three instances of physical and sexual assault by Cpl True. Enclosure 6. During the course of [redacted] CFI, she said

the night before she went down to the laundry room and saw Cpl True holding a [redacted] and [redacted] yelling for help; [redacted] told Cpl True that she was going to tell [redacted] and he pointed the [redacted] in her direction and told her to go upstairs and take a shower; [redacted] did not listen to him and instead went upstairs to the room she shared with [redacted] and [redacted] came up to the room later and was crying; [redacted] later told [redacted] everything. [redacted] made no sexual disclosures during her CFI. Enclosure 7.

m. That same day, the Commanding Officer of [redacted] issued a Military Protective Order (MPO) requiring that Cpl True have no contact with [redacted] or [redacted] [redacted][1] This MPO expired on 1 December 2019. Enclosure 8.

n. On 1 October 2019, [redacted] left Hawaii with [redacted] to stay with a friend in [redacted] Enclosure 9.

o. On 15 October 2019, the Commanding Officer of [redacted] ordered Cpl True into pre-trial confinement and he has remained confined since that date. Enclosure 10.

p. On 21 November 2019, [redacted] underwent a second CFI in [redacted] During this CFI [redacted] made reference to "bad stuff" as well as nonverbal disclosures (pointing to diagrams of body parts and shaking her head yes or no). Enclosure 11.

q. On 24 March 2020, Ms. [redacted] the maternal aunt to [redacted] and [redacted] was appointed by the Court as the designee for both [redacted] and [redacted] under R.C.M. 801(a)(6). Enclosure 12.

r. Cpl True has not seen or communicated with [redacted] or the three children since 1 October 2019.[2]

[1] The command appears to believe that [redacted] only has 1 daughter and her name is [redacted]

s. On 16 April 2020, the Defense filed a motion for in camera review of [redacted] mental health records, pursuant to Mil. R. Evid. 513. The same day, the VLCs representing [redacted] and [redacted] filed the subject motion jointly.

3. Discussion.

The VLCs for [redacted] move this Court to allow for the remote live testimony for [redacted] and [redacted] at trial. The VLCs cite to the nature of the allegations, along with two emails from [redacted] designee, Ms. [redacted] noting her recent interactions with both on the matter as well as her personal opinion, in support of their request. It is the Defense's position that the VLCs have not produced enough evidence justifying, under the standards laid out in the case law and the rules, that remote live testimony is appropriate in this case. A subjective proffer from a biased party, alone, should not be enough to overcome a criminal defendant's Sixth Amendment rights. However, the Defense seeks leave of the Court to file a substantive response in this matter for the reasons set forth below.

The accused's right to confrontation explicitly "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (citing *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)). While this right is not absolute, it is fundamental and cannot "easily be dispensed with." *Id.* at 850.

To overcome this right, there must be a showing of "necessity" which "must of course be a case-specific one: the *trial court must hear evidence* and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* at 856 (emphasis added). In addition, "[t]he trial court must also find that the child witness would be traumatized, *not by the courtroom generally*, but by the presence of the defendant." *Id.* (emphasis added). Finally, "the trial court must find that the emotional distress

[2] However, [redacted] was physically present in the courtroom for the preliminary hearing in this case, which was conducted on 12 February 2020.

suffered by the child witness in the presence of the defendant is more than *de minimis*, i. e., more than "mere nervousness or excitement or some reluctance to testify." *Id.* In *Craig*, this final prong was met by showing that the emotional distress would prevent the child from "reasonably communicat[ing]." *Id.* at 841, 856.

Military Rule of Evidence 611(d) applies the holding in *Craig* to military courts. Mil. R. Evid. 611(d)(3) requires the Military Judge to allow a child witness to testify remotely if the moving party satisfies a tripartite test (which the VLCs lay out in their motion) as follows:

a. that it is necessary to protect the welfare of the particular child witness;

b. that the child witness would be traumatized not by the courtroom generally, but by the presence of the accused; and

c. that the emotional distress suffered by the child witness in the presence of the accused is more than *de minimis*.

R.C.M. 914A (Use of remote live testimony of a child) serves to implement this evidentiary rule, providing that "A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied."

In filing the subject motion, the VLCs have placed the mental state of both [redacted] and [redacted] at issue. In order to adequately respond to this motion, the Defense has to be able to assess each of the three prongs laid out above in Mil. R. Evid. 611(d)(3). It is unable to do that without access to the evidence it has previously requested from the Government under Mil. R. Evid. 513, along with any other evidence that exists to support Ms. [redacted] opinion and the VLC's position in this matter. Upon receipt of that evidence, the Defense needs time to be able to review that evidence with its expert in forensic psychology before substantively responding to the subject motion.

4. Evidence. In addition to the charge sheets, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interviews of [redacted] of 29 Sep 19 and 21 Nov 19

Enclosure (2) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (3) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (4) – Lease Agreement of 1 Mar 19

Enclosure (5) – Excerpts from [redacted] and [redacted] SAFEs of 30 Sep 19 [SEALED]

Enclosure (6) – CFI for [redacted] of 30 Sep 19 (DVD)

Enclosure (7) – CFI for [redacted] of 30 Sep 19 (DVD)

Enclosure (8) – MPO of 30 Sep 19

Enclosure (9) – Executive Summary from 4 Nov 19 NCIS ROI

Enclosure (10) – Confinement Order of 15 Oct 19

Enclosure (11) – CFI for [redacted] of 21 Nov 19 (DVD)

Enclosure (12) – R.C.M. 801(a)(6) Designee Order of 24 Mar 20

5. Burden of Proof. Pursuant to R.C.M. 905(c), the burden of proof and persuasion is on the VLCs who filed the subject motion.

6. Requested Relief. The Court grant the Defense's request for leave to file a response to the VLC's motion, following discovery under Mil. R. Evid. 513 and consultation with the Defense expert in forensic psychology. The Defense further requests that the Court delay hearing argument on the subject motion until that time.

7. **Oral Argument.** Oral argument is requested on this motion.

Dated this 24th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 24th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES V. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	)	CASE LAW SUPPLEMENT TO DEFENSE RESPONSE TO VLC's MOTION FOR REMOTE LIVE TESTIMONY 2 May 2020

Pursuant to Hawaii Circuit Rules of Practice 10.3, the defense files this supplement to specify the case law[1] alluded to in its 24 April 2020 response:

1. United States v. Thompson, 31 M.J. 168 (C.A.A.F. 1990) (affirming military judge's finding of necessity based on the testimony of a psychologist who had been qualified as an expert witness in the area of child sexual abuse and had been treating the minor complaining witnesses over a long period).
2. United States v. Williams, 37 M.J. 289 (C.A.A.F. 1993) (affirming the military judge's finding of necessity based on the testimony of a psychologist who had examined both minor complaining witnesses).
3. United States v. Longstreath, 45 M.J. 366 (C.A.A.F. 1996) (affirming the military judge's finding of necessity based on the testimony of a clinical psychologist who had been treating one of the minor complaining witnesses, and the actual traumatization observed by the court during the other minor complaining witness' multiple attempts to testify).
4. United States v. Anderson, 51 M.J. 145 (C.A.A.F. 1999) (affirming the military judge's finding of necessity based on the testimony of a licensed psychologist, who had been accompanied by a government expert in child sexual abuse when evaluating the minor complaining witnesses).
5. United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (affirming the military judge's finding of necessity based on the testimony of a licensed clinical social worker who had been qualified as an expert in the field of diagnosing and treating sexually abused children, and had counseled the minor complaining witnesses over the course of 11-12 weekly sessions).
6. United States v. Pack, No. NMCCA 200400772, 2006 CCA LEXIS 286 (N-M Ct. Crim. App. Oct. 26, 2006) (affirming the military judge's finding of necessity based on the testimony of a psychologist who had been qualified as an expert in psychotherapy

[1] *See* first paragraph of the Discussion section on page 5 of the defense response.

and clinical psychology and had treated the minor complaining witness for several months prior to trial).

7. United States v. Pauly, No. ACM 36764, 2008 CCA LEXIS 292 (A.F. Ct. Crim. App. Aug. 11, 2008) (affirming the military judge's finding of necessity based on the testimony of a forensic psychiatrist who had: (1) been qualified as an expert in forensic psychiatry and the treatment of sexual abuse victims; (2) interviewed the minor complaining witness, her mother and step-mother; (3) reviewed records in the case; and (4) observed the complaining witness' attempted testimony from the back of the courtroom).
8. United States v. Lobsinger, No. NMCCA 200700010, 2009 CCA LEXIS 357 (N-M Ct. Crim. App. Oct. 27, 2009) (affirming the military judge's finding of necessity based on the testimony of an expert witness in the field of clinical and child psychology, along with extensive discussions that resulted in agreements amongst the parties).
9. United States v. Delmaster, No. ARMY 20150593, 2018 CCA LEXIS 43 (A. Ct. Crim. App. Jan. 31, 2018) (affirming the military judge's finding of necessity based on the testimony of four witnesses—the minor complaining witness' foster mother of 18 months, assigned social worker, therapist, and an expert witness who testified in the field of clinical and forensic psychology).

Dated this 2nd day of May 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 2nd day of May 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. MARINE CORPS	MOTION FOR APPRORIATE RELIEF (IMPROPER NOTICE PURSUANT TO M.R.E. 404 (B), 413, 414) 16 April 2020

1. Issue Presented

Military Rule of Evidence (M.R.E.) 404(b) requires the Government to "provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial." When the Government purports to give notice, but cites every piece of discovery previously served on the defense, fails to identify how they seek to introduce that evidence, whether through documents or testimonial evidence, or the legal basis for admitting the evidence, has the Government provided reasonable notice?

2. Summary of Relevant Facts

Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse).

The Government provided what they referred to as "Notice Pursuant to M.R.E. 404(b), 413, and 414" on 9 April 2020 (Enclosure 1). The purported "notice" referenced "BS01-BS26" which represents the entirety of the discovery served on the Defense on the date this document

was served on the Defense. However, nowhere in the body of the document are BS01-BS26 referenced with any degree of specificity.

3. Applicable Law

a. Military Rule of Evidence 404 (b)

Military Rule of Evidence 404(b) prohibits the introduction of evidence for the purpose of proving that an accused committed charged misconduct because they may have committed misconduct in the past. This is not an absolute ban on evidence of uncharged misconduct, but there must be some independent basis for its admission other than to show, as a result of predisposition to commit similar offenses, that the accused committed the offense currently before the court.

To determine whether evidence should be excluded under Rule 404(b), the United States Court of Military Appeals developed a three prong test in *United States v. Reynolds* (29 M.J. 105). If a piece of evidence fails any prong of the Reynolds test, that failure will be fatal to its admission. The first prong asks whether the evidence reasonably supports a determination that a prior crime, wrong, or act was committed by the accused. This determination is made pursuant to M.R.E. 104(b), whereby the military judge determines whether the fact finder could reasonably find the conditional fact. The second prong turns to the question of relevancy under M.R.E. 401, and the basis for that relevancy. If the relevancy of the evidence is tied to the defendant's character, that evidence should be excluded. The final prong applies the balancing test of M.R.E. 403, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

b. Notice Requirement, M.R.E. 404(b)

However, in order for the Government to introduce extrinsic evidence pursuant to M.R.E. 404(b), they must first provide notice to Defense counsel.

As noted in the Military Rules of Evidence Manual, notice of extrinsic evidence pursuant to M.R.E. 404 (b) "should include:

> (1) Details of the extrinsic conduct; (2) an indication of whether trial counsel will use documentary or testimonial evidence to establish it; (3) a list of witnesses trial counsel will call in support of her offer; (4) a demonstration of whether trial counsel intends on offering the evidence during her case-in-chief or rebuttal; (5) the legal basis for admitting the evidence; and (6) the current judicial authority in support of admission." [1]

The purpose of the notice provision in 404(b) is to prevent "needless litigation, uncertainty, and possible conflicts with other military procedural rules,"[2] by requiring the Government to provide clear notice tying the evidence they intend to introduce to its purported purpose and its theory of admission. Simply citing short-hand lists of theories, absent a connection to the actual evidence the Government seeks to introduce, provides little of value to the Defense and creates the substantial risk of uncertainty for the Defense and wasteful litigation before the Court. In the same vein, in the *United States v. Brannan*, the Military Appeals Court disproved of attorneys citing "broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil.R.Evid. 404(b)."[3]

Such notice does not apply to "intrinsic" evidence, or evidence that relates, "part in parcel," as part of the charged misconduct. "Intrinsic evidence encompasses evidence that is either of an act that is part of the charged offense or is of acts performed contemporaneously with the charged crime…if they facilitate the commission of the charged crime." [4]

c. Military Rules of Evidence 413 and 414.

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[1] Stephen A. Salzburg, et al, Military Rules of Evidence Manual (8th Ed.) 4-107
[2] Id. 4-106
[3] United States v. Brannan, 18 M.J. 181, 185 (1984)
[4] United States v Moore, 651 F.3d 20, 63

The Navy-Marine Corps Court of Criminal Appeals established a five part test for introducing M.R.E. 413 evidence in *United States v. Myers*: "1. Determining that the accused is charged with 'an offense of sexual assault.'... 2. Determining that the evidence offered is 'evidence of the accused's commission of one or more offenses of sexual assault.'... 3. Determining that the evidence is relevant under Mil. R. Evid. 402...4. Determining and ruling that the prejudicial impact of the evidence is substantially outweighed by its probative value...5. Determining that proper disclosure and notice, at least 5 days before trial, of the Government's intent to offer this evidence has been made."[5] In United States v. McDonald, the Court applied the same test to evidence the Government sought to introduce pursuant to M.R.E. 414.[6]

[redacted]

The Government fails to provide proper notice to the Defense for this purported evidence. For one, it is unclear what this evidence actually is. They do not cite any specific evidence they seeks to introduce to support this proffer, and by generally referencing all discovery asks the Defense counsel to divine what evidence will be introduced and under what theory of admission.

[redacted]

Perhaps it is testimonial evidence the Government seeks to introduce. Because of the lack of notice, the Defense is unclear as to who this statement was made to, if it was made, and whether they need to assert the privilege found in M.R.E. 513. Is the government asserting a hearsay exception applies? The Defense is left to guess, and thus is unable to respond.

[5] United States v. Myers, 51 M.J. 570, 580. (internal citations omitted)
[6] United States v. McDonald, 53 M.J. 593, 595

Nor does the Government tie how suicidal ideations relate to consciousness of guilt. No legal theory or case law tying [redacted] is provided to support admissibility, just the recitation of that talismanic phrase is offered to the Defense. Finally, the Government has failed to notify the Defense as to whether they intend to introduce this evidence in their case-in-chief, or in their rebuttal.

b. *"The Accused taking 10 minutes unaccompanied within his residence to retrieve his uniform (evidence of consciousness of guilt/explain the lack of memory cards in security cameras)"*

Again, the Government has failed to provide any sort of substantive notice, other than a broad sweeping rhetorical gesture at the entirety of the discovery in this matter. Nor is there a discussion in the document received by the Defense of how collecting his uniform is evidence of consciousness of guilt.

c. *"The Accused's use of kitchen knives when exploiting family members including but not limited to the rapes [redacted] the incident in which he brought a kitchen knife up to the bedroom in his pocket (modus operandi)."*

The Government is even less clear with this purported notice. It appears they anticipate the Defense will identify when Cpl True "exploited" family members for them, though they do wish to ensure that the Defense does not limit themselves "to the rapes of [redacted] and the incident."

Furthermore, the Government cites another talismanic phrase, *modus operandi*, as the basis for introducing the evidence. However, modus operandi evidence is only admissible in determining the identity of the perpetrator.[7] That evidence must be so idiosyncratic, so unusual and distinctive that it constitutes the accused "signature."[8] The Government has failed to provide

[7] United States v. Rappaport, 19 M.J. 709, 713 (1984)
[8] Id. at 713.

notice as to how modus operandi evidence is relevant or admissible in this case and how the purported evidence, whatever it may be, fulfills these requirements.

5. Discussion, "Intrinsic Acts" Evidence

In this section, the government states how intrinsic acts are not, "by definition, not 404 (b)." It is unclear, therefore, as to the purpose of this section. If the Government intends this section as a means to pre-admit certain evidence, the Defense requests a proper motion and reserves the right to respond. The Government then, in the same section and referring to every theory of admissibility under M.R.E. 404(b), attempts to preserve any possible M.R.E. 404(b) evidence if their analysis of intrinsic evidence is incorrect. As discussed above, such a blanket recitation of the theories outlined in M.R.E. 404(b) is not sufficient evidence to the Defense.

Notwithstanding the above, one particular piece of evidence is worth examining. The Government seeks to introduce [redacted]. Twice in the same sentence the Government refers to these incidents, whenever they occurred, as occurring in the "past," and yet the Government asserts that this evidence refers to an intrinsic act. The Government has made no attempt to identify how these acts are "inextricably intertwined" with the charged crimes. As they occurred in the past, it defies logic that such acts could be part and parcel of the charged crimes.

The Government, "in an abundance of caution," as an alternative lists all purposes for which 404 (b) evidence may be introduced, but again provides none of the notice required and asks the Defense counsel to identify the ways in which this evidence will be introduced at trial and then presumably address any issues with introducing the evidence. The notice requirement in M.R.E. 404(b) is not meant to elicit from the Defense counsel their defenses to vague notions of evidence that may be admitted at trial, but requires the Government to provide effective notice to the Defense of the evidence they intend to introduce.

6. Discussion, "404b/413/414" Evidence

"The Government intends to admit 404b/413/414 evidence that the Accused showed [redacted] a sexual meme/image of a female face and a 'mountain of ejaculation.'"

The Government has not provided a theory as to how this evidence is admissible under any of the rules listed out above, and thus have failed to provide proper notice to the Defense. In regards to M.R.E. 404(b), they have failed to articulate under what theory this evidence would be admissible: what is this evidence meant to show, other than propensity? The Defense is forced to guess based on what little information they have received from the government.

In regards to M.R.E. 413 and M.R.E. 414, beyond listing the Rules, the government has provided no other notice to the Defense. M.R.E. 413 allows the military judge to admit "evidence that the accused committed any other sexual offense" and M.R.E. 414 allows the military judge to admit "evidence that the accused committed any other offense of sexual molestation." Both rules define the respective offenses, and the Government has not articulated what offense they believe Cpl True has committed. Furthermore, M.R.E. 413 defines sexual offense to contact related offenses, and as there is no contact mentioned in the Government's proffer, it is difficult to discern how the Government can rely on M.R.E. 413 to introduce this evidence. As discussed, M.R.E. 414 has a similar notice provision, and the government has similarly failed to provide adequate notice as to how M.R.E. 414 will be used to introduce the evidence.

Whatever the theory may be for the Government in introducing this evidence, it is clear that this evidence fails the third prong of the Myers test, that "a factfinder could reasonably conclude that the appellant committed the [offense]." The Defense has not seen the "sexual meme" addressed in the Government's purported notice, although [redacted] stated she saw it on Cpl True's cellphone which was searched by N.C.I.S.

7. Relief Requested

The Defense respectfully requests that the Military Judge deny the Government's request to admit the abovementioned evidence as the Government has failed to provide adequate notice. Alternatively, the Defense respectfully requests the Military Judge order the Government to amend their notice pursuant to R.C.M. 701(g)(3) so that it comports with the requirements established in M.R.E. 404(b), M.R.E. 413, and M.R.E. 414.

8. Burden of Proof and Standard of Proof

The Government has a duty to provide notice pursuant to M.R.E. 404 (b), M.R.E. 413, and M.R.E. 414.

9. Evidence

a. The following exhibits are enclosed:

i. Enclosure (1): Government Notice Pursuant to M.R.E. 404(b), 413, and 414 dtd 9 Apr 20

10. Argument: Oral argument is requested.

Dated this 16th day of April 2020

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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A true copy of this motion was served electronically on the Court, Trial Counsel, and Victims' Legal Counsel via electronic mail this 16th day of April 2020.

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (REASONABLE NOTICE PURSUANT TO 404(B), 413, 414) 23 April 2020

1. Nature of the Motion: This is the Government's response to defense motion for appropriate relief regarding reasonable notice of M.R.E. 404(b), 413, and 414 evidence in the case of United States v. Corporal Michael True, U.S. Marine Corps.

2. Statement of Facts:

a. The accused is charged with 13 specifications of Article 120b, three specifications of Article 115, three specifications of Article 127, four specifications of Article 131b, one specification of Article 120, one specification of Article 128, and one specification of Article 128b. (Ref A).

b. The NCIS investigation was started on 29 September 2019, after [redacted] reported to her mother [redacted] that she had just been sexually assaulted by the accused. (Encl 1).

c. On 29 September 2019, [redacted] reported to her mother, [redacted] that the Accused had sexually assaulted her earlier that night. (Encl 1).

d[redacted] reported the incident and took her three children to [redacted] for a sexual assault forensic exam (SAFE). (Encl 1).

e. The DNA mixture detected in the vaginal swab of [redacted]. was subsequently found to be 1.0 quintillion times more likeluy to originate from [redacted] and the Accused than if it originated

from [redacted] and an unknown individual. (Encl 2).

f. On 29 September 2019, [redacted] told NCIS that the accused utilized knifes located in the residence to make threats. [redacted]. also stated that the accused has threatened her in the past with a knife. [redacted] also stated that [redacted] or [redacted] told her a knife was used during the sexual act committed earlier that night. (Encl 1).

g. On the night of 29 September 2019, at 1900 the Accused asked [redacted], who was living in a bedroom at the residence if she had seen [redacted] or the kids. The Accused sat on the couch for 45 minutes, looked dejected, and said "maybe she finally left." (Encl 1).

h. On 30 September 2019, the Officer of the Day (OOD) for [redacted] 1stLt [redacted], received a phone call from NCIS around 0200 requesting the Commanding Officer's phone number. Five minutes later the OOD received a phone call from the Executive Officer instructing him to pick up the Accused from the Accused's residence and to bring the Accused to the company office. (Encl 1).

i. The OOD retrieved the Accused from the residence and then contacted the executive officer to determine if the accused needed to bring any items with him. The Executive Officer told the OOD to have the Accused bring his uniform. (Encl 1).

j. The OOD brought the Accused back to the residence. The Accused took over 10 minutes unaccompanied to retrieve his uniform. (Encl 1).

k. On 30 September 2019, the Accused was taken to [redacted] for a sexual assault forensic exam. [redacted] (Encl 1).

l. During the SAFE, the Accused stated that a knife was involved in an incident with [redacted] and that [redacted] had bit his arm. (Encl 1).

m. Following the SAFE, the Accused was admitted to the psychiatric floor for a mental health evaluation. (Encl 1).

n. On 30 September 2019, [redacted] stated in a child forensic interview that she heard [redacted] yelling and saw the accused hold a knife at [redacted] [redacted]. told the Accused that she was going to tell her mother. The Accused then pointed the knife at [redacted] and told her to go upstairs. (Encl 1).

o. When [redacted] returned to the house on 29 September 2019, her two daughters were crying in their bedroom and appeared scared. [redacted] began asking [redacted] why she was crying, at which point, the Accused entered the room and tried to hurry [redacted] out of the room. (Encl 1).

p. During the crime scene examination, NCIS located several kitchen knives, including a single kitchen knife in the kitchen sink. (Encl 1)

q. During the child forensic interview, [redacted] stated that the Accused made her eat seven sleep inducing gummies after an incident of rape/sexual assault of a child (Encl 1).

r. During the child forensic interview, [redacted] stated that the Accused made her taken showers after raping and sexually assaulting her. (Encl 1).

s. During the child forensic interview, [redacted] stated that the Accused showed her a sexual meme of a female face and a "mountain of ejaculate." (Encl 1).

t. On 9 April 2020, the Government provided notice of evidence it intends to offer under Mil. R. Evid. 404(b), 413, and 414. (Ref B).

u. On 16 April 2020, Defense filed a motion titled "Motion For Appropriate Relief (Improper Notice Pursuant to M.R.E. 404(B), 413, 414)."

3. <u>Discussion</u>:

Evidence of uncharged crimes, wrongs, or acts is not admissible to prove a person's character "in order to show that on a particular occasion the person acted in accordance with the

character." Mil. R. Evid. 404(b)(1). However, such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2). This list of potential purposes "is illustrative, not exhaustive." *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989). However, the evidence at issue must still "have some independent relevance under Mil. R. Evid. 401 and 402." *Reynolds*, 29 M.J. at 109. In order for evidence to be relevant, it must be "probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). The evidence must be relevant to "some issue in controversy" and survive Mil. R. Evid. 403's balancing test to ensure that its probative value is not substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 111.

Per Mil. R. Evid. 404(b)(2)(A)-(B), the prosecution must "provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial."

Reynolds established a three-part test for the admissibility of Mil. R. Evid. 404(b) evidence: (1) "Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?" (2) What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?" and (3) "Is the probative value… substantially outweighed by the danger of unfair prejudice?" 29 M.J. at 109.

Mil. R. Evid. 414

Before admitting evidence under Mil. R. Evid. 414, three initial threshold requirements must be met: First, the accused is charged with an offense of child molestation within the meaning of Mil. R. Evid. 414(d). Secondly, the proffered evidence is that the appellant committed another offense of child molestation within the meaning of Mil. R. Evid. 414(d).

Lastly, the proffered evidence is logically relevant under both Mil. R. Evid. 401 and 402. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). Once the evidence meets the threshold requirements, a balancing test under Mil. R. Evid 403 is applied. *Id.* at 179-80. Additionally, disclosure and notice, at least five days before trial must be given.[1]

4. Analysis:

a. Reasonable notice of the general nature of 404(b) evidence was provided.

The government provided reasonable notice of the general nature of evidence it intends to offer under Mil. R. Evid. 404(b) at trial. Defense's interpretation of reasonable notice is not consistent with M.R.E. 404(b), caselaw, or existing military practice. Of note, Defense did not cite one case that supports the interpretation of reasonable notice. Defense also cites facts and statements from the discovery specifically relating to the notice that was provided indicating they were on notice of what evidence would be admitted. The notice provided by the Government meets the requirement under Mil. R. Evid. 404(b)(2)(A) to provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial

b. M.R.E. 404(b) evidence satisfies the *Reynolds* test.

[redacted] **following discovery of the charged misconduct**

The accused was brought to the company office by the OOD in the early morning of 30 September 2019 following the report of the Accused raping [redacted] the night prior. The Accused had knowledge that his wife and step-children had left the house late in the night on 29 September 2019. Subsequently, the Accused was transported to [redacted] by NCIS special agents to conduct a SAFE. While in the waiting room pending the SAFE, the accused made [redacted] NCIS attempted to interrogate the Accused

[1] *United States v. McDonald*, 53 M.J. 593, 595

following the SAFE, however, the Accused invoked his Article 31b, UCMJ rights. Following the SAFE, the Accused was hospitalized based on [redacted] before entering pre-trial confinement.

Consciousness of guilt[2] is well-established as a method of admitting M.R.E. 404(b) evidence.[3] The Drafter's Analysis of the Military Rules of Evidence 2016 Edition specifically cites consciousness of guilt:

> "Rule 404(b) provides examples rather than a list of justifications for admission of evidence other than misconduct. Other justifications, such as the tendency of such evidence to show the accused's consciousness of guilt to the offense charged, expressly permitted in Manual Para. 138 g(4), remain effective. Such a purpose would, for example, be an acceptable one."

Here, the accused made [redacted] after discovering his step-daughters reported that he raped them. The accused being held in a hospital for a [redacted] is not disputed. This course of action by the accused demonstrates a consciousness of guilt that a fact finder could reasonably rely on in a finding that the accused raped his step-daughters. As such, the first prong of the *Reynolds* test is met.

The evidence in conjunction with its temporal proximity to the rape reports makes a fact in question, that he raped his two step-daughters, more probable. Therefore, the second prong of the *Reynolds* test is met.

The evidence is prejudicial to the accused, but not unfairly prejudicial. Likewise, the probative value of this evidence is high. As such, all three prongs of the *Reynolds* test are met.

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[2] Black's Law, 10th Edition: "Consciousness of guilt. The awareness of an accused that he or she has engaged in blameworthy conduct."

[3] Admitting evidence tending to show the accused's consciousness of guilt is an accepted principle of military jurisprudence. *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (C.M.A. 1958). See *United States v. Curtis*, 45 M.J. 480, 482 (C.A.A.F. 1997) (discovery of a diuretic during a search of the appellant's home showed consciousness of guilt, and constituted indirect evidence of marijuana use by showing an effort to avoid detection, even though the product could have been used for weight reduction as the appellant testified). See also *United States v. Moran*, 65 M.J. 178, 188, (C.A.A.F. 2007).

Taking 10 minutes unaccompanied to retrieve uniform

Following the command being contacted by NCIS, the [redacted] Officer of the Day (OOD) was directed to bring the accused to the company office. After picking up the accused from his residence, but before arriving at the company office, the OOD was told to make sure the accused had his uniform with him. The OOD returned to the accused's residence. The accused went into the residence by himself. It took the accused over ten minutes to retrieve his uniform from his house. When NCIS searched the residence, memory cards were missing from all of the security cameras.[4]

The OOD stated in an interview with NCIS that the Accused took over ten minutes unaccompanied to retrieve his uniform from the residence. The evidence reasonably supports a finding by court-members that this occurred. The fact of consequence is that it explains the lack of memory cards in the security cameras. The evidence is highly probative and does not have a danger of unfair prejudice. As such, it is admissible under the acceptable purpose of consciousness of guilt.

Motive to control, exploit, and threaten family members with knives

The Accused had a motive to control, exploit, and threaten family members, including through the use of physical violence with a knife, and that he therefore had this same motive when he committed the charged rape of a child.

The Accused stated during the SAFE that a knife was involved in the incident between himself and [redacted] on the night of 29 September 2019. [redacted] stated that the knife was held to

[4] *United States v. Moran*, 703, 708-709, 62 M.J. 178, 188 (C.A.A.F. 2006) "That 'an inference of consciousness of guilt can be drawn from the destruction of evidence is well-recognized in the law.' *Haemonetics Corp. v. Dupre*, 238 B.R. 224, 228 n.10 (D. Mass. 1999); see also *Sullivan v. General Motors Corp.*, 772 F. Supp. 358, 360 (N.D. Ohio 1991) (citing *State v. Strub*, 48 Ohio App. 2d 57, 355 N.E.2d 819, 825 (Ohio Ct. App. 1975)); *United States v. Howard*, 228 F. Supp. 939, 942 (D. Neb. 1964)."

her throat during the commission of the rape. The use of a knife was also documented in the sexual assault forensic exam of [redacted] The DNA report showing the high probability that the Accused's DNA was found in a vaginal swab of [redacted] provides significant credibility to [redacted] report of being raped with the knife. [redacted] also stated that the Accused pointed a knife at her and told her to go upstairs. The victims also stated that the Accused used a knife during other threatening, controlling, and abusive interactions. The knife was found during the search of the accused's residence. Therefore, the evidence reasonably supports a finding by court-members that the Accused threatened and controlled family members with a knife.

The common motive of the use of a knife in threatening, controlling, and exploiting family members makes the charged rape of a child with a knife more probable.[5]

The probative value of this motive is high and not substantially outweighed by unfair prejudice.

Intrinsic Acts

The Government believes the acts listed in paragraph 2 of 404(b) notice are intrinsic acts that are part in parcel to the charged offenses. As stated in the 404(b) notice, the Government listed the acts as 404(b) evidence in the event they are not considered intrinsic acts. If they are not considered intrinsic acts, the Government intends offer the evidence under Mil. R. Evid. 404(b).

c. <u>Mil. R. Evid. 414 notice is sufficient.</u>

[5] "[I]f there is a common motive for both the uncharged misconduct and the charged offense, evidence that the accused committed the former strengthens the inference that he committed the latter." *U.S. v. Jenkins*, 48 M.J. 594, 598 (Army Ct. Crim. App. 1998).

Mil. R. Evid. 414 has an inherent presumption in favor of admission.[6] Here, the Government provided notice that it intends to offer evidence that [redacted] stated that the Accused showed her a sexual meme/image that contained a female face and a "mountain of ejaculate."

This act would constitute an Article 120b offense (i.e. lewd act) of sexual abuse of a child involving indecent communication and/or sexual abuse of a child involving indecent conduct. Under Mil. R. Evid. 414(d)(2)(A), any conduct prohibited by Article 120b is defined as "child molestation." Here, the Accused is charged with several specifications of Article 120b. Notice of intent to offer the evidence was provided on 16 April 2020. The logical relevance is that the act makes the charged sexual assault and rapes of [redacted] more probable. Defense counsel did not cite any of the *Wright* factors in its motion, however, the nine factors strongly weigh in favor of admissibility of the evidence.[7]

Regardless of the admissibility under Mil. R. Evid. 414, the evidence would also be admissible under Mil. R. Evid. 404(b). Specifically, the evidence would be admissible as evidence of knowledge, plan, and common scheme relating to grooming behavior towards the victim, especially when considering other intrinsic acts such as threatening to kill the victim and her pets if she told anyone about the abuse.

d. <u>Conclusion</u>

Accordingly, the Government has provided reasonable notice of the general nature of evidence it intends to offer at trial. The M.R.E. 404(b) evidence has satisfied the three-part test outlined in *U.S. v. Reynolds*. The Government's evidentiary purpose for this "other crimes,

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[6] *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005).

[7] "When conducting this balancing test, "the military judge should consider the following non-exhaustive factors: " (1) strength of proof of the prior act (i.e., conviction versus gossip); (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts; (8) presence or lack of intervening circumstances; and (9) the relationship between the parties." *Solomon*, 72 M.J. at 180 (citing *Wright,* 53 M.J. at 482).

wrongs, or acts" evidence does not relate to an impermissible use of the Accused's character, but concerns other relevant circumstantial facts, which are probative of the Accused's guilt of the charged offense, in accordance with M.R.E. 404(b),[8] Sufficient Mil. R. Evid. 414 notice was provided and the evidence would be admissible under the rule. Therefore, the Government requests the Court deny the defense motion for appropriate relief.

5. **Evidence:**

a. Encl 1 BS01 NCIS ROI dtd 4 Nov 19

b. Encl 2: BS02 DNA Report

c. Ref A: Charge Sheet

d. Ref B: Defense Encl 1 (Government 404b, 413, 414 Notice)

6. **Burden of Proof:** The Defense has the burden by a preponderance to show that the Government did not provide reasonable notice. The Government has the burden of showing that the 404(b) evidence is admissible for a proper purpose.

7. **Nature of Relief:** The Government requests the Court deny Defense's motion.

8. **Oral Argument:** The Government respectfully requests oral argument.

TURNER.JOHNATHON.PAUL.II.[redacted] Digitally signed by TURNER.JOHNATHON.PAUL.II.[redacted] Date: 2020.04.23 17:39:54 -10'00'

J.P. TURNER
Captain, U.S. Marine Corps
Trial Counsel

[8] *United States v. Lake*, 36 M.J. 317, 322 (CMA 1993).

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

UNITED STATES V. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL EXPERT CONSULTANT (DEFENSE INVESTIGATOR) 16 April 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 701(d)-(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the Court to compel the government to provide the defense with an expert investigative consultant.

2. Summary of Relevant Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. Notably, 4 of the specifications of Article 120b are charged during a 9-month period of time (between on or about 15 January 2019 and on or about 29 September 2019), and two specifications of Article 120b are charged during roughly a 1-month period of time (between on or about 1 August 2019 and on or about 7 September 2019). The remaining 7 specifications of Article 120b are charged on or about 8 and 29 September 2019. *See* Charge Sheets.

c. [redacted] met Cpl True in April 2018 through social media. [redacted] had three children: [redacted] (female, [redacted]), [redacted] (female, [redacted]), and [redacted] (male, [redacted]). [redacted] and [redacted] shared the same biological father. It appears that at the time they met, [redacted] was married to a U.S. Army soldier, [redacted] the biological father of [redacted] and [redacted] and was living with him onboard Joint Base Pearl Harbor Hickham. Enclosures 1 and 2.

d. Aguilar had been physically and sexually abusive toward [redacted] during the course of their marriage and [redacted] and [redacted] had borne witness to some of these incidents in the house. As a result of this abuse, [redacted] apparently suffered from permanent brain damage, short term memory loss, and post-traumatic stress disorder (PTSD). Enclosures 2 and 3.

e. At some point between April 2018 and 31 December 2018, [redacted] and [redacted] were divorced.

f. On 31 December 2018 Cpl True married [redacted]. Enclosure 1.

g. In early March 2019, Cpl True, [redacted] and the three children moved into housing onboard Marine Corps Base Hawaii. Enclosure 4.

h. In May 2019, Cpl [redacted] moved into what was [redacted] room of the True residence, forcing [redacted] and [redacted]. into a shared room. Enclosure 2.

i. In July 2019, Cpl [redacted] got married while on leave and his wife, [redacted], moved into Cpl [redacted] room in the True residence. Enclosure 3.

j. One weekend during September 2019, [redacted] was hospitalized for 48-hours at [redacted] after cutting her wrist. Enclosures 1-3.

k. On 13 September 2019, [redacted] was convicted of unknown criminal offense(s). [redacted] wrote a victim impact statement, and [redacted] had testified against [redacted] during the course of his court proceeding. Enclosure 3.

l. At some point after 2120 on 29 September 2019, [redacted] made disclosures in front of [redacted] and [redacted] alleging sexual assault by Cpl True. [redacted] asked [redacted] if Cpl True had done the same to her and she nonverbally affirmed. Enclosure 1.

m. At some point thereafter, [redacted]. took all three of her children to the emergency room (ER) at [redacted]. At [redacted] NCIS appears to have conducted its initial interview with [redacted] in a private room at [redacted] with a Victim Advocate from the Family Advocacy Program (FAP) present at some point prior to 0000. Enclosure 1.

n. From [redacted] took her children to [redacted] for Women and Children where they underwent sexual assault forensic examinations (SAFEs) on 30 September 2019. Enclosure 1. [redacted] was present for each of these SAFEs, which appear to have been conducted between 0345 and 0900 and proceeded as follows: 0500-0600 [redacted] 0600-0715 [redacted] and 0715-0900 [redacted]. disclosed that she had been taking [redacted] during the course of her SAFE. Enclosure 5.

o. At 1133 that same day, pursuant to a verbal Command Authorization for Search and Seizure (CASS), a SAFE was conducted with Cpl True at [redacted]. [redacted] Cpl True invoked his right to counsel. Enclosure 6.

p. That evening, [redacted] took her children to the [redacted] where they each underwent a child forensic interview (CFI) as follows: 1731-1937 ([redacted]), 1948-2014 [redacted] 2021-2040 [redacted]. Neither [redacted] nor [redacted] made any disclosures. Enclosure 7.

q. It appears that as of 30 September 2019, [redacted] was [redacted] Enclosure 3 and 8.

r. It appears that as of 30 September 2019, [redacted] was taking medication, including [redacted]. Enclosure 2 and 9.

s. On 1 October 2019, [redacted] left Hawaii with [redacted]., [redacted] and [redacted]. to stay with a friend in [redacted]. Enclosure 10.

t. On 15 October 2019, the Commanding Officer of [redacted] ordered Cpl True into pre-trial confinement. Enclosure 11.

u. On 21 November 2019, [redacted] was re-interviewed by an NCIS agent in [redacted] and made additional allegations of physical assault against Cpl True which prompted the initiation of a separate domestic assault investigation. Enclosure 1.

v. That same day, [redacted] underwent a second CFI in [redacted] Enclosure 12.

w. On 27 November 2019, the U.S. Army Criminal Investigation Laboratory (USACIL) produced a DNA report. Enclosure 13.

x. On 14 January 2020, 2 buccal swabs were obtained from [redacted] in [redacted] and forwarded to USACIL. Enclosure 14.

y. On 28 January 2020, USACIL produced a second DNA report. Enclosure 15.

z. On 31 January 2020, the defense submitted a request to the convening authority, via the trial counsel for investigative assistance. Enclosure 16.

aa. On 12 February 2020, the Regional Trial Investigator (RTI) conducted a walk-through of the True residence. During the course of this walk through, a number of unidentified medications prescribed to [redacted] were spotted in the master bedroom. Enclosure 17.

bb. On 20 February 2020, the convening authority denied the defense request for an investigator. Enclosure 18.

3. Discussion.

a. STANDARD FOR THE APPOINTMENT OF AN INVESTIGATIVE CONSULTANT.

R.C.M. 703(d) authorizes employment of experts to assist the defense at government expense when their testimony would be "relevant and necessary," if the government cannot or will not "provide an adequate substitute." R.C.M. 703(d). *See also* United States v. Ford, 51 M.J. 445,455 (C.A.A.F.1999). In addition, "upon a proper showing of necessity, an accused is entitled to expert assistance." United States v. Burnette, 29 M.J. 473,475 (C.M.A.1990), *cert. denied*, 498 U.S. 821 (1990). *See also* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F.2005) ("An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity.")

This court must apply a three-part test to determine whether expert assistance is necessary. United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A.1994), *cert. denied*, 513 U.S. 965 (1994). The defense must show: (1) why expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

Appellate courts have urged practitioners "to distinguish between a request for an expert witness and a request for an expert consultant. An expert consultant is provided to the defense as a matter of [military and constitutional] due process, in order to prepare properly for trial and

otherwise assist with the defense of a case." United States v. Langston, 32 MJ. 894, 896 (A.F.C.M.R.1991). The expert consultant is a member of the defense team and may receive confidential communications, his conclusions and opinions are protected by the attorney work-product privilege.

In United States v. Kreutzer, 59 M.J. 773, 776 (A. Ct. Crim. App. 2004) *aff'd*, 61 M.J. 293 (C.A.A.F. 2005) the court held that in the military, the right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, 10 U.S.C. § 846, MIL. R. EVID. 706, and R.C.M. 703(d). Further, "[E)qual opportunity to obtain evidence evidence under Article 46, UCMJ, as implemented by the President in the Rules for Courts-Martial, is a 'substantial right' of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution." United States v. Adens, 56 M.J. 724, 732 (A. Ct. Crim. App. 2002). Articles 46 and 49 were enacted to serve as a break on abuse by the convening authority and the trial counsel in their prosecutorial roles. The failure to adequately fund defense counsel investigation and travel for case preparation violates the accused's right to equal access to witnesses and evidence under Article 46, and R.C.M. 701(e) and the accused's right to counsel under the Sixth Amendment of the U.S. Constitution. This type of action prejudices defense trial strategy, materially affecting the presentation of the defense's case.

b. DEFENSE COUNSEL HAVE A DUTY TO INVESTIGATE.

Defense counsel have a duty to investigate. In Strickland v. Washington the Supreme Court held that defense counsel have a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. 466 U.S. 668, 688 (1984). With respect to pretrial investigation, the Court held "counsel have a duty to make reasonable investigations or

to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *See* Wiggins v. Smith, 539 U.S. 510 (2003); Strickland at 690-91.

In Strickland the Court held that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable." *Id.* at 688-689. The fourth edition of the ABA Criminal Justice Standards for the Defense Function, provides that defense counsel have "a duty to investigate in all cases" and that "investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties."

In Rompilla v. Beard the Supreme Court specifically found that defense counsel had a "duty to make all reasonable efforts to learn what they could about the offense." 545 U.S. 374, 385 (2005). These "reasonable efforts" included discovering mitigating evidence and ascertaining aggravating evidence.

The effective assistance of counsel guarantee of the Due Process Clause may require the allowance of investigative expenses or appointment of investigative assistance for indigent defendants to insure effective preparation of their defense. Congress, in providing for the adequate representation of federal indigent defendants, included "investigative, expert, and other services."[1] Further, the ABA, as well as many states, in promulgating minimum standards for criminal justice have adopted the position that investigative assistance is a necessity for an adequate defense.

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[1] 18 U.S.C. § 3006A(a).

c. Lack of Investigative Assistance Constitutes Constructive Denial of Counsel.

It is a core guarantee of the Sixth Amendment that every criminal accused has the right to counsel when facing incarceration. Gideon v. Wainwright, 372 U.S. 335, 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our rights in criminal proceedings. Gideon, 372 U.S. at 340-41; Powell v. Alabama, 287 U.S. 45, 67-69 (1932).

An analysis of Gideon cases informs that constructive denial of counsel may occur when: (1) on a systemic basis, detailed defense counsel face severe structural limitations, such as a lack of resources, high workloads, and understaffing, or (2) appointed counsel are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. Constructive denial may occur even if the detailed counsel are able to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." United States v. Cronic, 466 U.S. 648, 659-60 (1984). This may occur when, for example, the defense counsel is not provided sufficient time to prepare, or when defense counsel fails to "subject the prosecution's case to meaningful adversarial testing." *Id.* at 659; Powell at 53-58.

As the Supreme Court recognized in Ake v. Oklahoma, 470 U.S. 68, 77 (1985), provision of expert services are required to implement the Sixth Amendment right to counsel.

d. THE MILITARY HAS RECOGNIZED THE NECESSITY OF DEFENSE INVESTIGATORS.

For the past 6 years, the need for defense investigators has been recognized in the military justice system. On 23 September 2013, the Secretary of Defense established the Comparative Systems Subcommittee (CSS) to support the Response Systems Panel (RSP) established under Section 576(d)(1) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. The subcommittee included four members of the RSP as well as six experts with extensive knowledge of military or civilian criminal justice. Collectively, the subcommittee had more than 188 years of military service and 326 years of criminal justice experience[2]; it was supported by a staff with current knowledge of military justice and experience in investigation, training, prosecution, and defense.

Secretary Hagel established several objectives for the subcommittee, which was asked to compare military and civilian systems for the investigation, prosecution and adjudication of adult sexual assault and related crimes and identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.

In May 2014, the subcommittee issued its Report of the Comparative Systems Subcommittee To the Response Systems to Adult Sexual Assault Crimes Panel.[3] The Subcommittee specifically found "military defense counsel need independent, deployable defense investigators in order to zealously represent their clients and correct an obvious imbalance of resources. Defense investigators are such a basic and critical defense resource, the [s]ubcommittee finds they are required for all types of cases, not just sexual assault cases."[4]

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[2] The members of the Comparative Systems Subcommittee are: Dean Elizabeth Hillman, the Honorable Barbara Jones, BG (Ret) Malinda Dunn, BG (Ret) John Cooke, Mr. Harvey Bryant, COL (Ret) Stephen Henley, COL (Ret) Dawn Scholz, COL (Ret) Larry Morris, Ms. Rhonnie Jaus, and Mr. Russell Strand.

[3] The full final report can be found at: http://responsesystemspanel.whs.mil/Public/docs/Reports/01_CSS/CSS_Report_Final.pdf.

[4] Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Finding 37-2.

The subcommittee, along with the ABA[5] and state and federal criminal defense practitioners[6] testifying before the subcommittee, identified the objectively reasonable standard for effective assistance of counsel with respect to investigations. Ultimately, the subcommittee recommended, "the Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice." The subcommittee further noted:

> The alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory. This places an additional burden on counsel that is untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory or inconsistent statements.[7]

In August 2019, the Secretary of the Navy appointed an Executive Review Panel of civilian legal, academic, and business professionals from the public and private sectors to conduct a Comprehensive Review of both the Navy Judge Advocate General's Corps and Marine Corps Judge Advocate communities. On 9 December 2019, the panel released its Comprehensive Review of the Department of the Navy Legal Communities, in which it noted that "[n]either defense counsel nor the legal services specialists assigned to support the DSO receive specialized training in investigative techniques." *Id.* at 202. This review goes on to note that:

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[5] ABA Criminal Justice Standards for the Defense Function.

[6] *E.g.* Lisa Wayne of the National Association of Criminal Defense Lawyers told the RSP, "you all [don't] assign investigators to the defense. And that doesn't make sense. You can't be effective. You cannot provide effective assistance of counsel to your client without an investigator." Transcript of RSP Comparative Systems Subcommittee Meeting at 229 (7 January 2014); see also Transcript of RSP Public Meeting at 377-82 (12 December 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia). http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140107_CSS/20140107_CSS_Transcript_Final.pdf.

[7] Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel at 158.

> In April 2019, the DoD indicated it would "direct the Services to develop an appropriate defense [services] investigator capability on a trial basis for a three-year term." Additionally, there is a provision in the Senate version of the FY 20 NDAA that requires the Service Secretaries to establish a three-year pilot program on defense investigators in the military justice system. The Navy currently employs civilian "litigation support specialists" as defense investigators. For the Navy, the total cost of eight litigation support specialists is $1.3M per year, which reflects salary, benefits, permanent change of station travel, housing, and cost of living adjustments.

Id. at 203. The panel ultimately recommended the resourcing of "a pilot program for [DSO] investigators" in the Marine Corps, as well as training to convening authorities that emphasized "the convening authority's responsibilities to ensure equal access to evidence and witnesses per Article 46." *Id.* at 208 and 232.

4. Application.

As evident in the breadth of the summary of relevant facts above and the enclosures cited to therein, there is an enormous body of evidence in this case and a complex array of issues the defense will need to explore in order to adequately investigate. The defense intends to identify and locate [redacted] biological father for an interview. The defense intends to interview [redacted] the biological father of [redacted] and [redacted] who is presumably in post-trial confinement—this interview will likely require coordination with the facility where he is being held, as well as the virtual/telephonic presence of his trial and/or appellate defense counsel depending on where his case is in post-trial review. The defense intends to get copies of the record of trial from [redacted] case, including the written statements and/or testimony offered by [redacted] and [redacted] during the course of that trial. The defense intends to interview friends, family members, and co-workers of [redacted] on island and back in the mainland in order to uncover everything that

could impact her credibility and ability to perceive events as a witness. The defense intends to do the same for [redacted] The defense intends to evaluate the CFIs and SAFEs that were conducted in this case, as well as the DNA evidence that has been gathered, all with the assistance of experts. The defense also anticipates tracking down and interviewing Cpl True's adopted and biological family members for purposes of sentencing.

There is a widening military-civilian divide.[8] As officers in the Marine Corps, and attorneys, detailed defense counsel must identify themselves by rank and name in reaching out to witnesses. In doing so, detailed military defense attorneys are at an inherent disadvantage because such identification creates confusion, suspicion, or a chilling effect because the only person that witness may associate with the military is the accused who is facing allegations of criminal misconduct. There is a reason why NCIS and CID agents, as well as the Regional Trial Investigator (RTI) wear civilian attire both on and off duty—because they get more information that way. This is why CID agents and the RTI identify themselves as agents instead of their military rank, even though they are active duty enlisted Marines. Because these optics shape perceptions and make them more effective. Most of the interviews the defense intends to conduct are with civilians—having a civilian defense investigator will enable the detailed defense counsel to bridge the military-civilian divide.

Detailed defense counsel is also unable to gather and present the evidence that the requested investigator would be able to develop due to a lack of training and experience in investigative techniques, as well as a lack of resources. More importantly, to function

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[8] *DoD Official Cites Widening Military-Civilian Gap*, published 16 May 19, https://www.defense.gov/Explore/News/Article/Article/1850344/dod-official-cites-widening-military-civilian-gap/ ("This disconnect is characterized by misperceptions, a lack of knowledge and an inability to identify those who serve").

in the role of an investigator would violate Rule 3.7 of JAGINST 5803.1D, which prohibits a covered attorney from acting as an advocate at a trial in which the covered attorney is likely to be a necessary witness.[9] The RTI is an investigative asset available to the Trial Services Office (TSO)—no equivalent exists in the Defense Services Office (DSO). This asset imbalance creates an inequity in the ability of the parties to identify evidence and develop their cases. If both sides have an equal opportunity to obtain evidence under Article 46 of the UCMJ, shouldn't both sides have an equal opportunity to discover that evidence through investigation? *See generally* United States v. Stellato, 74 M.J. 473 (the discovery rules in the R.C.M.s ensure compliance with the equal-access-to-evidence mandate in Article 46; in doing so, the rules aid the preparation of the defense and enhance the orderly administration of military justice; and furthermore, the parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate).

Along with a dishonorable discharge, reduction to the lowest pay grade, and total forfeitures, Cpl True faces the possibility of 10 life sentences in confinement without the eligibility of parole. If he was in the U.S. Navy, his detailed defense counsel would have access to an independent civilian defense investigator. Because he is a Marine, Cpl True will not have access to the same resources and investigative assistance of a similarly situated accused wearing a different uniform within the Department of the Navy.

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[9] RULE 3.7 ATTORNEY AS WITNESS

a. A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and quality of legal services rendered in the case; or

(3) disqualification of the covered attorney would work substantial hardship on the client.

b. A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

5. **Evidence.** In addition to the charge sheets, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interviews of [redacted] of 29 Sep 19 and 21 Nov 19

Enclosure (2) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (3) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (4) – Lease Agreement of 1 Mar 19

Enclosure (5) – Excerpts from [redacted] SAFEs of 30 Sep 19 [SEALED]

Enclosure (6) – NCIS IAs: CASS/Execution of Cpl True SAFE and Interrogation of 30 Sep 19

Enclosure (7) – Excerpts from [redacted] CFIs of 30 Sept 19

Enclosure (8) – Photograph from NCIS Crime Scene Examination of 30 Sept 19

Enclosure (9) – Photograph from NCIS Crime Scene Examination of 30 Sept 19

Enclosure (10) – Executive Summary from 4 Nov 19 NCIS ROI

Enclosure (11) – Confinement Order of 15 Oct 19

Enclosure (12) – [redacted] CFI of 21 Nov 19

Enclosure (13) – USACIL DNA Report of 27 Nov 19

Enclosure (14) – NCIS IA: Collection of [redacted] DNA of 14 Jan 20

Enclosure (15) – USACIL DNA Report of 28 Jan 20

Enclosure (16) – Defense Request for DNA Expert Consultant of 31 Jan 20

Enclosure (17) – Response from Convening Authority of 20 Feb 20

6. **Burden of Proof.** Pursuant to R.C.M. 905(c), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

7. **Requested Relief.** The defense requests the Court compel the government to provide the defense with an expert investigative consultant.

8. **Oral Argument.** Oral argument is requested on this motion.

Dated this 16th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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Appellate Exhibit XL

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

Dated this 16th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL EXPERT CONSULTANT (DEFENSE INVESTIGATOR) 23 April 2020

1. Nature of the Motion: This is the Government's response to the defense motion to compel an expert investigative consultant.

2. Statement of Facts:

For purposes of this motion, the Government adopts defense's statement of facts, and adds the following fact:

a. All of the alleged sexual assaults took place on Marine Corps Base Hawaii. Reference (a)-(b).

3. Discussion:

a. Law

Pursuant to R.C.M. 703(d), regarding the employment of expert consultants, "[a] request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of an expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute."

To be entitled to expert assistance at Government expense, the accused must demonstrate "necessity."[1] In order to determine necessity, courts apply a two pronged test: "[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial."[2]

The first prong of that test is demonstrated by satisfying a three-part test. "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the Accused? Third, why is the defense counsel unable to gather and present evidence that the expert assistance would be able to develop."[3] The defense "must demonstrate something more than a mere possibility of assistance."[4]

With regard to the second prong, a trial is considered fundamentally unfair where the government's actions are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[5]

b. Necessity Analysis

i. Why Expert Assistance is Needed

The court in *U.S. v. Bresnahan* stated that "necessity requires more than the mere possibility of assistance from a requested expert."[6] Defense articulated in its motion that there is an "enormous body of evidence in this case and a complex array of issues the defense will need

[1] *See, United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005); *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001).
[2] *United States v. Freeman*, 65 M.J. 451,458 (C.A.A.F. 2006).
[3] *United States v. Gonzalez*, 39 M.J. at 459 (C.M.A. 1994) (quoting *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990)).
[4] *United States v. Robinson*, 39 M.J. 88, 89 (CMA 1994); *United States v. Short*, 50 M.J. 370 (1999).
[5] *United States v. Russell*, 411 U.S. 423, 431-32 (1973).
[6] *U.S. v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

to explore in order to adequately investigate."[7] Defense goes on to explain that it intends to locate and/or interview a number of individuals including: (1) the child victims' biological fathers, (2) individuals on Oahu and the mainland in order to secure impeachment material for [redacted] and [redacted] and (3) the accused's adopted and biological families.

Defense failed to articulate why expert investigatory assistance is needed. Defense's arguments is simply that there is an extensive amount of evidence in this case and that there are supposedly numerous individuals that need to be identified for interviews. Defense does not indicate what steps have already been taken to identify these individuals, nor explain why an expert is needed to review the evidence of this case. Therefore, defense has not demonstrated beyond a mere possibility that an expert may be of assistance.

Defense states that it intends to utilize other experts to evaluate the CFI's, SAFE's, and DNA evidence, which cut against its argument that this investigatory expert will assist in sifting through the "enormous body of evidence." Those three categories of evidence make up the majority of the evidence in this case. If defense intents to secure experts to assist with those complex issues, then there is no need for a general investigatory expert to assist with the other, relatively simple, evidence.

Lastly, the alleged misconduct occurred on Marine Corps Base Hawaii less than a quarter of a mile from Defense's office spaces and Defense has already gained access to the crime scene.

ii. What Expert Assistance Will Accomplish

Defense's motion does not articulate what an expert will accomplish. Defense argues that a civilian investigator may secure more information out of civilian witnesses because the investigator would be in civilian clothes and not identify themselves as a military member. This

[7] Defense motion at 11.

is a specious argument. It appears that many of defense's anticipated interviewees are not local, so any potential interview would be conducted over the phone. Therefore, any advantage gained by wearing civilian attire is moot. Second, the investigator would still identify him or herself as an investigator of some sort, regardless of whether the interview was conducted over the phone or in person. This identification has the same ability to lead to "confusion, suspicion, or a chilling effect" that defense identifies in its motion. Additionally, defense has not articulated that it has attempted to contact any potential witnesses who have refused to be interviewed. Without such information, any argument for an expert investigator is speculative. Therefore, defense has failed to articulate what in expert investigator will accomplish beyond defense counsel's own abilities.

iii. Inability of Defense Counsel to Gather Evidence Without Expert Assistance

Defense argues that it does not have investigative training, experience, and that it is prohibited by Rule 3.7 of JAGINST 5803.1D, "which prohibits a covered attorney from acting as an advocate at trial in which the covered attorney is likely to be a necessary witness." This argument fails because there is a simple solution. Defense can utilize third-party witnesses, such as a proofer, in any interview thereby protecting the attorney from becoming a witness. This is a standard practice that was implemented for this very reason.

Defense also argues that it is unable to gather the evidence due to a lack of resources. However, as explained above, defense anticipates utilizing additional experts to analyze the complex facets of this case. This expert is only being requested to conduct speculative witness interviews and potentially gather and analyze documentary evidence. This type of work lies squarely within the abilities of detailed defense counsel.

The courts in both *U.S. v. Bresnahan* and *U.S. v. Freeman* have provided additional guidance on this prong of the analysis. 62 M.J. at 140; 65 M.J. 451, 459. In both of those cases, the appellants argued that they had satisfied the requirement for expert assistance by stating, in so many words, they do not possess the requisite expertise that the requested expert does. *Id.* In *Freeman*, however, the court accepted that the expert "possessed knowledge and expertise" in the requisite area beyond that of the defense and that the defense could benefit from his assistance. *Id.* Nevertheless, that court upheld the denial of an expert assistant because, as here, the defense never established why they themselves were unable to gather and present any evidence that the expert would have been able to develop.

Last, Defense conflates punitive exposure with complexity in an attempt to leverage experts and assistance. The gravamen of these offenses is violent rape with DNA evidence. This is not a complicated fact pattern. Since the crime scene has already been accessed and many experts granted, the remaining investigatory steps consist of phone calls to locate/develop impeachment evidence.

c. Conclusion

Accordingly, the Defense has not satisfied any part of the three-part test outlined in *U.S. v. Freeman*. The Defense has failed to establish that an investigatory expert is necessary in this case. The Defense has failed to outline any tasks that go beyond their own capabilities and expertise. And, finally, the Defense has failed to show why they are unable to gather the evidence that the requested expert would be able to collect.

4. Burden of Proof.

The Defense, as the moving party, bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. *Id.* at (c)(l).

5. Evidence/Enclosures.

Reference (a): Enclosure 7 to defense motion, interview of [redacted].
Reference (b): Enclosure 12 to defense motion, interview with [redacted].

6. Relief Requested:

The Government requests that the Military Judge deny the Defense's Motion to Compel an Expert Consultant.

7. Argument:

The Government respectfully requests oral argument.

/s/
G. W. Adcock
First Lieutenant, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	DEFENSE MOTION TO COMPEL DISCOVERY UNDER RCM 701 16 APRIL 2020

Issues Presented

Upon request, the defense is entitled to discovery of tangible items that are "relevant to defense preparation." RCM 701(a)(2)(A). Here, the defense has requested "sex toys" used by the complaining witness and Cpl True in discovery. Is the discovery requested by defense relevant to the defense preparation and, as such, must be provided to the defense?

Summary of Relevant Facts

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. The defense submitted a discovery request on 18 March 2020 (Enclosure 1). The Government denied that request on 24 March 2020, stating that the "request is vague and does not demonstrate logical relevance to the charged offenses." (Enclosure 2).

c. [redacted], Cpl True's spouse and complaining witness, made it known to both of her roommates, Cpl [redacted] and his wife, [redacted] that she engaged in [redacted] (Enclosures 3 and 4).

d. Cpl [redacted] observed a rope in Cpl True and [redacted] bedroom. (Enclosure 4).

1. **Discussion Of The Law**

a. The Rules for Court-Martial and Uniform Code of Military Justice require liberal disclosure

Article 46, UCMJ, and the Rules for Court-Martial (RCMs) implementing the statute set forth the requirements for the production of evidence for courts-martial. "The prosecution and defense and the court-martial shall have *equal opportunity to obtain witnesses and evidence*, including the benefit of compulsory process." RCM 703(a) (emphasis added); see also Article 46, UCMJ. Rule for Courts-Martial 701(e) states, "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. "No party may unreasonably impede the access of another party to a witness or evidence." RCM 701(e).

Courts have routinely recognized that the scope of discovery in military courts is substantially broader than what is common in civilian practice. See, e.g., United States v. Williams, 50 M.J. 436, 439 (C.A.A.F. 1999) (citations omitted). In addition to the discovery rules, the military court of appeals outlined the importance of discovery, and stated that the military criminal justice system contains much broader rights of discovery than are available under the Constitution or in most civilian jurisdictions. See United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986).

The standard for discovery in RCM 701(a)(2)(A) used to be "material to the preparation of the defense." However, this changed in the 2019 MCM to require the government to discover any item "relevant to defense preparation." The analysis of rule 701 specifically notes that "[t]he provisions broaden the scope of discovery, requiring disclosure of items that are 'relevant' rather than 'material' to defense preparation of a case."

Rule for Courts-Martial 703(f)(1) states "[t]hat each party is entitled to the production of evidence which is relevant and necessary." The discussion section of RCM 703(f)(1) defines "necessary" evidence as evidence that contributes to the party's presentation of the case in a positive way on a matter in issue. Military Rule of Evidence 401 defines relevant evidence as evidence that tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Discussion of Requested Discovery

Cpl True and [redacted]. have a history of consensual sexual activity involving tying, binding, restraining, slapping, and hitting each other. Apparently, they used ropes for the bondage of their body parts and ball gags to cover their mouths. Cpl True is accused of touching [redacted] groin, breast, and buttocks with his hand, with an intent to "abuse, humiliate, harass, and degrade" [redacted] and to "arouse the sexual desire of any person" without [redacted] consent. Cpl True is also accused of strangling [redacted] with his hand.

The "sex toys" used by Cpl True and [redacted] are relevant to the defense preparation. Inspection of these items is necessary for the defense to argue that the physical contact between Cpl True and [redacted]. was consensual and non-offensive. Furthermore, these items are necessary for the Defense to establish a mistake of fact defense as to consent for these charges.

Relief Requested.

Pursuant to RCM 905(b)(4), RCM 701(a)(2)(A), and RCM 703(f)(4), the defense respectfully requests that the Court order discovery of the documents requested in this motion.

3. Burden of Proof and Standard of Proof.

Under RCM 905(c)(2), the defense bears the burden of persuasion. Under RCM 905(c)(1), the burden of proof is a preponderance of the evidence. As the moving party, the defense has the burden of showing by a preponderance of the evidence that the requested documents are relevant to the preparation of the defense. RCM 701(a)(2)(A).

4. Evidence.

(1) Defense Discovery Request, dtd 18 Mar 20

(2) Government Discovery Response, dtd 24 Mar 20

(3) NCIS Interview of Cpl [redacted] of 30 Sep 19

(4) NCIS Interview of Cpl [redacted] of 30 Sep 19

Testimony of [redacted], Civilian

Testimony of Cpl [redacted], USMC

5. **Argument:** Oral argument is requested.

Dated this 16th day of April 2020

[redacted]
B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

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

Dated this 16th day of April, 2020

[redacted]
B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY UNDER RCM 701 23 April 2020

1. Nature of the Response.

This is the Government's response to the defense motion to compel discovery under RCM 701.

2. Summary of the Facts.

For purposes of this motion, the Government adopts the facts in Defense's motion with the following additions:

a. Corporal True has been charged with Article 120 (Abusive sexual contact), 128b (Domestic violence), and Article 128 (Assault consummated by battery upon a spouse), against [redacted] *See* charge sheets.

b. Relevant to those charges, [redacted] stated that the accused touched her breasts, buttocks, and vaginal area without her consent on or about August or September 2019 in the kitchen area of their shared home. Reference A.

c. When [redacted]. resisted the touching, the accused then strangled [redacted] Reference A.

3. Discussion.

For the purposes of this motion, the Government does not oppose Defense's recitation of the applicable law.

m. On 27 November 2019, the U.S. Army Criminal Investigation Laboratory (USACIL) produced a DNA report. Enclosure 8.

n. In the report, no semen was identified on the following: vaginal swabs ([redacted], external genitalia swabs ([redacted] and [redacted]), perianal swabs ([redacted]). No spermatozoa were observed on the following: oral swabs [redacted], penile swabs (Cpl True), scrotal swabs (Cpl True), pubic mound swabs (Cpl True), and anal perineal swabs (Cpl True). DNA extraction procedures were performed on the following: buccal swabs [redacted] and [redacted], vaginal swabs [redacted]), external genitalia swabs [redacted] and [redacted]), oral swabs [redacted], perianal swabs ([redacted]), blood stain card (Cpl True), penile swabs (Cpl True), scrotal swabs (Cpl True), pubic mound swabs (Cpl True), and anal perineal swabs (Cpl True). Of these, a DNA mixture was detected on the vaginal and external genitalia swabs of [redacted] (assuming [redacted] the remaining DNA profile was consistent with Cpl True). Additionally, Cpl True could not be excluded from the partial Y-STR DNA profile detected from the genital and perianal swabs of [redacted] Finally, a DNA mixture was detected on the scrotal swabs from Cpl True but could not be further interpreted until the appropriate standard for comparison and/or elimination were submitted to USACIL. Enclosure 8.

o. On 14 January 2020, 2 buccal swabs were obtained from [redacted] in Missouri and forwarded to USACIL. Enclosure 9.

p. On 28 January 2020, USACIL produced a second DNA report indicating that DNA extraction procedures were performed on [redacted] buccal swabs. However, the DNA mixture detected on the scrotal swabs of Cpl True could not be interpreted due to "mixture complexity and biological relatedness." Enclosure 10.

q. On 11 February 2020, the defense received the previously requested USACIL discovery packet from the government. Enclosure 11.

Defense requested to inspect "sex toys" in order to "argue that the physical contact between Cpl True and [redacted] was consensual and non-offensive." Defense Motion at 3. Further, defense argues the toys are "necessary . . . to establish a mistake of fact defense as to consent for these charges." *Id.* Corporal [redacted] stated that [redacted] and the accused were into [redacted] Defense Enclosure (3). [redacted] simply stated that [redacted] Defense Enclosure (4).

The evidence requested is not relevant or material to prepare a defense against the relevant charges. The encounter in the kitchen is fundamentally different from the encounters described by the witnesses. [redacted] and the accused were not in their bedroom, engaged in sexual intercourse, participating in bondage or impact play, or utilizing sex toys. Assuming, *in arguendo*, that [redacted] had consented on prior occasions to being bonded or utilizing sex toys, those toys are not relevant to her consent to the charged misconduct.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers the following evidence:

Reference A: See Enclosure 1 to Def Motion for Appropriate Relief: Preadmission of Mil. R. Evid. 412(b) Evidence.

b. Defense is the moving party, bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(l).

5. Relief Requested.

The Government requests this court deny Defense's motion.

6. Oral Argument.

The Government requests oral argument.

/S/
G. F. CURLEY
Major, U.S. Marine Corps
Complex Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

HAWAII JUDICIAL CIRCUIT

GENERAL COURT MARTIAL

UNITED STATES vs. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	DEFENSE MOTION TO COMPEL DISCOVERY UNDER RCM 701 13 JULY 2020

Issues Presented

Upon request, the defense is entitled to discovery of documents that are "relevant to defense preparation." RCM 701(a)(2)(A). Here, the defense has requested, among other items, the work schedule and record of hours worked by [redacted] during the period of the alleged assaults. Is the discovery requested by defense relevant to the defense preparation and, as such, must be provided to the defense?

Summary of Relevant Facts

The defense submitted a discovery request on 17 April 2020 (Enclosure 1). In that request, the defense requested the employment documentation for [redacted] at the Semper Fit gym onboard Marine Corps Base Hawaii. On 23 April 2020, the government denied the request as "they are not relevant nor is the government in possession of [redacted] employment records." (Enclosure 2).

On 29 September 2019, Cpl True allegedly committed sexual assaults on [redacted] and [redacted], the minor biological children of [redacted] When these assaults occurred, [redacted] was at work at Semper Fit. (Enclosure 3). At some point in the evening, she returned to the home, whereupon the allegations were first made by [redacted] and [redacted]

Subsequent to the Defense's request and the government's denial of this request, the Defense attempted to acquire the requested information from Marine Corps Community Services Hawaii which employs the employees of Semper Fit. The Defense was informed that [redacted] worked from June 2019 until September 2019 and that the timesheet report for [redacted] would require [redacted] consent. (Enclosure 4).

1. **Discussion Of The Law**

a. The Rules for Court-Martial and Uniform Code of Military Justice require liberal disclosure

Article 46, UCMJ, and the Rules for Court-Martial (RCMs) implementing the statute set forth the requirements for the production of evidence for courts-martial. "The prosecution and defense and the court-martial shall have *equal opportunity to obtain witnesses and evidence*, including the benefit of compulsory process." RCM 703(a) (emphasis added); see also Article 46, UCMJ. Rule for Courts-Martial 701(e) states, "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. "No party may unreasonably impede the access of another party to a witness or evidence." RCM 701(e).

Courts have routinely recognized that the scope of discovery in military courts is substantially broader than what is common in civilian practice. See, e.g., United States v. Williams, 50 M.J. 436, 439 (C.A.A.F. 1999) (citations omitted). In addition to the discovery rules, the military court of appeals outlined the importance of discovery, and stated that the military criminal justice system contains much broader rights of discovery than are available under the Constitution or in most civilian jurisdictions. See United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986).

The standard for discovery in RCM 701(a)(2)(A) used to be "material to the preparation of the defense." However, this changed in the 2019 MCM to require the government to discover

any item "relevant to defense preparation." The analysis of rule 701 specifically notes that "[t]he provisions broaden the scope of discovery, requiring disclosure of items that are 'relevant' rather than 'material' to defense preparation of a case."

Rule for Court-Martial 701 does not solely apply to evidence within the immediate custody of the prosecution, but also requires due diligence to locate and identify relevant evidence in the possession, control, or custody of other Government authorities. Williams, 50 M.J. at 441; United States v. Stellato, 74 M.J. 472, 484-85 (C.A.A.F. 2015) (stating that the government does not have to physically possess something for it to be within their possession, custody, or control). This prosecutorial requirement of due diligence therefore extends to: (1) files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involve a specified type of information within a specified entity. Williams, 50 M.J. at 441. Furthermore, the trial counsel has a duty to seek out and examine the evidence in the possession of military investigative authorities that is favorable to the defense. See United States v. Briggs, 48 M.J. 143 (C.A.A.F. 1998).

As recognized in Giglio v. United States, 405 U.S. 150 (1972), defendants in criminal cases are entitled to be informed of evidence affecting a government witness' credibility. Id. at 154; accord Brady v. Maryland, 373 U.S. 83, 87 (1963) (noting that this right endures regardless of whether the prosecution denied production of the evidence in good faith). Many courts have interpreted this rule to mean that prosecutors must maintain and disclose records which tend to show evidence affecting law enforcement witnesses' credibility. See, e.g., United States v. Henthorn, 931 F. 2d 29 (9th Cir. 1991). As recognized in Kyles v. Whitley, 514 U.S. 419,

(1995), the government's disclosure obligations extend not only to witnesses in a trial, but also to **participants in a law enforcement investigation who do not actually testify**. Id. at 428-29, 445-49 (referencing statements and actions by an informant who was not called to testify). In reversing the decision of the lower courts, the court in Kyles noted that open discovery of exculpatory or impeachment evidence

> will serve to justify trust in [a justice system whose goal] is not that it shall win a case, but that justice shall be done. . . [Liberal disclosure] will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. at 439-40.

Rule for Courts-Martial 703(f)(1) states "[t]hat each party is entitled to the production of evidence which is relevant and necessary." The discussion section of RCM 703(f)(1) defines "necessary" evidence as evidence that contributes to the party's presentation of the case in a positive way on a matter in issue. Military Rule of Evidence 401 defines relevant evidence as evidence that tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

b. Semper Fit Employment Documents

The mother of the minor victims, [redacted] worked at the Semper Fit facility on Marine Corps Base Hawaii. Every alleged sexual assault in the home occurred when [redacted] was not in the home. On the night of the alleged assault that lead to the allegations, [redacted] was working at Semper Fit and stated she came home to attend to the kids. When [redacted] was working and not working is relevant to Defense preparation, as it will show when the minor complaining witnesses were left alone with Cpl True. It will further help develop the timeline of when the alleged assaults were supposed to have occurred.

2. **Relief Requested.**

Pursuant to RCM 905(b)(4), RCM 701(a)(2)(A), and RCM 703(f)(4), the defense respectfully requests that the Court order discovery of the documents requested in this motion.

3. **Burden of Proof and Standard of Proof.**

Under RCM 905(c)(2), the defense bears the burden of persuasion. Under RCM 905(c)(1), the burden of proof is a preponderance of the evidence. As the moving party, the defense has the burden of showing by a preponderance of the evidence that the requested documents are relevant to the preparation of the defense. RCM 701(a)(2)(A).

4. **Evidence.**

(1) Second Request for Discovery of 17 Apr 20

(2) Government's Response to Defense's Discovery Request of 23 Apr 20

(3) NCIS ROI of 10 Oct 19

(4) Email from MCCS of 10 July 2020

5. **Argument:** Oral argument is requested.

Dated this 13th day of July, 2020

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

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

Dated this 13th day of July, 2020

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES	)	
	)	DEFENSE MOTION FOR
V.	)	APPROPRIATE RELIEF:
	)	COMPEL ADDITIONAL FUNDING
MICHAEL A. TRUE	)	FOR EXPERT DNA CONSULTANT
CORPORAL	)	(MS. [redacted])
U.S. MARINE CORPS	)	
	)	16 April 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 701(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the court to order the government for additional funding for pretrial consultation with DNA expert Ms. [redacted].

2. Summary of Relevant Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheet.

b. Notably, 4 of the specifications of Article 120b are charged during a 9-month period of time (between on or about 15 January 2019 and on or about 29 September 2019), and two specifications of Article 120b are charged during roughly a 1-month period of time (between on or about 1 August 2019 and on or about 7 September 2019). The remaining 7 specifications of Article 120b are charged on or about 8 and 29 September 2019. *See* Charge Sheet.

c. On 31 December 2018, Cpl True married [redacted] Enclosure 1.

d. At the time of the marriage, [redacted] had three children: [redacted] (female, [redacted]), [redacted] (female, [redacted]), and [redacted] (male, [redacted]). [redacted] and [redacted] shared the same biological father. Enclosure 1.

e. In March 2019, Cpl True, [redacted] and the three children moved into on-base housing onboard Marine Corps Base Hawaii. Enclosure 2.

f. In May 2019, Cpl [redacted] moved into what was [redacted] room of the True residence, forcing [redacted] into a shared room. Enclosure 3.

g. In July 2019, Cpl [redacted] got married while on leave and his wife, [redacted], moved into Cpl [redacted] room in the True residence. Enclosure 4.

h. At some point after 2120 on 29 September 2019, [redacted] made disclosures in front of [redacted] alleging sexual assault by Cpl True. [redacted] if Cpl True had done the same to her and she nonverbally affirmed. Enclosure 1.

i. Later that night, [redacted] took all three of her children to the emergency room at [redacted], and then to [redacted] for Women and Children. Enclosures 1 and 5.

j. Between 0345 and 0830 on 30 September 2019, each of the children underwent a sexual assault forensic examination (SAFE) at [redacted]. [redacted] was present for all of these SAFEs. Enclosures 1 and 5.

k. On 30 September 2019, pursuant to a verbal Command Authorization for Search and Seizure (CASS), a SAFE was conducted of Cpl True at [redacted] Enclosure 6.

l. On 15 October 2019, the Commanding Officer of [redacted] ordered Cpl True into pre-trial confinement. Enclosure 7.

m. On 27 November 2019, the U.S. Army Criminal Investigation Laboratory (USACIL) produced a DNA report. Enclosure 8.

n. In the report, no semen was identified on the following: vaginal swabs ([redacted], external genitalia swabs ([redacted] and [redacted]), perianal swabs ([redacted]. No spermatozoa were observed on the following: oral swabs [redacted], penile swabs (Cpl True), scrotal swabs (Cpl True), pubic mound swabs (Cpl True), and anal perineal swabs (Cpl True). DNA extraction procedures were performed on the following: buccal swabs [redacted] and [redacted], vaginal swabs [redacted]), external genitalia swabs [redacted] and [redacted], oral swabs [redacted], perianal swabs ([redacted]), blood stain card (Cpl True), penile swabs (Cpl True), scrotal swabs (Cpl True), pubic mound swabs (Cpl True), and anal perineal swabs (Cpl True). Of these, a DNA mixture was detected on the vaginal and external genitalia swabs of [redacted] (assuming [redacted] the remaining DNA profile was consistent with Cpl True). Additionally, Cpl True could not be excluded from the partial Y-STR DNA profile detected from the genital and perianal swabs of [redacted] Finally, a DNA mixture was detected on the scrotal swabs from Cpl True but could not be further interpreted until the appropriate standard for comparison and/or elimination were submitted to USACIL. Enclosure 8.

o. On 14 January 2020, 2 buccal swabs were obtained from [redacted] in Missouri and forwarded to USACIL. Enclosure 9.

p. On 28 January 2020, USACIL produced a second DNA report indicating that DNA extraction procedures were performed on [redacted] buccal swabs. However, the DNA mixture detected on the scrotal swabs of Cpl True could not be interpreted due to "mixture complexity and biological relatedness." Enclosure 10.

q. On 11 February 2020, the defense received the previously requested USACIL discovery packet from the government. Enclosure 11.

r. On 25 February 2020, the defense submitted a request to the convening authority, via the trial counsel, for funding 20 hours of pre-trial consultation with a DNA expert, Ms. [redacted] Enclosure 12.

s. On 4 March 2020, the defense received discovery from the government, to include BS20 (interview notes with the government's DNA expert), and BS22 (DNA branch data files, etc. from USACIL). Enclosure 13.

t. On 5 March 2020, the convening authority approved the defense's request in part, authorizing only 10 hours of consultation with Ms. [redacted] Enclosure 14.

u. On 10 April 2020, Ms. [redacted] provided the defense with a declaration for the Court's consideration in this matter. Enclosure 15.

3. Discussion.

Pursuant to R.C.M. 703(d), when an expert is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[1]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable

[1] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

to gather and present the evidence that the expert consultant would be able to develop.[2] The defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[3]

(1) Why the expert is necessary.

Given the nature and severity of the allegations, the defense will be unable to mount a defense without properly understanding the DNA evidence in this case and the viable theories of attack or explanation that result therefrom. Assistance from Ms. [redacted] is necessary because of the complexities of this field and the facts underlying the allegations. There are 3 complaining witnesses ([redacted]) in the 26 specifications pending against Cpl True, all of whom are maternally related, and 2 of whom are minors ([redacted]). During the time frames charged in the specifications, Cpl True lived with all 3 complaining witnesses in the same residence and engaged in consensual sexual activity with one of the complaining witnesses ([redacted]). There are 2 DNA reports from USACIL and the findings linking Cpl True to the two minor complaining witnesses are based on DNA mixtures and Y-STR analysis.

Ms. [redacted] necessity has already been recognized in the convening authority's grant, in part, of her service to the defense as an expert DNA consultant. Ms. [redacted] has over 20 years of experience in forensic serology and DNA analysis and has been accepted as an expert witness over 120 times. *See* Enclosure 15. Based on her initial consultation with defense counsel and review of the materials, she estimated that she needed 20 hours to provide adequate consultation. By only granting half of the time requested, the convening authority will prevent the defense from effectively using Ms. [redacted] as an expert consultant. The defense needs to be fully prepared

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[2] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

[3] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

on all issues surrounding the DNA evidence in this case prior to trial in order for Cpl True to mount an effective defense.

(2) What the expert will accomplish for the defense.

Ms. [redacted] will review all relevant DNA evidence, identify theories from that evidence, conduct her own additional research on these theories, educate the defense on the evidence and viable theories, and assist the defense counsel in developing these theories up to trial. [redacted] will also be able to help the defense counsel to develop cross-examination questions based around these theories pre-trial, which will be probative for developing these theories during trial.

(3) Why defense counsel cannot do this on their own.

Defense counsel are not DNA experts and do not have the ability to analyze the facts as a DNA expert would. Similarly, defense counsel do not have the time to develop the same expertise that Ms. [redacted] has in time for trial. Defense counsel do not know what evidence to develop to allow an expert to give an opinion, less give an expert opinion with regard to them. Similarly, defense counsel would be unable to testify as an expert witness if that becomes relevant.

4. Evidence. In addition to the charge sheets, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interview of [redacted] of 29 Sept 19

Enclosure (2) – Lease Agreement of 1 Mar 19

Enclosure (3) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (4) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (5) – Intake Sheet from [redacted], SAFEs of 30 Sep 19[SEALED]

Enclosure (6) – NCIS IA: CASS and Execution of Cpl True SAFE of 30 Sep 19

Enclosure (7) – Confinement Order of 15 Oct 19

Enclosure (8) – USACIL DNA Report of 27 Nov 19

Enclosure (9) – NCIS IA: Collection of [redacted] DNA of 14 Jan 20

Enclosure (10) – USACIL DNA Report of 28 Jan 20

Enclosure (11) – USACIL Discovery Packet of 11 Feb 20

Enclosure (12) – Defense Request for DNA Expert Consultant of 25 Feb 20

Enclosure (13) – Discovery Email from TSO and Notes from Government DNA Expert

Enclosure (14) – Response from Convening Authority of 5 Mar 20

Enclosure (15) – Declaration of Ms. [redacted] of 10 Apr 20

5. **Burden of Proof.** Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. **Requested Relief.** The defense requests the court compel the government to produce Ms. [redacted] as an independent and confidential expert consultant for an additional 10 hours of pre-trial consultation.

7. **Oral Argument.** Oral argument is requested on this motion.

Dated this 16th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 16th day of April 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO Defense MOTION to Compel additional funding for a DNA Expert Consultant 23 APR 2020

1. Nature of the Response.

This is the Government's response to the defense motion to compel additional funding for Ms. [redacted]

2. Summary of the Facts.

For purposes of this motion, the Government adopts the facts in Defense's motion with the following additions:

a. Defense has not begun utilizing the funding authorized by the convening authority for the requested expert consultant. See Defense Motion Enclosure 15.

3. Discussion.

For the purposes of this motion, the Government does not oppose Defense's recitation of the applicable law. The Government agrees Defense has met the three part test to show DNA expert assistance is relevant and necessary.[1] The Convening Authority acted in accordance with this concession when it granted ten hours of expert consultation with [redacted]

This motion is not ripe at this time. While Defense did not receive the 20 requested hours, their request was not denied. Therefore, while understanding that the expert assistance was

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

necessary the Convening Authority provided funding for expert assistance. Defense has not worked with the expert and exhausted the funds available. Based on the email from Ms. [redacted] she has not conducted any review or consultation with Defense.

Defense makes the argument that the Accused is being denied the ability to mount an effective defense because its whole request was not granted. The Convening Authority did not issue an ultimatum in the authorization for Ms. [redacted] stating that Defense would only receive this ten hours with Ms. [redacted] and no more. On the contrary, the authorization signed by the Convening Authority explicitly stated that if additional Expert Assistance was needed that Defense would be able to make the request at that time. Defense did make a showing in its request that Expert Assistance was relevant and necessary. Defense has not shown in this motion how the additional 10 hours of expert assistance is relevant or necessary. Defense has failed to do any work or show how Ms. [redacted] is incapable of doing any work unless she is authorized the full amount of time she estimated she would need. Ms. [redacted] fee schedule did not list a minimum required number of hours for retention.

There is no danger of a fundamentally unfair trial at this stage. Defense requested expert assistance in the form of Ms. [redacted] as a DNA consultant on 25 February 2020. The Convening Authority granted that request on 5 March 2020. Defense then received a memo on 10 April 2020 from Ms. [redacted] stating that she has not done anything with no explanation as to why she could not conduct any research or consultation with the 10 approved hours. Defense then moved this court to compel the Convening Authority to provide the additional time originally requested. Defense has the ability to utilize the consultant and return to the Convening Authority to request additional funding if it is necessary. At this stage, Defense has not begun utilizing the funding authorized by the Convening Authority, and therefore this motion is not ripe.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers:

i. Email "DNA Expert ICO US v. True from the government to the Defense dtd 19 March 20

ii. TC endorsement

iii. Testimony from Ms. [redacted]

b. Defense is the moving party, bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(l).

5. Relief Requested.

The Government requests this court deny Defense's motion for additional funding.**6. Oral Argument.**

The Government requests oral argument.

/S/
G. F. CURLEY
Major, U.S. Marine Corps
Complex Trial Counsel

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. MARINE CORPS	SUPPLEMENTARY MOTION FOR APPRORIATE RELIEF (IMPROPER NOTICE PURSUANT TO M.R.E. 404 (B), 413, 414) 1 May 2020

1. Nature of the Motion.

This is the Defense's reply to the Governments Response to Defense Motion for Appropriate Relief (Reasonable Notice Pursuant to 404(b), 413, 414).

2. Summary of Relevant Facts

The Defense filed a motion to compel the Government to provide proper notice pursuant to M.R.E. 404(b), 413, and 414. In their initial notice, the Government provided the following notice, in part: "The government intends to admit 404b/413/414 evidence that the Accused showed [redacted] a sexual meme/image of a female face and a "mountain of ejaculation." In response to the Defense's motion, the Government clarified through omission that they were seeking to use M.R.E. 414.

3. Applicable Law and Discussion

Based on the motion filed by the Government, it appears that they intend to introduce evidence of uncharged misconduct where the victim in the uncharged misconduct is the same complaining witness in the present alleged misconduct. While the Defense has not seen this

image, even if the image is what the government purports it to be, the Government should have either charged the misconduct or it should be excluded from trial.

In *United States v. Hills*[1], the trial court allowed, pursuant to M.R.E. 413, the Government to use charged sexual misconduct to prove propensity to commit the charged sexual misconduct. The CAAF found that this was in error. "While M.R.E. 413 was intended to permit the members to consider the testimony of **other** victims with respect to an accused's past sexual offenses...there is no indication that M.R.E. 413 was intended to bolster the credibility of the **named victim** through inferences drawn from the same allegations of the **same named victim**."[2] Although this case dealt with M.R.E. 413, as "rules 413 and 414 are essentially the same in substance, the analysis for proper admission of evidence under either should be the same."[3]

While in *U.S. v Hills*, the evidence in question relates to charged misconduct, when the victim is the same, the logic still holds: the Government should not be allowed to bolster the victim's word simply by not charging the accused. If the named victim makes any allegations, then the Government needs to charge it or abstain from entering it into evidence at trial, as there is no indication that propensity instruction for other sex offenses applies to the same named victim in M.R.E. 413.

4. Relief Requested

The Defense respectfully requests that the Military Judge deny the Government's request to admit the abovementioned evidence.

5. Burden of Proof and Standard of Proof

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[1] *United States v. Hills*, 75 M.J. 2016 C.A.A.F.
[2] *Id.* at 355.
[3] *United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001)

The Government has a duty to provide notice pursuant to M.R.E. 404 (b), M.R.E. 413, and M.R.E. 414.

6. Evidence

No additional evidence.

7. Argument: Oral argument is requested.

Dated this 1st day of May, 2020

[redacted]
[redacted]B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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A true copy of this motion was served electronically on the Court, Trial Counsel, and Victims' Legal Counsel via electronic mail this 1st day of May 2020.

[redacted]
[redacted]. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES V. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL ADDITIONAL FUNDING FOR EXPERT DNA CONSULTANT (DR. [redacted]) 13 JULY 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 701(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the Defense moves the court to order the government for additional funding for pretrial consultation with forensic psychologist expert Dr. [redacted].

2. Summary of Relevant Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheet.

b. Notably, 4 of the specifications of Article 120b are charged during a 9-month period of time (between on or about 15 January 2019 and on or about 29 September 2019), and two specifications of Article 120b are charged during roughly a 1-month period of time (between on or about 1 August 2019 and on or about 7 September 2019). The remaining 7 specifications of Article 120b are charged on or about 8 and 29 September 2019. *See* Charge Sheet.

c. On 31 December 2018, Cpl True married [redacted] Enclosure 1.

d. At the time of the marriage, [redacted] had three children: [redacted] (female, [redacted], [redacted] (female, [redacted]), and [redacted] (male, [redacted]. [redacted] and [redacted] shared the same biological father. Enclosure 1.

f. In May 2019, Cpl [redacted] moved into what was [redacted] room of the True residence, forcing [redacted] into a shared room. Enclosure 2.

g. In July 2019, Cpl [redacted] got married while on leave and his wife, [redacted] moved into Cpl [redacted] room in the True residence. Enclosure 3.

h. At some point after 2120 on 29 September 2019, [redacted] made disclosures in front of [redacted] alleging sexual assault by Cpl True. [redacted] asked [redacted] if Cpl True had done the same to her and she nonverbally affirmed. Enclosure 1.

i. Later that night, [redacted] took all three of her children to the emergency room at [redacted] and then to [redacted] for Women and Children, where the children underwent forensic interviews. Enclosures 1, 4, and 5.

k. On 21 November 2019, [redacted] was again interviewed at [redacted] in [redacted] Enclosure 6.

r. On 19 March 2020, the Defense submitted a request to the convening authority, via the trial counsel, for funding 20 hours of pre-trial consultation with Dr. [redacted], a forensic psychologist. Enclosure 7.

s. On 1 April 2020, the Government denied the request for Dr. [redacted] but found Dr. [redacted] to be an adequate substitute, and granted 20 hours consultancy with Dr. [redacted] to the Defense. Enclosure 8.

t. On 6 July 2020, the Defense requested an additional 60 hours consultancy with Dr. [redacted] based on her estimation of the time required to adequately review the evidence in the case and consult with the Defense. Enclosure 9.

u. On 10 July 2020, the Government, in their endorsement of the Defense's request, stated that Dr. [redacted] requirement of an additional 60 hours was "facially unreasonable," even though Dr. [redacted] was the Government's chosen substitute. The Government did not provide any evidence to show why Dr. [redacted] estimation was without reasonable other than an accounting of the length of the video evidence. The Government stated the Defense's requested a total of 78 hours, when in fact it requested a total of 80. Enclosure 10.

v. On 12 September the Defense received an additional grant of 20 hours, a third of the requested time. Enclosure 11.

3. Discussion.

Pursuant to R.C.M. 703(d), when an expert is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The Defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[1]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the Defense, and (3) why defense counsel is

[1] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

unable to gather and present the evidence that the expert consultant would be able to develop.[2] The Defense must show that there is a reasonable probability that the expert would be of assistance to the Defense and that denial of the expert would result in a fundamentally unfair trial.[3]

(1) Why the expert is necessary.

The Government has conceded that Dr. [redacted] is necessary. Given the nature and severity of the allegations, the Defense will be unable to mount a defense without properly understanding the evidence in this case and the viable theories of attack or explanation that result therefrom. Assistance from Dr. [redacted] is necessary because of the complexities of this field and the facts underlying the allegations. There are 3 complaining witnesses ([redacted]) in the 26 specifications pending against Cpl True, all of whom are maternally related, and 2 of whom are minors ([redacted]). During the time frames charged in the specifications, Cpl True lived with all 3 complaining witnesses in the same residence and engaged in consensual sexual activity with one of the complaining witnesses ([redacted].

Dr. [redacted] has over 30 years of experience in forensic psychology and has been accepted as an expert witness by both trial and defense counsel. The Government has conceded Dr. [redacted] is an expert, as they selected her as an adequate substitute to the expert consultant originally requested by the Defense, Dr. [redacted] Based on her initial consultation with Defense counsel and review of the materials, she estimated that she needed 60 additional hours, in excess of the original 20 granted, in order to provide adequate consultation. By only granting a third of the time requested, the convening authority will prevent the Defense from effectively using Dr. [redacted] as an expert consultant.

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[2] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

[3] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

(2) What the expert will accomplish for the Defense.

Dr. [redacted] will review all relevant evidence, identify theories from that evidence, conduct her own additional research on these theories, educate the Defense on the evidence and viable theories, and assist the Defense counsel in developing these theories up to trial. Dr. [redacted] will also be able to help the Defense counsel to develop cross-examination questions based around these theories pre-trial, which will be probative for developing these theories during trial.

(3) Why Defense counsel cannot do this on their own.

The Government has conceded that the Defense counsel cannot do this analysis on their own. Defense counsel are not forensic psychology experts and do not have the ability to analyze the facts as a forensic psychologist would. Similarly, Defense counsel do not have the time to develop the same expertise that Dr. [redacted] has in time for trial. Defense counsel do not know what evidence to develop to allow an expert to give an opinion, less give an expert opinion with regard to them. Similarly, Defense counsel would be unable to testify as an expert witness if that becomes relevant.

4. <u>Evidence</u>. In addition to the charge sheets, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interview of [redacted] of 29 Sept 19

Enclosure (2) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (3) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (4) – NCIS IA: Child Forensic Interview of [redacted] of 30 Sep 19

Enclosure (5) – NCIS IA: Child Forensic Interview of [redacted] of 30 Sep 19

Enclosure (6) – NCIS IA: Child Forensic Interview of [redacted] of 21 Nov 19

Enclosure (7) – Defense's Request for Expert Consultant of 19 March 20

Enclosure (8) – Government's Selection of Dr. [redacted] of 1 April 20

Enclosure (9) – Defense's Request for Additional Hours of 6 July 20

Enclosure (10) – Trial Counsel's Endorsement of Defense's Request of 10 July 20

Enclosure (11) – Additional Grant of 20 Hours of 12 July 20

Enclosure (12) – Declaration of Dr. [redacted]

5. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the Defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. Requested Relief. The Defense requests the court compel the government to produce Dr. [redacted] as an independent and confidential expert consultant for an additional 60 hours of pre-trial consultation.

7. **Oral Argument.** Oral argument is requested on this motion.

Dated this 13th day of July 2020

[redacted]
J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 13th day of July 2020

[redacted]
J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO Defense MOTION to Compel additional funding for Forensic Psychologist (Dr. [redacted] 17 JUL 2020

1. Nature of the Response.

This is the Government's response to the defense motion to compel additional funding for Dr. [redacted]

2. Summary of the Facts.

For purposes of this motion, the Government agrees with defense's recitation of the relevant facts; however, the Government adds the following facts:

a. The accused's DNA was located inside the vagina of [redacted] (encl (1));

b. The accused's DNA was located on the external genetalia of [redacted] (encl (1)).

3. Discussion.

For the purposes of this motion, the Government does not oppose Defense's recitation of the applicable law. The Government agrees Defense has met the three part test to show child forensic psychologist expert assistance is relevant and necessary.[1] The Convening Authority acted in accordance with this concession when he granted 20 hours of expert consultation and an additional 20 hours on request for 60 hours.

[1] *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

The Government concedes that Dr. [redacted] is necessary. However, the Defense's request for at least 78 hours of consultation is facially unreasonable. The primary report of investigation (ROI) in this case consists of 254 pages: Largely photos, forensic reports, and synopses of the videos. The transcripts are of the videos. The videos total ~3:55:38.

a. The forensic interview of [redacted] is ~2:05:18;

b. The first forensic interview of [redacted] is ~0:25:57;

c. The second forensic of [redacted] is ~1:05:00; and

d. The interview of [redacted] (non-victim) is ~0:19:23.

There is no danger of a fundamentally unfair trial at this stage. The defense has been provided 40 hours of consultation with Dr. [redacted] This expert has been employed to assist defense develop case theories and trial strategies relating to the child sexual abuse charges. This time is more than adequate considering the relatively small amount of evidence that is relevant to this expert. Additionally, given the DNA evidence, the universe of case theories is rather limited. Both a [redacted] elaborately framed an adult in a manner consistent with forensic DNA and their recitation of events or a crime occurred. While a forensic psychologist is necessary, a lay person—utilizing their experience, judgment, and knowledge of the ways of the World—can properly conclude that 80-hours is excessive to determine a psychological theory consistent with the (extremely limited) legal means by which an adult's DNA could be found inside and on a [redacted] and [redacted]

Defense has not demonstrated why the additional 60 hours is necessary. Defense received approval for 20 hours of consultation on 1 April 2020. Defense submitted an additional request for 60 hours of funding on 6 July 2020 based on Dr. [redacted] declaration that she had already consumed 18 of the granted 20 hours and that she needed an additional 60 hours to adequately

advise the defense. The Convening Authority approved 20 hours of additional funding on 13 July 2020. In its motion, defense requested 60 hours of funding despite the previously granted 40 hours. It is unclear if defense is requesting a total of 100 hours (40 hours previously granted plus 60 more), or the expert's assertion of 78 to 80 hours to complete the evidentiary review. 20 hours of analysis and application per hour of video (with transcripts) is facially unreasonable. Dr. [redacted] assessment as to the number of hours necessary should not be unimpeachable or beyond a reasonability analysis by the court.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers the USACIL DNA report (encl (1)). The Government may offer:

Testimony from an expert psychologist.

b. Defense is the moving party and bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(1).

5. Relief Requested.

The Government requests this court deny Defense's motion for additional funding.

6. Oral Argument.

The Government requests oral argument.

/S/
G. F. CURLEY
Major, U.S. Marine Corps
Complex Trial Counsel

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

UNITED STATES V. MICHAEL A. TRUE Corporal U.S. Marine Corps	DEFENSE MOTION FOR APPROPRIATE RELIEF: JURY VIEW PURSUANT TO R.C.M. 913(c)(3) 13 July 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 913(c)(3) and the Sixth Amendment to the U.S. Constitution, the defense moves the court to permit the viewing of the on-base residence where the alleged sexual and physical assaults occurred during the course of the defense's case-in-chief at trial.

2. Summary of Relevant Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheet.

b. The situs of the Article 120b allegations were two bedrooms located on the third level, and the laundry room/kitchen on the second level of [redacted] *See* Enclosures 1-2.

c. On 31 December 2018, Cpl True married [redacted] Enclosure 1.

APPELLATE EXHIBIT XXXIV

d. At the time of the marriage, [redacted] had three children: [redacted] (female, [redacted]), [redacted] (female, [redacted]), and [redacted] (male, [redacted]). [redacted] shared the same biological father. Enclosure 1.

e. In March 2019, Cpl True, [redacted] and the three children moved into on-base housing onboard Marine Corps Base Hawaii. Their residence was located at [redacted] and featured 3 bedrooms and 2.5 bathrooms. Enclosure 3.

f. In May 2019, Cpl [redacted] moved into what was [redacted] room of the True residence, forcing [redacted] into a shared room. Enclosure 4.

g. In July 2019, Cpl [redacted] got married while on leave and his wife, [redacted], moved into Cpl [redacted] room in the True residence. Enclosure 5.

h. At some point after 2120 on 29 September 2019, [redacted] made disclosures in front of [redacted] alleging sexual assault by Cpl True. [redacted] if Cpl True had done the same to her and she nonverbally affirmed. Enclosures 1-2.

i. At the time of the allegations there were 4 adults, 3 children, 1 dog, 2 rabbits, and 1 cat living in the single family residence. Enclosure 1-4.

j. At 2153 on 30 September 2019 NCIS conducted a crime scene examination of the True on-base residence. NCIS described the residence as a "three story attached townhome with the lower level consisting of the garage; the second level consist[ing] of the main living area with the living room, half bathroom, kitchen, dining room and laundry room; the third floor consist[ing] of three bedrooms and two full bathrooms." Enclosure 6. During the course of this examination, NCIS took 102 photographs (45 of which were featured in templates contained within the report of investigation), and generated 3 diagrams using Scene PD (1 of the second level and 2 of the third level of the home). *See* id.

k. On 12 February 2020, the Complex Trial Counsel, accompanied by Victim's Legal Counsel, [redacted] and the Regional Trial Investigator conduced a walkthrough during daylight hours of the residence, including the taking of 3 photographs and 1 video (7 minutes and 56 seconds in length). Enclosure 7.

3. Discussion.

A request for a view or inspection falls squarely under the military judge's inherent authority to manage and control the court-martial.[1] The proponent of a view "must establish to the military judge's satisfaction that a view or inspection is relevant to the issue of guilt or innocence of the accused, as opposed to a collateral issue."[2] R.C.M. 913(c)(3) provides that, "the military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object." Prior to the 2019 Manual for Courts-Martial, the nonbinding, but persuasive, discussion section provided that "a view or inspection should be permitted *only in extraordinary circumstances*."[3] Military case law addressing R.C.M. 913(c)(3) directly are dated from 1986 through 2008.[4] These cases came out prior to the Military Justice Act of 2016 and treat the "extraordinary circumstances" language from the discussion section as a prerequisite for the proponent. Pursuant to executive order by the President, the 2019 version eliminated this language from the discussion section of R.C.M. 913(c)(3). Given the executive

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[1] *See, e.g.*, Mil. R. Evid. 104(a); United States v. Browers, 20 M.J. 356, 360 (C.M.A. 1985) (Cox, J., concurring); United States v. Ayala, 22 M.J. 777, 797 n.42 (A.C.M.R. 1986).

[2] *See* United States v. Huberty, 50 M.J. 704, 708 (A.F. Ct. Crim. App. 1999).

[3] This "exceptional circumstances" language from the discussion section for this rule was in effect from the 1984 through the 2016 editions of the Manual for Courts-Martial. In the 1949 through the 1969 editions, the rule provided explicitly for views or inspections in "exceptional circumstances" in order to "enable the members to better understand and apply the evidence in the case." *See* Manual for Courts-Martial (1949 ed.).

[4] *See* United States v. Pauly, No. ACM 36764, 2008 CCA LEXIS 292 (A.F. Ct. Crim. App. Aug. 11, 2008); United States v. Barnett, No. NMCCA 9901313, 2004 CCA LEXIS 285 (N-M Ct. Crim. App. Dec. 30, 2004); United States v. McCormick, ACM 33676, 2001 CCA LEXIS 99 (A.F. Ct. Crim. App. Mar. 14, 2001); United States v. Huberty, 50 M.J. 704 (A.F. Ct. Crim. App. 1999); United States v. Wells, NMCM 96 01349, 1998 CCA LEXIS 107 (N-M Ct. Crim. App. Feb. 27, 1998); United States v. Coker, ACM 32047, 1998 CCA LEXIS 340 (A.F. Ct. Crim. App. Aug. 27, 1998); United States v. Adams, NMCM 96 00485, 1997 CCA LEXIS 338 (N-M Ct. Crim. App. Feb. 14, 1997); United States v. Cooper, ACM 32388, 1997 CCA LEXIS 595 (A.F. Ct. Crim. App. Dec. 31, 1997); United States v. Ayala, 22 M.J. 777, 779 (A.C.M.R. 1986).

and judicial history associated with this rule, the Defense focuses on the relevance and logistics of the requested view.

The members' ability to see the on-base residence and appreciate the physical dimensions of the second and third levels is relevant to the issue of guilt or innocence of the accused, and is not a collateral issue. The defense theory that these sexual assaults never happened relies heavily on the fact finder contextualizing the evidence they receive from the two minor Complaining Witnesses. By having a jury walk through the residence and view the spaces wherein these sexual assaults are alleged to have occurred, the fact finder will be able to see the implausibility of these kinetic and violent acts occurring as described by the two minor Complaining Witnesses. Attempting to have witnesses describe the physical dimensions of these spaces during the course of testimony, even with the assistance of visual aids like photographs and diagrams, does not adequately allow the defense to present its theory. The fact finders, after walking through these spaces will gain the contextual awareness necessary to assess the plausibility of the testimony presented by the two minor Complaining Witnesses.

The fact finder will not be familiar with the premises of the alleged sexual assaults. The members for this panel may come from off-island, may live on-island but off-base, may live on-island and on-base but in different on-base housing. As such, it is unlikely that the members they will have any first-hand knowledge about the specific layout of this residence or the spaces within. It is important for the fact finder to be familiar with the layout and dimensions of the rooms within the residence to be able to contextualize and assess the testimony of the two minor Complaining Witnesses. Further, photographs and diagrams will not adequately enable the fact finder to understand the physical dimensions of the space.

The logistics required for this view are also in favor of the Defense. The court-martial is currently docketed to take place in the courtroom at the Regional Legal Services Office on Joint Base Pearl Harbor Hickham. The residence is roughly 20 miles away from that courtroom. Should a change in the docket between now and trial re-locate the court-martial to the annex courtroom onboard Marine Corps Base Hawaii, the residence will be 1.2 miles away. In both of these circumstances, a single bus from motor-t would be of sufficient size to transport the necessary court personnel from the courtroom to the residence. Transportation by a single bus vice individual POVs would help in ensuring the safety of members as well as preventing inappropriate communication with the members. Should construction be completed on the courtroom at the Marine Corps Base Hawaii legal building as of the time of trial, the residence will be less than 0.2 miles away and walking could be considered. In all three scenarios, the closeness of the viewing area to the courtroom also lends itself to ensuring there is no undue consumption of time in the viewing process.

The viewing of the residence would not impact the orderliness of the trial. During the defense's case-in-chief, the defense would ask the military judge to allow the members to be escorted by the bailiff out of the courtroom, to a bus or on foot, to the viewing site. Upon arriving at the site, the members would be escorted to the second and third level of the residence, where they would, either in waves or all together (depending on the final number of members selected for the court-martial), go through each room on these two floors, making silent observations and returning immediately back to the courtroom via escort by the bailiff. The estimated time needed to complete this viewing, from members leaving to returning to their seats, is approximately 20-70[5] minutes depending on the location of the court-martial.

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[5] 20 minutes should the court-martial take place in the courtroom at building 215 onboard Marine Corps Base Hawaii (5 minutes walking each way in addition to an estimated max of 10 minutes walking through the rooms on

The military judge is in the best position to determine whether a view or inspection will help the fact finder make a fair and just determination of guilt or innocence. Applying all of the above factors, this court should permit the view to allow the accused present his defense.

4. Evidence. In addition to the charge sheets, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interview of [redacted] of 29 Sept 19

Enclosure (2) – Child Forensic Interviews of [redacted] of 30 Sep 19 and 21 Nov 19

Enclosure (3) – Lease Agreement of 1 Mar 19

Enclosure (4) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (5) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (6) – Excerpts from NCIS Crime Scene Examination of 30 Sep 19

Enclosure (7) – Prosecution/VLC Walkthrough of Residence of 12 Feb 20

5. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. Requested Relief. The defense requests the military judge permit the court-martial to view the location of the alleged sexual assaults during the defense's case-in-chief, pursuant to R.C.M. 913(c)(3).

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the second and third levels of the residence); 20 minutes should the court-martial take place in the courtroom at the annex courtroom onboard Marine Corps Base Hawaii (5 minute bus ride each way in addition to an estimated max of 10 minutes walking through the rooms on the second and third levels of the residence); 70 minutes should the court-martial take place in the courtroom at Joint Base Pearl Harbor Hickham (25 minute bus ride each way in addition to an estimated max of 10 minutes walking through the rooms on the second and third levels of the residence).

7. **Oral Argument.** Oral argument is requested on this motion.

Dated this 13th day of July 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 13th day of July 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO Defense MOTION for a Site View 17 JUL 2020

1. Nature of the Response.

This is the Government's response to the Defense motion for appropriate relief: Jury view pursuant to R.C.M. 913(c)(3)

2. Summary of the Facts.

For purposes of this motion, the Government concurs with the Defense facts. The Government adds the following:

a. The household goods at the requested site view location are packed up and not in the same condition they were at the time of the incident.

3. Discussion.

The purpose of a visit is to serve as an aid to understanding the evidence or the case.[1] Site visits are rare both by design and in practice.[2] An informal survey of the trial judiciary at [Joint Base Lewis McChord] found participation in a single site visit in a combined forty-one years of service as judge advocates.[3] At issue is whether the court can be educated about a scene via photographs and diagrams, or is there some unique aspect about the scene that requires the presence of the court-martial.[4] There are no unique aspects of this on-base residence.

a. **Circuit Precedent/Standard:**

Enclosure (1) is a ruling issued by this circuit on a Government request for a site visit in another case. Of note the Military Judge found: "Extraordinary circumstances exist only when the military judge determines that other available alternative evidence is inadequate to sufficiently describe the premises or object. Alternative evidence includes testimony, diagrams, photographs, or videos." In this case, testimony, diagrams, photographs, and video exist or will exist that sufficiently describe the premises for the fact-finder. Defense articulates no unique characteristics of this on-base residence that cannot adequately be captured by the alternate forms of evidence.[5]

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[1] David A. Schlueter, Military Criminal Justice: Practice and Procedure, §15-12(E) at p. 107-108 (Matthew Bender & Co. 2015).

[2] Lieutenant Colonal Kwasi L. Hawk, "A View from the Bench: Real and Demonstrative Evidence," *The Army Lawyer,* Trial Judiciary note, April 2012.

[3] Id.

[4] See United States v. Wells, No. 9601349, 1998 WL 85571, at *7 (N-M. Ct. Crim. App. Feb. 27, 1998) (defense made no showing that anything "unique to the case" would be accomplished with a crime scene viewing; parties were able to educate the panel by other means). This case is not available on the NMCCA website or Lexis, reference to a footnote from a hornbook is available at:

[redacted]

[5] See: *United States v. Pauly*, 2008 WL 3538676 (A.F. Ct. Crim. App. 2008 unpublished) this case is directly on point—a site view of a residence. The military judge did not abuse his discretion in denying the request because other forms of evidence were sufficient; *United States v. Barnett*, 2004 WL 3015292, unpublished op. (N-M Ct. Crim. App. 2004) members were not permitted to view the inside of a tank despite Defense's assertion as to the implausibility of a sexual assault occurring inside a tank given its dimensions. Additionally, the court noted that

b. **M.R.E. 403**

MRE 403's unfair prejudice weighs against permitting a site view. The location contains boxed up household goods and has been cleaned. The photos and videos more accurately capture the state of the residence at the time of the crime. The acoustics of a cleaned and vacant base house are markedly different than those of the occupied dwelling with "4 adults, 3 children, 1 dog, 2 rabbits, and 1 cat," in the state of cleanliness that this residence was maintained at the time of the crime. " 'Unfair prejudice' within [Fed. R. Evid. 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[6] "M.R.E. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness."[7] A site view would improperly subordinate more accurate photos, videos, diagrams, and testimony of the site, prejudicing the process because the members will see a house in a substantially different condition than it was the night of many of the alleged crimes. Additionally, members will be left with acoustic evidence that is not an accurate representation of the acoustics of an occupied dwelling—thereby injecting prejudice into the process when alternate forms of evidence suffice. The validity a site view gives to a now-unoccupied house in substantially different condition will effectively confuse the members in contravention of the persuasive authority of U.S. v. Huberty.[8]

c. **Discussion Section.**

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photographs, diagrams, and maps are the preferred methods for educating members; *U.S. v. Huberty*, 50 M.J. 704 (A.F. Ct. Crim. App. 1999).

[6] Fed. R. Evid. 403 advisory committee's note.

[7] United States v. Gaddis, 70 M.J. 248, 254-255 (C.A.A.F. 2011).

[8] *United States v. Huberty*, 50 M.J. 704, 708-09 (A.F. Ct. Crim. App. 2001) (internal citations and marks in original).

As CAAF noted in *United States v. Quiroz*, the discussion sections in the MCM are "non- binding."[9] Thus, neither a trial court nor an appellate court was ever required to adhere to the notion that a view or inspection under RCM 913(c)(3) should be permitted only in "extraordinary circumstances." And whatever the purpose behind removing this nonbinding language from the 2019 MCM was, it has zero impact on the cases which found the non-binding discussion persuasive.

d. **Defense Arguments**.

The Defense argues that "Attempting to have witnesses describe the physical dimensions of these spaces during the course of testimony, even with the assistance of visual aids like photographs and diagrams, does not adequately allow the defense to present its theory." The Defense's proffered theory is the implausibility of the violent and kinetic acts described by the children. Taken to its logical conclusion, there would be no case under this position in which a site view would not be permitted. That is not the state of the law, what is required is a showing by a preponderance of the evidence that extraordinary circumstances exist, rendering alternate forms of evidence inadequate. If the purpose of the site view is acoustics, the location is substantially different and a site view would confuse the members. If the purpose of the site view is to gain context of the size of the space, the alternate forms of evidence suffice and Defense has failed to meet its burden.

The Defense has failed to establish by a preponderance of the evidence that extraordinary circumstances exist that warrant a site view—namely has not demonstrated that other available alternative evidence (testimony, diagrams, photographs, or videos) is insufficient to describe the premises.

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[9] *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001) (internal citations and marks in original).

4. **Evidence.**

In support of this motion, the Government offers:

(1) Circuit Ruling on a site view motion by the Government in US v. McDonald;

(2) Testimony (or alternatively) an affidavit from Agent [redacted] describing the current condition of the premises.

5. **Relief Requested.** That the Defense motion be denied.

6. **Argument.** Government desires oral argument.

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Gregg F. Curley
Major, U.S. Marine Corps
Senior Trial Counsel

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

UNITED STATES v. MICHAEL TRUE CORPORAL, USMC	GOVERNMENT MOTION FOR A PRELIMINARY VENUE RULING 10 SEPTEMBER 2020

1. **Nature of Motion**.

This is a government motion for a preliminary ruling on venue. Defense asserts that a motion is required for a designation of venue but it is unclear if Defense is opposed to moving the court generally or with Fort Leonard Wood specifically.

2. **Summary of Facts.**

a. COVID restrictions and policies on the island of Oahu are fluid. There is no ability to generate certainty with regard to witnesses traveling to the island and the Government cannot justify placing civilians under a 14-day ROM prior to trial. As a result, Government counsel have explored a variety of options including continuances, alternate resolutions, and changes of venue to ensure cases continue to proceed in this COVID-inhibited environment (Encl (1)).

b. Fort Leonard Wood (FLW), Missouri, hosts the largest Marine Corps detachment outside of a Marine Corps base with ~1200 students and support personnel. On the installation are the Motor Transport Instruction School, Military Police Instruction School, Chemical Biological Radiological and Nuclear Defense School, and the Engineer Equipment Instruction School (Encl (2)).

c. The Marine Corps Detachment at FLW (POC LtCol [redacted]) has indicated an ability to support logistics and to make a pool of Marines available from which the Convening Authority (CA) may select members in accordance with the Article 25 criteria.

d. 18 January 21 is a Federal Holiday (Martin Luther King, Jr. Observance).The FLW garrison has indicated that their courtroom is available the week of 18-22 January and that the Holiday will not impact our ability to access the courtroom.

e. Liaison with the local confinement facility to FLW, Missouri [redacted]. The facility is 12 miles from the front gate of FLW (Encl (3)).

f. The LSST OIC has requested use of the FLW courtroom 18-22 January 21 and that request has been routed to the CA for endorsement (Encl (4)). Once endorsed, it will be routed to the FLW garrison commander for approval. Upon approval, the convening order in this case will be modified to reflect the location of the court-martial in accordance with R.C.M. 504(d)(1)(B). The current convening order has not designated a location.

g. Currently, the anticipated witnesses in this case are:

[redacted]

(2) G: [redacted]-The Government anticipates no conflicts with this witness;

(3) G: Child SAFE Examiner (Hawaii)—This witness has been uncooperative with the Government and the Defense. This witness will not cooperate without compensation and has indicated he has no availability or alternate availability;

(4) G: NCIS Agent (Hawaii);

(5) G: 2 Child Forensic Interviewers (Hawaii);

(6) G: [redacted]

(7) D: 2 Fact Witnesses (Oklahoma);

(8) D: Child Forensic Psychologist consultant (Hawaii); and

(9) D: SAFE expert consultant (Kentucky).

If and when the venue is ordered and in an abundance of caution, the Government anticipates requesting depositions for the child SAFE Examiner and the child forensic interviewers located on the island of Oahu in order to preserve all options in the COVID-constrained operational environment and appropriately mitigate risks.

h. None of the anticipated witnesses are located in California. [redacted] The Victims and the child forensic interviewers would be authorized travel via POV mileage to the courtroom. No other CONUS Marine courtroom can facilitate this trial without requiring a greater number of witnesses to fly (Encl (5)).

i. The Chief Judge of the Western Judicial Circuit has indicated that the Western Judicial Circuit will support any courts-martial moved from the Pacific Region to the Western Region.

j. Logistics comparison:

[redacted]

[redacted]

3. **Law.**

a. Rule 12 of the Navy and Marine Corps Trial Judiciary Uniform Rules of Practice states, "Unless otherwise directed by the CA pursuant to R.C.M. 504(d)(1), the military judge will designate the situs of trial (Ref (2).

b. Hawaii Circuit Rule (HCR) 12 states:

> The situs of the trial will be designated by the Circuit Military Judge when the weekly docket is published. If the convening authority desires to direct a specific situs for a session of court, then the trial counsel shall put that information in the Docketing Memorandum. Absent specific notice made to the Circuit Military Judge via the Docketing Memorandum, it will be inferred that the situs will be determined by the Circuit Military Judge.

c. R.C.M. 504(d)(1)(B) states, "A convening order may designate where the court-martial will meet."

d. R.C.M. 504(e) states, "The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided."

e. The Government has some discretion in choosing the situs of the trial.[1] The situs may be changed to accommodate the convenience of the parties and witnesses.[2] If the situs is shifted to accommodate only the prosecution, then the test is whether the accused's rights have been prejudiced.[3] Article 6(b) UCMJ provides and protects the right of a victim not to be excluded from any public proceeding.

4. **Analysis**

I. IS A MOTION REQUIRED FOR A CONVENING AUTHORITY TO DESIGNATE THE VENUE FOR A COURT MARTIAL?

No venue for this court-martial has been designated. The Convening Order is silent (Ref (a)). When the convening order is silent, the uniform and circuit rules are clear that the military judge determines the situs via the weekly docketing memo (Refs (2)-(3)). For a specified location, trial counsel is required to request in the weekly docketing memo the location dictated by the CA. Here, the Government, the CA, and FLW are coordinating use of the FLW courtroom. Once coordination and correspondence are complete, the Government anticipates the CA will modify the convening order to reflect where the court-martial will meet in accordance with R.C.M. 504(d)(1)(B).

Defense asserted in an 802 held on 10 September, that a motion is required to change the venue in the subject case. It is the Government's position that there is no venue change per the rules and thus a motion is not necessary. The interplay between the R.C.M.s, the CA, the Convening Order, and the Rules of Court do not require a motion to

[1] R.C.M. 906(b(11) Analysis. The government's interest is operational.
[2] *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982).
[3] R.C.M. 906(b)(11).

direct the situs. If the situs has been directed by the CA or the judge, the Government believes R.C.M. 906(b)(11) is then applicable. In fairness, the original TMO does list a location on board the Island of Oahu, the current TMO lists MCBH or FLW, and the long range docket has included different venues (to include a FLW potentiality).

Last, the location is not being ordered solely for the convenience of the Government. A CONUS venue is an operational necessity.

II. OPERATIONAL NECESSITY DUE TO COVID REQUIRES THE VENUE BE LOCATED ON THE CONTINENTAL UNITED STATES.

This change of venue order is based on operational necessity. COVID on the island of Oahu and the fluid and onerous travel restrictions associated with it, effectively prevents trying this case on the island of Oahu. The accused is in pretrial confinement and the case has already been continued twice. As a result, an alternate venue (CONUS) is required. The available venues with 1) an adequate court-martial facility, and 2) a critical mass of Marines from which to draw a members' pool are limited. Fort Leonard Wood is one such venue. Marine Corps Installations within the Western Judicial Circuit could also satisfy these two prerequisites.

III. OPERATIONAL PRACTICALITIES, EFFICIENCIES, AND CONVIENENCE SUPPORT FORT LEONARD WOOD AS THE SPECIFIC LOCATION.

Currently, there are approximately 13 projected witnesses [redacted] one of the witnesses reside in California. [redacted]

R.C.M. 504(e) requires that a convening authority shall ensure appropriate facilities are provided. In this case, the CA is ensuring such a facility through coordination with the FLW Garrison Commanding Officer and SJA. Requiring a court-martial be held outside of the circuit is not uncommon—for example, a reserve case from California being tried at MARFORRES in Northern Louisiana (different geographic circuits) or misconduct from Afghanistan being tried stateside. If the courtroom is made available, the facilities are adequate, and the rights of the accused are not prejudiced, the CA may require a court-martial to take place in a courtroom outside the circuit and on an Army installation.

a. The limits on 504(e) are defined in R.C.M. 906(b)(11): "The place of the trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced." As the Discussion of that paragraph notes, "When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the CA, as long as the choice is not inconsistent with the ruling of the judge" – a ruling which is necessary only when "there exists in the place where the court-martial is pending so great a prejudice against the accused that he accused cannot obtain a fair and impartial trial there." R.C.M. 906(b)(11) adequately addresses the limits of such power to change a venue. For example, the commissary parking lot would prejudice the rights of the accused because the lack of technology would prevent the presentation of a case, the lack of climate control would distract the members, and the lack of security would pose a danger to all. There is no prejudice to the accused when the court martial is held in a military courtroom, with access to all modern technology, and with a Marine Corps panel

properly selected and vetted in accordance with Article 25. Given the expeditionary nature of the military justice system (e.g., Military Justice needs to be capable of functioning on a ship, in a CONEX box, during periods of Martial Law in foreign countries, etc.),[4] constraining courts-martial to specific circuits or service facilities cuts against the expeditionary purpose built into the UCMJ. The Government concedes these standards relative to expeditionary contingencies constitute the floor, rather than the ceiling, of what must be provided—but they also show that FLW more than satisfies the requirements of process due for the accused.

5. **Conclusion**

For the foregoing reasons, the Government respectfully requests this Court to preliminarily rule that FLW is a permissible venue should the CA order it. In the alternative, the Government requests the Western Judicial Circuit as the secondary option.

6. **Evidence and Burden of Proof.**

a. The following evidence is attached to this motion:

References:

(a) Convening Order;

(b) Navy and Marine Corps Trial Judiciary Uniform Rules of Practice;

(c) Hawaii Circuit Rules.

Enclosures:

(1) Witness considerations Hawaii;

(2) FLW MarDet Information;

(3) Email from Regional Trial Investigator (liaison with local confinement facility);

[4] See MCM (2016) preamble para 2.

(4) Venue request;

[redacted]

(6) Lodging IVO FLW; and

(7) Airport Comparison SAN/STL.

b. Burden. Pursuant to R.C.M. 905(c), the burden of proof is by a preponderance of the evidence. The burden is on the Defense to demonstrate that ordering the trial off island prejudices their client if opposed to movement generally; or, if opposed specifically to FLW, that FLW prejudices their client and Camp Pendleton does not.[5]

5. **Relief Requested.** The Government respectfully moves this Court to make a preliminary ruling authorizing FLW or Camp Pendleton in order to facilitate pre-trial planning and preparation.

6. **Argument**. The Government requests oral argument in support of this motion.

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G. F. CURLEY
Major, USMC
Trial Counsel

[5] R.C.M. 906(b)(11).

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

UNITED STATES V. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE RESPONSE TO GOVERNMENT MOTION FOR APPROPRIATE RELIEF: CHANGE OF VENUE 17 September 2020

1. Nature of the Response. The Defense hereby responds to the motion filed by the Government on 10 September 2020 captioned as a request for a preliminary ruling on venue. The issue before the Court is a request for a change of venue. The Defense opposes the Government's request to move the court-martial to [redacted] or California and requests that the court-martial remain docketed for trial on Oahu at either Marine Corps Base Hawaii or Joint Base Pearl Harbor Hickham.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse).

b. The situs of all allegations is the island of Oahu, Hawaii, and most of the alleged misconduct occurred on Marine Corps Base Hawaii (MCBH), where Cpl True is a member of [redacted] *See* Charge Sheets.

APPELLATE EXHIBIT XLI

c. Cpl True entered pretrial confinement at the Naval Brig Pearl Harbor on 15 October 2019. Encl 1.

d. On 4 March 2020, charges were referred by General Court-Martial Convening Order 1-19, dated 16 January 2019. Encl 2.

e. On 4 March 2020, the Defense filed a motion for appropriate relief (docketing request), which was thereafter signed by the Military Judge in the Hawaii Judicial Circuit on 9 March 2020. Encl 3. Trial dates were set for 13-17 July 2020.

f. On 4 May 2020, the first Article 39a hearing was conducted at the courtroom at Joint Base Pearl Harbor Hickham (JBPHH). The Trial Management Order (TMO) was signed by the Military Judge on that date and set trial dates of 13-17 July 2020 at JBPHH. Encl 4.

g. On 12 May 2020, the Military Judge ordered, sua sponte, the redocketing of this case to 21-25 September 2020. Encl 5.

h. On 17 June 2020, a revised TMO was signed by the Military Judge pushing the trial dates to 21-25 September 2020 at JBPHH. Encl 6.

i. On 24 July 2020, the second Article 39a session in this case was conducted in the courtroom on MCBH.

j. On 28 August 2020, the Government filed a motion for appropriate relief requesting a continuance of the trial dates to 18-22 January 2021 based on the then-current state and military COVID travel restrictions. This motion was unopposed by the Defense and thereafter granted by the Military Judge. Encl 7.

k. On 31 August 2020, an amended TMO was signed by the Military Judge listing trial dates as 18-22 January 2021 at either MCBH or Fort Leonard Wood. Encl 8.

l. Below is a breakdown of the currently anticipated witnesses in this case:

[redacted]

m. Below is a breakdown of the currently anticipated additional personnel associated with this case:

1. Major Gregg Curley – Senior Trial Counsel (Hawaii)
2. Major Aran Walsh – Complex Trial Counsel (Hawaii)
3. Agent [redacted] – Regional Trial Investigator (Hawaii)
4. TSO Clerk? (Hawaii)
5. Unidentified Court Reporter (Hawaii)
6. Captain Shannon Hillery – Defense Counsel (Hawaii)
7. Captain James Larkin – Defense Counsel (Hawaii)
8. Corporal Michael True – Accused (Hawaii)
9. DSO Clerk? (Hawaii)
10. Captain Thomas Shealy – Victims' Legal Counsel, [redacted] (South Carolina)
11. Captain Lauren Neal – Victims' Legal Counsel, [redacted] (Arizona)
12. Major Charles Olson – Victims' Legal Counsel, [redacted] (Japan)
13. Military Judge (Unknown)

n. In sum, the geographic breakdown of all foreseeable personnel from subparagraphs (j) and (k), supra, is as follows:

[redacted]

[1] In its motion, the Government noted that there were two child forensic interviewers from Hawaii – the Defense has yet to receive any form of witness list from the Government, so is unclear based on a review of the evidence as to the identity of the second interviewer.

o. On 16 September 2020, Governor David Ige announced plans for a pre-travel testing program to begin on 15 October 2020. The program will allow travelers to Hawaii the option of providing evidence of a negative COVID-19 test within 72-hours of their flight arrival to Hawaii in order to avoid the 14-day quarantine in the state. Encl 9.

p. This case first appeared on the long range docket in the docket released for the week of 30 March 2020 to 3 April 2020[2]; it has appeared on the long range docket a total of 26 times as of the date of the filing of this response. Of those 26 times, the location for trial is listed as JBPHH 20 times and MCBH 6 times; Fort Leonard Wood (FLW) has never been listed on the long range docket for this case in a docket signed by the Military Judge.[3]

q. As of 17 September 2020, both California and [redacted] score worse than Hawaii across all metrics for measuring the impact of COVID-19 (total cases, cases in the last 7 days, cases per 100,000, total deaths, deaths per 100,000) than Hawaii according to data collected and analyzed by the Centers for Disease Control and Prevention (CDC). Encl 10. This assessment is further supported by comparing the cumulative trend rates for Hawaii, California, and Missouri on both raw totals of COVID-19 cases and rates of COVID-19 infection per 100,000. Encl 11.

3. Law.

Rules for Courts-Martial (R.C.M.) 504(d)(1)(B) provides that "a convening order may designate where the court-martial will meet."

The preamble to the Uniform Rules of Practice before Navy and Marine Corps Courts-Martial (Uniform Rules) states that the Uniform Rules are meant to "supplement the Rules for

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[2] It is unclear to the Defense why this case did not appear on the long range dockets for 16-20 or 23-27 March given that the Defense's motion for appropriate relief (docketing request) was signed by the Military Judge on 9 March 2020.

[3] **JBPHH**: 30 March to 3 April, 6-10 April, 13-17 April, 20-24 April, 27 April to 1 May, 4-8 May, 11-15 May, 18-22 May, 25-29 May, 1-5 June, 8-12 June, 15-19 June, 22-26 June, 29 June to 3 July, 6-10 July, 13-17 July, 20-24 July, 27-31 July, 3-7 August, 10-14 August. **MCBH**: 17-21 August, 24-28 August, 31 August to 4 September, 7-11 September, 14-18 September, 21-25 September.

Courts-Martial (R.C.M.) and, together with them, govern trials by courts-martial in the Navy and Marine Corps." Uniform Rule 12 ("Situs") states: "Unless otherwise directed by the convening authority pursuant to R.C.M. 504(d)(1), the military judge *will* designate the situs of trial" (emphasis added).

The Hawaii Judicial Circuit Rules of Practice provide in HRC 12: "The situs of trial will be designated by the Circuit Military Judge when the weekly docket is published. If the convening authority desires to direct a specific situs for a session of court, then the trial counsel shall put that information in the Docketing Memorandum. Absent specific notice made to the Circuit Military Judge via the Docketing Memorandum, it will be inferred that the situs will be determined by the Circuit Military Judge."

R.C.M. 906(b)(11) provides that the "place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby." The discussion section that follows notes that when "it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge."

4. <u>Discussion.</u>

a. A venue for this court-martial has been designated and the Government's motion amounts to a request for a change of venue.

Cpl True is assigned to a unit in Hawaii; the criminal investigation into the allegations was conducted by NCIS on MCBH; Cpl True was ordered into a pretrial confinement facility in Hawaii, where he has been for the past 339 days; all of the 26 specifications pending against him arose on the island of Oahu, Hawaii; charges were preferred against him by a trial counsel and trial services clerk assigned to the Legal Services Support Team in Hawaii; the accused was

detailed two military defense counsel assigned to the Defense Services Office in Hawaii; his Article 32 hearing was conducted on MCBH; Cpl True's charges were referred to general court-martial and received by the Hawaii Judicial Circuit; all three of the TMOs signed by the Military Judges in this case have listed either MCBH or JBPHH as the venue for trial; all of the 26 long range dockets listing this case have annotated either MCBH or JBPHH as the venue for trial; and all sessions of court have been conducted at either MCBH or JBPHH.

The Government argues that "the interplay between the R.C.M.s, the CA, the Convening Order, and the Rules of Court" in this case reveal that no venue for this court-martial has been designated. *See* Government Motion at 5-6. The Defense disagrees. A convening order *may* designate where the court-martial will meet; the convening order which referred the charges against Cpl True to a general court-martial did not. *See* R.C.M. 504(d)(1)(B). The Hawaii Judicial Circuit received the convening order and referred charge sheet, and the Military Judge signed a TMO designating a venue in Hawaii (JBPHH) for trial. Per both the Uniform Rules and the Hawaii Circuit Rules, the venue for this court-martial has been designated. *See generally* Chenoweth v. Van Arsdall, 46 C.M.R. 183, 186 (U.S. C.M.A. 1973) (holding that once a convening authority has referred charges to a court-martial "any motion for a change of venue . . . is properly addressed solely to the military judge as an interlocutory matter" pursuant to Article 51(b) of the UCMJ)[4].

b. The Government has not demonstrated convenience to justify a change of venue, and the substantive rights of Cpl True would be adversely impacted by any movement of trial off the island of Oahu.

Because venue has been designated in this case, the Government's motion amounts to a request for a change of venue which must be interpreted in accordance with R.C.M. 906(b)(11).

[4] Unlike the R.C.M. 504(d)(1)(B) in the 2019 MCM (providing that the convening authority may designate where the court-martial will meet), paragraph 36b of the 1969 MCM relied upon by the court in Van Arsdell stated that the convening order designated, among other things, "the kind of court, the place and time it is to meet . . ."

Almost all of the military case law addressing R.C.M. 906(b)(11) does so in the context of an affirmative Defense motion for change of venue based on averred prejudice in the form of pretrial publicity, local prejudice, command influence, etc.[5] Here, the Government has moved for a change of venue and in doing so has failed to demonstrate convenience, which is articulated as operational necessity in its motion.

Although the Government bases its convenience argument for change of venue to the continental United States on operational necessity, it limits its focus to concerns surrounding the civilian witnesses. In doing so, the Government fails to account for the 13 active-duty service members who would be required to travel, 9 of whom are stationed in Hawaii. When considering the "practicalities" and "efficiencies" as a whole, of the 26 personnel associated with this court-martial, 50% are located in Hawaii. Accordingly, if the venue for this court-martial is changed from Hawaii to California, 96% of the total personnel (25 out of 26) involved will be required to travel, including all active duty personnel; from Hawaii to [redacted] 85% of the total personnel (22 out of 26) involved will be required to travel, including all active duty personnel. The Defense offers that neither options are convenient for the Government, especially given the recent order by the Hawaii Governor providing alternative options for the 14-day quarantine for travelers to the island of Oahu. Further, the Government has failed to show how a course of action that places the health and safety of 13, or at best 9, active-duty service members at risk during a global pandemic constitutes operational necessity.

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[5] *See* United States v. Akbar, 74 M.J. 364, 398 (C.A.A.F. 2015) (considering appellant's assertion of error on appeal that his trial venue should have been moved because of pretrial publicity); United States v. Simpson, 58 M.J. 368, 372 (C.A.A.F. 2003); United States v. Curtis, 44 M.J. 106, 124 (C.A.A.F. 1996); United States v. Loving, 41 M.J. 213, 282 (C.A.A.F. 1994). *See also* United States v. Mallicote, 32 C.M.R. 374, 387 (U.S. C.M.A. 1962) (considering appellant's assertion of error on appeal that his trial venue should have been moved because of prejudice by the local population); United States v. Hurt, 27 C.M.F. 3, 30 (U.S. C.M.A. 1958). *See also* United States v. Martinez, 42 M.J. 327, 332 n. 6 (C.A.A.F. 1995) (considering appellant's assertion of error on appeal that his trial venue should have been moved because of command influence).

Even if the Court finds that change of venue serves the convenience of the Government, the substantive rights of Cpl True are adversely impacted by any movement. More personnel will have to travel in order to accommodate a venue change to [redacted] California, to include key personnel like Cpl True and his two detailed defense counsel, who are not fungible. Travel from Hawaii to [redacted] or California is considered a "higher risk activity" per the CDC because the United States as a whole is considered a country with a level 3 health notice and within it, [redacted] California have higher levels of COVID-19 than Hawaii.[6] Travel involves increased risks for COVID-19 exposure, contraction, and spread[7]; the development of COVID-19 symptoms prior to, or during, the court-martial of key personnel will force a delay pending any mandated quarantine. Accordingly, any change of venue unnecessarily increases the risk of delay in a court-martial that has already been continued twice, for a Marine who will have been in pretrial confinement for a total of 462 days as of the first day of his trial on 18 January 2021. Cpl True has a Sixth Amendment due process right to a speedy trial, and the Government's request born out of convenience does not outweigh the foreseeable risk and subsequent prejudice to this right. *See also* Article 10 of the UCMJ. Further, the Defense is concerned about any movement of Cpl True that would require hours of commercial air travel during which time he would be in restraints, required to wear a mask, in a uniform dictated by the brig, escorted by federal marshals or brig chasers.

Moreover, the Government noted that Dr. [redacted] the sexual assault forensic examiner for both [redacted] and [redacted] on 30 September 2019, will not "cooperate without compensation" and refuses to provide his availability. *See* Government Motion at 2. Dr. [redacted] is a critical witness

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[6] *See*: https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html#anchor_1600361695898 (defining what constitutes "higher risk activities") and https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html (world map depicting the level health notices for each country).
[7] Per the CDC: https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html.

for both the Defense and the Government in this case because, after their mother [redacted] he was the first person to question [redacted] and [redacted] about what allegedly happened. He also collected all of the swabs and samples during their examinations, which were thereafter tested by USACIL, producing the DNA evidence in this case. The Government further alerted the Court and the Defense to its intent to request depositions for Dr. [redacted] and Ms. [redacted] (the child forensic interviewer at the [redacted] in Honolulu) in order to "preserve all options." *See* Government Motion at 3. The Defense will oppose these deposition requests by the Government; should the Court order the depositions, the Defense will require the presence of its SANE expert consultant, Ms. [redacted] at the deposition of Dr. [redacted] and its expert consultant in forensic psychology, Dr. [redacted], at the deposition of Ms. [redacted] Accordingly, this possibility presented by the Government to decrease the number of witnesses traveling from Hawaii by 2 will only serve to increase the tangible risk for delay.

4. Evidence. In addition to the charge sheets, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – Confinement Order of 15 Oct 19

Enclosure (2) – General Court Martial Convening Order 1-19 of 16 Jan 19

Enclosure (3) – Motion for Appropriate Relief (Request for Docketing) of 4 Mar 20

Enclosure (4) – TMO of 4 May 20

Enclosure (5) – Email from Military Judge to Parties of 12 May 20

Enclosure (6) – TMO of 17 Jun 20

Enclosure (7) – Email from Military Judge to Parties of 30 Aug 20

Enclosure (8) – TMO of 31 Aug 20

Enclosure (9) – Governor Ige Announcement of 16 Sep 20

Enclosure (10) – CDC's Assessment of the United States of 17 Sep 20

Enclosure (11) – CDC's Trend Comparison: Hawaii, [redacted] California of 17 Sep 20

5. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the Government to demonstrate a convenience necessitating a change of venue. If the Court finds the Government has done so, the burden shifts to the Defense to show that the Government's proposed change of venue prejudices the rights of Cpl True.

6. Requested Relief. The Defense requests the Court deny the Government's request for a change of venue.

7. Oral Argument. Oral argument is requested on this motion if the Court is not inclined to grant the Defense's requested relief.

Dated this 17th day of September 2020

[redacted]
S. B. Hillery [redacted]
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 17th day of September 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE MOTION TO COMPEL DISCOVERY 7 December 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 701, 703, and 906(b)(7), the Defense moves the Court to compel discovery of: (1) the plane tickets and associated receipts for [redacted] departure from Oahu [redacted] on 1 October 2019; (2) the wolf onesie worn by [redacted] during the first alleged sexual assault, and (3) the Government's witness list.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 30 September 2019, NCIS interview [redacted] at [redacted]. During that initial interview, [redacted] disclosed that she had made plans to leave Cpl True because of his abuse and had already purchased plane tickets for her and her children to leave Hawaii on 1 October 2019 at 0730. Enclosure 1.

c. Later that day, [redacted]. underwent a child forensic interview from 1731-1937, which was video recorded. Enclosure 2. During that interview [redacted] stated that the first time Cpl True sexually assaulted her was in her bed, in the bedroom she shared with her two younger siblings on the third floor of their on-base residence, while she was wearing a wolf onesie. *See* id.

d. NCIS conducted a search of the residence from 2153-0008 that same day and found a letter by [redacted] which was photographed. Enclosure 3. Although undated, the note indicated that [redacted] was unhappy in her marriage to Cpl True and had considered separating with him prior to the 30 September 2019 allegations by her daughters, [redacted] and [redacted] ("If we can't work this out I want to go home"). *See* id. The only items of evidence seized by NCIS during the search of the residence were: (1) one knife found in the kitchen sink, and (2) two Micro SD cards. Enclosure 4.

e. On 4 May 2020 a Trial Management Order was signed by the Military Judge. Enclosure 5. In that TMO, 25 March 2020 was set as the date for the Government's disclosure obligations; footnote ii stated that on that date the Government owed the Defense, among other things, the "names and addresses/contact information of witnesses the [T]rial [C]ounsel intends to call in the prosecution's case-in-chief." Id.

f. On 9 July 2020, the Defense requested discovery of the plane tickets from 1 October 2019 and associated purchase receipt for [redacted] for their flight from Hawaii to Missouri following their disclosures. Enclosure 6.

g. On 3 August 2020, the Defense asked for an estimate of the Government's response to the Defense's request for the plane tickets; the Defense also requested discovery of the wolf onesie that [redacted]. was wearing during the course of the first alleged sexual assault. *See* id.

h. On 16 September 2020, the Government provided the Defense with a response, denying its requests for the plane tickets and wolf onesie because the items were not in possession of the Government and were not relevant. Enclosure 7.

i. The three Complaining Witnesses in this case—[redacted]—have refused to be interviewed by, or respond to written interrogatories from, the Defense.

j. As of the filing of this motion, the Defense has not received the "names and addresses/contact information of witnesses the [T]rial [C]ounsel intends to call in the prosecution's case-in-chief."

3. Discussion.

a. The Rules for Courts-Martial and the Uniform Code of Military Justice require liberal disclosure.

Article 46 of the Uniform Code of Military Justice (UCMJ) and the R.C.M.s implementing the statute set forth the requirements for discovery and the production of evidence for courts-martial. "The prosecution and the defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." R.C.M. 703(a); *see also* Article 46.

Courts have routinely recognized that the scope of discovery in military courts is substantially broader than what is common in civilian practice. *See* United States v. Williams, 50 M.J. 436, 439 (C.A.A.F. 1999) (citations omitted). In addition to the discovery rules, the military court of appeals outlined the importance of discovery, and stated that the military criminal justice system contains much broader rights of discovery than are available under the Constitution or in most civilian jurisdictions. *See* United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986).

The standard for discovery in R.C.M. 701(a)(2)(A) used to be "material to the preparation of the defense." However, this changed in the 2019 Manual for Courts-Martial to require the Government to discover any item "relevant to defense preparation." The analysis of R.C.M. 701 specifically notes that "[t]he provisions broaden the scope of discovery, requiring disclosure of items that are 'relevant' rather than 'material' to defense preparation of a case." Evidence that is discoverable under R.C.M. 701 goes beyond that which would be admissible at trial. United States v. Luke, 69 M.J. 309, 320 (C.A.A.F. 2011). It includes materials that would aid the Defense in formulating a trial strategy, developing a defense, or pursuing lines of investigation. United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008); Eshalomi, 23 M.J. at 12. In evaluating evidence under this rule, the Military Judge should cast a deferential eye towards the Defense, insofar as even evidence which appears innocuous or insignificant on its face "may have special significance to one who knows the more intimate facts" of the case. *See* Alderman v. United States, 394 U.S. 165, 182 (1969).

Of course, the Government's ability to identify and obtain information is not limited by the "custody and control" requirement of R.C.M. 701. Under R.C.M. 703, the Defense is entitled to compulsory process to obtain evidence that is "relevant and necessary." R.C.M. 703(e)(1). The discussion which follows defines "relevance" by referring to Military Rule of Evidence 401, and "necessary" as evidence that is "not cumulative and [which] would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(g)(3) empowers the Trial Counsel to seek subpoenas for evidence that is not currently under Government control.

b. <u>The three items requested by the Defense are relevant and necessary.</u>

i. Plane Tickets and Purchase Receipt

The plane tickets and associated purchase receipts are relevant and necessary to the Defense because these documents reveal the moment in time when [redacted] made the decision to leave Cpl True and their life in Hawaii and take her children to [redacted]. During her interview with NCIS [redacted] indicated that she had made this decision at some point prior to NCIS arriving to [redacted] but she did not provide NCIS with further information. The timing of when she made this purchase will impact not only an assessment of her credibility but that of the allegations made by her and her daughters [redacted] against Cpl True. It appears that [redacted] had contemplated leaving Cpl True prior to her daughters' allegations based on the note found in the residence—had she bought the plane tickets prior to her daughters' allegations or after? The timing here makes it more or less probable that her daughters' allegations were independently borne. Having the plane tickets and associated purchase receipt is critical for the Defense—it will not only impact its cross examination of [redacted] (her credibility and motivations as not only a Complaining Witness herself, but as the the mother of the other two Complaining Witnesses in this case), but will inform its preparations with its expert witness, Dr. [redacted], who will testify to issues of suggestability and influence in this case.

ii. [redacted] Wolf Onesie

The wolf onesie is also relevant and necessary to Defense preparation. [redacted] disclosed that she was first sexually assaulted by Cpl True in her bed located in the bedroom she shared with her two younger siblings, which shared a common wall to the guest room habituated by a Marine and his wife. The sexual assault occurred while she was lying on her bed wearing a wolf onesie. [redacted] stated that Cpl True penetrated her vaginally with his "member" from behind while she was wearing this onesie. The material and design of this article of clothing will make her allegation more or less feasible—how did one get in and out of this onesie? Did it feature footies? A

zipper on the front or back? Buttons or snaps? Did it have any velcro that would make noise when pulled or adjusted? Did it have a hood or face covering? Was it worn as pajamas or loungewear or a costume? The answers to these questions will inform the cross examination of [redacted] at trial. The wolf onesie makes it more or less probable that the sexual assault occurred, and that it occurred as described by [redacted] It will also have a bearing on the weight and credibility of her testimony as a witness.

iii. Government Witness Lists

Finally, the Government is months overdue in providing the Defense with the names and contact information of the witnesses it intends to call on the merits or at presentencing at trial. The Government is required to provide the Defense the names and contact information of witnesses the Government intends to call on the merits and at presentencing. *See* R.C.M. 701(a)(3) (merits witness list before the beginning of trial) and R.C.M. 701(a)(5)(B) (presentencing witness list upon request by the Defense). These requirements are captured in the TMO, which is signed into effect by the Military Judge. *See* R.C.M. 701(g)(1) ("the Military Judge has the authority to regulate the time, place, and manner of discovery").

The purpose of ordering the Government to provide a witness list early in the case is to provide the Defense adequate time to investigate and prepare for trial. It also prevents unnecessary delay from new or unexpected witnesses being sprung on the Defense at the last second, necessitating a continuance. Obviously, the witness list provided with the Government's disclosure obligations will not be final; it will be subject to change and updates by the Government. However, the witness list must be a good faith witness list of the witnesses the Government intends to call at trial, not just a list of all individuals mentioned in an investigation or interviewed as part of an investigation. To allow such would be an abuse of the disclosure

requirement and would undercut its purpose. Therefore, pursuant to the TMO and the R.C.M.s, the Defense requests that this Court order the Government to provide a good faith merits and presentencing witness list to the Defense and to supplement those witness lists if they change between now and trial.

4. Evidence. In addition to the charge sheets and Appellate Exhibits cited herein, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – Initial NCIS Interview of [redacted] of 29 Sep 19

Enclosure (2) – Child Forensic Interview of [redacted] of 30 Sep 19 (DVD)

Enclosure (3) – NCIS Photograph of [redacted] Note to Cpl True of 30 Sep 19

Enclosure (4) – NCIS Results of Crime Scene Examination of 30 Sep 19

Enclosure (5) – TMO of 4 May 20

Enclosure (6) – Emails Between Trial and Defense Counsel

Enclosure (7) – Government Response to Second Discovery Request of 16 Sep 20

5. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the Defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. Requested Relief. The Defense requests that the Court compel order the discovery of the documents and items requested in this motion.

7. Oral Argument. Oral argument is requested if the Government opposes this motion.

Dated this 7th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 7th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY 14 December 2020

1. Nature of the Response.

This is the Government's response to the Defense motion to compel discovery and production under RCM 701 and RCM 703. The Government requests the Court deny the Defense motion, while also finding it moot with regard to the discovery of the Government's witness list.

2. Summary of the Facts.

a. On 14 December 2020, the Government provided the Defense a preliminary witness list, to which the Defense replied via email that they now consider the issue as to production of the list to be moot.

b. On 3 August 2020, the Defense requested discovery of (1) the plane tickets and associated receipts for [redacted] departure from Oahu to [redacted] on 1 October 2019; and (2) the wolf onesie associated with [redacted]. See Reference (A).

c. The Government sought records of any government procured plane tickets for the named victims in this case, which would be discoverable as a benefit conferred upon a victim in connection with the report of a crime. See Enclosure (1) and (2).

d. The Government inquiry into this matter determined that, while a safety move was

requested, [redacted] ultimately procured her own air travel and did not received Government provided plane tickets. See Enclosure (2)

e. On 16 September 2020, the Government provide formal denial of the Defense to the request for records of plane tickets and the "wolf onesie" worn by [redacted] as not relevant items and not in the possession of the Government. See Enclosure (3)

f. On 7 December 2020, the Defense filed a motion to compel discovery of, in part, the "plane tickets and associated receipts for [redacted] 's departure from Oahu to [redacted] on 1 October 2019' and "the wolf onesie worn by [redacted] during the first alleged sexual assault…" See Reference (A).

g. On 12 December 2020, the Government emailed the Victims Legal Counsel for [redacted] (the named victim and mother of the two child victims) and requested any information pertaining to the Defense request. The Government provided the Victims Legal Counsel with a copy of a subpoena for the requested documents and items. The response is pending. See Enclosure (4).

h. [redacted] describes the wolf onesie in her child forensic interview as having buttons around the bottom. See Reference (A) and Enclosure (5).

3. Discussion.

"Each party is entitled to the production of evidence which is relevant and necessary." RCM 703(e)(1). "Relevant evidence is 'necessary when it is not *cumulative* and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." [emphasis added] U.S. v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004.) The trial counsel shall, as soon as practicable, disclose evidence known to the trial counsel which reasonably tends to: (a) negate guilt; (b) reduce the degree of guilt; (c) Reduce the punishment; Adversely affect the credibility of any prosecution witness or evidence. RCM 701(a)(6).

The Plane Tickets

The initial Defense discovery request was denied because the items were not in the possession of the Government. Furthermore, production was denied as the Government had established the plane tickets were not provided by the Government, and therefore not a benefit conferred, which would have triggered discovery – and also would have produced associated government records. The timing of the victims' flight off the island is not in dispute, and production of the plane tickets would be cumulative and not material. In the their 7 December 2020 motion, the Defense raise the issue of the timing of when [redacted] plan to depart the island was formed, and whether it was before or after the disclosure by the children of the sexual crimes. Without, commenting on the merits of the Defense argument, the government has reconsidered the matter, and on 12 December 2020, re-submitted the request to [redacted] though Victims Legal Counsel (with an associated subpoena compelling production of any records that may exist and are in the possession of [redacted]). The issuance of the subpoena renders this issue moot until the Government fails to effectuate service, or [redacted] fails to comply with the subpoena.

The Wolf Onesie

The "wolf onesie" garment is not in the possession of the Government and is not material and necessary to the Defense. The Defense motion asserts that the "material and design of this article of clothing will make her allegation more or less feasible – how did one get in and out of this onesie?" The production of the onesie for this purpose is cumulative with the description provided by [redacted] as memorialized in her video recorded child forensic examination in which she describes the onesie as having buttons at the bottom, covering the body except the

face, and worn during normal everyday things. Furthermore, potential members can be expected to be familiar with the design of a onesie with buttons.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers the following evidence:

Reference (A): See Def Motion for Appropriate Relief with Enclosures

Enclosure (1): Email traffic between TC and VLC

Enclosure (2): Regional Trial Investigators Investigative Action

Enclosure (3): Government response to Defense discovery request

Enclosure (4): Email traffic from TC to VLC with subpoena

Enclosure (5): Transcript excerpts from [redacted] 30 Sept 20 interview

b. Defense as the moving party, bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(l).

5. Relief Requested.

The Government requests this court deny Defense's motion and find it moot in part.

6. Oral Argument.

The Government requests oral argument.

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

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

UNITED STATES V. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: PRELIMINARY RULING ON THE ADMISSIBILITY OF EVIDENCE 7 December 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 906(b)(13), the Defense moves the Court to make a preliminary ruling on the admission of two videos which it intends to offer into evidence at trial.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. The situs of the Article 120b allegations were two bedrooms located on the third level, and the laundry room/kitchen on the second level of [redacted] *See* Enclosures 1-2.

c. On 31 December 2018, Cpl True married [redacted] Enclosure 1.

Appellate Exhibit L

d. At the time of the marriage, [redacted] had three children: [redacted] (female, [redacted]), [redacted] (female, [redacted]), and [redacted] (male, [redacted]. [redacted] and [redacted] shared the same biological father. Enclosure 1.

e. In March 2019, Cpl True, [redacted] and the three children moved into on-base housing onboard Marine Corps Base Hawaii. Their residence was located at [redacted] and featured 3 bedrooms and 2.5 bathrooms. Enclosure 3.

f. In May 2019, Cpl [redacted] moved into what was [redacted] room of the True residence, forcing [redacted] into a shared room. Enclosure 4.

g. In July 2019, Cpl [redacted] got married while on leave and his wife, [redacted] moved into Cpl [redacted] room in the True residence. Enclosure 5.

h. At some point after 2120 on 29 September 2019, [redacted] made disclosures in front of [redacted] alleging sexual assault by Cpl True. [redacted] asked [redacted] if Cpl True had done the same to her and she nonverbally affirmed. Enclosures 1-2.

i. At the time of the allegations there were 4 adults, 3 children, 1 dog, 2 rabbits, and 1 cat living in the single family residence. Enclosure 1-4.

j. At 2153 on 30 September 2019 NCIS conducted a crime scene examination of the True on-base residence. NCIS described the residence as a "three story attached townhome with the lower level consisting of the garage; the second level consist[ing] of the main living area with the living room, half bathroom, kitchen, dining room and laundry room; the third floor consist[ing] of three bedrooms and two full bathrooms." Enclosure 6. During the course of this examination, NCIS took 102 photographs (45 of which were featured in templates contained within the report of investigation), and generated 3 diagrams using Scene PD (1 of the second level and 2 of the third level of the home). *See* id.

k. On 12 February 2020, the Complex Trial Counsel, accompanied by Victim's Legal Counsel, [redacted] and the Regional Trial Investigator conduced a walkthrough during daylight hours of the residence, including the taking of 3 photographs and 1 video (7 minutes and 56 seconds in length). Enclosure 7.

l. On 13 July 2020, the Defense moved the Court to permit a jury view pursuant to R.C.M. 913(c)(3) of the on-base residence during trial. *See* Appellate Exhibit 34. On 24 July 2020, the Court denied the Defense's motion, in part because videos of the house existed. *See* Appellate Exhibit 42. In so ruling, the Court offered: "if [D]efense finds that evidence to be insufficient to afford the member's contextual awareness, it may seek to compel the government to make a better video, or make one of the defense's own." *See* id.

m. On 18 September 2020, the Defense entered the on-base residence and took two videos using a [redacted] camera. Enclosures 8-9. The first video is a floor-by-floor walk through of the residence—it is a total of 3 minutes and 42 seconds in length. Enclosure 8. The second video depicts [redacted] movements[1] before, during, and after the 30 September 2019 alleged sexual assault (starting in her bedroom, downstairs to the laundry room, into the kitchen, and then back up to her bedroom)—it is a total of 1 minute and 45 seconds in length. Enclosure 9.

3. Discussion.

The decision on whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the Military Judge. *See* discussion of R.C.M. 906(b)(13). The Defense intends to play these videos during trial and to use them during the course of examining witnesses.

The members' ability to visualize the on-base residence and appreciate the physical dimensions of the space is relevant to the issue of guilt or innocence of Cpl True, and is not a

[1] According to the statements she made during her 30 September 2019 child forensic interview. *See* enclosure 2.

collateral issue. The Defense theory that these sexual assaults never happened relies heavily on the fact finder contextualizing the evidence they receive from the two minor Complaining Witnesses. By having the members virtually walk through the residence and view the spaces wherein these sexual assaults are alleged to have occurred, the fact finder will be able to see the implausibility of these kinetic and violent acts occurring as described by the two minor Complaining Witnesses. Attempting to have witnesses describe the physical dimensions of these spaces during the course of testimony, even with the assistance of visual aids like photographs and diagrams, does not adequately allow the Defense to present its theory. Additionally, any attempt by the Defense to do so will prolong the anticipated testimony of the two minor Complaining Witnesses, and will likely confuse the members. The fact finders, after watching the video of these spaces will gain the contextual awareness necessary to assess the plausibility of the testimony presented by the two minor Complaining Witnesses.

The fact finder will not be familiar with the premises of the alleged sexual assaults. The members for this panel may come from off-island, may live on-island but off-base, may live on-island and on-base but in different on-base housing. As such, it is unlikely that the members they will have any first-hand knowledge about the specific layout of this on-base residence or the spaces within. It is important for the fact finder to be familiar with the layout and dimensions of the rooms within the residence to be able to contextualize and assess the testimony of the two minor Complaining Witnesses. Further, two-dimensional photographs and diagrams will not adequately enable the fact finder to understand the physical dimensions of the space.

4. Evidence. In addition to the charge sheets and Appellate Exhibits cited herein, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interview of [redacted] of 29 Sept 19

Enclosure (2) – Child Forensic Interviews of [redacted] of 30 Sep 19 and 21 Nov 19

Enclosure (3) – Lease Agreement of 1 Mar 19

Enclosure (4) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (5) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (6) – Excerpts from NCIS Crime Scene Examination of 30 Sep 19

Enclosure (7) – Prosecution/VLC Walkthrough of Residence of 12 Feb 20

Enclosure (8) – Video of Walk-Through (Residence) of 18 Sep 20

Enclosure (9) – Video of Walk-Through ([redacted] Movements) of 18 Sep 20

In addition to the enclosures, the Defense intends to call Sergeant [redacted] U.S. Marine Corps, a Defense services clerk, as a witness during the hearing to lay the foundation for the admission of these two videos.

5. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the Defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. Requested Relief. The Defense requests that the Court to make a preliminary ruling on the admission of two videos which it intends to offer into evidence at trial.

7. Oral Argument. Oral argument is requested if the Government opposes this motion.

Dated this 7th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

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

Dated this 7th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

Appellate Exhibit L
Page 6 of 33

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	Government Response to the Defense MFAR—preliminary ruling on the admissibility of evidence 14 December 20

1. Nature of the Response. The Defense seeks to admit two videos. The Government opposes the video labeled [redacted] Movements." The government does not oppose the other video (subject to proper foundation at trial). The Government's response is limited to the video evidence—not the accompanying audio.

2. Summary of the Facts. For purposes of this motion, the Government adopts Defense's facts and adds the following:

a. The residence is empty in the video and contains no personal belongings.

b. At the time of the crime, the house was occupied by the true family and the [redacted] couple and their personal belongings/furnishings.

3. Good Cause.

This motion is filed after all substantive motion deadlines. However, in his ruling the Military Judge permitted the Defense to compel the Government to make a video or to make one of their own. This ruling came after all substantive motions sessions. The Government concedes there is good cause for this motion.

4. Law

APPELLATE EXHIBIT LI

Paragraph 54e, Manual for Courts-Martial, 1951, providing that "Re-enactments of the events involved or acts alleged to have been committed are not authorized upon a view" states the general rule governing conduct of juries which prohibits any experiments, demonstrations or tests during authorized views.[1]

b. M.R.E. 403. " 'unfair prejudice' within [F.R.E. 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[2] "M.R.E. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness."[3]

4. Application

The video that purports to retrace the steps of one of the victims is effectively a jury view re-enactment. This should not be admissible based on historical precedent and unfair prejudice to the process. Showing this video-shot by an adult in an empty house and purporting to show the path the victim took lacks accuracy to the scene at the time of the crime and is far better captured in the photos of the crime scene. This video should be excluded under MRE 403..

5. Burden of Proof and Evidence

a. As the moving party, the Defense bears the burden of persuasion by a preponderance of the evidence.

6. Relief Requested. The Government requests the court rule the video purporting to be a re-enactment of the path the victim took as inadmissible. The Government does not oppose the other video but opposes the video being played with sound—as the acoustics of an empty dwelling are markedly different from an occupied one with furniture, belongings, and other

[1] UNITED STATES v. MARTIN, 19 C.M.R. 646, 650, 1955 CMR LEXIS 376, *10
[2] Fed. R. Evid. 403 advisory committee's note.
[3] United States v. Gaddis, 70 M.J. 248, 254-255 (C.A.A.F. 2011).

occupants.

7. Oral Argument. The Government requests oral argument.

//S//
G. F. Curley
Major, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT LJ

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. MARINE CORPS	**DEFENSE MOTION IN LIMINE** **(M.R.E. 404(b) and 413)** 7 December 2020

1. Motion

The Defense moves the Court for a ruling that Cpl True's statements of suicidal ideation, evidence that he took ten minutes to collect his uniform, and the use of kitchen knives are inadmissible for any purpose under Mil R. Evid. 403 and 404(b).

2. Summary of Relevant Facts

Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse).

3. Applicable Law

a. Military Rule of Evidence 404 (b)

Military Rule of Evidence 404(b) prohibits the introduction of evidence for the purpose of proving that an accused committed charged misconduct because they may have committed misconduct in the past. This is not an absolute ban on evidence of uncharged misconduct, but

there must be some independent basis for its admission other than to show, as a result of predisposition to commit similar offenses, that the accused committed the offense currently before the court.

To determine whether evidence should be excluded under Rule 404(b), the United States Court of Military Appeals developed a three prong test in *United States v. Reynolds* (29 M.J. 105). If a piece of evidence fails any prong of the Reynolds test, that failure will be fatal to its admission. The first prong asks whether the evidence reasonably supports a determination that a prior crime, wrong, or act was committed by the accused. This determination is made pursuant to M.R.E. 104(b), whereby the military judge determines whether the fact finder could reasonably find the conditional fact. The second prong turns to the question of relevancy under M.R.E. 401, and the basis for that relevancy. If the relevancy of the evidence is tied to the defendant's character, that evidence should be excluded. The final prong applies the balancing test of M.R.E. 403, and the probative value of the evidence must not be substantially outweighed by the danger of

Discussion, 404(b) Evidence

b. *"On 30 September 2019, the Accused made* [redacted] *to the staff at* [redacted] *following the discovery of the charged misconduct (evidence of his consciousness of guilt."*

The Government's 404(b) notice is misleading. The [redacted] to the staff at [redacted] may have occurred after he was arrested, but he stated he had these ideations for months prior to the arrest. Consequently, these claims of [redacted], even if made, are irrelevant to the case and do not show any consciousness of guilt. Furthermore, the danger of unfair prejudice far outweighs the probative value, particularly when the relevancy is so attenuated.

c. *"The Accused taking 10 minutes unaccompanied within his residence to retrieve his uniform (evidence of consciousness of guilt/explain the lack of memory cards in security cameras)"*

The Government notice is misleading. The Accused was ordered to collect his belongings, it is unclear why the Government may now argue that Cpl True collecting his uniform is evidence of consciousness of guilt. Furthermore, nowhere in the evidence of the case as it has developed is there any reference to memory cards being in the security cameras. Despite access to the complaining witnesses in this case, they have been unable to provide any evidence there was memory cards.

> d. *"The Accused's use of kitchen knives when exploiting family members including but not limited to the rapes of* [redacted] *and the incident in which he brought a kitchen knife up to the bedroom in his pocket (modus operandi)."*

Modus operandi evidence is only admissible in determining the identity of the perpetrator.[1] That evidence must be so idiosyncratic, so unusual and distinctive that it constitutes the accused "signature."[2] The Government has failed to provide notice as to how modus operandi evidence is relevant or admissible in this case and how the purported evidence, whatever it may be, fulfills these requirements.

4. Discussion, "Intrinsic Acts" Evidence

In this section, the government states how intrinsic acts are not, "by definition, not 404 (b)." It is unclear, therefore, as to the purpose of this section. If the Government intends this section as a means to pre-admit certain evidence, the Defense requests a proper motion and reserves the right to respond. The Government then, in the same section and referring to every theory of admissibility under M.R.E. 404(b), attempts to preserve any possible M.R.E. 404(b) evidence if their analysis of intrinsic evidence is incorrect. As discussed above, such a blanket recitation of the theories outlined in M.R.E. 404(b) is not sufficient evidence to the Defense.

Notwithstanding the above, one particular piece of evidence is worth examining. The Government seeks to introduce [redacted]

[1] United States v. Rappaport, 19 M.J. 709, 713 (1984).
[2] Id. at 713.

[redacted]" Twice in the same sentence the Government refers to these incidents, whenever they occurred, as occurring in the "past," and yet the Government asserts that this evidence refers to an intrinsic act. The Government has made no attempt to identify how these acts are "inextricably intertwined" with the charged crimes. As they occurred in the past, it defies logic that such acts could be part and parcel of the charged crimes.

The Government, "in an abundance of caution," as an alternative lists all purposes for which 404 (b) evidence may be introduced, but again provides none of the notice required and asks the Defense counsel to identify the ways in which this evidence will be introduced at trial and then presumably address any issues with introducing the evidence. The notice requirement in M.R.E. 404(b) is not meant to elicit from the Defense counsel their defenses to vague notions of evidence that may be admitted at trial, but requires the Government to provide effective notice to the Defense of the evidence they intend to introduce.

5. Relief Requested

The Defense respectfully requests that this Court rule that the evidence the Government intends to offer under Mil. R. Evid 404(b) is inadmissible for any purpose. The Defense requests oral argument.

Burden of Proof and Standard of Proof

The Government has a duty to provide notice pursuant to M.R.E. 404 (b).

6. Argument: Oral argument is requested.

Dated this 7th day of December, 2020

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

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A true copy of this motion was served electronically on the Court, Trial Counsel, and Victims' Legal Counsel via electronic mail this 7th day of December 2020.

[redacted]

J. B. LARKIN
Captain, U.S. Marine Corps
Detailed Defense Counsel

Appellate Exhibit LII
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GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	Government Response to Defense 404b and 413 14 Dec 20

1. Nature of the Response. The Government noticed Defense of its intention of introducing [1] [redacted] of the accused on 30 September 2019 as evidence of consciousness of guilt, [2] that the accused took 10 unsupervised minutes to retrieve his uniform, [3] the accused's modus operandi of utilizing kitchen knives to exert influence over family members, and [4] a provision highlighting other intrinsic acts. The Defense opposes [1]-[3] and asserts the acts in [4] are not inextricably intertwined with the charged offense and/or are not admissible under M.R.E. 404(b). The Government will not introduce [3] as modus operandi evidence.

2. Summary of the Facts.

For purposes of this motion, the Government concurs with the Defense summary of relevant facts but adds the following:

a. The Government filed 404b notice on 9 April 2020 (enclosure (1)).

b. Defense submitted a MFAR (insufficient 404b notice) on 16 April 2020.

c. The Government Responded on 23 April and adopts the fact section and enclosures from this motion (reference (A)).

d. The Defense has not provided good cause.

APPELLATE EXHIBIT LIII

3. Law

a. While evidence of other crimes, wrongs, or acts is not admissible to prove a predisposition to commit a crime, M.R.E. 404(b) expressly permits use of evidence of other crimes, wrongs, or acts when it is relevant to another specific purpose. One permissible purpose is consciousness of guilt.

4. Application

Suicidal Ideations

The question is whether [redacted] of the accused should be considered evidence of his guilt. In *Commonwealth v. Knapp,*[1] Daniel Webster argued that an unbearable sense of guilt can drive an individual to suicide and such an act is tantamount to a full confession. In 1904, American courts first recognized attempted suicide as evidence of guilt in *State v. Jaggers,*[2] the suicidal act was characterized as an attempt to "escape further prosecution" and compared to flight from the area of the crime. "Flight [has] long been considered admissible as a relevant factor bearing on the probability of guilt.[3] The inference chain is simple: the suicidal ideation is evidence of consciousness of guilt; consciousness of guilt is evidence of actual guilt.[4]

Therefore, since legal relevancy requires only common sense probability, not demonstrable certainty,[5] it would perhaps be permissible to assume that true guilt might inspire

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[1] Argument by Daniel Webster in Commonwealth v. Knapp, 26 Mass. 496 (1830).
[2] 71 N.J.L. 281, 58 Atl. 1014 (1904).
[3] Attempted Suicide As Evidence of Guilt in Criminal Cases: The Legal and Psychological Views, 1964 WASH. U. L. Q. 204 (1964) [hereinafter, Suicide].
[4] Id.
[5] MICHAEL & ADLER, THE NATURE OF JUDICIAL PROOF 73 (1931); 1 WIOMORE, EVIDENCE § 11 (3d ed. 1940).

an act of self-destruction.[6] Psychologists contend, however, that the assumption is true only if the accused is "suicide prone."[7] "Nevertheless, the close proximity of an attempted suicide to the alleged crime would seem to suggest a calculable inference of guilt."[8] In *State v. Plunkett,*[4] the defendant was found suffering from a dangerous, self-inflicted wound in the same room with the battered body of his young child. There would appear every reason to infer a logical relationship between the homicide and the attempt. Moreover, the guilt hypothesis could be applied since the suicidal act was apparently a sincere one. The court, commenting on the fact of proximity, concluded that "the act of self-destruction was so clearly connected with the killing of the child as to constitute it a part of the *res gestae."*[9] "All other American cases have dealt with suicide attempts occurring after arrest and, usually, during confinement."[6] In this case, the [redacted] occurred one day after NCIS was made aware of the crimes and while the accused was at [redacted] The accused was then held for approximately 15 days prior to be released and placed into pretrial confinement (see ROI, charge sheet, and mental status evaluation to establish the timeline).

Defense argues that the accused had these ideations for months prior to the arrest but did not provide any citation for that information. Regardless, this fact inures to the benefit of admission. The treatise on suicide as consciousness of guilt highlights that the psychological

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[6] See Commonwealth v. Giacobbe, 341 Pa. 187, 193, 19 A.2d 71, 74, 1941 Pa. LEXIS 405, *9 ("One of defendant's assignments of error is directed to the admission in evidence of her attempts at suicide. While the probative value of such evidence has apparently never come before a Pennsylvania court for consideration, there is a unanimity of decision in other jurisdictions that it is admissible on the same theory as flight, or manifestations of mental distress, fear, nervousness or excitement on the part of one charged with crime. The learned trial judge charged the jury that they might give to this testimony, in connection with all the other facts and circumstances of the case, whatever weight they, in their discretion, thought it deserved, because an attempt to commit suicide under a given set of circumstances might or might not indicate a consciousness of guilt. In this there was no semblance of error."
[7] BOSSELMAN 93-94; Bunzel, *Suicide,* 14 THE ENCYCLOPEDIA OF SOCIAL SCIENCES 455 (1934); Robins, Schmidt & O'Neal, *Some Interrelations of Social Factors and Clin-ical Diagnosis in Attempted Suicide: A Study of 109 Patients,* 114 AM. J. PSYCHIATRY 230 (1957).
[8] Suicide, 209.
[9] Id, 209.

correlation is strongest—or statistically apparent—in the suicide prone.[10] The most recent ideation that led to the committing of the accused occurred in close proximity to the allegation and the ideations of self-destruction were so clearly connected temporally with the violent rapes that it constitutes part of the res gestae. An attempt to commit suicide, like an attempt to escape from jail or a flight after the commission of a crime, may indicate the efforts of a guilty person to avoid punishment for his crime.[11] Members should be permitted to give this evidence the weight they see fit.

Memory Cards

This provision in the 404b notice is tied specifically to consciousness of guilt, motive, plan, and intent. If Defense wishes to elicit testimony relative to the void—that there were cameras at the house but investigators did not seize videos or no videos were admitted into evidence—the Government, in fairness should be permitted to introduce evidence that the accused was present in the house unaccompanied for over 10 minutes after he knew he was accused of these crimes. Likewise, if Defense is permitted to argue the void, the Government should be permitted to argue that the accused was alone in the house for an extended period of time. No memory cards were found in the cameras. The Government does not plan to introduce this evidence in its case in chief but as rebuttal evidence. However, the Government wants to ensure the Defense is on notice.

Intrinsic Acts

The Government is withdrawing "b." related to the knives. The Government provided and listed the intrinsic acts to avoid any notice issues at trial. The remaining notice, a., c., and d.,

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[10] Id, 208.
[11] Commonwealth v. Goldenberg, 315 Mass. 26, 51 N.E.2d 762, 1943 Mass. LEXIS 900

are part and parcel to the charged offenses and are part of the continuing course of conduct that led to the charges on the charge sheet.

5. Burden of Proof and Evidence

a. The Government bears the burden of demonstrating that the 404b evidence is for a purpose other than propensity.

b. Evidence:

1) Government response and enclosures to Defense MFAR 404b notice (ref (a));

2) Government 404b notice (encl (1));

3) Mental Status Evaluation ICO True (encl (2));

4) Charge Sheet ICO True (ref (b))

c. Witnessses:

1) The Government may call an NCIS agent to establish [redacted] timeline.

6. Relief Requested. The Government requests a ruling permitting the introduction of the suicidal ideation as consciousness of guilt and that the accused was unaccompanied in his residence after his crimes were discovered as rebuttal evidence should Defense introduce evidence of the cameras or a lack of video. Last, the Government requests the military judge rule that a., c., and d. are in fact intrinsic acts to the charged misconduct.

7. Oral Argument. The Government requests oral argument.

//S//
G. F. Curley
Major, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL ADDITIONAL FUNDING FOR EXPERT WITNESSES 9 December 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 703(d)-(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the court to order the government for additional expert funding, specifically: (1) 2 hours of pre-trial telephonic consultation with Ms. [redacted] ($550), (2) 2 additional days of trial observation/testimony of Ms. [redacted] ($4,500 plus attendant travel expenses); and (3) 1 additional day of trial observation/testimony of Dr. [redacted] ($2,400 plus attendant mileage expenses).

2. Late Filing. Pursuant to Uniform Rules of Practice 10.7, the defense submits this motion late for the Court's consideration at the Article 39a hearing currently docketed for 21 December 2020. The defense provided notice to the Court and opposing counsel prior to the motions deadline of its intent to file this additional motion. As the Court will see below, the defense was provided the Convening Authority's endorsements for expert witness funding on the afternoon of the motions filing deadline. Upon receipt, the defense consulted with the two experts (one on-island and the other on the west coast) whose funding is the subject of this motion. For these reasons, the defense offers that it has demonstrated good cause for this late filing.

3. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 9 November 2020, the defense submitted requests for expert funding and production of Dr. [redacted] and Ms. [redacted] to the Convening Authority. Enclosures 1 and 2. The defense requested a total of $12,871.50 in funding for Dr. [redacted] as an expert witness, which included 5 days of trial observation/testimony, along with associated travel expenses. Enclosure 1. The defense requested a total of $16,690.50 in funding for Ms. [redacted] as an expert witness, which included 2 hours of pre-trial consultation, 5 days of trial observation/testimony, along with associated travel expenses. Enclosure 2. In making this request, the defense disclosed that it had used up all 20 hours of pre-trial consultation time with Ms. [redacted], ordered by the Court on 4 May 2020. *See* id. at paragraph 2.

c. On 7 December 2020, the defense emailed the trial counsel requesting an update on the expert witness requests. Enclosure 3.

d. The same day, the defense received the Convening Authority's endorsements on its requests for expert funding. Enclosures 3-5. The Convening Authority approved in part and denied in part the requests for funding associated with Dr. [redacted] and Ms. [redacted]. *See* id. In the case of Dr. [redacted] the Convening Authority granted $9,600 for 4 days of trial observation/testimony. Enclosure 4. In that of Ms. [redacted] the Convening Authority granted 3

days of trial observation/testimony and denied the request for the 2 hours of additional pre-trial consultation. Enclosure 5.

e. On 7 December 2020, the defense alerted the Court of its intent to file a late motion to compel additional expert funding no later than 1200 HST on 9 December 2020. Enclosure 6.

4. Discussion.

Pursuant to R.C.M. 703(d), when expert funding is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[1]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop.[2] The defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[3]

a. Ms. [redacted] (DNA expert).

(1) Why the expert is necessary.

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[1] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

[2] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

[3] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

Given the nature and severity of the allegations, the defense will be unable to mount a defense without properly understanding the DNA evidence in this case and the viable theories of attack or explanation that result therefrom. Assistance from Ms. [redacted] is necessary because of the complexities of this field and the facts underlying the allegations. There are 3 complaining witnesses ([redacted]) in the 26 specifications pending against Cpl True, all of whom are maternally related, and 2 of whom are minors ([redacted]). During the time frames charged in the specifications, Cpl True lived with all 3 complaining witnesses in the same residence and engaged in consensual sexual activity with one of the complaining witnesses [redacted]). There are 2 DNA reports from USACIL and the findings linking Cpl True to the two minor complaining witnesses are based on DNA mixtures and Y-STR analysis. Further, the defense has reason to believe that the Government will be calling Ms. [redacted] from USACIL as a witness during its case-in-chief, who will not testify to the possibility of DNA transfer in this case. The defense is only able to present that theory to the members at trial through the expert testimony of Ms. [redacted].

Ms. [redacted] necessity to the defense in this case has already been recognized by the Convening Authority and this Court. The question before the Court is whether the funding associated with 2 additional trial days and the 2 hours of pre-trial telephonic consultation are necessary for an adequate defense.

(2) What the expert will accomplish for the defense.

In the 20 hours Ms. [redacted] was previously granted for pre-trial consultation she has reviewed all relevant DNA evidence, identified theories from that evidence, conducted her own additional research on these theories, educated the defense on the evidence and viable theories, and assisted the defense counsel in preparing for its pre-trial interview with Ms. [redacted]. With the

additional 2 hours of pre-trial telephonic consultation Ms. [redacted] will assist the defense counsel developing direct and cross-examination questions for herself and Ms. [redacted] Without the 2 hours of additional pre-trial telephonic consultation time, the defense will not be able to work with Ms. [redacted] until her arrival during the week of trial—a point which is too late to effectively develop examination questions. The defense also seeks an additional 2 days of trial observation/testimony so Ms. [redacted] is present and available to the defense as an expert witness for all 5 substantive days of trial. The Government has not provided the defense with a witness list for trial in this case.[4] As such, the defense can only speculate at this point about the composition and duration of the Government's case-in-chief at trial. Given that, and the fact that there are three Complaining Witnesses in this case, there is a possibility that he Government's case-in-chief takes 3 days or longer. The defense intends to have Ms. [redacted] observe the testimony of Ms. [redacted] during the Government's case-in-chief—the defense is unsure whether the Government will be calling Ms. [redacted] as their first or last witness, or somewhere in between. Even if the Government proffers that they intend to call her last or first, without having the Government's witness list, the defense is unable to make the estimates required to select the 3 days of trial for Ms. [redacted] presence so that she is able to observe Ms. [redacted] during the Government's case-in-chief, testify during the defense's case-in-chief, and then be subject to recall in the event a question concerning the DNA arises during the course of the Government's rebuttal case. Since there are so many unknowns, it is necessary for the Government provide funding for this off-island defense expert witness for the entire length of trial (which is currently docketed for 5 days). Anything less forces the defense into a logistical dilemma as Ms. [redacted] will have to commit to the dates of her travel during a global pandemic weeks before the start of

[4] This issue is raised and briefed for the Court's consideration in the defense's 7 December 2020 motion to compel discovery.

trial—the defense is left to determine, without any fidelity, which 3 days of the week of 18-22 January 2021 it must select for her presence. Ultimately, the current course will result in delay during trial as the defense will be forced to request additional time for its expert witness once trial has started, thereby necessitating reservation changes at a time when Ms. [redacted] focus and that of the defense counsel should be on the trial.

(3) Why defense counsel cannot do this on their own.

Defense counsel are not DNA experts and do not have the ability to analyze the facts as a DNA expert would. Similarly, defense counsel do not have the time to develop the same expertise that Ms. [redacted] has in time for trial. Defense counsel do not know what evidence to develop to allow an expert to give an opinion, less give an expert opinion with regard to them. Similarly, defense counsel would be unable to testify as an expert witness if that becomes relevant. Finally, this is the first DNA expert either defense counsel have ever had the opportunity to work with and examine during trial. Given the inexperience of defense counsel, the additional pre-trial consultation time with Ms. [redacted] to develop effective examination questions for herself and Ms. [redacted] is necessary in order to mount an adequate defense.

a. Dr. [redacted] (expert in forensic psychology).

(1) Why the expert is necessary.

Given the nature and severity of the allegations, the defense will be unable to mount a defense without properly understanding the evidence in this case and the viable theories of attack or explanation that result therefrom. Assistance from Dr. [redacted] is necessary because of the complexities of this field and the facts underlying the allegations. The bulk of the charges against Cpl True arise from allegations made by two minor Complaining Witnesses, [redacted] and [redacted] who are step-sisters. Following their initial disclosures on the evening of 29 September

2019 to their mother [redacted] each went through a child forensic interview (CFI) the evening of 30 September 2019 with Ms. [redacted] at the [redacted] in Honolulu. During the course of her interview [redacted] alleged, among other things, that Cpl True had sexually assaulted her on three separate occasions in their residence onboard Marine Corps Base Hawaii. [redacted] also underwent a CFI with Ms. [redacted] but did not make any disclosures. Nearly two months later, [redacted]. underwent a second CFI at the [redacted] with Ms. [redacted] During the course of this second CFI, [redacted] made nonverbal disclosures in the latter portions of her interview, prompted by Ms. [redacted] use of a body diagram. Given this, the defense has reason to believe that the Government will be calling the child forensic interviewers—Ms. [redacted] and Ms. [redacted]—as witnesses at trial. Dr. [redacted] will observe the testimony of each of these interviewers, as well as the testimony of [redacted] during the Government's case in chief in order to testify as an expert during the defense's case-in-chief to her impressions of the CFIs and the issue inherent to the disclosures made by [redacted] (suggestability, distortion, etc.). The defense is only able to present these theories to the members at trial through the expert testimony of Dr. [redacted]

The Government has conceded Dr. [redacted] is an expert, as they selected her as an adequate substitute to the expert consultant originally requested by the defense. Moreover, Dr. [redacted] necessity to the defense in this case has already been recognized by the Convening Authority and this Court. The question before the Court now is whether the funding associated with 1 additional trial day is necessary for an adequate defense.

(2) What the expert will accomplish for the defense.

The defense seeks 1 additional day of trial observation/testimony funding so Dr. [redacted] is present and available to the defense as an expert witness for all substantive days of trial. As

noted above, the Government has not provided the defense with a witness list for trial in this case. As such, the defense can only speculate at this point about the composition and duration of the Government's case-in-chief at trial. The defense intends to have Dr. [redacted] observe the testimony of [redacted] as well as Ms. [redacted] and Ms. [redacted] (if the Government calls them as witnesses), testify as an expert during the defense's case-in-chief, and then be subject to recall in the event a relevant issue arises during the Government's rebuttal case (if any). Because the Government's witness list is unknown to the defense, the defense is unsure the length or the order in which the Government will be calling these 5 witnesses. It is possible that the Government's case alone lasts 4 days or longer. Since there are so many unknowns, it is necessary for the Government provide funding for this on-island defense expert witness for the entire length of trial (which is currently docketed for 5 days). Anything less forces the defense to determine, without any fidelity, which 4 days of the week of 18-22 January 2021 it must select for Dr. [redacted] presence. Ultimately, the current course will result in delay during trial as the defense requests additional time for its expert witness once trial has started, creating unnecessary distraction at a time when Dr. [redacted] focus and that of the defense counsel should be on the trial.

(3) Why defense counsel cannot do this on their own.

The issues that Dr. [redacted] will testify to at trial cannot be developed or presented to the finder of fact without expert testimony from Dr. [redacted] at trial. Through cross-examination of the child forensic interviewers, the Defense cannot present the contrary opinion by a qualified expert regarding the import of the evidence in this case.

4. <u>Evidence</u>. In addition to the charge sheets, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – Defense Expert Witness Request – Dr. [redacted] of 9 Nov 20

Enclosure (2) – Defense Expert Witness Request – Ms. [redacted] of 9 Nov 20

Enclosure (3) – Emails Between Defense and Trial Counsel of 9 Nov-7 Dec 20

Enclosure (4) – Convening Authority Endorsement – Dr. [redacted] of 4 Dec 20

Enclosure (5) – Convening Authority Endorsement – Ms. [redacted] of 4 Dec 20

Enclosure (6) – Defense Email of 7 Dec 20

5. **Burden of Proof.** Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

6. **Requested Relief.** The defense requests the court compel the government to provide the defense with the additional expert funding requested above.

7. **Oral Argument.** Oral argument is requested on this motion.

Dated this 9th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

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

Dated this 9th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT Response to Defense MFAR (Additional Expert Funding) 15 Dec 20

1. Nature of the Response.

This is the Government's response to Defense motion for appropriate relief with regard to funding for expert witnesses Ms. [redacted] and Dr. [redacted] The Government respectfully requests the court **DENY** Defense's motion.

2. Summary of the Facts.

For purposes of this motion, the Government concurs with Defense counsel's recitation of the relevant facts.

3. Law

The Government concurs with Defense counsel's recitation of the applicable Military Rules of Evidence and case law regarding the showing of necessity concerning expert witnesses.

4. Discussion.

a) Ms. [redacted] (DNA)

Defense is requesting two (2) additional days of trial observation and two (2) additional hours of pre-trial consultation. Defense motion at 4.

Two additional days of trial observation are not necessary. This witness has been requested to observe Ms. [redacted] (the Government's DNA Expert) testimony, testify in defense's case-in-

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chief, and be subject to recall, if necessary. Defense motion at 5. The Government understands Defense counsel's argument that it does not know the order of witnesses in the Government's case-in-chief and, therefore, cannot ascertain which days the witness' presence would be necessary. However, the Government's witness is a DNA expert who will be testifying regarding the science of forensic DNA analysis and the report generated in this case. This testimony does not require Ms. [redacted] to personally observe the witness' testimony in order to read the body language and demeanor of the Government's witness, which Ms. [redacted] would not even be qualified to do. Additionally, the Defense is able to pull the audio from the Government's witness and deliver the audio (and any necessary demonstrative aids or prosecution exhibits) to Ms. [redacted] for review. This review can be completed while the witness is present during her previously granted three (3) days and on standby.

Two (2) additional pre-trial consultation hours are also not necessary. Defense has been granted twenty (20) pre-trial consultation hours with this witness. Defense has detailed generally what Ms. [redacted] has accomplished in the twenty hours, but has failed to demonstrate why the twenty hours was not sufficient to include trial preparation. Defense stated that the two (2) hours are necessary in order to develop "direct and cross-examination questions" for Ms. [redacted] and the Government's expert, respectively. However, twenty (20) hours being "educated . . . on the evidence and viable theories . . . [and] preparing for its pre-trial interview with [the Government's expert]," is more than enough time for defense to be sufficiently educated on the issues in order to draft examinations. Defense, as stated in its motion, can compete the revision process once the witness is on-island for trial. Overall, Defense has failed to establish the necessity for the additional time requested over that already granted by the convening authority and court.

b) Dr. [redacted] (Forensic Psychology)

The additional day of trial observation is not necessary. Defense's argument is based on the unknowns of trial. As all parties are aware, trial is a fluid process. Even with the Government's witness list, there would be no certainty as to the order of witness testimony or whether each witness will ultimately testify, and the Government is under no obligation to provide such information to the Defense. Regardless, this witness is located on-island and can be on standby in order to be present as needed. Therefore, considering the witness does not need to be present for the entire proceeding and is located on island, the requested two days are not necessary.

The additional forty (40) hours of pre-trial consultation is not necessary. This court's ruling of 24 July 2020, allowed defense leave "to seek more [time], but [defense] shall do so with specificity, both as to what Dr. [redacted] had done with the [previously granted] 40 hours and what she needs additional time to accomplish." Defense has failed to meet the court's requirements. Defense did not state what Dr. [redacted] has accomplished in the previously granted 40 hours and did not include sufficient specificity in its request for additional hours to this court. Therefore, this request should be denied.

4. Burden of Proof and Evidence

As the moving party, the Defense bears the burden of persuasion by a preponderance of the evidence. R.C.M. 412 & R.C.M. 905(c)(1)-(2).

5. Relief Requested.

The Government requests that Defense's motion be denied.

6. Oral Argument.

The Government requests oral argument.

/s/
G. W. Adcock
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **MICHAEL A. TRUE** **CORPORAL** **USMC**	**MOTION TO RECONSIDER DENIAL OF MINOR CHILDREN VICTIMS' MOTION FOR REMOTE LIVE TESIMONY** **7 DEC 2020**

MOTION

Pursuant to RCM 905(f), two of the named victims in this case, minor children [redacted] and [redacted] (sometimes referred to hereinafter as the "children"), move for this court to reconsider the military judge's ruling denying their Motion for Remote Live Testimony and allow the children to testify outside the presence of the Accused by remote live testimony in accordance with RCM 914A and Mil. R. Evid. 611.

SUMMARY

This case involves various offenses under the UCMJ, including violations of Article 120b (Charge I, Specifications 1-13), Article 115 (Charge II, Specifications 1-3), Article 127 (currently numbered Charge IV, Specifications 1-3), Article 131b (currently numbered Charge V, Specifications 1-4), and additional charges related to the Accused's spouse. The issue addressed by this Motion is whether the court should reconsider its previous ruling and allow the children to testify outside the presence of the Accused.

FACTS

1. This case involves allegations of child sexual abuse against minor children [redacted] and [redacted] (Charge Sheet; BS01-104 through BS01-105; BS01-0087 through BS01-0090; BS11-0005; BS01-0001 through BS01-0005)

2. Minor child [redacted] will be [redacted] when she provides testimony in this court-martial. (BS01-0002; Trial Management Order)

3. Minor child [redacted] will be [redacted] when she provides testimony in this court-martial. (BS01-0002; Trial Management Order)

4. During one alleged incident of abuse by the Accused, the Accused held minor child [redacted] neck with his hand, used a knife, and told her, "I will kill you if you tell the secret," or words to that effect. (BS01-0030)

5. During one alleged incident of abuse by the Accused, the Accused struck minor child [redacted] and threatened to kill her if she told anyone about the abuse. (BS01-0008; BS01-0087 through BS01-0090)

6. The actions of minor children [redacted] and [redacted] indicate that they believed the Accused's threats. (BS01-0066 through BS01-0068)

7. The children's 801(a)(6) designee has spoken to the children about the possibility of testifying in front of the Accused. Minor child [redacted] "immediately began to cry" upon hearing the Accused's name, said that she never wanted to see the Accused again, and tearfully recalled the Accused threatening her life should she ever tell someone about what he did to her. After merely hearing about the Accused, minor child [redacted] hardly speaks, eats, or smiles during the days that follow. (Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted])

8. When the children's 801(a)(6) designee spoke to minor child [redacted] about the possibility of testifying in front of the Accused, she made it clear that she cannot do that, feels embarrassed and ashamed of what the Accused did to her, expressed fear at being in the same vicinity as the Accused, and would likely suffer emotional trauma if she is forced to do so. (Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted])

9. The children have indicated that they are so afraid of the Accused that they are unable to speak in his presence about the abuse they suffered. (BS01-0066 through BS01-0068; BS01-0087 through BS01-0090; Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted]; Email from 801(a)(6) Designee dtd 15 April 2020 re [redacted]; Letter of Ms. [redacted] dtd 23 November 2020; Email from 801(a)(6) Designee dtd 4 December 2020)

10. The military judge issued a "Notice and Summary of Ruling ICO True (VLC/Gov't Motion for Remote Live Testimony)" on 18 May 2020 via electronic mail. While there was no evidence presented by the Accused to contradict the evidence in support of the Motion for Remote Live Testimony and the military judge stated that, "The court also has no reason, based on the record, to question the sincerity of [the 801(a)(6)'s] observations and assessment [of the children]," the military judge held, "Nonetheless, the court finds that based on the evidence currently before the court—lay observations and hearsay accounts of the minor witnesses' preferences from an individual who is related to the prospective witnesses— the moving parties have not met their burden to establish the factors under M.R.E. 611(d) ***such that the accused's constitutional right to be confronted with the witnesses against him in person should yield***." Notice and Summary of Ruling ICO True (VLC/Gov't Motion for Remote Live Testimony) (***emphasis added***).

11. On 23 November 2020, [redacted] therapist stated that having [redacted] testify in front of the Accused "could jeopardize [redacted] welfare. She expresses fear of him and says that being in the same room with him would make her feel unsafe… could be traumatizing for her. As stated above, is scared of the Defendant and says that if she ever saw him again, she would 'freak out', run, and try to hide… could cause [redacted] significant emotional distress. During her time in therapy, historically gets very upset when talking about her past trauma. Afterwards, she tends to isolate, shut down, and has outbursts of anger. These reactions will likely be amplified if she is made to talk about them in the presence of the Defendant." Letter of Ms. [redacted] dtd 23 November 2020.

12. On 4 December 2020, the children's 801(a)(6)'s Designee stated that [redacted] "feelings have not changed since my [15 April 2020] letter, she still cries at the thought of having to ever see her accused abuser again and with each day has displayed increasing symptoms of anxiety." She also stated that, "the thought of attending court does not intimidate [the children]. What does intimidate them is the idea of having to face the accused." Regarding [redacted] the designee stated that she "is in an extremely fragile state and the emotional distress that she will suffer testifying in front of her accused rapist would greatly diminish her already damaged ego… [and] will, in my opinion, without a doubt cause more emotional distress than add to any therapeutic value and her emotional and mental health will significantly diminish…getting closer to the day that she may have to be in the same room as the accused she becomes more depressed on some days she sleeps 20 hours out of a 24 hour day, she contemplates suicide daily at the thought of seeing the accused Michael True and has made comments on several occasions that she would rather die than see him ever again." Email of 801(a)(6) Designee dtd 4 December 2020.

BURDEN

13. The burden of proof and persuasion rests on the children for this motion. The standard as to any factual issue necessary to resolve this motion is a preponderance of the evidence. RCM 905(c)(1).

LAW

14. "On request of any party or sua sponte, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge." R.C.M. 905(f). "A military judge has inherent authority to reconsider any ruling made and to receive additional evidence thereon if appropriate." *United States v. Starks*, No. ACM S32221, 2015 CCA LEXIS 295, at *7 (A.F. Ct. Crim. App. July 16, 2015); Review denied by *United States v. Starks*, 2015 CAAF LEXIS 860 (C.A.A.F., Oct. 2, 2015). "[I]n the interests of justice, a trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith." *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985)

15. "A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied." RCM

914A. The minimum procedures that must be observed for such testimony are set forth in RCM 914A (a)(1)-(5).

16. Per Mil. R. Evid. 611(d)(3), Remote live testimony will be used only where the military judge makes the following three findings on the record:

(A) that it is necessary to protect the welfare of the particular child witness;
(B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the accused; and
(C) that the emotional distress suffered by the child witness in the presence of the accused is more than de minimis.

17. "In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem." Mil. R. Evid. 611(d)(5).

ARGUMENT

18. The military judge incorrectly applied the test set forth in Mil. R. Evid. 611(d). Instead of using the proper burden of proof, which is a preponderance of the evidence, the military judge heightened the burden by incorporating the Accused's right to confront witnesses into his reasoning in that he weighed the evidence offered by the child victims in support of their motion, without reference to the three findings stated in Mil. R. Evid. 611(d), and compared it to the weight he personally attaches to the Accused's right to confront the witnesses against him in an in-person, traditional sense. He believed the evidence presented by the children, although not contradicted by any evidence presented by the Accused, did not outweigh the right to confrontation. The military judge should have simply weighed the available evidence and used the appropriate standard to determine whether the children met their burden to establish each of the three findings set forth in Mil. R. Evid. 611(d).

19. The military judge's reference to "lay observations" in support of his ruling indicates that he discounted observations by the Article 801(a)(6) designee because she was not an expert witness. Defense counsel, in their CASE LAW SUPPLEMENT TO DEFENSE RESPONSE TO VLC's MOTION FOR REMOTE LIVE TESTIMONY, cited nine appellate cases where expert testimony was offered in support of motions for remote live testimony. What the military judge perhaps either misunderstood based on the implication of the CASE LAW SUPPLEMENT, or ignored in his ruling, is that Mil. R. Evid 611 has not required expert testimony since implementation of the 2016 version of the Manual for Courts-Martial. There is nothing inherently dishonest about a lay witness as compared to an expert witness. While the judge remarked that the 801(a)(6) designee is related to the children, such that he could

have suspected her of having bias toward protecting them, he did not state that conclusion and instead held that there was "no reason, based on the record, to question the sincerity of [the 801(a)(6) designee's] observations and assessment [of the children]." Notice and Summary of Ruling ICO True (VLC/Gov't Motion for Remote Live Testimony).

20. RCM 914A makes it clear that once the requirements of Mil. R. Evid. 611(d)(3) have been satisfied by a preponderance of the evidence, the military judge must allow the children to testify outside the Accused's presence. While the military judge may question the minor children in order to determine whether the requirements have been met, there currently exists sufficient evidence as set forth in the Facts section above to satisfy the requirements without such an inquiry. The Accused threatened to kill the children if they disclosed the abuse he had perpetrated against them. It is clear the children believed the Accused because they kept the abuse secret until the night of 29 September 2019, when the minor children's mother returned home, noticed that one of the children was crying and the other child appeared scared, and prompted the children to explain what had happened. Only after the Accused left the room were the children able to tell their mother even some of what happened. The children disclosed more details only after escaping the house to go to a hospital while the Accused was at home. (BS01-0066 through BS01-0068).

21. The evidence makes it clear that allowing the minor children to testify outside the presence of the Accused is necessary to protect their welfare. The children show signs of trauma at the mere mentioning of the Accused' name and as recently as 4 December 2020 have shown extreme signs of trauma when confronted with the possibility of testifying in front of the Accused. It is also clear that they would be traumatized, not by the courtroom generally, but by the presence of the accused. As set forth in the Fact section above, the children have indicated that the death threats the Accused made against them and extreme trauma they experienced at the hands of the Accused would greatly affect them if they are forced to be in his presence. The 801(a)(6) designee's 4 December 2020 email explains that the children are not afraid of the court, but rather the Accused.The evidence also shows that the emotional distress they would suffer in the presence of the accused is more than de minimis. Minor child [redacted] hardly speaks, eats, or smiles for days after merely hearing about the Accused. Minor child [redacted] made it clear that she cannot testify in front of the Accused and expressed fear at the possibility of being in the same vicinity as the Accused, even to the extent that she would rather die than see him again. Therefore, based on the cited evidence, the requirements of Mil. R. Evid. 611(d)(3) have been satisfied and the military judge should allow the minor children to testify outside the presence of the Accused per RCM 914A.

RELIEF REQUESTED

22. Minor children [redacted] and [redacted] request that this Court allow them to testify via live remote testimony pursuant to RCM 914A.

Respectfully submitted,

/s/Thomas Camden Shealy
T. C. SHEALY
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

/s/Lauren E. Neal
L. E. NEAL
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

I certify that I have served a true copy (via e-mail) of the above on Captain Ann K. Minami (USN), Major Gregg F. Curley (USMC), Major Aran T. Walsh (USMC), Captain James B. Larkin (USMC), and Captain Shannon B. Hillery on 7 Dec 20.

/s/Thomas Camden Shealy
T. C. SHEALY
Captain, U. S. Marine Corps
Victims' Legal Counsel for minor child [redacted]

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT joining VLC Motions to Reconsider 14 Dec 20

1. Nature of the Response.

This is the Government's motion joining VLCs' motions to reconsider Children Victims' ability to testify remotely and opposing defense's motions to reconsider compelling production of [redacted] and [redacted] mental health records for *in camera* review.

2. Summary of the Facts.

For purposes of this motion, the Government concurs with VLCs' recitation of the facts.

3. Law

R.C.M. 905(f) permits reconsideration of previously litigated matters. The rule states "On request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling." There is a dearth of case law on the topic of reconsideration. No bright-line standard exists as to when a military judge should permit reconsideration of a previously litigated matter. In federal practice, district judges are entrusted with near-complete discretion as to whether to reconsider previously-decided matters. For example, the 7th Circuit has explicitly declined to adopt a bright-line rule for when district courts should permit reconsideration of suppression hearings. Rather the court opted to leave "the matter to the district

court's discretion."[1] Similarly, the 2nd Circuit has held that "a district court should be permitted, in the exercise of its discretion and in light of the totality of the circumstances, to determine whether its suppression ruling should stand."[2] The Air Force Court of Criminal Appeals held that a military judge abused his discretion for refusing the government's request to provide additional evidence rebutting the defense allegation of unlawful command influence, and ultimately, that the judge abused his discretion for refusing to permit reconsideration.[3] However, the court relied on the particular facts of that case and did not articulate a bright-line rule for reconsideration. Although appellate courts and the rule itself provide little guidance for military judges, there are at least three instances where reconsideration will usually be permitted.

First, reconsideration will be permitted when the moving party shows good cause to present new evidence or argument. More specifically, good cause exists when the moving party presents new evidence which (1) was not reasonably available to the party when the matter was previously litigated and (2) is relevant to the matter at hand such that it might have changed the previous ruling. Similarly, new law (e.g. a newly released appellate case) might establish good cause if the change in the law might reasonably have impacted the previous ruling. To summarize, the fundamental question is "Would a reasonably diligent counsel have submitted the new evidence or argument at the previous session?" If so, good cause is most likely lacking.

Second, this court will typically permit reconsideration when denial will result in manifest injustice. Courts function with an interest in truth-seeking.[4] While courts also have a legitimate interest in judicial efficiency, that interest does not operate to the exclusion of all other

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[1] United States v. Ozuna, 561 F.3d 728, 735 (7th Cir. 2009).
[2] In re Terrorist Bombings of the U.S. Embassies in E. Afr., 552 F.3d 177, 197 (2d Cir. 2008).
[3] United States v. Mobley, 2013 CCA LEXIS 1102, *11, 2013 WL 6913318 (A.F.C.C.A. December 20, 2013).
[4] United States v. Custis, 65 M.J. 366, 369 (C.A.A.F. 2007).

interests. Thus, even when counsel fail to establish good cause (i.e. when their failure to present matters is due to their own negligence or incompetence), a court will likely permit reconsideration when the moving party can establish that denial will result in manifest injustice. This is a higher standard than merely establishing that the new evidence or argument might have caused a different outcome when previously litigated. Otherwise, deadlines would be meaningless and the parties would have little incentive to engage in thorough and diligent pretrial litigation.

Third, this court will permit reconsideration when the moving party can establish that the court's prior ruling was based on an erroneous view of the law. Unlike presentation of evidence, which falls squarely on the shoulders of the moving party, courts have a duty to know the law. Thus, for example, a court should permit reconsideration if the moving party can establish that the prior ruling was based on outdated case law, regardless of whether the party's motion or argument contained a correct statement of the law.

Note that these three bases for reconsideration are not exclusive. The language of the rule ("may") entrusts the matter of reconsideration to the sound discretion of military judges. Thus, this court may, in its discretion, permit reconsideration outside of these three examples on a case-by-case basis.

Regarding child remote testimony, all three bases for reconsideration are present here and this matter should be reconsidered. Accordingly, the Government joins the VLC motion. Given the nature of the crimes, the evidence established by the VLC, and the importance of the victims' testimony, it would be a manifest injustice to require the victims to testify in the presence of the accused when the rules specifically permit an alternative process for cases directly analogous to this one.

The Government will prepare an alternate testimony venue in vicinity of the courtroom. At a minimum, the military judge should withhold judgement until after meeting with the victims in chambers prior to the court martial under M.R.E. 611(d)(5).

Regarding defense's motions for reconsideration to compel mental health records for *in camera* review in accordance with M.R.E. 513, the Government concurs that defense has failed to meet its burden (both in regard to [redacted] and [redacted]) and joins in VLCs' opposition.

5. Burden of Proof and Evidence

As the moving party, VLC bear the burden of persuasion by a preponderance of the evidence. R.C.M. 412 & R.C.M. 905(c)(1)-(2).

6. Relief Requested.

The Government requests that VLCs' motions be granted.

7. Oral Argument.

The Government requests oral argument.

/s/
G. W. Adcock
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES V. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE RESPONSE TO VLC MOTION FOR RECONSIDERATION OF REMOTE LIVE TESTIMONY 14 December 2020

1. Nature of the Response. The Defense hereby responds to the joint motion for reconsideration filed by the Victims Legal Counsel (VLCs) for [redacted] and [redacted] for remote live testimony pursuant to Rules for Courts-Martial (R.C.M.) 905(f) and 914A, as well as Military Rules of Evidence (Mil. R. Evid.) 611. The Defense seeks leave of Court to file a substantive response to the subject motion, following discovery under Mil. R. Evid. 513 and consultation with its expert. The Defense further requests that the Court delay hearing argument on this motion until it has the information necessary to substantively respond.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. Of these 26 specifications, 23 involve allegations by two minor complaining witnesses [redacted] and 3 involve allegations made by their mother, [redacted] *See* Charge Sheets.

c. [redacted] has three children: [redacted]. (female, now [redacted]), [redacted]. (female, [redacted] old), and [redacted]. (male, now [redacted]. It appears that at the time [redacted] met Cpl True, she was married to a U.S. Army soldier, [redacted], the biological father of [redacted]. and [redacted]., and was living with him onboard Joint Base Pearl Harbor Hickham. Enclosures 1 and 2.

d. [redacted] had been physically and sexually abusive toward [redacted] during the course of their marriage and [redacted]. had borne witness to some of these incidents in the house. Enclosures 2 and 3.

e. At some point between April 2018 and 31 December 2018, [redacted] and [redacted] were divorced.

f. On 31 December 2018 Cpl True married [redacted] Enclosure 1.

g. In early March 2019, Cpl True, [redacted] and the three children moved into housing onboard Marine Corps Base Hawaii. Enclosure 4.

h. In May 2019, Corporal [redacted], U.S. Marine Corps, moved into a bedroom of the True residence. Enclosure 3. Cpl [redacted] observed that [redacted]. was "depressed and had been hurting herself by cutting her arms and legs" and that the kids had been given melatonin to help them sleep. In July 2019, [redacted] moved into the True residence with her husband. Enclosure 4. Ms. [redacted] observed that [redacted]. was on a number of prescribed medications (stored in a lockbox in the house), had weekly therapy sessions, and had intentionally cut herself in the past (there were visible scars on her thighs). Ms. [redacted] was aware that the children had witnessed [redacted] abuse by [redacted] and told NCIS that they "were likely traumatized as well."

i. On 11 September 2019, [redacted] pled guilty at general court-martial to, among other things, two specifications of Article 128 (striking [redacted] head and neck against the corner of the stairs/tile floor, wrapping his hands around [redacted] neck and applying pressure), one specification

of Article 92 (violating a no contact order by showing up to [redacted] place of employment), one specification of Article 134 (endangering the mental health and welfare of [redacted] by slamming [redacted] head against the floor in their presence), of the UCMJ. [redacted] testified as a witness for the Government at [redacted] guilty plea hearing, noting that all three of her children were present in the house, or bore witness to, her frequent abuse at the hands of [redacted]. As a result, she noted that [redacted] had attempted suicide and [redacted] had reverted to baby talk. Enclosures 3, 5.

j. During [redacted] sexual assault forensic examination on 30 September 2019 it was noted that [redacted] and was prescribed [redacted] Enclosure 6.

k. On 1 October 2019, [redacted] left Hawaii with [redacted] to stay with a friend in [redacted] Enclosure 1.

l. On 24 March 2020, Ms. [redacted] the maternal aunt to [redacted] and [redacted], was appointed by the Court as the designee for both [redacted] under R.C.M. 801(a)(6). Enclosure 7.

m. On 16 April 2020, the Defense filed a motion for in camera review of [redacted] mental health records, pursuant to Mil. R. Evid. 513. AE 15. The same day, the VLCs representing [redacted] and [redacted]. filed their motion for remote live testimony with the Court. AE 3. Following the Article 39a hearing on 4 May 2020, the Court sent out its rulings via email on 18 May 2020. AEs 43-44. The Court denied the Defense's Mil. R. Evid. 513 motion, as well as the VLCs' motion for remote testimony. In doing so, the Court found that based on the evidence then before it ("lay observations and hearsay accounts of the minor witnesses' preferences from an individual who is related to the prospective witnesses") the VLCs had "not met their burden to establish the factors under Mil. R. Evid. 611(d) such that the accused's constitutional right to be confronted with the witnesses against him in person should yield."

n. On 7 December 2020, the VLCs filed the subject motion.

o. On 8 December 2020, the Defense submitted a discovery request with the Government for, among other things: (1) counseling records for [redacted] from the [redacted] for [redacted] from 22 April 2020 to the present, (2) medical records surrounding [redacted] October 2020 suicide attempt, (3) contact information and the curriculum vitae for [redacted] (4) contact information for [redacted] (5) the educational transcripts of Ms. [redacted], and (6) "any medical and counseling records for [redacted]. that informed the opinions of Ms. [redacted] and Ms. [redacted] captured in the 7 December 2020 motion by the VLCs." Enclosure 8. As of the date of this filing, the Defense has not received a response on this discovery request.

p. As of the date of this filing, none of the Complaining Witnesses—[redacted]—have agreed to be interviewed by, or respond to written interrogatories from, the Defense.

q. As of the date of this filing, the trial venue has not been established by the Government—although the current Trial Management Order lists Marine Corps Base Hawaii or Fort Leonard Wood as the trial location, recent discussions with Trial Counsel seem to indicate that trial may be moved to the courtroom at Joint Base Pearl Harbor Hickham. Accordingly the trial location on Oahu is currently unknown to the Defense.

3. Law.

The accused's right to confrontation explicitly "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Maryland v. Craig, 497 U.S. 836, 844 (1990) (citing Coy v. Iowa, 487 U.S. 1012, 1016 (1988)). While this right is not absolute, it is fundamental and cannot "easily be dispensed with." *Id.* at 850.

To overcome this right, there must be a showing of "necessity" which "must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness

who seeks to testify." *Id.* at 856 (emphasis added). In addition, "[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* (emphasis added). Finally, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i. e., more than "mere nervousness or excitement or some reluctance to testify." *Id.* In Craig, this final prong was met by showing that the emotional distress would prevent the child from "reasonably communicat[ing]." *Id.* at 841, 856.

Military Rule of Evidence 611(d) applies the holding in Craig to military courts. Mil. R. Evid. 611(d)(3) requires the Military Judge to allow a child witness to testify remotely if the moving party satisfies a tripartite test (which the VLCs lay out in their motion) as follows:

a. that it is necessary to protect the welfare of the particular child witness;

b. that the child witness would be traumatized not by the courtroom generally, but by the presence of the accused; and

c. that the emotional distress suffered by the child witness in the presence of the accused is more than *de minimis*.

R.C.M. 914A (Use of remote live testimony of a child) serves to implement this evidentiary rule, providing that "A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied."

4. Discussion.

a. The Military Judge did not incorrectly apply the test set forth in Mil. R. Evid. 611(d).

The VLCs now come before the Court again, arguing that the Military Judge incorrectly applied the test set forth in Mil R. Evid. 611(d) by signaling in his ruling that expert testimony was required to justify such a request. In doing so, the VLCs argue that the Court applied the pre-2016 version of Mil. R. Evid. 611(d) which required expert testimony. This is simply not

correct. In the VLCs' original motion and the Defense's 24 April 2020 response, the parties cited to the correct standards under R.C.M. 914A and Mil. R. Evid. 611(d) captured in the 2019 Manual for Courts-Martial. At the 4 May 2020 Article 39a hearing, the Defense addressed all of the military appellate case law on this issue[1] which spanned the years of 1990 to 2018 in argument before the Court. The Defense argued that the VLCs had not produced enough evidence justifying, "under the standards laid out in the case law **and the rules**," that remote live testimony was appropriate in this case—a subjective proffer from a biased party, alone, should not be enough to overcome a criminal defendant's Sixth Amendment rights. The Court agreed. The third bullet point of the Court's ruling clearly recites the correct and current version of Mil. R. Evid. 611(d). The VLCs' disagreement ultimately arises from the fifth bullet point of the

[1] United States v. Thompson, 31 M.J. 168 (C.A.A.F. 1990) (affirming military judge's finding of necessity based on the **testimony of a psychologist who had been qualified as an expert witness** in the area of child sexual abuse and had been treating the minor complaining witnesses over a long period); United States v. Williams, 37 M.J. 289 (C.A.A.F. 1993) (affirming the military judge's finding of necessity based on the **testimony of a psychologist who had examined both** minor complaining witnesses); United States v. Longstreath, 45 M.J. 366 (C.A.A.F. 1996) (affirming the military judge's finding of necessity based on the **testimony of a clinical psychologist** who had been treating one of the minor complaining witnesses, and the actual traumatization observed by the court during the other minor complaining witness' multiple attempts to testify); United States v. Anderson, 51 M.J. 145 (C.A.A.F. 1999) (affirming the military judge's finding of necessity based on the **testimony of a licensed psychologist**, who had been accompanied by a government expert in child sexual abuse when evaluating the minor complaining witnesses); United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (affirming the military judge's finding of necessity based on the **testimony of a licensed clinical social worker who had been qualified as an expert in the field of diagnosing and treating sexually abused children**, and had counseled the minor complaining witnesses over the course of 11-12 weekly sessions); United States v. Pack, No. NMCCA 200400772, 2006 CCA LEXIS 286 (N-M Ct. Crim. App. Oct. 26, 2006) (affirming the military judge's finding of necessity based on the **testimony of a psychologist who had been qualified as an expert in psychotherapy and clinical psychology** and had treated the minor complaining witness for several months prior to trial); United States v. Pauly, No. ACM 36764, 2008 CCA LEXIS 292 (A.F. Ct. Crim. App. Aug. 11, 2008) (affirming the military judge's finding of necessity based on the **testimony of a forensic psychiatrist who had: (1) been qualified as an expert in forensic psychiatry and the treatment of sexual abuse victims**; (2) interviewed the minor complaining witness, her mother and step-mother; (3) reviewed records in the case; and (4) observed the complaining witness' attempted testimony from the back of the courtroom); United States v. Lobsinger, No. NMCCA 200700010, 2009 CCA LEXIS 357 (N-M Ct. Crim. App. Oct. 27, 2009) (affirming the military judge's finding of necessity based on the **testimony of an expert witness in the field of clinical and child psychology**, along with extensive discussions that resulted in agreements amongst the parties); United States v. Delmaster, No. ARMY 20150593, 2018 CCA LEXIS 43 (A. Ct. Crim. App. Jan. 31, 2018) (affirming the military judge's finding of necessity based on the **testimony of** four witnesses—the minor complaining witness' foster mother of 18 months, assigned social worker, therapist, and **an expert witness who testified in the field of clinical and forensic psychology**).

Court's ruling wherein it finds that the VLCs had not met their burden under R.C.M. 905(c). The VLCs' motion for reconsideration amounts to a mere disagreement with the Military Judge's ruling and should be denied.

b. The Defense is unable to substantively respond without discovery.

As it did previously, the Defense seeks leave of the Court to file a substantive response in this matter. In filing the subject motion, the VLCs have placed the mental state of both [redacted] and [redacted] at issue—a Mil. R. Evid. 513 analysis requires a prediction of the anticipated emotional distress and trauma on each child witness should they testify in-person. In doing so, the VLCs have revealed only what they want. They have provided the Court some, but not all, of the known evidence addressing the mental state of [redacted] arguing in turn that the Defense has not presented evidence to "contradict" them. *See* VLC Motion at 4. The VLC cannot use the sword in Mil. R. Evid. 611(d) and the shield in Mil. R. Evid. 513 in this fashion when the constitutional rights of a criminal defendant are at stake.

In order to adequately respond to this motion, the Defense has to be able to assess each of the three prongs laid out above in Mil. R. Evid. 611(d)(3). It is unable to do that without access to the evidence it has previously requested from the Government under Mil. R. Evid. 513, along with any other evidence that exists to support the opinions of Ms. [redacted] and Ms. [redacted] on this matter. Upon receipt of that evidence, the Defense needs time to be able to review that evidence with its expert in forensic psychology before substantively responding to the subject motion. This is the only way for the Defense to mount an adequate attack on their opinions.

c. The VLCs have not met the requirements set forth in Mil. R. Evid. 611(d).

In their original 16 April 2020 motion the VLCs cited to the nature of the allegations and provided the Court with two emails from [redacted] designee, Ms. [redacted] noting her recent

interactions with both on the matter as well as her personal opinion, in support of their request. The VLCs offered no sworn testimony from witnesses in support of that motion. In this second attempt, the VLCs offer two new pieces of evidence, but again, no sworn testimony from witnesses in support of their request for reconsideration.

The first piece of evidence is an updated email from Ms. [redacted] who now presents herself to the Court as a quasi-expert who is not a "licensed professional" but who has recently graduated with a bachelors of science in psychology and is applying to graduate school to earn her masters in clinical psychology. With this educational pedigree she offers that "most of [her] classes have been geared in the realm of child psychology and applied behavior analysis so [she] understand[s] that recognizing stressors after a traumatic event is crucial in keeping one's mental health intact" and thus, remote testimony is in the best interest of both [redacted] and [redacted] One can presume that Ms. [redacted] educational background has not changed dramatically in the 7 months since the first Article 39a hearing, but it was presented for the first time in the VLCs' motion for reconsideration. The only new fact presented in Ms. [redacted] email is that [redacted]. had a suicide attempt in October 2020 that nearly claimed her life. Ms. [redacted] is vague about the nature, circumstances, and treatment of [redacted]—perhaps purposefully so, because details would enable the Defense to investigate further. There is substantial evidence before the Court that prior to her allegations against Cpl True in September 2019, [redacted] had: borne witness to the sexual and physical abuse of her mother by her previous step-father who was thereafter court-martialed, attempted suicide following [redacted] abuse, engaged in self-harm through cutting to the point where knives had to be hidden away in the residence, participated in weekly therapy sessions, was aware that her mother also cut herself and required in-patient mental treatment, had been prescribed [redacted] and took melatonin in order to sleep at night. Without knowing more

about the October 2020 suicide attempt how can the Defense confront or contradict it? The Defense is unable to effectively show the Court how [redacted] prior trauma and mental health issues, which predate her allegations against Cpl True, are impacting her current mental health picture.

The second piece of evidence is a signed letter from Ms. [redacted], a licensed social worker and outpatient therapist who has been seeing [redacted] since before the first Article 39a hearing in this case. Why was this evidence not offered at the 4 May 2020 hearing? Regardless, the therapy did not begin until 7 months after the allegations against Cpl True and the letter itself lacks specificity. Ms. [redacted] noted that [redacted] "historically gets very upset when talking about past trauma." Although Ms. [redacted] references the "upcoming court case" and the "Defendant" in her letter, she does not define this past trauma or offer further details. As with [redacted] above, how can the Defense confront or contradict this without being able to distinguish between residual trauma from [redacted] and the relevant trauma resulting from the allegations against Cpl True?

In either case, these two pieces of evidence do not reveal a marked change from what was known to the Court at the initial Article 39a session. Ms. [redacted] is still a lay person who is a biased party (being the sister of one of the complaining witnesses, and the aunt to the other two). Although Ms. [redacted] brief letter reveals that [redacted] is undergoing therapy, there is little in her proffer that wasn't previously conveyed by Ms. [redacted]. The VLCs have still failed to meet their burden under Mil. R. Evid. 611(d) in order to overcome Cpl True's fundamental right to face his accusers in person.

d. The Government is unable to show the Court how it is able to meet the requirements set forth in R.C.M. 914A.

R.C.M. 914A provides the minimum general procedures that must be in place once a Military Judge has determined that the requirements of Mil. R. Evid. 611(d) have been satisfied. In spite of this motion appearing before the Court twice, neither the Government nor the VLCs have demonstrated to the Court how these requirements will be met at the designated trial location, nor how the parties will be able to utilize media and photographic evidence in real time with [redacted] and [redacted] during the course of their testimony.

5. Evidence. In addition to the charge sheets, the Defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – NCIS Interviews of [redacted] of 29 Sep 19 and 21 Nov 19

Enclosure (2) – NCIS Interview of Cpl [redacted] of 30 Sep 19

Enclosure (3) – NCIS Interview of [redacted] of 30 Sep 19

Enclosure (4) – Lease Agreement of 1 Mar 19

Enclosure (5) – Aguilar Record of Trial

Enclosure (6) – Excerpt from [redacted] SAFE of 30 Sep 19

Enclosure (7) – Court Appointment of Designee for [redacted] and [redacted] of 19 Mar 20

Enclosure (8) – Defense Fourth Discovery Request of 8 Dec 20

6. Burden of Proof. Pursuant to R.C.M. 905(c), the burden of proof and persuasion is on the VLCs who filed the subject motion.

7. Requested Relief. The Court deny the VLCs' motion. Alternatively, the Court grant the Defense's request for leave to file a response to the VLC's motion following discovery under Mil. R. Evid. 513 and consultation with the Defense expert in forensic psychology.

8. **Oral Argument.** Oral argument is requested on this motion.

Dated this 14th day of December 2020

[redacted]

S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 14th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL FUNDING FOR EXPERT WITNESS 20 December 2020

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 703(d)-(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the court to order the Government for funding for Mr. [redacted] to act as an expert witness in this case.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 27 November 2019, USACIL produced a DNA report in this case. Enclosure 1. That report contained the following findings: (1) a DNA mixture was detected on the vaginal and external genitalia swabs of [redacted] (assuming [redacted] the remaining DNA profile was consistent with Cpl True); (2) Cpl True could not be excluded from the partial Y-STR DNA profile detected

from the genital and perianal swabs of [redacted] and (3) a DNA mixture was detected on the scrotal swabs from Cpl True but could not be further interpreted until the appropriate standard for comparison and/or elimination was submitted to USACIL.

c. On 28 January 2020, USACIL produced a second DNA report in this case following collection of buccal swabs from [redacted]. Enclosure 2. That report contained the following finding: the DNA mixture detected on the scrotal swabs of Cpl True could not be interpreted due to "mixture complexity and biological relatedness."

d. On 17 November 2020, [redacted] produced a case report at the request of the defense. *See* enclosure 3 to enclosure 3 [redacted], processed Cpl True's scrotal swab and the buccal swabs of [redacted] in independent replicate computer runs to infer possible DNA contributor genotypes from the samples. Notably, [redacted] were excluded from the DNA mixture found on Cpl True's scrotal swab. Further, [redacted] is associated with the closest exclusionary statistic of the three (assuming both two and three contributors).

e. On 9 December 2020, the defense submitted a request for expert funding for Mr. [redacted], from Cybergenetics. Enclosure 3. In doing so, the defense discovered onto the Government, among other things, the [redacted] case report and Mr. [redacted] non-availability dates (which include the current dates docketed for trial: 5-22 January 2021).

f. On 18 December 2020, the defense received the convening authority's denial. Enclosure 4. In denying the defense's request, the convening authority found that the defense had not provided sufficient justification that Mr. [redacted] was necessary as an expert witness. Specifically, the convening authority found that the defense had failed to show what information

Mr. [redacted] would provide to the finder of fact and how this information would differ from the Government's USACIL expert, Ms. [redacted]

g. That same day, the defense received discovery from the Government which included an email sent from trial counsel to Ms. [redacted] on 14 December 2020 requesting that USACIL "conduct any and all testing that may provide clarity on the scrotal swab DNA profiles in US v. True (case 19-1856)." Enclosure 5.

h. As of the date of this filing, the defense has not received the trial counsel's endorsement that the convening authority reviewed prior to denying the defense's expert witness request.

4. Discussion.

Pursuant to R.C.M. 703(d), when expert funding is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[1]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop.[2] The

[1] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

[2] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[3]

(1) Why the expert is necessary.

The most critical piece of evidence the Government intends to present to members during the course of this court-martial are the results of a DNA test done on the vaginal and external genitalia swabs of [redacted]., and the genital and perianal swabs of [redacted] The Government intends to call Ms. [redacted], a DNA examiner from USACIL, to testify about the USACIL testing done on the swabs and the results of that testing. Mr. [redacted] will testify to the testing conducted by [redacted] system as well as the results of that testing on the scrotal swabs of Cpl True [redacted] has been widely recognized, accepted, and admitted in state and federal courts across the country. *See* enclosures (4)-(5) of enclosure (3).

(2) What the expert will accomplish for the defense.

The defense intends to offer the testimony of Mr. [redacted] at trial as an expert witness in accordance with Mil. R. Evid. 702. The defense anticipates that Mr. [redacted] will testify to the [redacted], and the results of that testing in this case to the finders of fact.

(3) Why defense counsel cannot do this on their own.

Because of the [redacted] the matters that Mr. [redacted] will testify to at trial cannot be developed or presented to the finder of fact without expert testimony from a [redacted] Moreover, the defense cannot solicit this information through its granted DNA expert Ms. [redacted] who is not employed by [redacted], nor through the cross-examination of Ms. [redacted] because USACIL does not

[3] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

conduct this type of testing (as evident in their 28 January 2020 report). In sum, Mr. [redacted] expert testimony is the only way for the defense to present this exculpatory evidence to the finders of fact.

3. Evidence. In addition to the charge sheets cited above, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – USACIL DNA Report of 27 Nov 19

Enclosure (2) – USACIL DNA Report of 28 Jan 20

Enclosure (3) – Defense Expert Witness Request – [redacted] of 9 Dec 20

Enclosure (4) – Convening Authority Denial of 18 Dec 20

Enclosure (5) – BS74 Email from TC to Ms. [redacted] of 14 Dec 20

In addition to the enclosures, the defense intends to call Mr. [redacted] as a telephonic witness during the hearing.

4. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

5. Requested Relief. The defense requests the court compel the government to provide the defense with the additional expert funding requested above.

6. Oral Argument. Oral argument is requested on this motion.

Dated this 20th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 20th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES V. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL WITNESSES 29 JANUARY 2021

1. Nature of the Motion. Pursuant to RCM703(c)(2) and RCM 906(b)(7), the defense moves this Court to produce Special Agent [redacted] on the merits to testify to that Mrs. [redacted]. told her on 29 September 2019 that she had never been sexually assaulted by Cpl True.

2. Facts.

a. Cpl True stands accused of violating Article 120 of the Uniform Code of Military Justice, among other charges, to wit: one specification of abusive sexual contact. (Charge Sheet).

b. On 14 December, 2021 the Government provided their initial witness list, pursuant to a Defense discovery request, that included Special Agent [redacted]. (Enclosure 1).

c. On 14 January, 2021 the defense requested Special Agent [redacted] to testify on the merits that she spoke with [redacted] the night her children made allegations of sexual assault against Cpl True, and when asked if she had been sexually assaulted, [redacted] stated she had only suffered physical abuse of a non-sexual nature. (Enclosure 2).

d. On 14 January 2021, the government refused to produce Special Agent [redacted]. (Enclosure 3).

e. Despite repeated requests, [redacted] refuses to speak with the Defense. (Enclosure 4).

3. Discussion.

The prosecution, defense, and court-martial have an equal opportunity to obtain witnesses and evidence. Article 46, UCMJ; RCM 703(a). "Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would relevant and necessary." RCM 703(b)(1). Relevant evidence has a tendency to make a fact of consequence more or less probable. Mil. R. Evid. 401. Necessary evidence describes non-cumulative evidence that contributes to a party's presentation of the case in some positive way on a matter in issue. RCM 703(b)(1). Here, Special [redacted] will testify that [redacted] responded negatively when asked if she had been sexually assaulted, on the same day her children accused Cpl True of sexual assault. Special Agent [redacted] testimony is relevant and necessary because it makes the allegation of a sexual assault less probable, supports the defense's theory Mrs. [redacted] fabricated the allegation on a later date, and the defense has no other way to present this evidence.

4. Evidence. The Defense submits the following as evidence on this motion:

c) Testimony of Special Agent [redacted]

The Defense asks that the Government be ordered to produce Special Agent [redacted] for the purposes of the requested 39(a), pursuant to RCM 703 (b)(1).

5. Burden of Proof. In accordance with 905(c), the burden of proof and persuasion on any factual issue necessary to decide the motion rests on the Defense. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

6. Requested Relief. The Court order the Government to produce Special Agent [redacted] on the merits.

7. Oral Argument. The Defense requests an Article 39(a), UCMJ, hearing to present additional evidence and argument on this motion

Dated this 29th day of January 2021

[redacted]
B. Larkin
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 29th day of January 2021

[redacted]
. B. Larkin
Captain, U.S. Marine Corps
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF SPECIAL AGENT [redacted], NCIS 8 February 2021

1. Nature of the Response.

This is the government response to the defense motion to produce Special Agent (SA) [redacted], NCIS, for in-person testimony. The government moves this Court to deny the request because (1) it is untimely and unsupported by good cause justifying the deviation from the court ordered milestones, and (2) SA [redacted] expected testimony is not relevant or necessary to the defense of the charged misconduct.

2. Summary of the Facts.

a. The Accused is charged in relation to [redacted] with violations of Articles 120, 128, and 128b of the Uniform Code of Military Justice. *See* Charge Sheet.

b. On 29 Sept 2019, Special Agent (SA) [redacted] accompanied [redacted] and her children to [redacted], and during this time she had a discussion with [redacted] that was annotated in the report of the investigation. *See* Enclosure (1).

c. SA [redacted] is identified as the "Reporting Agent" and the ROI has been bates stamped as BS01-0066 through BS01-0068. *See* Enclosure (1).

d. SA [redacted] report indicates that [redacted] informed SA [redacted] that the Accused had physically assaulted [redacted] in the past. See Enclosure (1).

e. On 21 November 2019, [redacted] was again interviewed by NCIS and recounted at least three instances in which the Accused physically assaulted her. *See* Enclosure (2).

f. [redacted] recounted an instance sometime around August or September of 2019, after she had married the Accused, in which the Accused attempted to be "lovey" and started to touch her breast, buttocks, and thighs. [redacted] rebuffed his advances as he started to try and pull her pants down. [redacted]. stated the sexual advances were unwanted and the Accused responded by becoming violent and physically assaulting [redacted] *See* Enclosure (2).

g. The government provided discovery that identified Special Agent [redacted] as a participating agent prior to completing its disclosure obligations on 25 march 2020. *See* Trial Management Order (TMO).

h. Defense witness request were due on 2 April 2020. *See* TMO.

i. Paragraph 2 of the judicially ordered TMO requires the parties to include an explanation for good cause when providing notice after a ordered milestone. *See* TMO.

j. SA [redacted] is currently stationed in [redacted]

3. Discussion.

RCM 703(a) provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence . . . including the benefit of compulsory process." *RCM 703*. Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be "relevant and necessary." *RCM 703(b)(1)*. Evidence is relevant when it has a tendency to make a fact that is of consequence in determining the action more or less probable than it would be without the evidence. *MRE 401*. Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. *RCM 703(b)(1)*.

Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. *MRE 608(c)*. Furthermore, MRE 613 permits the introduction of a witness' prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement. *MRE 613(b)*.

The defense request to produce SA [redacted] is untimely and they have not provided this Court with any good cause for why a deviation from the court ordered milestones is warranted. The defense has been in possession of discovery identifying SA [redacted] for approximately a year and is only now requesting SA [redacted] production. The defense untimely request should be denied as SA [redacted] testimony is not relevant or necessary because [redacted] prior statements of 30 September and 21 November 2019 are not inconsistent.

[redacted] statement made to SA [redacted] that she had *not* been the victim of sexual assault is not inconsistent with her 21 November statement, in which she explains that the Accused, her husband at the time, attempted to get "lovey" and started touching her body [redacted] resisted him as he attempted to pull her pants down, which initiated a physical assault for which the Accused is charged. While this description may meet the definition of abusive sexual contact, it may not fit the laymen's definition of a sex crime. [redacted] September statement was in the context of her discovering her children had been vaginally raped by the Accused – such conduct is always understood to be a sexual offense. In both interviews, [redacted] asserted that she was the victim of domestic violence. SA [redacted] testimony would only become relevant or necessary in the event that [redacted] testified inconsistent with her November 2019 statement.

4. Evidence and Burden of Proof

a. In support of this motion, the Government offers the following evidence:

i. The Charge Sheet and TMO
ii. Enclosure (1). Summary of [redacted] statement to NCIS of 29 September 2019.
iii. Enclosure (2). Summary of [redacted] statement to NCIS of 21 November 2019.

b. Defense as the moving party, bears the burden of persuasion. R.C.M. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide this motion is by a preponderance of the evidence. Id. at (c)(l).

5. Relief Requested.

The Government requests this court deny Defense's motion to produce SA [redacted] for in-person testimony and find that alternate forms of testimony are sufficient in the event that [redacted] were to testify inconstantly with prior out of court statements.

6. Oral Argument.

The Government requests oral argument.

[redacted]
A. T. WALSH
Major, U.S. Marine Corps
Complex Trial Counsel

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

UNITED STATES **V.** **MICHAEL A. TRUE** **CORPORAL** **USMC**	**DEFENSE MOTION IN LIMINE (Unanimous Verdict Instruction)** **27 January 2021**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M) 905(b), the Defense moves that the members panel be instructed that they must reach a unanimous verdict in order to convict Corporal (Cpl) Michael A. True.

SUMMARY

Currently the law allows service members to be convicted at court-martial by a two-thirds or three-fourths vote. However, the Supreme Court has ruled that the Sixth Amendment mandates that *civilian* juries cannot convict except by a *unanimous* verdict. While the Supreme Court has long said that the Sixth Amendment right to trial by jury does not apply to courts-martial, this sweeping declaration—which was dicta when it was pronounced—has never been tested against a request for unanimity. In the alternative and in light of the substantial changes to the scope, form, and impact of courts-martial since the founding era, due process requires unanimity in findings because the factors militating in favor of this right outweigh the balance struck by Congress.

FACTS

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

BURDEN

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

LAW

1. The Sixth Amendment Requires a Unanimous Verdict to Convict

The Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" in "all criminal prosecutions." The Fifth Amendment provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

In *Ramos v. Louisiana*, 590 U.S. ____, No. 18-5924 (2020), the Supreme Court held that the Sixth Amendment jury trial right carries with it a requirement that verdicts for "serious" offenses be rendered by unanimous vote. Slip. Op. at 3-5. The Court reached this conclusion on the basis of the historical practice during the founding era, and found that the Framers would

have understood the phrase "impartial jury" as used in the Sixth Amendment to mean one that could only render a conviction upon reaching a unanimous verdict. *Id.* at 4-7. The Court also pointed out that it has long recognized a distinction between the constitutionally required composition of a jury (e.g. allowing women and people of color to sit on juries), and whether or not the constitution required that jury render a unanimous verdict, however constituted. *Id.* at 15, fn.47.

By contrast, the Supreme Court has long held that the Sixth Amendment right to trial by jury does not apply to courts-martial based on the exception from grand jury indictment in the Fifth Amendment. *See, e.g., Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *Welchel v. McDonald*, 340 U.S. 122, 127 (1950); *Reid v. Covert*, 354 U.S. 1, 21 (1957); *O'Callahan v. Parker*, 395 U.S. 258, 261-62 (1969). However, the Supreme Court has not elaborated on why precisely this is, nor has the Court specified whether this declaration applies to all facets of the jury trial right, or just some of them.

The decision in *Milligan* concerned the rights of a civilian tried by military commission during the Civil War. The Court based its conclusion about the Sixth Amendment on the Framer's exclusion of "cases arising in the land and naval forces" from the grand jury requirement of the Fifth. 71 U.S. at 122-30. All subsequent cases reiterated this dicta without criticism, though never in the context of unanimity. *Quirin* dealt with the jurisdiction of military commissions to try violations of the laws of war by enemy combatants. 317 U.S. at 39-45. In *Welchel*, the Court upheld the all-officer composition of the members' panel against a Sixth Amendment challenge. 340 U.S. at 126-27. In *Covert*, the Court rejected military jurisdiction over crimes committed by military dependents. 354 U.S. at 20-41. The Court in *O'Callahan* enunciated the "service connection" requirement of court-martial jurisdiction, holding that a

service member was entitled to the full panoply of Sixth Amendment protections for crimes wholly unconnected to his military service. 395 U.S. at 272-74 (overruled on that point by *Solorio v. United States*, 483 U.S. 435, 436.)

The Court of Appeals for the Armed Forces has adopted this conclusion without comment or elaboration. *See, e.g., United States v. Witham*, 47 M.J. 297, 300-301 (holding that the *Batson* rule applies to peremptory challenges in courts-martial despite the inapplicability of the Sixth Amendment jury trial right). Yet the C.A.A.F., like the U.S. Supreme Court, has never addressed a unanimity requirement.

It is worth noting that the Supreme Court has recently confirmed that courts-martial "decide criminal 'cases' as that term is generally understood . . . in strict accordance with a body of federal law (of course including the Constitution)" and that the "procedural protections afforded to a service member are 'virtually the same' as those given a civilian criminal proceeding, whether state or federal." *Ortiz v. United States,* 138 S.Ct. 2165, 2174 (2018) (citation omitted). The Court went on to note that while court-martial "jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. [Citations]. As a result, the jurisdiction of those tribunals overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 2174-75 (citing *Solorio*, 483 U.S. at 438-41).

2. Due Process

The Constitution gives Congress the power to "make rules for the government and regulation of the land and naval forces." U.S. CONST, art I, § 8, cl. 14. The Supreme Court has held that the composition, organization, and administration of courts-martial are matters

"appropriate for congressional action." *Welchel*, 340 U.S. at 127 (upholding an all-officer panel's conviction of an enlisted man). When Congress is acting pursuant to this power, its decisions are owed great deference. *Solorio*, 483 U.S. at 447-48 (doing away with the service connection requirement for court-martial jurisdiction). The High Court has further found that military tribunals "probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Covert*, 354 U.S. at 39. This is owing in large part to the different demands of the military, as against the civilian sector. *Id.* at 35-39 (noting the consolidation of legislative and judicial powers in the executive branch under the military justice system); *see also Curry v. Secretary of Army*, 595 F.2d 873, 880 (1979) (finding that the needs of the military "mandate[] an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence").

Nevertheless, Congress' power to act in the arena of military justice is not absolute. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176 (1994). In arguing that the Due Process Clause mandates a right not provided for by Congress, the standard is "whether the factors militating in favor of" that right "are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177 (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) [rejecting a Due Process right to counsel at summary courts-martial]). This test is one that must consider the role that military law plays in "maintaining good order and discipline in the armed forces," the promotion of "efficiency and effectiveness in the military establishment," and in "strengthen[ing] the national security of the United States." *Sanford v. United States*, 586 F.3d

28, 36 (D.C. Cir. 2009) (internal quotation marks omitted). However, these considerations are underpinned by the principle that "a fair trial in a fair tribunal is a basic requirement of due process." *Weiss*, 510 U.S. at 178 (internal quotation marks omitted).

In *Weiss*, the Court rejected the accused's argument that military judges needed to serve for fixed terms. 510 U.S. at 181. With respect to the Due Process argument, the Court found that "the historical fact that military judges have never had tenure is a factor that must be weighed" in assessing Congress' balance of rights. *Id.* at 179. The Court went on to hold that other provisions of the UCMJ—Article 26, Article 37, Article 98, Article 41, and appellate review by the Court of Military Appeals—all worked to preserve judicial independence and impartiality sufficient to satisfy the Due Process Clause. *Id.* at 179-81.

In *United States v. Mitchell*, the C.A.A.F. rejected the accused's assertion that the roles played by the Judge Advocate General and Assistant Judge Advocate General of the Navy in preparing fitness reports for appellate military judges created a constitutionally impermissible appearance of impropriety and lack of independence by tempting those judges to shape their opinions in an effort to curry favor. 39 M.J. 131, 135-42 (C.M.A. 1994). Relying on *Weiss*, the court held that (a) the accused had not carried his burden to show the invalidity of this practice, and (b) the legal premises of his argument were inadequate. *Id.* at 136-142. To the latter point, the court found that the arguments (1) misapprehended the role and independence of the JAG and AJAG, (2) failed to adduce any evidence that supported a perception that these officials were biased in favor of the government, (3) failed to show that the JAG or AJAG disregarded laws prohibiting them from attempting to influence findings and sentencing decisions through fitness reports, (4) failed to show that the judges in question actually believed their fitness reports

evaluated their decisions, and (5) failed to show that the proposed "reasonable man" perception created a constitutionally impermissible risk of unfairness. *Ibid.*

The C.A.A.F. applied this standard again in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013). There, the accused challenged procedures under UCMJ Article 29 which, after a member was excused from his trial following the bulk of the government's case in chief, allowed the new members to be read a verbatim transcript of all witness testimony up to that point. *Id.* at 15-16. The court held that the accused failed to carry his burden under *Weiss*, noting that Article 29 "represents Congress' view of what 'process is due' in the event a panel falls below quorum," and that the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair." *Id.* at 19-20.

In *Sanford*, the Circuit Court of Appeals rejected a challenge to the panel size of a special court-martial which convicted the accused. The accused argued that *Ballew v. Georgia*, 435 U.S. 223 (1978)—holding that the Sixth Amendment requires a minimum of six people to sit on a jury for trial of non-petty offenses—rendered his four-person special court-martial invalid. *Sanford*, 586 F.23d at 29. The court began by acknowledging that court-martial members are selected "on the basis of who is best qualified for the position." *Id.* at 33-34. The court went on to find that the accused had failed to apply the *Weiss* balancing test to his claim, and therefore failed to show that the "same concerns underlying the *Ballew* decision also undermine 'a fair trial in a fair tribunal,' which is 'a basic requirement of due process,'" and thereby establish the constitutional invalidity of the practice. *Id.* at 35-37. Specifically, the court contended that the accused had not addressed the role military law plays in the maintenance of good order and discipline, military effectiveness, or the rules governing member qualifications and de novo appellate review. *Id.* at 36.

ARGUMENT

1. The Sixth Amendment Unanimity Requirement Extends to Courts-Martial

As an historical matter, the Founders likely never considered that the court-martial system would be so extensively applied as it is today for the simple reason that they did not intend to provide a standing military. Thus it is far more plausible that they expected most crimes to be tried through the civilian criminal justice system with all of its attendant protections, while courts-martial would be applied only in times of actual national conflict.

Moreover, the actual scope of court-martial jurisdiction in the Founding Era was limited. Indeed, if a military member was accused of committing a crime "punishable by the known laws of the land," the service member's commander was charged with delivering "such accused person or persons to the civil magistrate" for trial.[1] AMERICAN ARTICLES OF WAR OF 1776, § X, art. 1 (hereinafter AW 1776). Once again, this trial would presumably be conducted with the full spectrum of constitutional rights afforded to an accused.

Today, by contrast, Congress has established a system that is essentially "judicial" in character, and which exercises comprehensive jurisdiction over service members wherever they are and whatever crimes they may have committed. *See Ortiz*, 138 S.Ct. at 2174. As such, the sweeping declaration of *Milligan* is at odds with *Ortiz*'s implicit recognition that many courts-martial today are "criminal prosecutions," and for that reason should now fall under the purview of the Sixth Amendment. Indeed, the Court in *Ramos* recognized that it is improper to subject the guarantee of the Sixth Amendment to a "functionalist assessment." Slip Op. at 15. In short,

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[1] The Majority in *Solorio* noted some dispute over the precise reach of courts-martial in practice—citing the "general article" of AW 1776, section XVIII—but ultimately deemed resolution of that question irrelevant to its conclusion that fears of Executive overreach were satisfied by placing the authority to define jurisdiction with Congress. *Solorio*, 483 U.S. at 444-46. But see *Covert*, 354 U.S. at 23-26 & nn.42, 44 (noting that civilian jurisdiction over crimes committed by service members was the rule in peacetime at least through the end of the 19th century).

because the dicta in *Milligan* lacks a foundation for its application to the modern system with regard to unanimity, this facet of the Sixth Amendment should be incorporated to the court-martial, even if those other facets (e.g. venir) are not. While it is true that *Ramos* based its conclusion on the common law practice of jury trials, *Ramos*, Slip Op. at 6 (citing *Thompson v. Utah*, 170 U.S. 343, 348 (1989))—a common law that excluded courts-martial by parallel historical practice—the modern court-martial system more closely resembles the civilian system in scope and application. For this reason, the court-martial should be reevaluated as worthy of coming within this historical protection, rather than simply functioning as a label that allows Congress to abrogate whatever rights it thinks expedient.

As a final matter, there is no merit to a slippery slope argument that such a holding would have the effect of requiring grand jury indictments in courts-martial. The Supreme Court long ago recognized that a trial—even for a capital offense—can be conducted in accordance with due process even if done so without an indictment. See *Hurtado v. California*, 110 U.S. 516, 537 (1884). This same logic can be extended to courts-martial without doing violence to the language of the Fifth or Sixth Amendments. *See, e.g., Curry v. Secretary of Army*, 595 F.2d 873, 876-77 (upholding the convening authority's role in the referral of charges as consistent with due process).

2. Due Process Requires Unanimous Findings

a. Historical development of court-martial voting

For nearly 150 years, courts-martial reached their findings by majority vote. *See* Hearings before the Senate Committee on Military Affairs, Appendix I to S.Rep. 130, 64th Cong., 1st Sess., 64 (statement of Brig. Gen. Enoch Crowder). Indeed, it was not until 1920 that the requisite percentage was raised to two-thirds in non-capital cases. AMERICAN ARTICLES OF

WAR OF 1920, § 43. This change was met with some dissent, with one general noting that the old system "makes for justice most of the time," and arguing that because military law has as its "primary object . . . the paramount necessity of safeguarding the whole force," the risk that the guilty go free poses a much greater danger to the military establishment than it does to civilian society, and justifies less emphasis on individual protections and rights. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919 (OCLC No. 276296627).

In 1946, the War Department directed a study of the military justice system, and an advisory committee received and complied answers to forty-five different questions. It received responses from 81 general officers, 66 active and former judge advocates, and 46 enlisted men. Report of War Department Advisory Committee on Military Justice (hereinafter Vanderbilt Report) (OCLC No. 318813448). When asked specifically whether unanimous votes should be required to convict, the majority of all three categories of respondent answered in the negative. Each group stated that "hung juries" were not desirable in times of war. *Id.* at pp. 54-55. Among the judge advocates, however, "the suggestion was made that unanimity be required when the charged offense is the equivalent to a felony in civilian jurisprudence." *Id.* at p. 55.

Two-thirds vote was the rule for non-capital cases until 2019, when the Military Justice Act of 2016 became effective. See 10 U.S.C. § 852. That law raises the required number of votes to three-fourths of the members. This change came about after a working group noted the wide variance in actual percentages required for a conviction under the previous system—ranging from 67% to 80% depending on the number of members present. REPORT OF THE MILITARY JUSTICE REVIEW GROUP 2015, pp.458-59. Notably, this report cited to the Oregon and Louisiana statutes which were ruled unconstitutional by *Ramos* in its discussion of civilian

practice. *Id.* at p.459, n.6. The House and Senate adopted this change without substantive comment. H.Rep. 114-840, 114th Cong., 2d. Sess., p.1521; S.Rep. 114-255, 114th Cong., 2d Sess., p.604.

b. A unanimous finding is required for proof beyond a reasonable doubt.

The Supreme Court in *Ramos* ultimately concluded that, in order to give content to the phrase "impartial jury," the verdict needed to be unanimous. 590 U.S. ____, No. 18-5924 Slip. Op. at 4-5, 12. The Sixth Circuit held almost 70 years ago that "unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof, for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms." *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). That court went on to hold that unanimity "is of the very essence of our traditional concept of due process in criminal cases." *Id.*; *accord Ramos*, 590 U.S. ____, No. 18-5924, Sotomayor, J., concurring at 2. And, as the Court held in *Ortiz*, "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution)." *Ortiz*, 138 S.Ct. at 2174.

The UCMJ currently mandates that members be instructed that an accused "must be presumed innocent until his guilt is established beyond a reasonable doubt," and that "if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted." 10 U.S.C. § 851(c)(1)-(2). The Supreme Court has stated that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error," and that it "provides concrete substance for the presumption of

innocence." *In re Winship*, 397 U.S. 358, 363 (1970). The Court went on to find that a lower standard would place an accused at "a disadvantage amounting of a lack of fundamental fairness" under the Due Process Clause. *Id.* at 363-64. In support of its conclusion, the Court noted that there is always a margin of error in litigation, and where an accused has an interest at stake which is protected by the Due Process Clause—namely, his liberty—that risk is mitigated by requiring the government to carry its burden beyond a reasonable doubt. *Id.* at 364.

In our system of military justice, members are not selected at random from the service at large. Rather, members are specifically nominated by the convening authority as those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2); *see also Sanford*, 586 F.23d at 33-34. As such, it is impossible to understand how doubts held by members selected for these qualities could be considered "unreasonable." Yet this is precisely what the current arrangement allows. The government is required to prove its case beyond a reasonable doubt, yet the law implies that the doubts of 25% of members deciding the case are not reasonable doubts and can be disregarded for the purpose of carrying that burden and thereby depriving an accused of a protected interest. This is an inherent conflict that cannot be resolved except through the requirement of unanimity.

To the extent that concerns expressed by the dissenting General on the Special War Department Board—the risk of having criminals go free to rejoin the ranks—is a consideration relevant to the desirability of this facet of the military justice system, it reflects a pre-judgment of an accused that runs directly counter to the presumption of innocence. Moreover, it entirely disregards the concomitant risk that an innocent person gets convicted.

This is not a case like *Mitchell*, wherein the accused only offered speculation as to how he was harmed by a mere perception of potential unfairness in the preparation of fitness reports

for judges. 39 M.J. 136-142. Nor is it like *Vazquez* where the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair" when brought up to speed by transcripts rather than live testimony. 72 M.J. at 19-20. Rather, the risk of unfairness in the present case is tangible and calculable. The government need not carry its burden with respect to 25% of the members to secure a conviction, thus truncating the presumption of innocence and shifting the risk of factual error or insufficiency onto the accused. Due Process requires a "fair trial in a fair tribunal," *Weiss*, 510 U.S. at 178, and by failing to hold the government to its burden, the law allowing for less than unanimous findings creates a constitutionally impermissible risk of unfairness, *see Winship*, 397 U.S. at 363-64.

c. The attendant effects of a court-martial conviction mandate unanimous findings

Following conviction at a general or special court-martial, a service member then becomes subject to a host of federal laws and regulations. First and foremost, a finding of guilt is counted as a "prior sentence" under the Federal Sentencing Guidelines. U.S.S.G. § 4A1.2(g). It becomes unlawful for that person—if convicted of any crime punishable for more than one year in confinement—to possess a firearm. 18 U.S.C. § 922(g)(1). That person can then be convicted for violating the that law, even if their court-martial conviction was for military-specific offenses. *United States v. MacDonald*, 922 F.2d 967 (9th Cir. 1993) (upholding a conviction for felon-in-possession where the defendant had been court-martialed forty years prior for fraudulent enlistment, failure to obey a lawful order, and sale of a liberty pass). The court in *MacDonald* specifically held that courts-martial are "courts" and convictions rendered therein are "crimes" for civilian federal law purposes. *Id.* at 970. Additionally, and particularly pertinent here, individuals convicted of sex crimes in violation of the UCMJ are required to register as sex offenders under the Sex Offender Registration and Notification Act. 18 U.S.C. §

2250; 34 U.S.C. §§ 20911, 20913. And of course those individuals will have a criminal record in a federal data base that will then follow them throughout their lives long after their sentence has been served and their military service has ended.

These laws apply equally to civilians, but a key difference is that, following *Ramos*, every civilian will have the benefit of the requirement of a unanimous jury verdict, while Cpl True will be made to suffer these effects on the basis of a mere three-fourths concurrence of court-martial members. In effect, Cpl True is prone to lose a host of rights more easily by virtue of his military service. This loss is a substantial factor in evaluating the balance struck by Congress in delineating the rights due an accused in military courts, for it increases the risk to his liberty without increasing the scope of protections.

d. The scope of the modern court-martial favors unanimous findings.

The jurisdiction and scope of the court-martial has expended greatly since the founding era. Aside from the enactment of a comprehensive criminal code, modern precedent has authorized military jurisdiction over service members regardless of where they commit crimes and regardless of whether those crimes are related to military service. *See Solorio*, 483 U.S. at 436 (overruling the "service connection" requirement for court-martial jurisdiction). This certainly was not always the case. In the decades following the founding of the United States, "the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded." *Covert*, 354 U.S. at 23. Certainly by 1916, the jurisdiction of courts-martial had been extended to give them "concurrent jurisdiction with the civil courts to try noncapital crimes of person subject to military law at all times and wherever committed . . . ." Statement of Brig. Gen. Enoch Crowder, p.32. Even so, there was some dispute as to whether these enactments granted jurisdiction on the basis of "status," or whether there needed to be

some connection to military service to bring offenses within the cognizance of military courts. *Compare Solorio*, 483 U.S. at 439, 444-45 (noting the ostensibly broad reach of the "general article") *with id.* at 458-60, Marshall, J., dissenting (arguing that military law traditionally only covered "offenses committed by members of the armed forces that had some connection with their military service"). The majority in *Solorio* declined to resolve this dispute, finding instead that fears about Executive overreach in the use of courts-martial to enforce his will were dealt with by giving Congress the authority to define that jurisdiction. *Id.* at 446.

In any event, it was not at all clear that those practicing military law around the time the UCMJ was first adopted considered it to function as an equivalent to a civilian criminal code. As recorded by the Vanderbilt Report, at least some experienced judge advocates believed unanimity was advisable "when the charged offense is the equivalent to a felony in civilian jurisprudence." Vanderbilt Report at p.55. This indicates that at least some practitioners were of the understanding that courts-martial were not vehicles to enforce civilian laws. When asked whether military and non-military offenses should be treated differently, both generals and enlisted men suggested that it might be best to turn over civilian offenses to civilian authorities, at least during peacetime. *Id.* at pp.17-18. A number of enlisted men also suggested that civilian offenses should be handled "consistent with Federal laws and procedures." *Id.* at p.18. Yet today courts-martial have become all-encompassing bodies for the plenary enforcement of law. Military members may now be prosecuted for any number of crimes which are the equivalent to civilian felonies, whether committed on or off base, on duty or on leave, and whether they detract from military efficiency and readiness or not. Given the historical concerns about abuses of military justice, *see Covert*, 354 U.S. at 23-29, Congress cannot expand the reach of military law without also expanding the protections due to those subject to that law.

The present case is illustrative. Here, Cpl Truewas the subject of a proactive investigation that combined the resources of the Federal DOJ, NCIS, the State of Hawaii, and the [redacted]. Undercover agents posed as civilians and actively sought out individuals they believed were attempting to commit various sexual offenses, without regard to the operations or functions of any military department. This sort of coordinated effort—as well as the attenuation from military service—would have been anathema to the founding generation's beliefs about the role of courts-martial. Indeed, it was precisely this sort of wide-ranging application of military law that led the drafters of the Constitution to divest the Executive of plenary control over military jurisdiction. If Congress has chosen to cast such a wide net, it cannot do so consistent with Due Process without providing an increased measure of protection for those that might be caught in it.

e. No military concerns underpinning the court-martial system justify non-unanimous findings.

There are a number of concerns unique to the military environment that have been advanced to justify a court-martial system that would not stand up to constitutional muster if applied to civilians. None of them, however, favor non-unanimous convictions.

It is true that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 743-44 (1974), citing *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955) and *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (internal quotation marks omitted). The D.C. Circuit in *Sanford* identified the maintenance of good order and discipline, the promotion of efficiency and effectiveness in the military establishment, and the strengthening of national security as relevant considerations. 586 F.3d at 36 (citing the Preamble to the Manual for Courts-Martial

[MCM]).[2] In *Curry*, the court noted that military law "must be equally applicable in time of war and national emergency," and that the "need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence." 595 U.S. at 878, 880. The court also suggested that "the deterrent effect of immediate punishment may be crucial to the maintenance of discipline in crisis situations." *Id.* at 879.

Brigadier General Crowder voiced the position that "The object of militaries is to govern armies composed of strong men so as to be capable of exercising the largest measure of force at the will of the Nation." Statement of Brig. Gen. Crowder, p.34 (internal quotation marks omitted). He goes on to say that "An army is a collection of armed men obliged to obey one man. Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence." *Id.* (internal quotation marks omitted.) He cites these principles as support for his position that the military cannot have "the vexatious delays and failures of justice incident to the requirement of a unanimous verdict." *Id.* at p.35.

Levy, however, was a case deciding the scope of substantive rights due to a service member. 417 U.S. at 7454-49 (finding that military law may properly regulate "aspects of the conduct of members of the military which in the civilian sphere are left unregulated"). Nothing in the requirement for unanimous findings impacts the power of the military to curtail those rights to the benefit of good order and discipline, or to otherwise govern the conduct of Marines to that end.

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[2] Conspicuously absent from the court's elucidation is the first stated purpose of military law, which is to "promote justice." MCM 2019 ed., I-1, Preamble.

Likewise, concerns about the efficiency of the military justice process and the military establishment as a whole are inapposite to a requirement that members render findings unanimously. Findings are the last step in a court-martial, aside from sentencing. The procedures for obtaining and producing witnesses and evidence, for detailing counsel, and all other aspects of the actual preparation for and conduct of the trial are not impacted by this requirement. This satisfies the concern in *Curry*, that the precepts of civilian jurisprudence which are "deliberately cumbersome" not undermine the effectiveness of the military—unanimity is no such burden. *See* 595 U.S. at 880. And to the extent *Curry* found "immediate punishment" to be a major factor in discipline, this position is undermined by failing to consider the parallel role of justice.

The Vanderbilt Report recorded a number of important thoughts on this topic. Among the generals queried, the vast majority indicated the purpose of military justice was a combination of justice and discipline. Specifically, one noted that "an unjust application will result in loss of morale and of combat strength." Another noted that discipline does not hinge on punitive potential, but rather is "maintained by effective, responsible leadership through command, and indoctrination of all intelligent individuals with principles of personal responsibility for self-discipline and conduct." Vanderbilt Report, at p.1. Likewise, the enlisted men argued that "strict discipline results from justice," that discipline "is maintained by administration of justice," remarking that discipline "is not always punishment." Similarly, discipline "must be tempered with justice, if for no other reason than to maintain high morale and esprit de corps." *Id.* at p.2. The upshot is that the maintenance of discipline does not—and indeed should not—turn on the relative certitude of punishment. For if Marines are convinced

that they will not face a fair trial, their morale will suffer and the whole combat effort will be diminished. To this end, unanimity in fact *promotes* discipline, rather than impedes it.

Any lingering concerns that unanimity will result in delay and "hung juries" are rendered moot by the current framework. As it now stands, if the members cannot reach a quorum for a finding of guilt, the accused is acquitted. 10 U.S.C. § 852; R.C.M. 921(c)(2). In any event, concerns over hung juries and attendant delay in proceedings are not concerns which justify lightening the government's burden and shifting it to the accused.

Lastly, there is the stated need for the military justice system to be equally effective in wartime as in peacetime. Yet, as with the concerns over the efficiency of the military establishment, it is not at all clear what impact a unanimity requirement would have on the overall efficacy in a deployed environment. It would seem there is none. Moreover, it is today sufficiently easy to convene courts-martial in a garrison setting, such that the need for full-blown trials on the front lines is greatly reduced. Finally, in the event that the procedures attendant to traditional courts-martial—to which unanimity would be but a minor modification—are still too cumbersome, the UCMJ preserves the right to try certain offenses which are deleterious to the war effort by military commission rather than court-martial. *See, e.g.*, 10 U.S.C. § 81 (conspiracy); § 103 (spies); § 103b (aiding the enemy). Congress is free to expand this list as the needs of the military evolve, but whether it does or not, unanimity has no impact on the *conduct* of courts-martial.

In short, while all of these identified concerns are legitimate ones for Congress to consider, the factors which favor a unanimous panel outweigh their impact in this regard. As such, Due Process demands that an accused be convicted only by the unanimous vote of all members.

RELIEF REQUESTED

The Defense requests that the members be instructed as follows:

"The concurrence of all members present when the vote is taken is required for any finding of guilty. Since we have (8) members, that means all (8) members must concur in any finding of guilty. If one or more members do not agree that the government has proved a charge or specification beyond a reasonable doubt, then you must return a finding of not guilty as to that charge or specification."

The Defense does not request oral argument.

Respectfully submitted,

[redacted]

[redacted] B. LARKIN
[redacted]aptain, U.S. Marine Corps
Defense Counsel

I certify that I have served a true copy of the above on the Court and opposing counsel on 29 January 2021.

[redacted]

J. Brad Larkin
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR UNANIMOUS VERDICT INSTRUCTION 4 February 2021

1. Nature of the Motion.

This is the government's response to the defense motion seeking a unanimous verdict instruction in the case of United States v Corporal (Cpl) Michael A. True, U.S. Marine Corps. This Court should **DENY** the defense's motion because the Sixth Amendment right to a trial by jury does not apply to courts-martial and legal precedent has consistently recognized non-unanimous verdicts as proper within the military.

2. Statement of Facts.

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

3. Law.

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

1. The Fifth Amendment

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

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia*... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

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

Appellate Exhibit LXIX
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public use, without just compensation. [Emphasis Added][3]

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

The Supreme Court addressed the requirements of the Fifth Amendment Due Process Clause in *Weiss v. United States*, noting that when Congress legislates in military affairs, courts "must give particular deference to the determination of Congress."[6] The *Weiss* standard established by the Supreme Court is "whether the factors militating in favor of" the claimed right "are so extraordinarily weighty as to overcome the balance struck by Congress."[7] Furthermore, the Supreme Court has expressly found that "military society," is unique due to its mission to fight and win wars.[8]

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

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

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

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[3] U.S. Const. amend. V.
[4] United States v. Begani, 79 M.J. 767, 776 (N-M Ct. Crim. App. 2020) Citing: Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 18 L. Ed. 281 (1866).
[5] Id.
[6] Weiss v. United States, 510 U.S. 163 (1994),
[7] Id. At 177-78; See Also: United States v. Bramel, 32 M.J. 3 (C.M.A. 1990) (CMA summarily affirming a finding over defense argument that denial of fundamentally fair criminal trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members.)
[8] Parker v. Levy, 417 U.S. 733
[9] U.S. Const. amend. VI.

The Supreme Court in their decision in *Ramos v. Louisiana*, held that the Sixth Amendment jury trial right carries with it a requirement that verdicts for "serious" offenses be rendered by unanimous vote.[10] However, it is well established that "there is no Sixth Amendment right to trial by jury in courts-martial" in the armed forces.[11] The express exception relating to "*land or naval forces*" found in the Fifth Amendment and discussed above, has been "read over into the Sixth Amendment, so that the requirements of jury trial are inapplicable."[12] Moreover, the Supreme Court and the C.A.A.F. have, over time, repeatedly held that the Sixth Amendment right to a jury trial does not apply to courts-martial.[13] C.A.A.F. has also expressly recognized that military criminal practice "requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as two-thirds of the panel members agree that the government has proven all the elements of the offense."[14]

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

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

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[10] Ramos v. Louisiana, 590 U.S.___, No. 18-5924 (2020), Slip. Op. at 3-5.
[11] United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012); Citing: Ex parte Quirin, 317 U.S. 1, 39, 63 S. Ct. 2, 87; United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002).
L. Ed. 3 (1942); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002)
[12] Reid v. Covert, 354 U.S. 1, 37 n.68 (1957)
[13] Ex parte Quirin, 317 U.S. 1 (1942); United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (surveying different application of constitution to service members and noting "there is no Sixth Amendment right to trial by jury in courts-martial")
[14] United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) Citing: United States v. Vidal, 23 M.J. 319, 325 (C.M.A. 1987).
[15] United States v. Easton, 71 M.J. 168, (C.A.A.F. 2012)
[16] United States v. Rollins, No. 201700039, 2018 CCA LEXIS 372, at *25 (N-M Ct. Crim. App. July 30, 2018)

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

3. Stare Decisis and Congressional Authority Control

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

Under the doctrine of stare decisis, a lower court is required to uphold the precedent established by its superior courts.[25] In the recent Supreme Court case of *June Medical Services*

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[17] Parker v. Levy, 417 U.S. 733, 743 (1974)
[18] Id.
[19] Id.
[20] U.S. Constitution. Art 1, § 8, cl. 14
[21] Solorio v. United States, 483 U.S. 435, 447 (1987).
[22] Ex parte Milligan, 71 U.S. 2, 123 (1866) ("Everyone connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.)
[23] Chappell v. Wallace, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline….")
[24] Chappell v. Wallace, 462 U.S. 296, 301 (1983)
[25] United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018).

L.L.C. Et Al v. Russo, Chief Justice Roberts, in his concurring opinion, opined that adherence to the principle of stare decisis and the authority of legal precedent is necessary to "avoid an arbitrary discretion in the courts."[26] Respect for precedent is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.[27] Lower courts should not assume that a new higher-court decision implicitly overrules precedent.[28] Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent.[29]

4. Discussion.

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

Since the decision in *Ex parte Quirin* in 1942, the Supreme Court and Court of Appeals for the Armed Forces have repeatedly held that the Sixth Amendment right to a jury trial does not apply to courts-martial. With respect to the Due Process Claim, even assuming arguendo, that the overwhelming precedent supporting non-unanimous verdicts within the military was not clear, the defense has failed to satisfy the *Weiss* standard. They have not alleged any factors so "extraordinarily weighty" as to overcome the balance struck by Congress, and long recognized by the Supreme Court.[30] Due to the ever present threat of

[26] June Medical Services L.L.C. Et Al v. Russo, 591 U. S.____(2020)
[27] Id. Citing: Vasquez v. Hillery, 474 U. S. 254, 265 (1986)
[28] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)
[29] Id.
[30] The defense motion argues the a unanimous finding is required for proof beyond a reasonable doubt, the attendant effects of a court-martial conviction mandate unanimous findings, and the scope of the modern court-martial favors unanimous

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

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

5. Conclusion.

The Supreme Court has consistently recognized the military is a unique society in which the constitutional rights of service members must be balanced against the needs of good order and discipline. The Supreme Court, C.A.A.F., and N.M.C.C.A. have each recognized that the Sixth Amendment does not apply to courts-martial and due process protections are less than that which may be afforded a civilian. While the *Ramos* decision may have upset non-unanimous verdicts for civilians, it does not apply to courts-martial. This Court should find that the defense failed to carry its "heavy burden" to demonstrate "the factors militating in favor of [the accused's interest] are so extraordinarily weighty to overcome the balance struck by Congress" and decline to create a procedural rule where Congress and the President have already done so.

6. Burden of Proof.

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

party.[31]

7. Evidence/Enclosures.

a. *See* Charge Sheet

8. Relief Requested.

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

9. Argument.

The Government does not request oral argument.

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

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

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

UNITED STATES v. MICHAEL A. TRUE Corporal U.S. Marine Corps	)	DEFENSE MOTION FOR APPROPRIATE RELIEF: (1) RECONSIDERATION OF MOTION TO COMPEL EXPERT FUNDING FOR MR. [redacted] AND (2) MOTION TO COMPEL EXPERT FUNDING FOR DR. [redacted] 29 January 2021

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 703(d)-(e), 905(f), and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the court to reconsider its prior ruling denying expert funding for Mr [redacted], and to order the Government for expert funding for Dr. [redacted], both of whom are associated with the [redacted] and would act as expert witnesses in this case.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 27 November 2019, USACIL produced a DNA report in this case. Enclosure 1. That report contained the following findings: (1) a DNA mixture was detected on the vaginal and external genitalia swabs of [redacted] (assuming [redacted], the remaining DNA profile was consistent with

Cpl True); (2) Cpl True could not be excluded from the partial Y-STR DNA profile detected from the genital and perianal swabs of [redacted] and (3) a DNA mixture was detected on the scrotal swabs from Cpl True but could not be further interpreted until the appropriate standard for comparison and/or elimination was submitted to USACIL.

c. On 28 January 2020, USACIL produced a second DNA report in this case following collection of buccal swabs from [redacted] Enclosure 2. That report contained the following finding: the DNA mixture detected on the scrotal swabs of Cpl True could not be interpreted due to "mixture complexity and biological relatedness."

d. On 17 November 2020, [redacted] produced a case report at the request of the defense. *See* enclosure 3 to enclosure 3, [redacted], processed Cpl True's scrotal swab and the buccal swabs of [redacted] and [redacted]. in independent replicate computer runs to infer possible DNA contributor genotypes from the samples. Notably, [redacted] were excluded from the DNA mixture found on Cpl True's scrotal swab. Further, [redacted] is associated with the closest exclusionary statistic of the three (assuming both two and three contributors).

e. On 9 December 2020, the defense submitted a request for expert funding for Mr. [redacted] from [redacted] Enclosure 3. In doing so, the defense discovered onto the Government, among other things, the [redacted] case report and Mr. [redacted] non-availability dates (which include the prior dates docketed for trial: 5-22 January 2021).

f. On 18 December 2020, the defense received the convening authority's denial. Enclosure 4. In denying the defense's request, the convening authority found that the defense had not provided sufficient justification that Mr. [redacted] was necessary as an expert witness. Specifically, the convening authority found that the defense had failed to show what information

Mr. [redacted] would provide to the finder of fact and how this information would differ from the Government's USACIL expert, Ms. [redacted].

g. That same day, the defense received discovery from the Government which included an email sent from trial counsel to Ms. [redacted] on 14 December 2020 requesting that USACIL "conduct any and all testing that may provide clarity on the scrotal swab DNA profiles in US v. True (case 19-1856)." Enclosure 5.

h. As of the date of this filing, the defense has not received the trial counsel's endorsement that the convening authority reviewed prior to denying the defense's expert witness request for Mr. [redacted]

i. On 20 December 2020, the defense filed a motion for appropriate relief to compel funding for Mr. [redacted] as an expert witness. Of note, the defense requested oral argument on the motion. Enclosure 6.

j. On 21 December 2020, USACIL produced a third DNA report at the request of the trial counsel. Enclosure 7. That report showed that USACIL had run a statistical analysis on the DNA mixture found on the scrotal swab "testing alternate inclusionary hypotheses" for [redacted] and [redacted] Assuming two contributors, [redacted] was assigned a likelihood ratio of at least 3800, [redacted] at least 580, and [redacted]. at least 200; assuming three contributors, [redacted] was assigned a likelihood ratio of at least 450, [redacted] at least 120, and [redacted] at least 49. Although these results were reported, USACIL thereafter noted that the presence of [redacted] in the mixture "could not be conclusively determined."

k. On 30 December 2020, the Government filed a response and likewise requested oral argument.

l. On 4 January 2021, the Court issued a ruling denying the defense's motion on the basis of the filings. Enclosure 8. This ruling was issued less than two weeks prior to the then-docketed trial dates of 15-22 January 2021.

m. On 13 January 2021, the defense submitted a request for expert funding for Dr. [redacted] the [redacted] at [redacted], to act as an expert defense witness during pretrial hearings in this case. Enclosure 9.

n. The same day, the trial counsel endorsed the defense's request, citing to the findings contained within the Court's 4 January 2021 ruling in recommending that the Convening Authority deny the request. Enclosure 10.

o. On 20 January 2021, the Convening Authority denied the defense's request. Enclosure 11.

p. Ms. [redacted], the defense's expert witness in DNA, drafted a declaration for the Court's consideration on this motion. Enclosure 12.

q. As of the date of this filing, the defense is still awaiting discovery from the Government as it pertains to USACIL and its STRmix system. Enclosure 13.

4. Discussion.

a. Reconsideration is warranted on the issue of Mr. [redacted] expert funding.

Pursuant to R.C.M. 905(f), the Military Judge may reconsider any ruling on the request of any party. The Court denied the defense's prior motion on Mr. [redacted] expert funding on the basis of the filings alone, even though both parties requested oral argument. R.C.M. 905(h) provides that written motions "*may* be disposed of . . . without a session" (emphasis added) – this appears to be a change from the 2016 edition of the Manual for Courts-Martial since Appendix 15 notes that R.C.M. 905(h) was "amended to authorize the Military Judge to exercise discretion

on whether an Article 39(a) session is necessary for the resolution of a motion." However, the assertion in R.C.M. 905(h) that motions may be disposed of without a session is followed immediately thereafter with the assertion that "[e]ither party may request an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions." Given the timing of this ruling and the lack of rationale within it for the Court's exercise of this discretionary disposition, reconsideration is warranted.

Additionally, there is new information and evidence that has arisen since the defense filed its 20 December 2020 motion that justify reconsideration. First, as of 20 December 2020, the defense did not have any funding left with its expert witness in DNA, Ms. [redacted][1] In its response to the defense's motion, the Government stressed the fact that the defense already had a DNA expert witness and cited to Ms. [redacted] curriculum vitae in an effort to conflate her expertise in DNA with that of Mr. [redacted] in probabilistic genotyping. The Court relied upon this proposition in finding that the defense "has its own DNA expert who can testify regarding the Government's evidence." *See* page 4 of enclosure 8. Since 20 December 2020 the Court has granted the defense an additional 10 hours of pretrial consultation with Ms. [redacted]. The defense has used a portion of that additional time for Ms. [redacted] to produce a declaration that clearly delineates her expertise—which notably fails to include probabilistic genotyping, STRmix, and/or True Allele. Enclosure 12.

The day after the defense filed its motion, it received through discovery a third DNA report from USACIL which was produced at the request of the trial counsel. Enclosure 7. Although the Court referenced this evidence briefly in its ruling[2], the defense had no opportunity

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[1] *See* Defense Amended Motion for Appropriate Relief: Compel Additional Funding for Expert Witnesses of 10 December 2020.

[2] *See* paragraph e on page 2 of enclosure 8 ("USACIL did not conduct any new biological testing on the scrotal swabs.").

at an Article 39a to address this evidence with the Court. Finally, since receiving the Government's response on 30 December 2020, which attacked the basis of True Allele's findings[3], the defense has requested and been denied funding for Dr. [redacted] to testify as an expert defense witness at pretrial hearings. Because of the inherent interplay between Dr. [redacted] anticipated pretrial testimony and Mr. [redacted] anticipated testimony at trial—both as expert witnesses in probabilistic genotyping from True Allele—the defense offers both issues before the Court in this filing. For all of these reasons reconsideration is warranted.

b. Mr. [redacted] and Dr. [redacted] are relevant and necessary expert witnesses for the defense.

Pursuant to R.C.M. 703(d), when expert funding is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[4]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop.[5] The

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[3] *See* pages 6-7 of the Government's Response of 30 December 2020.
[4] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).
[5] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[6]

(1) Why the experts are necessary.

The most critical piece of evidence the Government intends to present to members during the course of this court-martial are the results of a DNA test done on the vaginal and external genitalia swabs of [redacted] and the genital and perianal swabs of [redacted] Because Cpl True is charged with acts that involve sexual and physical contact between himself and [redacted] DNA swabs taken from the bodies of both the Complaining Witnesses and the Accused are relevant. The Government's argument that the import of these swabs is lessened by the belief that the Accused may have showered at some point between the alleged incidents and his SAFE the following day goes to the weight and not the admissibility of that evidence. Even if Cpl True showered and cleaned his body following PT the following morning, how can the Government show that based on the third round of testing by USACIL that he cleaned off some of [redacted] and [redacted] DNA and left a majority of [redacted] DNA is not something that can be seen by the naked eye or manipulated to such a degree.

Of all of the swabs taken of Cpl True during his SAFE, USACIL only performed DNA extraction procedures on 4 (penile, scrotal, pubic mound, anal perineal), and only 1 (scrotal) revealed a DNA mixture. At first, USACIL found that no further interpretations would be made until it received the DNA swab from [redacted] Once USACIL received [redacted]s swab it found that the mixture is interpreted as originating from two individuals, one of whom was Cpl True and the other could not be interpreted due to mixture complexity and biological relatedness. If the defense had not pursued additional DNA testing through [redacted], this is what the finder of fact would have been presented with at trial. After testing by True Allele, and at the behest of

[6] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

the trial counsel, USACIL performed additional statistical analysis on the DNA mixture from the scrotal swabs—testing which is had heretofore refused or neglected to perform—and came up with a third result. This result showed that, on the basis of 2 contributors, [redacted] was over 6 times more likely than [redacted] and 19 times more likely than [redacted] to be the contributor. However, it does not appear that USACIL is going to stand by the propositions explored in this additional testing because it subsequently reverted to the finding in its second report: assuming Cpl True "as a contributor to the scrotal swabs, the remaining DNA profile is inconclusive due to mixture complexity, which is based on uncertainty with the number of contributors and genotypes, and also biological relatedness between the individuals of interest in this case." Page 2 of enclosure 7.

As of right now, the Government is going to present evidence at trial that there was a DNA mixture found on Cpl True's scrotal swabs. It is unclear whether its expert from USACIL, Ms. [redacted] is going to testify to the additional statistical analysis performed on the scrotal swabs using STRmix or whether she will fall back to the finding that the DNA profile is inconclusive due to mixture complexity and biological relatedness. This finding does not reflect the reality of the testing conducted heretofore on this piece of evidence—the testing performed by both USACIL and True Allele revealed that [redacted] was the most likely contributor. Ms. [redacted] will be unable to present this opinion because she lacks the expertise to testify to True Allele's testing and findings, nor STRmix testing. *See* enclosure (12). Without an expert in probabilistic genotyping, the fact finder will be left with the inaccurate impression that the DNA mixture found on the scrotal swabs was that of [redacted] The defense will be unable to present known alternate and exculpatory theories about this evidence without an expert from True Allele.

During pretrial hearings, the defense intends to call Dr. [redacted] to testify to the testing conducted by [redacted] using the True Allele Casework system as well as the results of that testing on the scrotal swabs of Cpl True in order to respond to the Government's challenge of True Allele's findings and pre-admit that evidence. The True Allele Casework system has been widely recognized, accepted, and admitted in state and federal courts across the country. *See* enclosure 9. At trial, the Government intends to call Ms. [redacted] a DNA examiner from USACIL, to testify about the testing and findings of USACIL. Mr. [redacted] will testify at trial to the testing conducted by [redacted] using the True Allele Casework system as well as the results of that testing on the scrotal swabs of Cpl True. Dr. [redacted] and Mr. [redacted] will also be used by the defense to challenge the findings by USACIL with regard to the scrotal swabs of Cpl True. In doing so, the defense anticipates showing how USACIL, at the trial counsel's direction, reported out findings using its STRmix system in its 21 December 2020 report that were not in accord with its own protocol. This will reveal a Government bias at USACIL that the defense intends to explore through the direct examination of Dr. [redacted]—namely, USACIL's failure to: (1) pursue testing of swabs taken from Cpl True, and (2) USACIL's willingness to subvert protocol at the Government's direction following exculpatory DNA testing pursued by the defense. *See* pages 8-9 of enclosure 6 to enclosure 9. The defense anticipates that this line of examination will call into question not only USACIL's handling of the scrotal swabs, but the handling of the rest of the DNA evidence in this case.

(2) What the experts will accomplish for the defense.

The defense intends to offer the testimony of Dr. [redacted] and Mr. [redacted] as an expert witness in accordance with Mil. R. Evid. 702. The defense anticipates that Dr. [redacted] will testify at pretrial hearings, and Mr. [redacted] will testify at trial, to: the True Allele Casework system, the

testing conducted by [redacted] using the True Allele Casework system, the results of that testing, as well as the testing conducted by USACIL using STRmix.

(3) Why defense counsel cannot do this on their own.

Because of the proprietary nature of the True Allele Case system, the matters that Dr. [redacted] and Mr. [redacted] will testify to at trial cannot be developed or presented to the finder of fact without expert testimony from a [redacted] representative. Moreover, the defense cannot solicit this information through its granted DNA expert Ms. [redacted] who is neither employed by [redacted] nor an expert in probabilistic genotyping. *See* enclosure 11. The defense is also unable to present this information through the cross-examination of Ms. [redacted] because USACIL utilizes STRMix and produced different results than that of True Allele with regard to Cpl True's scrotal swabs. In sum, Dr. [redacted] expert testimony at pretrial hearings, and Mr. [redacted] expert testimony a trial, is the only way for the defense to effectively attack USACIL's STRMix findings and to present the exculpatory True Allele evidence to the finders of fact at trial.

3. <u>Evidence</u>. In addition to the charge sheets cited above, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – USACIL DNA Report of 27 Nov 19

Enclosure (2) – USACIL DNA Report of 28 Jan 20

Enclosure (3) – Defense Expert Witness Request – [redacted] of 9 Dec 20

Enclosure (4) – BS74 Email from TC to Ms. [redacted] of 14 Dec 20

Enclosure (5) – Convening Authority Denial of 18 Dec 20

Enclosure (6) – Defense Motion for Appropriate Relief (Mr. [redacted] of 20 Dec 20

Enclosure (7) – USACIL DNA Report of 21 Dec 20

Enclosure (8) – Court's Ruling of 4 Jan 21

Enclosure (9) – Defense Expert Witness Request – Dr. [redacted] of 13 Jan 21

Enclosure (10) – TC Endorsement of 13 Jan 21

Enclosure (11) – Convening Authority Denial of 20 Jan 21

Enclosure (12) – Declaration by [redacted] of 11 Jan 21

Enclosure (13) – Government Response to Fourth/Fifth Discovery Request of 4 Jan 21

4. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

5. Requested Relief. The defense requests the Court compel the Government to provide the defense with the expert funding requested above.

6. Oral Argument. Oral argument is requested on this motion.

Dated this 29th day of January 2021

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 29th day of January 2021

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES	)	
	)	DEFENSE MOTION FOR
v.	)	APPROPRIATE RELIEF:
	)	COMPEL FUNDING FOR EXPERT
MICHAEL A. TRUE	)	WITNESS
Corporal	)	
U.S. Marine Corps	)	20 December 2020
	)	

1. Nature of the Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 703(d)-(e) and 906(b)(7), Article 46 of the Uniform Code of Military Justice (UCMJ), and the Sixth Amendment to the U.S. Constitution, the defense moves the court to order the Government for funding for Mr. [redacted], a casework supervisor at [redacted] to act as an expert witness in this case.

2. Summary of Relevant Facts.

a. Corporal (Cpl) Michael A. True, U.S. Marine Corps, has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 27 November 2019, USACIL produced a DNA report in this case. Enclosure 1. That report contained the following findings: (1) a DNA mixture was detected on the vaginal and external genitalia swabs of [redacted] (assuming [redacted], the remaining DNA profile was consistent with Cpl True); (2) Cpl True could not be excluded from the partial Y-STR DNA profile detected

from the genital and perianal swabs of [redacted]; and (3) a DNA mixture was detected on the scrotal swabs from Cpl True but could not be further interpreted until the appropriate standard for comparison and/or elimination was submitted to USACIL.

c. On 28 January 2020, USACIL produced a second DNA report in this case following collection of buccal swabs from [redacted] Enclosure 2. That report contained the following finding: the DNA mixture detected on the scrotal swabs of Cpl True could not be interpreted due to "mixture complexity and biological relatedness."

d. On 17 November 2020 [redacted] produced a case report at the request of the defense. *See* enclosure 3 to enclosure 3 [redacted], using the proprietary True Allele Casework system, processed Cpl True's scrotal swab and the buccal swabs of [redacted] and [redacted]. in independent replicate computer runs to infer possible DNA contributor genotypes from the samples. Notably, [redacted] were excluded from the DNA mixture found on Cpl True's scrotal swab. Further, [redacted] is associated with the closest exclusionary statistic of the three (assuming both two and three contributors).

e. On 9 December 2020, the defense submitted a request for expert funding for Mr. [redacted] from [redacted] Enclosure 3. In doing so, the defense discovered onto the Government, among other things, the [redacted] case report and Mr. [redacted] non-availability dates (which include the current dates docketed for trial: 5-22 January 2021).

f. On 18 December 2020, the defense received the convening authority's denial. Enclosure 4. In denying the defense's request, the convening authority found that the defense had not provided sufficient justification that Mr. [redacted] was necessary as an expert witness. Specifically, the convening authority found that the defense had failed to show what information

Mr. [redacted] would provide to the finder of fact and how this information would differ from the Government's USACIL expert, Ms. [redacted].

g. That same day, the defense received discovery from the Government which included an email sent from trial counsel to Ms. [redacted] on 14 December 2020 requesting that USACIL "conduct any and all testing that may provide clarity on the scrotal swab DNA profiles in US v. True (case 19-1856)." Enclosure 5.

h. As of the date of this filing, the defense has not received the trial counsel's endorsement that the convening authority reviewed prior to denying the defense's expert witness request.

4. Discussion.

Pursuant to R.C.M. 703(d), when expert funding is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.[1]

Relevant evidence is defined in Military Rules of Evidence (Mil. R. Evid.) 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop.[2] The

[1] *See* R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

[2] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[3]

(1) Why the expert is necessary.

The most critical piece of evidence the Government intends to present to members during the course of this court-martial are the results of a DNA test done on the vaginal and external genitalia swabs of [redacted] and the genital and perianal swabs of [redacted] The Government intends to call Ms. [redacted], a DNA examiner from USACIL, to testify about the USACIL testing done on the swabs and the results of that testing. Mr. [redacted] will testify to the testing conducted by [redacted] using the True Allele Casework system as well as the results of that testing on the scrotal swabs of Cpl True. The True Allele Casework system has been widely recognized, accepted, and admitted in state and federal courts across the country. *See* enclosures (4)-(5) of enclosure (3).

(2) What the expert will accomplish for the defense.

The defense intends to offer the testimony of Mr. [redacted] at trial as an expert witness in accordance with Mil. R. Evid. 702. The defense anticipates that Mr. [redacted] will testify to the True Allele Casework system, the testing conducted by [redacted] using the True Allele Casework system, and the results of that testing in this case to the finders of fact.

(3) Why defense counsel cannot do this on their own.

Because of the proprietary nature of the True Allele Case system, the matters that Mr. [redacted] will testify to at trial cannot be developed or presented to the finder of fact without expert testimony from a [redacted] representative. Moreover, the defense cannot solicit this information through its granted DNA expert Ms. [redacted] who is not employed by [redacted] nor through the cross-examination of Ms. [redacted] because USACIL does not

[3] *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

conduct this type of testing (as evident in their 28 January 2020 report). In sum, Mr. [redacted] expert testimony is the only way for the defense to present this exculpatory evidence to the finders of fact.

3. Evidence. In addition to the charge sheets cited above, the defense submits the following enclosures as evidence in support of this motion:

Enclosure (1) – USACIL DNA Report of 27 Nov 19

Enclosure (2) – USACIL DNA Report of 28 Jan 20

Enclosure (3) – Defense Expert Witness Request – [redacted] of 9 Dec 20

Enclosure (4) – Convening Authority Denial of 18 Dec 20

Enclosure (5) – BS74 Email from TC to Ms. [redacted] of 14 Dec 20

In addition to the enclosures, the defense intends to call Mr. [redacted] as a telephonic witness during the hearing.

4. Burden of Proof. Pursuant to R.C.M. 905(c)(1)-(2), the burden of proof is on the defense as the moving party to establish the factual issues necessary to decide this motion by a preponderance of the evidence.

5. Requested Relief. The defense requests the court compel the government to provide the defense with the additional expert funding requested above.

6. Oral Argument. Oral argument is requested on this motion.

Dated this 20th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 20th day of December 2020

[redacted]
S. B. Hillery
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES v. MICHAEL A. TRUE CPL/E-4 USMC	)	RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL FUNDING FOR EXPERT WITNESS 4 JANUARY 2021

1. **Nature of Motion**. The Defense moves to compel funding for Mr. [redacted], a casework supervisor at [redacted] to act as an expert witness on behalf of the Defense. The Court determined that it could resolve this issue on the basis of the filings and an Article 39(a) hearing on this motion was not held.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice. All the charges were referred to General Court-Martial on 4 March 2020.

b. On 27 November 2019 and 28 January 2020, USACIL provided DNA reports in this case. The reports show that a DNA profile consistent with the accused was found on both the vaginal swab and external genital swab samples taken from [redacted], one of the alleged child victims. The USACIL reports also show that the accused could not be excluded from the partial Y-STR DNA profile found on the external genital swabs and perianal swabs taken from [redacted], the other alleged child victim in this case. Lastly, the USACIL reports show that a DNA mixture was detected from the scrotal swabs of the accused and it was interpreted as originating from two individuals. However, USACIL could not interpret the contributing profile not assumed to be the accused.

c. On 5 March 2020, the convening authority approved Ms. [redacted] to serve as a Defense expert consultant in the field of forensics and DNA and approved 10 hours of pre-trial consultation. On 4 May 2020, the Court granted an additional 10 hours of consultation with Ms. [redacted], bringing the total hours of approved defense consultation with Ms. [redacted] to 20 hours.

d. On 19 November 2020, [redacted] produced a case report at the request of the Defense. [redacted] analyzed the accused's scrotal swabs and provided statistical analysis as to the likelihood ratio DNA match statistics of [redacted] and the children's mother, [redacted]. Mr. [redacted] is expected to assert that Cybergenetics' analysis excludes [redacted]. as contributors to the DNA mixture found on the accused's scrotal swabs.

e. On 14 December 2020, the Government requested USACIL assistance in testing the accused's scrotal swabs. USACIL re-examined the information regarding the accused's scrotal swabs and their report (3rd USACIL report) was discovered to the Defense on approximately 21 December 2020. USACIL did not conduct any new biological testing on the scrotal swabs.

f. In a separate ruling on 4 January 2021, the Court granted the Defense an additional 10 hours of consultation with their DNA expert, Ms. [redacted] bringing the total number of consultation hours with her to 30 hours. This was done to allow the Defense to understand the information they received from [redacted] and the additional information received in the 3rd USACIL report.

g. The children allege that the accused raped, sexually assaulted and sexually abused them over the course of a few months. The final incident was alleged to have occurred around 1830 on 29 September 2019 in their shared residence. The children's mother, [redacted] returned home from work at approximately 2120. The children were crying and upset in their bedroom and [redacted] asked what had happened. After the disclosure, [redacted] immediately took the children to [redacted] for evaluation. Sexual Assault Forensic Exams were conducted on the children between 0345 and 0830, 30 September 2019. During these exams, swabs were taken for DNA analysis.

h. The accused was removed from his residence at approximately 0250, 30 September 2019 by a command representative. The accused was provided a barracks room.

i. At approximately 0615, 30 September 2019, Cpl [redacted], the accused's former roommate, saw the accused at morning PT. Cpl [redacted] let the accused use the shower in his barracks room after PT. After the accused showered, they both changed and left the barracks room

j. At approximately 1133, 30 September 2019, the accused was taken to [redacted] for a command authorized search and seizure Sexual Assault Forensic Exam. The accused's scrotal swabs were taken at approximately 1345, 30 September 2019.

k. The trial dates for this case are 15 – 27 January 2021. The Defense has indicated that their requested expert, Mr. [redacted] is not available for these trial dates.

l. The accused has been in pre-trial confinement since 15 October 2019.

m. The charges in this case have been referred since 4 March 2020.

3. **Analysis and Conclusions of Law**

A military judge has discretion to determine whether an Article 39(a) session is necessary for the resolution of a motion. R.C.M. 905(h) and M.C.M. Appendix 15, Analysis of the Rules for Courts Martial. If the convening authority denies a request for expert witness, a military judge shall determine whether the testimony of the requested expert witness is relevant and necessary. R.C.M. 703(d). An expert witness may testify if his testimony will help the trier of fact to understand the evidence or to determine a fact in issue. M.R.E. 702.

It is undeniable that a defendant has a constitutional right to present a defense. In Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the Court held that compulsory due process includes both the right to compel the attendance of defense witnesses and the right to introduce their testimony into evidence. However, the Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant. See Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). U.S. v. Dimberio, 56 M.J. 20 (C.A.A.F. 2001.)

Mil.R.Evid. 401-404 set forth what is legally and logically relevant. Rule 401 defines logically relevant evidence as "evidence ... having any tendency and reason to prove or disprove any disputed fact that is of consequence to the determination of the action." However, even though the evidence is logically relevant, it may be excluded as not legally relevant if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay .... " Rule 403.

The Court agrees with the Government that the Defense has not established the necessity of the requested expert. A consequential fact in issue in this case is whether the accused committed sexual acts with the two children, [redacted] Besides the children's expected testimony, the Government has evidence that DNA consistent with the accused was found on [redacted] vaginal swab and external genital swab. The accused could not be excluded from the DNA profile found on [redacted] genital and perianal swabs. The Government recognizes that the DNA evidence collected from the two children is arguably their "linchpin" evidence. But, the Defense does not establish that their requested expert will challenge the DNA evidence found on the children.

What the Defense asserts is that the requested expert will testify about the DNA evidence found on the accused. [redacted]' analysis of the DNA mixture found on the accused's scrotal swabs statistically excluded the two children as contributors. The Defense describes this evidence as exculpatory, but the Court disagrees. However, even if the [redacted] results are fully accepted, the Court still finds that Mr. [redacted] testimony regarding such results will not be helpful to the trier of fact to

understand the evidence or to determine a fact in issue. The absence of the children's DNA on the accused does not change the Government's evidence of the accused's DNA on the children.

The evidentiary posture of the case will not be altered by Mr. [redacted] testimony. The Government had previously analyzed the accused's scrotal swabs and although a DNA mixture was found, the contributors to the DNA mixture could not be interpreted. The Government's results were inconclusive as to who contributed to the DNA mixture found on the accused. The Defense evidence is more definitive that the children's DNA were not on the accused. But the probative weight of the Defense evidence is lowered with the proffered evidence that the accused had exercised, showered and changed clothes between the time of the alleged assaults and the scrotal swabs being taken. The DNA evidence collected from the accused's scrotal swabs is not "linchpin" evidence for either side.

The Court further finds that denial of the additional expert witness will not result in an unfair trial. The Defense has its own DNA expert who can testify regarding the Government's evidence. Ms. [redacted] has the ability to educate the fact-finder on how the DNA evidence should be applied or weighed in this case. An additional expert witness ultimately would not be necessary to help the trier of fact understand the evidence. While it could prove helpful for an additional expert to review the evidence in this case, the Defense has only demonstrated a mere possibility of assistance, not necessity.

Because of the low probative weight of the testimony of the requested Defense expert, any probative value of such testimony is outweighed by considerations of undue delay and confusion of the issues. The Defense has had the Government's DNA evidence for over 8 months prior to seeking the assistance of [redacted] With Mr. [redacted] not being available for the current trial dates, the time necessary to present this evidence will delay the trial for another two to five months. The accused has been in pre-trial confinement since 15 October 2019. The intervening circumstances of the accused exercising, showering and changing clothes lowers the probative weight and value of the Defense evidence. For these reasons the Court finds that the probative value of the additional expert testimony is substantially outweighed by considerations of undue delay and danger of confusion of the issues.

4. **Ruling**. The Defense motion is DENIED.

So ordered this 4th day of January, 2021.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL UNITED STATES MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (MR. [redacted] AND DR. [redacted]) 8 February 2021

1. **Nature of the Motion:** Pursuant to Rules for Courts-Martial (RCM) 703 and 905, the government moves the court to (1) decline to reconsider the defense motion to compel production and funding of Mr. [redacted] as an expert witness and (2) deny production of Dr. [redacted] as an expert witness.

2. **Summary of the Facts:**

In addition to the facts presented by the government's motion in response to the defense motion to compel Mr. [redacted] of 20 December 2020, the government provides the following facts:

a. On 20 December 2020, the defense moved this Court to order the production of funding for Mr. [redacted] as a defense expert in the field of DNA. *See* Defense MTC Mr. [redacted]

b. On 4 January 2021, this Court issued a written ruling denying the production of funding for Mr. [redacted] *See* Court Ruling.

c. On 6 January 2021, the Court granted the defense request to continue the trial dates from 15 – 27 January 2021 to 12 – 24 March 2021. The government did not oppose that request. *See* Court Ruling.

Appellate Exhibit LXXI
Page 1 of 7

d. On 13 January 2021, the defense submitted a request to the convening authority requesting approval of $56,000 in expert funding for Dr. [redacted], in addition to the previously requested funds for Mr. [redacted]

e. On 20 January 2021, the convening authority denied the defense request for expert funding of Dr. [redacted] *Reference* Defense MFAR of 29 January 2021.

3. **Discussion.**

[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." United States v. Lloyd, 69 M.J. 95 (C.A.A.F. 2010) quoting United States v. Freeman, 65 M.J. at 458 (C.A.A.F. 2008). The Court of Appeals for the Armed Forces has established a three-part test that the defense must satisfy in order to demonstrate a necessity for a government-funded expert assistant. *United States v. Gonzalez,* 39 M.J. 459 (C.M.A. 1994). First, the defense must show why the expert is needed. The issue must be central to the defense theory of the case, as opposed to the mere possibility of assistance. *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010) but see *United States v. McAllister*, 55 M.J. 270, 276 (C.A.A.F. 2001) (Finding specialized DNA expert necessary due (1) the DNA being the lynchpin of the government's case; (2) the first defense DNA expert's recommendation to substitute; and (3) the timeliness of the defense motion). Second, the defense must state what the expert assistance will accomplish. Third, the defense must show that they are unable to gather and present the evidence that the expert assistance would be able to develop. *Id.* Only after demonstrating the expert would be of assistance to the defense under the above three factors, does the Court even need to consider if, "the denial of the expert would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

The government largely rests on its previous motion regarding the relevance of the True Allele evidence. The USACIL and True Allele have similar findings with regard which of the named victims is more probable a contributor, or stated in the opposite, the degree to which they are excluded. The controversy remains reduced to the statistical weight of these findings – a statistical distinction that will not aid the fact finder in any way. In reality the distinction between the statistics is academic. The defense has provided no additional evidence that would warrant this Court to reconsider its previous ruling.

The defense seeks an order by this Court to produce an approximately $80,000 of expert funding for Mr. [redacted] and Dr. [redacted] which is in addition to the funding already approved for Ms. [redacted] their current expert. *R.C.M. 102*, states that the Rules for Courts-Martial should be construed to "secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." However, in the instant case, the defense moves the Court to order production of substantial expert funds that, if granted, would cause unnecessary delay and cost. The defense does so without providing any clear or compelling rationale as to how USACIL's findings relating to the scrotal swab cannot be used for the defense's asserted exculpatory purpose. Simply put, they have failed to establish why they cannot advance their theory regarding the exculpatory nature of this evidence through the government's DNA expert. The defense has more than adequate evidence and expertise to raise a robust and fair defense of the Accused.

The defense assertion that Dr. [redacted] and Mr. [redacted] are necessary to present evidence of bias on the part of USACIL is not supported by the facts. In response to the defense raising the issue, the government requested USACIL conduct additional analysis in order to better understand the defense request for Mr. [redacted] USACIL maintains industry accepted safeguards

and protocols to ensure accurate findings. Here, USACIL deviated from those protocols to assist the parties in attempting to understand the True Allele results. The assertion that this is evidence of bias is without merit.

4. **Evidence & Burden of Proof.**

a. In support of its motion, the Government offers the following:

1. Reference Government Response MTC Mr. [redacted].
2. Reference Defense MFAR of 29 January 2021
3. Enclosure 1: Defense Request for Expert Funding Dr. [redacted]

b. The defense bears the burden of persuasion. RCM 905(c)(2). They bear the burden by a preponderance of the evidence. RCM 905(c)(1).

5. **Relief Requested.** The government respectfully requests the defense motion to fund expert consultation be **denied**.

6. **Oral Argument.** Oral argument is respectfully requested.

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

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

UNITED STATES **v.** **MICHAEL A. TRUE** **CORPORAL** **USMC**	**AMENDED DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance Request)** **5 January 2021**

1. Nature of Motion. Pursuant to Rules for Courts-Martial (R.C.M.) 906(b)(l), the Defense moves the Court for a continuance of the subject case.

2. Summary of Facts and Discussion.

a. The case is currently docketed for trial from 15–27 January 2021. The Defense requests that trial be re-docketed by the Court for 12–24 March 2021 with final pretrial matters due on 5 March 2021.

b. The Defense is requesting a continuance for the trial dates because its three granted expert witnesses (Ms. [redacted] Ms. [redacted], and Dr. [redacted]) are not available for 23–27 January 2021. The requested Defense expert in probabilistic genotyping from True Allele, who was denied by the court on 4 January 2021, is also not available for the currently docketed trial dates. Additionally, the Government continues to avoid the Court's queries about the estimated length of its case-in-chief, offering instead "long days of trial" during the R.C.M. 802 conference yesterday as a solution. Cpl True has a right to a panel of service members who are alert and attentive, and the Defense will object to "long days of trial" and/or court sessions on the weekend. Moreover, the Defense is confident of the impossibility of getting through the Government's 14 witnesses on its witness list, some of whom are experts, and all 3 of the Defense's expert witnesses in a 5 day window.

c. On 4 January 2021, the Court granted the Defense an additional 10 hours of pretrial consultation with Ms. [redacted] and Dr. [redacted]. The Defense's request for additional pretrial consultation funding for Dr. [redacted] has been an ongoing point of litigation since summer 2020; the Defense's request for additional pretrial consultation with Dr. [redacted] was submitted with the Court on 8 December 2020, and before that was with the Government and Convening Authority for review and consideration from 9 November 2020 onward. Neither Ms. [redacted] nor Dr. [redacted] are available to work with the Defense between now and the start of trial on 15 January 2021. Enclosures (1) and (2).

d. The Court heard the sworn testimony of Dr. [redacted] on how the 40 hours of

consultation time had been used prior to the 21 December 2020 39(a) hearing, and the difficulties faced by the Defense in working with Dr. [redacted] due to her other commitments. As the Court found when granting 10 additional hours of consultation time, the Defense had been forced to triage the insufficient time granted by the Government. Significant preparation for trial with Dr. [redacted] remains outstanding because of the Government-imposed constraints: the Defense received the contact information for Dr. [redacted] on 4 January 2020, and have yet to interview [redacted] or [redacted], the child forensic interviewers. Dr. [redacted] was granted by the Government in part to assist the Defense in interviewing and preparing cross examination of these witnesses, as these witnesses will likely form the linchpin of the Government's case. The additional consultation time already granted by the Court is necessary to provide Cpl True with an adequate defense.

e. Additionally, part of the need for the additional time was additional USACIL DNA evidence, which the Government discovered on the Defense on 21 December 2020. The Defense will not be able to use the granted hours with the experts due to the short time between the additional time being granted and the scheduled dates of trial. Because the Defense's experts are unable to effectively consult with the defense before the scheduled trial dates, the Defense requires additional time for expert consultation to provide competent and effective defense for Cpl True.

f. The Defense opposes the Court's determination during an R.C.M. 802 on 4 January 2021 to rule on the filings with regard to the Defense motion to compel Mr. [redacted] from True Allele as an expert witness in probabilistic genotyping. The Government contested Mr. [redacted] necessity because the Defense already has Ms. [redacted] as a DNA expert. However, contrary to the Government's response and the court's findings, Ms. [redacted] is not able to testify as an expert in probabilistic genotyping nor can she conduct testing similar to True Allele. Enclosures (3) and (4). Accordingly, the Defense anticipates filing a motion for reconsideration to the Court's ruling.

g. As a result of the Defense's proffered True Allele evidence, the Government asked USACIL to conduct testing which it had not done in its first and second iterations with the DNA evidence; testing which by the Government's own account during the R.C.M. 802 conference fell below USACIL's standard threshold for STRmix. The Defense will raise a *Daubert* challenge to the USACIL STRmix results; however, Ms. [redacted] is unable to assist the Defense in that effort due to the limits of her knowledge with probabilistic genotyping.

h. Per the discussion of R.C.M. 906 in the Manual for Courts Martial, "the military judge should, upon a reasonable cause, grant a continuance to any party." Reasonable cause "may include: insufficient opportunity to prepare for trial; unavailability of an essential witness." The Defense has had insufficient opportunity to prepare, particularly in light of the Court's grant of 20 additional hours of pretrial consultation with Ms. [redacted] and Dr. [redacted], and the Government's recent discovery of new DNA evidence from USACIL and the contact information for Dr. [redacted]. The Defense has requested, but has not yet received, the litigation package for this new DNA evidence. Additionally, given the short time between the production of new DNA evidence by the Government, the court's approval of additional time for Defense experts, and the scheduled start of trial

in just over one week, none of the Defense expert witnesses are available to prepare the Defense before trial begins. Moreover, all three of the defense's approved expert witnesses are unavailable for the current trial dates. For these reasons, the Defense request is reasonable and should be approved.

i. This is the *first* continuance requested by the Defense in this case. This case was originally docketed for trial 13–17 July 2020. On 12 May 2020, the Military Judge sua sponte redocketed the trial to 21–25 September 2020. On 28 August 2020, the Government moved to continue the trial to 18–22 January 2020, which was unopposed by the Defense and granted by the Court on 30 August 2020. While Cpl True has been in pretrial confinement since 15 October 2019, he is facing 26 specifications 13 of which carry life confinement—this requested continuance is required for him to present an adequate defense at trial.

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

k. The Defense certifies that Victim's Legal Counsel (VLC) was provided a copy of this request.

[redacted]
S. B. HILLERY

[redacted]
J. B. LARKIN

Appellate Exhibit XCIV
Page 3 of 4

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	GOVERNMENT MOTION ON THE ADMISSIBILITY OF RECORDED CHILD FORENSIC EVIDENCE 8 January 2021

1. Nature of the Response. Pursuant to *R.C.M. 906(13)* and *M.R.E. 807*, the government moves this Court, upon the occurrence of the predicate conditions at trial, to (1) rule on the admissibility of the recorded forensic interviews of [redacted] and [redacted] the named child victims in the subject case; and (2) to include findings of fact and conclusions of law for inclusion with the record.

2. Summary of the Facts.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse, and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128 and 128b, Uniform Code of Military Justice. All the charges were referred to General Court-Martial on 4 March 2020.

b. The child victims in this case, [redacted] and [redacted] made their disclosures on 29 September 2019. Both children underwent a child forensic interview with Ms. [redacted] on 30 September 2019. [redacted] underwent a second forensic interview with Ms. [redacted] on 21 November 2019.

c. During each child forensic interview, the forensic interview specialist questioned the child victims as to the distinction between truth and lies and informed them on the importance of telling the truth.

d. The child forensic interview specialist made use of open ended questions during the recorded interviews. Both [redacted] and [redacted] discussed topics of a sexual nature not normally associated with what a [redacted] would be familiar.

f. During the interviews, both [redacted] and [redacted] were alone in the interview room with the forensic interview specialist.

g. The trial is currently scheduled to begin on 12 March 2021, which will be approximately 19 months after the date of the charged offenses.

3. Law

R.C.M. 906 states generally that a motion for appropriate relief is a "request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case." *R.C.M. 906(a)*. A request for a preliminary ruling on the admissibility of evidence is an appropriate basis to seek a motion for appropriate relief. *R.C.M. 906(13)*.[1]

a. <u>Residual Hearsay</u>

A military judge's decision to admit evidence under *M.R.E. 807* is reviewed for an abuse of discretion. *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." *Id.* A military judge has "considerable discretion" in admitting residual hearsay. *United States v. McAninch*, 2019 CCA LEXIS 142, at *7 (A. Ct. Crim. App., 2019) (Citing: *United States v. Kelley*, 45 M.J. 275, 280-81 (C.A.A.F. 1996)).

[1] "Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge." R.C.M. 906(13) Discussion (MCM 2019 ed.)

A hearsay statement may be admitted, even when the hearsay statement is not specifically excluded by a hearsay exception, when the proponent of the statement provides reasonable notice under *M.R.E. 807(b)* of their intent to offer a residual hearsay statement, and when:

> "(1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice."

M.R.E. 807(a)(1) –(4).

"The residual hearsay rule sets out three general requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability." *Kelley*, 45 M.J. at 280 (discussing a prior version of the rule). The materiality prong "is merely a restatement of the general requirement that evidence must be relevant." *McAninch*, 2019 CCA LEXIS 142 (Citing: United States v. Peneaux, 432 F.3d 882, 892 (8th. Cir. 2005).

The necessity prong does not require that the proffered evidence be "necessary" to prove the proponent's case. Rather, the necessity prong "essentially creates a 'best evidence' requirement." *Kelley*, 45 M.J. at 281. Further, the necessity prong may be satisfied where a witness cannot remember material facts and there is no other more probative evidence of those facts. *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003)

b. <u>Admissibility of Recorded Child Forensic Interviews</u>

The C.A.A.F. has found admissible the out of court recorded hearsay statements of child victims. In the case of *United States v. Casteel*, the C.A.A.F. ruled that recordings of a police interview of a six year old child victim was admissible, after the victim testified at trial in an "abbreviated fashion." *United States v. Casteel*, 45 M.J. 379 (C.A.A.F. 199).

The Army Court of Criminal Appeals recently provided a persuasive explanation as to the test developed by the Supreme Court for the trustworthiness of the hearsay statement, explaining that there are "several non-exclusive factors that courts may consider: spontaneity of the statements; consistent repetition of the statements; the mental state of the declarant; the use of terminology unexpected of a child of similar age; and lack of motive to fabricate." United States v. McAninch, 2019 CCA LEXIS 142, at *10 (A. Ct. Crim. App., 2019) (Discussing Idaho v. Wright, 497 U.S. 805, 821-822, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)). The ACA went on to explain: "These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test . . . ." Id." (See Also: United States v. Jackson, No. 201600299, 2017 CCA LEXIS 758, at *1 (N-M Ct. Crim. App. Dec. 19, 2017) A military judge did not err when he allowed the Government to use a video of an interview of the stepdaughter that was conducted shortly after the incident, after the stepdaughter could not remember critical details about the incident when she testified at trial).

4. Application

The government moves this Court to provide a ruling as to the admissibility of the recorded child forensic interviews of [redacted] and [redacted], upon the predicate facts being established at trial. The predicate facts will have occurred after the court hears the testimony of [redacted] and [redacted], [redacted], and [redacted]. Raising this issue to the Court at this juncture facilitates the military judge's ability to review the child forensic interviews in advance – thereby avoiding excessive delay at trial. The government has provided the required notice pursuant to *M.R.E. 807* on 1 December 2020. The recorded hearsay statements satisfy the remaining prongs of M.R.E. 807 in the following manner:

Equivalent circumstantial guarantees of trustworthiness: The recorded statements of [redacted] and [redacted] possess circumstantial guarantees of trustworthiness because they were conducted close in time to the allegations, were conducted by trained child forensic interview specialists, were not the product of suggestive or improper examination techniques, and were done in a controlled environment. Hearsay statements of this type have been repeatedly found trustworthy. *See generally*: *United States v. Casteel*, 45 M.J. 379; *United States v. Jackson*, No. 201600299, 2017 CCA LEXIS; *United States v. McAninch*, 2019 CCA LEXIS 142.

Offered as evidence of a material fact: The three recorded child forensic interviews contain [redacted] and [redacted] recitation of the underlining facts relating to the charged sex offenses. They include the statements as to the location of the accused, the position of the accused, weapons used by the accused, acts committed by the accused, and which body parts the accused used to assault them. These statements all go to material facts of the case.

More probative on the point for which it is offered than any other evidence: The recorded child forensic interviews were all taken closer in time to the charged offenses and completed in a controlled interview room. The child victim's in-court testimony will occur approximately nineteen months after the events and occur in open court – in the presence of the Accused. It is likely that recorded interviews will be more probative than stifled child testimony at trial, and therefore offer the best evidence.

Serve the purposes of these rules and the interests of justice: To satisfy the Accused's right to confrontation, both [redacted] and [redacted] will be required to testify in his presence – the person accused of raping them. Moreover, they will be required to testify as to intimate and traumatic events in front of a room filled with complete strangers. It's reasonable to expect the child victims to have significant difficulty testifying under such circumstances. Both the purpose of

residual hearsay and the interests of justice are served by presenting the members with the recorded child forensic interviews because they will provide a more clear and probative account of the events. The inability of child victims to remember or testify as to traumatic events should not be allowed to hinder the search for the truth at trial.

5. Burden of Proof and Evidence

a. As the moving party, the government bears the burden of persuasion by a preponderance of the evidence.

b. The government offers the following evidence in support of the motion:

(1) Government M.R.E. 807 Notice of 1 December 2020.
(2) NCIS report of investigation extracts.
(3) Video recording of [redacted] child forensic interview of 30 September 2019.
(4) Video recording of [redacted] child forensic interview of 30 September 2019.
(5) Video recording of [redacted] child forensic interview of 21 November 2019.
(6) Transcript of [redacted] child forensic interview of 30 September 2019.
(7) Transcript of [redacted] child forensic interview of 30 September 2019.
(8) Transcript of [redacted] child forensic interview of 21 November 2019.
(9) Curriculum Vitae of [redacted]
(10) Resume of [redacted].

6. Relief Requested. The government requests the court review recorded child forensic interviews and included enclosures, in advance of the trial, to facilitate a ruling on the admissibility of offered evidence upon the predicate facts and conditions occurring following the testimony of [redacted] and [redacted] at trial.

7. Oral Argument. The government does not request oral argument.

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

REQUESTS

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. Michael True Corporal U.S. Marine Corps	GOVERNMENT REQUEST FOR ALTERNATE FORMS OF TESTIMONY AND WARRANT OF ATTACHMENT 21 January 2021

1. Nature of the Request. The Government has probable cause to believe that [redacted] cannot and/or will not honor his subpoena for the subject case. The Government seeks 1) a judicial ruling that this witness is not essential to a fair trial, 2) a warrant of attachment, 3) authorized use of alternate forms of testimony, and/or 4) an adequate substitute for [redacted] testimony.

2. Summary of the Facts.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice. All the charges were referred to General Court-Martial on 4 March 2020.

b. During the time of the charged offenses, [redacted] and [redacted] were living (squatting) in the True residence and occupied one of the three bedrooms.

c. [redacted] has been discharged from the Marine Corps. Prior to [redacted] EAS, the

Government served him with a subpoena (AE1-PE1). Due to COVID-19 and other factors, this case has been continued multiple times. It has become increasingly difficult to serve [redacted] with updated subpoenas.

d. The Government granted [redacted] as a witness on 9 April 2020 (AE1-PE2).

e. The Government provided [redacted] a signed subpoena on or about 9 April 2020 (AE1-PE1).

f. [redacted] informed SSgt [redacted] in December that he was a [redacted] and in no condition to travel, and implied he likely would not honor a subpoena (AE1-PE3).

g. [redacted] and [redacted] are now estranged. [redacted] provided that [redacted] (AE1-PE3).

h. On 29 December and after attempting to speak with [redacted] with regard to the most recent trial dates (15-27 Jan), the Government provided a new subpoena, travel funds, travel instructions and a DTS witness information form to the email addresses [redacted] and [redacted] provided the Government. We have not received the signed subpoena or a response to that email (AE1-PE 1 and 3).

i. The Government notified Defense that it was having difficulty serving [redacted] on 31 December 2020. Defense indicated in an 802 that they would file a motion compelling his production. The Government informed the Defense that the Government granted [redacted] as a witness and a motion by the Defense would not be required—the onus is now on the Government to produce the witness under compulsory process or establish facts to support that his production is not required (AE1-PE4).

j. The Government can no longer guarantee that [redacted] will honor his subpoena (AE1-

PE3).

k. [redacted] testimony is cumulative with [redacted] testimony.

l. The Government believes [redacted] testimony is necessary and relevant to the Defense's case (AE1-PE2).

m. The Government is willing to stipulate that [redacted] testimony would be substantially similar to [redacted] testimony.

n. The Government is willing to arrange—to the extent practicable—alternate forms of testimony.

o. The Defense has not sought to introduce a witnessed affidavit.[1]

p. [redacted] is a Defense witness—the Confrontation Clause does not apply.

3. Law & Application:

R.C.M. 703(c)(1) states: *"Witnesses for the prosecution.* Trial counsel shall obtain the presence of witnesses whose testimony trial counsel considers relevant and necessary for the prosecution." The Government acknowledges that [redacted] testimony is necessary and relevant.

Under M.R.E. 804(a) and R.C.M. 703(b)(3), a trial may proceed in the absence of a relevant and necessary witness if that witness is not amenable to process.[2] The lengths to which the prosecution must go to produce a witness is a question of reasonableness.[3] If the testimony of

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[1] *See* US v. Davis, 29 M.J. 357, 359 (CMA 1990) at FN 3, "When a defense counsel becomes aware of a relevant and material witness who may be unamenable to service of process, it would serve counsel well to first obtain from the potential witness an affidavit which is, in turn, witnessed by a third party. If the witness remains true to form and refuses to testify, defense counsel can at least offer the affidavit as an exception to the hearsay rule under M.R.E. [807]"

[2] Manual for Courts-Martial, United States, 2019 (hereinafter, MCM); United States v. Bennett, 12 M.J. 463 (CMA 1982); *cf.* United States v. Santiago-Davila, 26 M.J. 380 (CMA 1988); United States v. Cordero, 22 M.J. 216 (CMA 1986).

[3] Ohio v. Roberts, 448 U.S. 56, 74 (1980) *quoted in* U.S. v. Burns, 27 M.J. 92, 96-97 (CMA 1988); U.S. v. Hinton, 21 M.J. 267 (CMA 1986).

a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness's presence or shall abate the proceedings.[4] The party requesting a witness that has been deemed unavailable is required to show that [the witness's] testimony is more than relevant and necessary.[5] The rule requires a showing that the witness was essential to a fair trial and that there was no adequate substitute for such testimony.[6] The party is then required to elect and justify a remedy short of dismissal, either a continuance or abatement.[7]

First, The Government has taken the requisite steps to obtain the presence of the witness. The Government has exhausted their compulsory process options. The only remaining step is a warrant of attachment. While it is the Government's position that a warrant of attachment can be issued proactively—that is before a witness is compelled to appear if there is probable cause to believe he/she will not appear—that is contrary to a plain reading of the rule which suggests that the witness must fail to appear before a warrant is ripe. At this juncture, the Government has exhausted all reasonable efforts for the production of this witness and cannot guarantee his presence.

Second, this witness, while necessary and relevant, is not essential. [redacted] testimony is cumulative with [redacted] and is not affirmative testimony (e.g. I witnessed X) but rather testimony of a void (e.g. I did not hear or see X). The Defense may demonstrate that an adequate substitute for [redacted] testimony does not exist in its response to this filing. The Government can arrange for telephonic or VTC testimony if the Defense can ascertain the

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[4] R.C.M. 703(b)(3).
[5] United States v. Davis, 29 M.J. 357, 359 (CMA 1990).
[6] *Id.*
[7] *Id* at 360.

location of [redacted] and we can procure a telephone or VTC capability from a public or private facility that he has access to. The Defense has time to procure a witnessed affidavit in accordance with U.S. v. Davis.[8] Last, the Government is willing to stipulate that [redacted] testimony is substantially the same as [redacted]' testimony.

Finally, a continuance or abatement is not appropriate here. The current situation with [redacted] is unlikely to change in the near future and a continuance or abatement will not change that. This case has been continued multiple times and the accused is in pretrial confinement.

Warrant of Attachment

Subsection (ii) of R.C.M. 703(h) reads:

> A warrant of attachment may be issued only upon probable cause to believe that [1] the witness or evidence custodian was duly served with a subpoena, [2] that the subpoena was issued in accordance with these rules, [3] that a means of reimbursement of fees and mileage, if applicable, was provided to the witness or advanced to the witness in cases of hardship, [4] that the witness or evidence is material, [5] that the witness or evidence custodian refused or willfully neglected to appear or produce the subpoenaed evidence at the time and place specified on the subpoena, and [6] that no valid excuse is reasonably apparent for the witness' failure to appear or produce the subpoenaed evidence.

[1] The Government has properly served [redacted] with multiple subpoenas.

[2] The subpoenas were issued in accordance with R.C.M. 703.

[3] Cost is not an issue in this case. The Government has provided the information and funding to the witness (AE1-PE5).

[4] The witness is material but not essential.

[8] 29 M.J. 357, 359 (CMA 1990).

[5] The witness has indicated that he will not get on the aircraft and that he is unable/unwilling to honor the subpoena. If the Government waits until trial to address this issue, the Government will have failed to produce a witness despite indicating to the Defense that we would.
[6] A valid and reasonably apparent excuse does exist—namely that [redacted] mental health precludes him from travel (we are also in the midst of an unprecedented pandemic).

There is no question that the Military Judge has the authority to issue the warrant of attachment. In the interests of judicial economy, the warrant of attachment is appropriate at this juncture given the unique circumstances of this case. The MCM (Presidential Rule) specifically provides the authority for the military judge to issue a warrant of attachment in these circumstances that compels the Marshals (Executive Branch) to produce the witness. The convening authority is responsible for paying the U.S. Marshals' costs associated with the production of this witness. If this issue is litigated after members' selection, the Government would be unable to authorize and cross-org funding to a sister executive agency, locate a homeless mentally ill veteran, compensate him, get him on a plane, and produce him while the Government and the Defense are still on the merits.

Last, there is no requirement that the Government must wait until the date the witness is required to appear and fails to appear prior to obtaining the warrant of attachment—particularly in a case in which the Government can establish that the witness will not appear absent the warrant. The interests of judicial economy support issuing the warrant of attachment now.

4. Evidence and Burden of Proof

There is no burden of proof required for the production of witnesses the Government has deemed relevant and necessary under R.C.M. 703. Defense bears the burden of demonstrating that [redacted]' testimony is essential to a fair trial and that the trial cannot continue without

his presence.[9] The Government bears the burden of probable cause with regard to the warrant of attachment.

In support of this motion, the Government will offer testimony of Agent [redacted] and SSgt [redacted] (if needed).

Encls: (1) Subpoenas and associated email traffic, (2) Government response to Defense witness request, (3) affidavit of SSgt [redacted] (4) December notification to Defense of the Government's difficulty in locating and serving [redacted], (5) DTS instructions, ETF form, email, and witness information form.

5. Relief Requested. The Government requests this court deem [redacted] as "not essential," and rule that he is "unavailable." Defense may posit a reasonable alternative and if the witness is located and has access to that reasonable alternative, the Government will comply. In the alternative, the Government asks the court to rule that [redacted]' testimony is cumulative with [redacted]. Last, the Government requests the attached warrant of attachment be executed so that the Government can attempt to produce the witness or exhaust all reasonable efforts prior to the assembly of members.

6. Oral Argument. The Government does not request oral argument.

//S//

G. F. CURLEY
Major, U.S. Marine Corps
Trial Counsel

[9] 29 M.J. 357, 359 (CMA 1990).

NOTICES

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES *v.* MICHAEL A. TRUE CORPORAL U.S. MARINE CORPS	M.R.E 807(B) NOTICE 1 December 2020

Pursuant to M.R.E. 807(b) the government hereby provides notice of its intent to admit the following evidence subject to the residual hearsay exception:

1. The audio-video recording of the forensic interview of [redacted]. conducted by [redacted] on 30 September 2019.[1] [redacted] may be reached at [redacted] or at [redacted] may be reached through her detailed Victims' Legal Counsel.

2. The audio-video recording of the forensic interview of [redacted] conducted by [redacted] on 21 November 2019.[2] [redacted] may be reached at [redacted] or at [redacted] may be reached through her detailed Victims' Legal Counsel.

3. The audio-video recording of the forensic interview of [redacted] conducted by [redacted] on 30 September 2019.[3] [redacted] may be reached at [redacted] or at [redacted]. [redacted] may be reached through her detailed Victims' Legal Counsel.

[redacted]
A. T. WALSH
Major, USMC
Trial Couns

[1] Bates Stamp 04 Previously disclosed and provided to the defense prior to the government's initial discovery response of 24 March 2020.
[2] Bates Stamp 12 Previously disclosed and provided to the defense prior to the government's initial discovery response of 24 March 2020..
[3] Bates Stamp 05 Previously disclosed and provided to the defense prior to the government's initial discovery response of 24 March 2020.

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Certificate of Service

I hereby attest that a copy of the foregoing notice was served on opposing counsel via email on 1 December 2020.

[redacted]
A. T. WALSH
Major, USMC
Trial Counsel

DEPARTMENT OF THE NAVY
UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
CORPORAL MICHAEL A. TRUE,	)	VICTIM, MRS. [redacted]
USMC	)	
	)	

1. I, Major Charles C. Olson, USMC, Victims' Legal Counsel Organization, Okinawa, Japan, admitted to practice law and currently in good standing with California State Bar, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), and sworn under Article 42(a), hereby enter my appearance in the above captioned court-martial on behalf of Mrs. [redacted], the named victim in the charge.

2. On 16 January 2020, I, Major Charles C. Olson, Regional Victims' Legal Counsel, detailed myself to represent Mrs. [redacted] I entered into an attorney-client relationship with Mrs. [redacted] I have not acted in any manner which might disqualify me in the above captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Western Pacific Judicial Circuit Rules of Court.

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

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

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

Appellate Exhibit XXVI
Page 1 of 2

7. My current contact information is as follows:

Legal Services Support Section
Victims' Legal Counsel Organization
[redacted]

8. Respectfully submitted this 4th day of May 2020.

[redacted] Digitally signed by OLSON.CHARLES.CASPER[redacted]41
Date: 2020.05.04 13:47:24 +09'00'

C. C. OLSON

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served on the 4th day of May 2020 via email.

[redacted] Digitally signed by OLSON.CHARLES.CASPER[redacted]
Date: 2020.05.04 13:47:40 +09'00'

C. C. OLSON

Appellate Exhibit XXVI
Page 2 of 2

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

UNITED STATES	)	
	)	VICTIMS' LEGAL COUNSEL
V.	)	NOTICE OF APPEARANCE
	)	ON BEHALF OF
MICHAEL A. TRUE	)	MS. [redacted]
CORPORAL	)	
USMC	)	
	)	

1. I am Captain Lauren E. Neal, U.S. Marine Corps, Victims' Legal Counsel, Marine Corps Air Station Yuma. I am admitted to practice law and currently in good standing in the commonwealth of Massachusetts, and am certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice. I hereby enter my appearance in the above captioned court-martial on behalf of Ms. [redacted] a named victim in this case.

2. The MCI-W Regional Victims' Legal Counsel detailed me to represent Ms. [redacted] and I have entered into an attorney-client relationship with her. I have not acted in any manner which might disqualify me in the above-captioned court-martial.

3. Ms. [redacted] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve her.

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

5. Ms. [redacted]. has limited standing in this court-martial and reserves the right to make factual statements and legal arguments herself or through counsel.

6. My current contact information is as follows:

[redacted]

Respectfully submitted this 1st day of May 2020,

NEAL.LAUREN.ELIZ[redacted] Digitally signed by NEAL.LAUREN.ELIZABETH[redacted] Date: 2020.05.01 21:57:34 -07'00'

L. E. NEAL

Appellate Exhibit XXVII
Page 1 of 2

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel via email on 1 May 2020.

NEAL.LAUREN.ELIZABETH.[redacted]
Digitally signed by NEAL.LAUREN.ELIZABETH.[redacted]
Date: 2020.05.01 21:57:59 -07'00'

L. E. NEAL

Appellate Exhibit XXVII
Page 2 of 2

DEPARTMENT OF THE NAVY
UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT

UNITED STATES	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
CORPORAL MICHAEL A. TRUE,	)	VICTIM, MINOR CHILD [redacted]
USMC	)	
	)	

1. I, Captain Thomas C. Shealy, USMC, Victims' Legal Counsel Organization, Parris Island, South Carolina, admitted to practice law and currently in good standing with the South Carolina State Bar, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), and sworn under Article 42(a), hereby enter my appearance in the above-captioned court-martial on behalf of minor child [redacted], the named victim in the charge.

2. On 30 January 2020, I was detailed to represent minor child [redacted]. by Major [redacted], USMC, the Regional Victims' Legal Counsel-East, Camp Lejeune, NC. I entered into an attorney-client relationship with minor child [redacted]. I have not acted in any manner that might disqualify me in the above-captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Western Pacific Judicial Circuit Rules of Court.

4. Minor child [redacted] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve minor child [redacted]

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

6. Minor child [redacted] has limited standing in this court-martial, and reserves the right to make factual statements and legal arguments themselves or through counsel.

7. My current contact information is as follows:

Legal Services Support Team
Victims' Legal Counsel Organization
[redacted]

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Page 1 of 2

[redacted]

Respectfully submitted this 4th day of May 2020.

/s/Thomas Camden Shealy
T. C. SHEALY

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served on the 4th day of May 2020 via email.

/s/Thomas Camden Shealy
T. C. SHEALY

Appellate Exhibit XXVIII
Page 2 of 2

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT

UNITED STATES v. MICHAEL A. TRUE CORPORAL U.S. Marine Corps	GOVERNMENT NOTICE OF INTENT TO ADMIT EVIDENCE UNDER M.R.E. 304(f)(2) 17 December 2020

1. Nature of the Response.

The government provides notice to this Court, as required by MRE 304(f)(2), of its intent to offer statements made by the accused that were not disclosed prior to arraignment.

2. Summary of the Facts.

a. Corporal (Cpl) True has been charged with: 13 specifications of Article 120b (rape/sexual abuse/sexual assault of a child), 3 specifications of Article 115 (communicating threats), 3 specifications of Article 127 (extortion), 4 specifications of Article 131b (obstructing justice), 1 specification of Article 120 (abusive sexual contact), 1 specification of Article 128b (domestic violence), and 1 specification of Article 128 (assault consummated by battery upon a spouse). *See* Charge Sheets.

b. On 9 April 2020, the government granted the defense request to produce Mrs. [redacted] as a witness for trial. *See* Enclosure (1)

c. On 16 December 2020, the government contacted Mrs. [redacted] to coordinate travel for the trial dates currently scheduled to commence on 15 January 2020. During this conversation, Mrs. [redacted] disclosed the existence of an audio recording of the accused. *See* Enclosure (2)

d. On 16 December 2020, Agent [redacted], the government's Regional Trial Investigator (RTI) conducted a telephonic interview with Mrs. [redacted] and acquired a copy of the audio recording. Later that day, the government disclosed the existence of the recording and provided a copy to the defense. *See* Enclosure (2)

e. Mrs. [redacted] asserts that the recording is from on or about 31 August 2019. See Enclosure (2)

f. At playtime 03:58, the recording includes the following exchange between [redacted] and the Accused:

> [redacted] *"Leave her alone. I will fucking fight you, leave her alone [inaudible] punch me..."*
> ***Accused**: "Yeah [inaudible]..."*
> [redacted] *"That's your excuse to punch me. Leave her alone. You've never needed an excuse before. Come on. Leave my kid alone."*

See Enclosure (3)

3. Discussion.

"Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused." *MRE 304(d)*. "If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice to the military judge and defense counsel. The defense may object at that time, and the military judge may make such orders as are required in the interests of justice." *MRE 304(f)(2)*.

In the instant case, the government learned of the existence of Enclosure (3) on 16 December 2020. Immediately thereafter, the government provided a copy to the defense. The statements made by the accused occurred after the charged offense against [redacted], and contain admissions by the Accused as to committing past abuse. The government now provides notice, pursuant to *MRE 304(f)(2)*, of its intent to admit statements made by the accused which were disclosed to the defense subsequent to arraignment.

[redacted]
A. T. WALSH
Major, U.S. Marine Corps
Complex Trial Counsel

COURT RULINGS & ORDERS

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

UNITED STATES **v.** **MICHAEL A. TRUE** **CPL/E-4 USMC**	**RULING – VICTIM LEGAL COUNSEL MOTION TO RECONSIDER DENIAL OF MINOR CHILDREN VICTIMS' MOTION FOR REMOTE LIVE TESTIMONY** **23 DECEMBER 2020**

1. Nature of Motion. Victim's Legal Counsel for [redacted]. and [redacted] moved the Court to reconsider its prior ruling that denied their remote live testimony at trial. The Government joined the motion and the Defense opposed. An Article 39(a) hearing was held on this motion on 21 December 2020.

2. **Findings of Fact**.

a. Victims Legal Counsel submitted their original motion on 16 April 2020. An Article 39(a) session was held on the motion on 4 May 2020 and the Court issued its ruling on 18 May 2020.

b. The Uniform Rules of Practice Before Navy and Marine Corps Courts-Martial, Rule 10.8 states that motions to reconsider must be filed within fourteen days after the ruling is filed unless an extension is granted for good cause shown.

c. In support of its original motion, Victims Legal Counsel presented e-mail statements from [redacted] and [redacted] RCM 801(a)(6) designee, Ms. [redacted] Ms. [redacted] is the maternal aunt of the two children.

d. On 7 December 2020, Victims Legal Counsel submitted this motion to reconsider with an updated e-mail statement from Ms. [redacted] and an unsigned letter from Ms. [redacted] LCSW, identified as an Outpatient Therapist at Capital Region Center for Mental Wellness who has been working with [redacted]

e. Ms. [redacted] stated in her letter that she had been seeing [redacted] for therapy since 22 April 2020 and that she believes it would not be in [redacted] best interest to testify in front of the accused. Ms. [redacted] states that [redacted]. has expressed fear of the accused and has stated that if she ever saw him again, she would "freak out," run and try to hide. Ms. [redacted] further states that after [redacted]. talks about her past trauma, she tends to isolate, shut down and has outbursts of anger.

3. **Statement of the Law**

Under Rule for Courts-Martial (R.C.M.) 914A and Military Rule of Evidence (Mil. R. Evid.) 611(d) a military judge must allow a child victim of sexual abuse to testify outside the presence of the accused

when the military judge makes the following findings: A) that it is necessary to protect the welfare of the particular child witness; B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the accused; and C) that the emotional distress suffered by the child witness in the presence of the accused is more than *de minimis*. The trauma to the child must be attributable to the presence of the defendant and not be from the court-martial process generally. *U. S. v. Delmaster*, 2018 CCA LEXIS 43 (A.Ct.Crim.App. Jan 31, 2018.)

4. **Analysis and Conclusions of Law**

The Court denies Victim Legal Counsel and the Government's request for reconsideration. The request is untimely, does not assert any intervening change in controlling law or the availability of new evidence. The motion claims that the Court incorrectly applied the test set forth in M.R.E. 611(d), but the 18 May 2020 ruling appropriately cited the M.R.E. 611(d) standard and stated the reasons the Court found that the moving parties had not met their burden. The Court does not find that there was clear error or manifest injustice in its prior ruling.

Even if reconsidered, the Court still denies the request for remote live testimony. The Court is sensitive to the fact that [redacted]. and [redacted]. are children who must bear in-person witness against an adult accused of their victimization. The determination the Court must make is not about how difficult or uncomfortable it will be for the children to testify in front of the accused. If it were just that, then all cases involving children would likely result in remote live testimony. What the Military Rules of Evidence require is that the Court find necessity and trauma. Victim Legal Counsel and the Government have not provided evidence sufficient for the Court to make these required findings under M.R.E. 611(d).

Regarding [redacted] the moving parties have submitted summaries of statements from the investigation and two e-mail statements from the R.C.M. 801(a)(6) representative, Ms. [redacted] Ms. [redacted] mentions suicide attempts and ideations, stressors in [redacted] life, and the fact that [redacted] has been in Ms. [redacted] care since November 2020. But there is no independent link that ties all these events to trauma of her testifying in the presence of the accused. Ms. [redacted] describes [redacted]. as expressing some desire to testify for potential therapeutic value yet previously described [redacted]. as embarrassed and ashamed of what was done to her and saying she wishes that she not be put to testify in front of the accused or in front of many strangers. Mixed-emotions would seem to be reasonable in this circumstance, but it is not sufficient for this Court to find trauma. What Ms. [redacted] describes is that [redacted] testifying in front of the accused, or at the court-martial in general, will be an additional stressor to many that [redacted] is currently experiencing for various reasons. There was no mention that [redacted]. has been diagnosed with any trauma-related mental health conditions or that she is currently being evaluated or treated for such. [redacted] is lucky to have Ms. [redacted] but Ms. [redacted] opinions are that of a concerned, loving family member with a bias towards protecting [redacted]. The information presented is insufficient for this Court to make its required M.R.E. 611(d) findings.

Regarding [redacted] the moving parties have submitted summaries of statements from the investigation, two e-mail statements from the R.C.M. 801(a)(6) representative, Ms. [redacted] and an unsigned letter from Ms. [redacted], LCSW, a therapist who has been seeing [redacted]. since April 2020. Ms. [redacted] indicates she has been working with [redacted]. "towards emotional and behavioral goals" and mentions that [redacted]. has discussed her fear of the accused. Ms. [redacted]r describes [redacted]. as historically

getting very upset when talking about her past trauma and how she tends to isolate, shut down and have outbursts of anger afterwards. Ms. [redacted] indicated that [redacted] cries at the thought of having to see the accused. Ms. [redacted] also indicated that [redacted]. has always had high anxiety and that when confronted with any topic that makes her uncomfortable, [redacted] completely shuts down. The Court is unable to determine from these written statements whether [redacted] trauma is solely from actions attributed to the accused, whether her anxiety is any different from the high anxiety [redacted]. has always displayed or whether the observed "shutting down" is solely from thoughts of the accused or other things that make [redacted] uncomfortable. There was no mention whether [redacted] has been diagnosed with any trauma-related mental health conditions or that she is currently being evaluated or treated for such. The information presented is insufficient for this Court to make its required M.R.E. 611(d) findings.

The children in this case have undoubtedly experienced disruptions and stressors in their family life that included a move from Hawaii [redacted] a new environment made even more difficult during the ongoing pandemic and their pending return to Hawaii for the court-martial. But without receiving sworn testimony or actual evidence, the Court cannot make findings as to what is necessary to protect the welfare of these particular child witnesses. The Court is being asked to make generalizations about how a child can be traumatized by having to testify. The Court has not been provided evidence that makes the correlation between stressors these children are experiencing and testifying in the presence of the accused.

5. **Ruling**. The joint Victim Legal Counsel and Government motion for reconsideration of remote live testimony is **DENIED**.

So ordered this 23rd day of December, 2020.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

U N I T E D S T A T E S **v.** **CORPORAL MICHAEL A. TRUE,** **USMC**	**APPOINTMENT OF DESIGNEE** **IAW R.C.M. 801(a)(6)** **19 MAR 2020**

1. **Nature of Order**. Pursuant to Rule for Court-Martial 801(a)(6) and the *Navy and Marine Corps Trial Judiciary Uniform Rules of Practice* rule 38, the Court is required to appoint a designee to represent a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces. In this case, the minor children [redacted]. and [redacted] are the named victims of the offenses alleged. Minor children [redacted]. and [redacted] qualify for a designee under the Rule. Via joint motion, the parties nominate Ms. [redacted] as the R.C.M. 801(a)(6) designee and herein address the factors provided in R.C.M. 801(a)(6).

2. **Findings of Fact:** The Court made the following findings of fact:

a. The ages, [redacted] and maturity of the victims necessitate a designee;
b. Minor children [redacted] and [redacted] are alleged victims and witnesses in the case;
c. The designee is the minor children's ([redacted] maternal aunt and has agreed to serve in this role;
d. No other designee has been appointed by another court;
e. Minor children [redacted] approve of Ms. [redacted] serving as designee;
f. No delay is anticipated as a result of this appointment;
g. Trial Counsel and Victims' Legal Counsel request this appointment; and
h. Defense Counsel does not oppose this appointment.

3. **Rights of the Designee:** In addition to the rights conferred upon a victim under Article 6(b) of the UCMJ, the rights that a designee may exercise on behalf of a victim include:

a. The right to receive notice of public hearings in the case;
b. The right to be reasonably heard at such hearings, if permitted by law; and
c. The right to confer with counsel representing the government at such hearings.

4. For purposes of this order, a public hearing or proceeding under this instruction shall include any hearing or procedure which is open to the public generally or which has not been closed by competent authority. Personal appearance by the victim is not necessary to satisfy the right to be

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Page 1 of 2

reasonably heard. The right to be reasonably heard may ordinarily be accomplished by telephonic, written or other means.

5. While all reasonable efforts shall be made to ensure these rights are afforded to the victim/designee, in no case shall the rights of the accused be infringed or the administration of justice be unduly prejudiced.

6. **Order.** The Court **ORDERS** that Ms. [redacted] be appointed as [redacted] and [redacted] designee within the meaning of R.C.M. 801(a)(6). Trial counsel shall provide a copy of this order to the designee and inform the military judge when delivery is accomplished.

So **ORDERED** this 24th day of March 2020[redacted]

W. LEE
LtCol, USMC
Military Judge

Appellate Exhibit XXX
Page 2 of 2

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

UNITED STATES	)	
	)	**RULING – GOVERNMENT MOTION FOR VENUE RULING**
v.	)	
	)	
MICHAEL A. TRUE	)	**25 SEPTEMBER 2020**
CPL/E-4 USMC	)	

1. **Nature of Motion**. The Government moves for a preliminary ruling regarding venue so they may have certainty in coordinating the logistics for trial.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice.

b. The charges were referred to General Court-Martial on 4 March 2020.

c. On 4 May 2020, the accused was arraigned, seven motions were litigated, and a trial management order was signed that set trial dates of 13-17 July 2020. The trial location was set as Joint Base Pearl Harbor – Hickam.

d. From March 2020, the Covid-19 pandemic began affecting DoD personnel travel and court-martial dockets. Travel to the state of Hawaii was also affected. This case has been continued twice from its original July 2020 date. Trial is currently set for 18-22 January 2021.

e. The Government began exploring the possibility of conducting this case on mainland United States, and in August 2020, informed the Court that a location at Fort Leonard Wood, Missouri was contemplated. Fort Leonard Wood is an Army installation [redacted]

f. The Court held R.C.M. 802 conferences regarding trial location on 14 August 2020 and on 10 September 2020. The Court asked the Government about the possibility of moving this case to another Marine Corps base on mainland United States, such as Camp Pendleton. Counsel were directed to submit filings and an Art. 39(a) hearing was held on this issue on 23 September 2020.

g. At the Art. 39(a) hearing, Victims Legal Counsel for both children participated telephonically.

h. The Government and both Victims Legal Counsel stated that there are no restrictions, specific to the children, on their ability to travel for trial.

i. The Government indicated that they would be able to conduct this trial whether it occurred at Joint Base Pearl Harbor – Hickam, Marine Corps Base Hawaii, Camp Pendleton or at Fort Leonard Wood.

j. The Government, in its filing, identified one civilian witness that has been uncooperative with both the Government and the Defense. This witness, Dr. [redacted], was the child SAFE examiner who took several significant steps in the collection of evidence in this case. Dr. [redacted] is located on the island of Oahu.

k. The Defense desires that the trial location remain on the island of Oahu.

l. The accused has been in pre-trial confinement on the island of Oahu since 15 October 2019.

3. **Analysis and Conclusions of Law**

R.C.M. 906(b)(11) states that the place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby. The discussion to the rule states that when it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge.

The Court does not find necessity to change the location of this trial from the island of Oahu. The Court agrees with the Government that the pandemic environment creates a great amount of uncertainty surrounding witness travel and other trial logistics. But, Covid-19 travel restrictions, military restriction of movement policies and risk of contracting the virus exist at all the locations contemplated for this trial. There are uncertainties whether local exceptions to policy or Covid-19 testing will be required and available to the trial participants at the different locations. It is unknown whether state travel restrictions or installation HPCON levels will lessen or tighten in the coming months. The Court finds that it is unreasonable to insert the additional uncertainties of moving a complicated general court-martial to an Army location unfamiliar to any of the trial participants during the winter. This is especially so when the Government has indicated they can conduct this trial at its current location on Oahu, that it is the desire of the Defense to conduct the trial on Oahu, and the child witnesses do not have any travel restrictions that would prevent them from traveling to Oahu for trial.

In addition, the one witness the Government identified as "uncooperative" and who is very important to the case, is located on Oahu. The Court understands that the case investigators are on Oahu and the evidence is maintained on Oahu. The accused is in pre-trial confinement on Oahu.

The Court finds that despite the logistical challenges of conducting a trial during a pandemic, that in this case, necessity does not exist to require a change in trial location. Holding trial either at Joint Base Pearl Harbor-Hickam or Marine Corps Base Hawaii, on Oahu, will allow counsel to tackle the challenges in a familiar environment. Because of the gravity of the charges in this case, holding trial on Oahu will best maintain the integrity of the defense counsel/accused relationship by not interrupting it with trans-Pacific travel.

4. **Ruling**. The Government request to rule that Fort Leonard Wood is a permissible venue is DENIED. The Government request that the Western Judicial Circuit be a secondary option is GRANTED IN PART. The Court authorizes Camp Pendleton as a back-up option for trial if significant changes on Oahu later render it necessary to move the trial location.

So ordered this 25th day of September, 2020.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

UNITED STATES	)	
	)	**RULING – DEFENSE MOTION IN**
v.	)	**LIMINE (M.R.E. 404(b))**
	)	
MICHAEL A. TRUE	)	**22 DECEMBER 2020**
CPL/E-4 USMC	)	

1. **Nature of Motion**. The Defense moves to preclude the Government from introducing, pursuant to M.R.E. 404(b), Cpl True's [redacted] evidence that he took ten minutes to collect his uniform and evidence he used kitchen knives when exploiting his family. In its response, the Government indicated they would no longer seek to introduce evidence about the kitchen knives. An Article 39(a) hearing on this motion was held on 21 December 2020.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice.

b. On 9 April 2020, the Government provided notice to the Defense of its intent to offer evidence pursuant to M.R.E. 404(b), 413 and 414. On 4 May 2020, the parties litigated a Defense motion claiming the Government's notice was inadequate. The Court denied the Defense motion on 18 May 2020 and noted that at the 4 May 2020 Article 39(a) hearing, the Government had specified the evidence that it intended to use in relation to its notice. A second Article 39(a) hearing was held in this case on 24 July 2020 and the Defense did not raise this motion then.

c. The Defense has not shown good cause as to why this motion should be considered when it was not filed in accordance with the Trial Management Order.

d. Sometime after 0200, 30 September 2019, the Officer of the Day, 1stLT [redacted] went to pick the accused up at his residence. When they returned to allow the accused to retrieve his uniform, the accused entered the house unaccompanied and took approximately 10 minutes to retrieve his items.

e. Later on 30 September 2019, the accused was taken to [redacted] to undergo a Sexual Assault Forensic Exam. During his intake, the accused told the nurse that he had thoughts of suicide for the preceding three months.

3. **Analysis and Conclusions of Law**

The admissibility of evidence under M.R.E. 404(b) is subject to a three pronged test: (1) the evidence must reasonably tend to show the accused committed the uncharged act; (2) the evidence must make some fact of consequence more or less probable, and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The evidence must be logically relevant under the second prong for some purpose other than propensity. *United States v. Diaz*, 59 M.J. 79 (C.A.A.F 2003); *United States v. Humpherys*, 57 M.J. 83, 90-91 (C.A.A.F. 2002).

Uncharged misconduct or other acts of an accused may be properly offered under M.R.E. 404(b) to prove his consciousness of guilt. *See United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010); *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998).

Despite not showing good cause, the Court will consider this Defense motion. The Court understands the challenges during this timeframe of litigating cases through the 2020 global pandemic.

Evidence of the Accused's [redacted].

The Court grants the defense motion with regard to the accused's statement of [redacted] made on 30 September 2019. Although there is a preponderance of evidence that supports a finding that the accused made the statement and that such thoughts may be probative as to his consciousness of guilt, the Court finds that the evidence fails the third *Reynolds* prong.

The statement was made to an intake nurse prior to the accused undergoing a Sexual Assault Forensic Examination. The Government points to the fact that the accused then spent approximately two week in-patient for evaluation, implying the significance of the prior ideations. However, it is just as plausible that the accused remained in-patient for two weeks for

mental health evaluation because he had just been accused of serious crimes by his family and was under investigation by NCIS. It is reasonable for an accused to experience stress when facing serious crimes where reputation, career, family relationships and extended confinement are at stake. It is not unusual for an accused to become overwhelmed by the stress such that his mental state needs to be evaluated. Even if such stress could raise the inference of consciousness of guilt, the Court finds that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice.

Evidence That the Accused Had 10 Minutes, Unaccompanied, in his Residence to Retrieve his Uniform

The Court denies the defense motion with regard to this evidence. The Government clarified in its response that this evidence would merely be offered in rebuttal if the Defense argues that investigators failed to seize camera memory cards even though the cameras were clearly visible throughout the residence. This evidence would be admissible rebuttal evidence if the Defense were to make such arguments or implications during its case in chief.

In addition to appropriate rebuttal evidence, the Court finds the evidence admissible pursuant to M.R.E. 404(b). The evidence in the case reasonably shows that the accused took approximately 10 minutes, unaccompanied, in his residence to retrieve his uniform. 1stLt [redacted] the Officer of the Day, relayed this incident to NCIS. The temporal proximity of the accused's actions after learning that he was being taken away in the middle of the night by the Officer of the Day makes the evidence probative as to the accused's consciousness of guilt and probative as to opportunity. Because the Government only intends to offer this evidence if the Defense challenges the investigators' actions with respect to the camera memory cards, the Court finds that the probative value of the evidence is not substantially outweighed by any danger of unfair prejudice or confusing the members. This evidence will be admissible if otherwise allowed under the Military Rules of Evidence.

Intrinsic Evidence

The Government, in their response to the Defense motion, requested a preliminary ruling that items #2a, 2c, and 2d in their 9 April 2020 notice be considered intrinsic evidence that will be admissible at trial. The Court believes that items #2a (accused's attempts to separate [redacted] from the children) and 2c (accused making [redacted] eat 7 sleep inducing gummies) would be res gestae and

intrinsic to the alleged offenses. They will be admissible if otherwise allowed under the Military Rules of Evidence.

Regarding item #2d (accused requiring [redacted] to take showers after raping her), the Court makes no ruling at this time on this item of evidence. The Court is unclear what evidence the Government is referring to in item #2d of its notice. There is one doctor's notation on [redacted] SAFE exam that the accused told [redacted] to shower but she didn't. There is other reference to the accused telling [redacted] to go shower after she came down to the laundry room to check on [redacted]

4. **Ruling**. The Defense motion is GRANTED IN PART and DENIED IN PART. Evidence of the accused's [redacted] will not be admissible. Evidence of the accused taking 10 minutes, unaccompanied in the residence, to retrieve his uniform will be admissible if otherwise allowed under the Military Rules of Evidence. Evidence of the accused's attempts to separate [redacted] from the children and to make [redacted] eat sleep inducing gummies will be admissible if otherwise allowed under the Military Rules of Evidence.

So ordered this 22nd day of December, 2020.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

UNITED STATES	)	
	)	
	)	**RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF: PRELIMINARY RULING ON THE ADMISSIBILITY OF EVIDENCE**
v.	)	
	)	
MICHAEL A. TRUE	)	
CPL/E-4 USMC	)	
		22 DECEMBER 2020

1. **Nature of Motion**. The Defense moves for a preliminary ruling regarding the admissibility of two videos it intends to offer at trial. One video depicts the accused's residence where the alleged incidents occurred and the other video depicts one named victim, [redacted] movements through the residence. The Government does not oppose the Defense intent to offer the video depicting the accused's residence but opposes the video regarding [redacted] movements. An Article 39(a) hearing on this motion was held on 21 December 2020.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice.

b. One of the named child victims in the specifications is [redacted] who was [redacted] at the time. [redacted] alleges three different occasions where she was sexually assaulted by the accused: one taking place in her bedroom on the third level of her residence, one taking place in the accused's bedroom on the third level of the residence and the last taking place in the laundry room/kitchen on the second level of the residence. The last incident is alleged to have occurred on 29 September 2019.

c. At the time of the alleged offenses, Cpl [redacted]. and his wife, [redacted] lived in a third floor bedroom of the accused's residence. Both indicated they were in the residence on 29 September 2019.

d. The Defense seeks admission of two video clips, one titled "Video Walk-Through (Residence)" and the second titled "Video Walk-Through [redacted] Movements)." The video clips were recorded on 18 September 2020.

3. **Analysis and Conclusions of Law**

The witnesses in this case are expected to testify as to where they were located in the home during the alleged incidents. This testimony is not complex and use of static demonstrative evidence is sufficient to explain these locations to the members. That said, the Defense may offer the video clip titled "Video Walk-Through (Residence)" and it will be admitted if proper foundation is laid. The Court finds that this video clip will help the members contextualize the locations within the residence. The Government does not object to the offer of this video walk-through of the residence. The audio will not be played as the Court agrees with the Government that the acoustics of an empty residence are different from what the acoustics may have been during the timeframe of the alleged incidents. The acoustics depicted in the video, in an empty residence one year after the alleged incidents, are not probative as to a matter in issue and thus are outweighed by danger of misleading the members.

The video clip titled "Video Walk-Through [redacted] Movements) will not be admissible. This video clip has low probative value as it purports to show the movements of a child as described from proffers of the child's expected testimony. The video clip was taken by an adult in an empty house, making it dissimilar to what the expected evidence at trial may show. The acoustics in this video captures the sounds of an adult male, wearing shoes, climbing the stairwell. Additionally, the video is suggestive in the number of adult steps it takes to move about the residence, the maneuver room in the empty spaces, the pause showing the sliding glass door in the dining room that leads to the outside, the pause showing the stairwell that leads to the exit of the residence, and the pause in front of the door leading to the bedroom then occupied by Cpl [redacted] and his wife. The dissimilar perspective, lack of temporal proximity, intervening circumstances and suggestibility make any possible probative value outweighed by the dangers of confusion and misleading the members.

4. **Ruling**. The Defense motion is GRANTED IN PART and DENIED IN PART. The Defense may offer the video clip titled: "Video Walk-Through (Residence)" and it will be admitted if otherwise admissible. The audio of the video clip "Video Walk-Through (Residence)" will not be played. The video clip titled: "Video Walk-Through [redacted] Movements)" will not be admissible.

So ordered this 22nd day of December, 2020.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

UNITED STATES	)	
	)	**RULING – DEFENSE AMENDED MOTION FOR APPROPRIATE RELIEF: COMPEL ADDITIONAL FUNDING FOR EXPERT WITNESSES**
v.	)	
MICHAEL A. TRUE	)	
CPL/E-4 USMC	)	
		4 JANUARY 2021

1. **Nature of Motion**. The Defense moved for additional expert funding, specifically: (1) two hours of pre-trial telephonic consultation with Ms. [redacted] (2) two additional days of trial observation/testimony of Ms. [redacted] (3) one additional day of trial observation/testimony of Dr. [redacted]; and (4) an additional 40 hours of pre-trial consultation with Dr. [redacted] An Article 39(a) hearing was held on this motion on 21 December 2020.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice.

b. The current dates for trial are 15 – 27 January 2021. The Defense has had the Government's DNA evidence since at least March 2020 when the charges against the accused were referred. Ms. [redacted] the Defense granted DNA expert, was made available to the Defense on 5 March 2020 with 10 hours of approved consultation. The Court granted an additional 10 hours of consultation on 4 May 2020, bringing the total hours of approved defense consultation with Ms. [redacted] to 20 hours.

c. On 20 December 2020, the Defense filed a separate motion to compel funding for an expert witness from [redacted]., Mr. [redacted], to testify as to probabilistic genotyping done by [redacted] the scrotal swabs taken from the accused. Mr. [redacted] was

expected to testify that [redacted] analysis excluded [redacted] and [redacted] as contributors to the DNA mixture found on the accused's scrotal swabs.

d. The [redacted] report provided to the Defense is dated 19 November 2020.

e. Based upon the [redacted] report, on 9 December 2020, the Defense asked the Convening Authority to fund Mr. [redacted] to act as an expert witness for the Defense. The Convening Authority denied this request on 18 December 2020.

f. In a separate ruling, on 4 January 2021, the Court denied the Defense request to compel funding for Mr. [redacted] as an expert witness.

g. On 14 December 2020, and after being provided the [redacted] report, the Government requested USACIL assistance in testing the accused's scrotal swabs. USACIL produced an additional report that was discovered to the Defense on or about 21 December 2020.

h. In its response to this motion, the Government contends that the granted Defense DNA expert, Ms. [redacted], is capable of assisting the Defense with similar data obtained from [redacted].

i. At the 21 December 2020 Article 39(a) hearing, the Defense argued that they needed additional consultation hours with Dr. [redacted] because they had not yet interviewed the two child forensic interviewers in this case.

3. **Analysis and Conclusions of Law**

Regarding Ms. [redacted], the Court finds that DNA evidence is a significant part of the Government's evidence. That said, the Defense has had the Government's DNA evidence for over 8 months before it sought the opinions of another DNA laboratory. In a separate ruling, the Court found that [redacted] expert testimony is not necessary for the Defense. The Court will grant the Defense 10 (ten) additional pre-trial consultation hours with Ms. [redacted] however, so they may understand the information they have received from [redacted] and the additional information received from USACIL. The Court will also grant one additional day of trial observation/testimony for Ms. [redacted] to ensure she is adequately available to the Defense during trial.

Regarding Dr. [redacted] the Court grants the Defense 10 (ten) additional pre-trial consultation hours with Dr. [redacted] so they may prepare for trial. The Court will also grant one additional day of trial observation/testimony for Dr. [redacted] to ensure she is adequately available to the Defense during trial. The Court does not condone the Defense tactic of not

interviewing the child forensic interviewers in this case and waiting until the eve of trial and when all expert funding has been used up to claim that additional hours are needed from the expert consultant in order to interview these important witnesses. The Court grants these additional hours with Dr. [redacted] to protect the accused.

4. **Ruling**. The Defense motion is GRANTED IN PART and DENIED IN PART.

So ordered this 4th day of January, 2021.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

UNITED STATES	)	
	)	**RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL FUNDING FOR EXPERT WITNESS**
v.	)	
MICHAEL A. TRUE	)	
CPL/E-4 USMC	)	**4 JANUARY 2021**

1. **Nature of Motion**. The Defense moves to compel funding for Mr. [redacted], a casework supervisor at [redacted] to act as an expert witness on behalf of the Defense. The Court determined that it could resolve this issue on the basis of the filings and an Article 39(a) hearing on this motion was not held.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice. All the charges were referred to General Court-Martial on 4 March 2020.

b. On 27 November 2019 and 28 January 2020, USACIL provided DNA reports in this case. The reports show that a DNA profile consistent with the accused was found on both the vaginal swab and external genital swab samples taken from [redacted], one of the alleged child victims. The USACIL reports also show that the accused could not be excluded from the partial Y-STR DNA profile found on the external genital swabs and perianal swabs taken from [redacted], the other alleged child victim in this case. Lastly, the USACIL reports show that a DNA mixture was detected from the scrotal swabs of the accused and it was interpreted as originating from two individuals. However, USACIL could not interpret the contributing profile not assumed to be the accused.

c. On 5 March 2020, the convening authority approved Ms. [redacted] to serve as a Defense expert consultant in the field of forensics and DNA and approved 10 hours of pre-trial consultation. On 4 May 2020, the Court granted an additional 10 hours of consultation with Ms. [redacted], bringing the total hours of approved defense consultation with Ms. [redacted] to 20 hours.

d. On 19 November 2020, [redacted] produced a case report at the request of the Defense. [redacted] analyzed the accused's scrotal swabs and provided statistical analysis as to the likelihood ratio DNA match statistics of [redacted] and the children's mother, [redacted] Mr. [redacted] is expected to assert that Cybergenetics' analysis excludes [redacted] as contributors to the DNA mixture found on the accused's scrotal swabs.

e. On 14 December 2020, the Government requested USACIL assistance in testing the accused's scrotal swabs. USACIL re-examined the information regarding the accused's scrotal swabs and their report (3rd USACIL report) was discovered to the Defense on approximately 21 December 2020. USACIL did not conduct any new biological testing on the scrotal swabs.

f. In a separate ruling on 4 January 2021, the Court granted the Defense an additional 10 hours of consultation with their DNA expert, Ms. [redacted], bringing the total number of consultation hours with her to 30 hours. This was done to allow the Defense to understand the information they received from [redacted] and the additional information received in the 3rd USACIL report.

g. The children allege that the accused raped, sexually assaulted and sexually abused them over the course of a few months. The final incident was alleged to have occurred around 1830 on 29 September 2019 in their shared residence. The children's mother, [redacted] returned home from work at approximately 2120. The children were crying and upset in their bedroom and [redacted] asked what had happened. After the disclosure, [redacted] immediately took the children to [redacted] for evaluation. Sexual Assault Forensic Exams were conducted on the children between 0345 and 0830, 30 September 2019. During these exams, swabs were taken for DNA analysis.

h. The accused was removed from his residence at approximately 0250, 30 September 2019 by a command representative. The accused was provided a barracks room.

i. At approximately 0615, 30 September 2019, Cpl [redacted], the accused's former roommate, saw the accused at morning PT. Cpl [redacted] let the accused use the shower in his barracks room after PT. After the accused showered, they both changed and left the barracks room

j. At approximately 1133, 30 September 2019, the accused was taken to [redacted] for a command authorized search and seizure Sexual Assault Forensic Exam. The accused's scrotal swabs were taken at approximately 1345, 30 September 2019.

k. The trial dates for this case are 15 – 27 January 2021. The Defense has indicated that their requested expert, Mr. [redacted] is not available for these trial dates.

l. The accused has been in pre-trial confinement since 15 October 2019.

m. The charges in this case have been referred since 4 March 2020.

3. **Analysis and Conclusions of Law**

A military judge has discretion to determine whether an Article 39(a) session is necessary for the resolution of a motion. R.C.M. 905(h) and M.C.M. Appendix 15, Analysis of the Rules for Courts Martial. If the convening authority denies a request for expert witness, a military judge shall determine whether the testimony of the requested expert witness is relevant and necessary. R.C.M. 703(d). An expert witness may testify if his testimony will help the trier of fact to understand the evidence or to determine a fact in issue. M.R.E. 702.

It is undeniable that a defendant has a constitutional right to present a defense. In Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the Court held that compulsory due process includes both the right to compel the attendance of defense witnesses and the right to introduce their testimony into evidence. However, the Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant. See Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). U.S. v. Dimberio, 56 M.J. 20 (C.A.A.F. 2001.)

Mil.R.Evid. 401-404 set forth what is legally and logically relevant. Rule 401 defines logically relevant evidence as "evidence ... having any tendency and reason to prove or disprove any disputed fact that is of consequence to the determination of the action." However, even though the evidence is logically relevant, it may be excluded as not legally relevant if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay .... " Rule 403.

The Court agrees with the Government that the Defense has not established the necessity of the requested expert. A consequential fact in issue in this case is whether the accused committed sexual acts with the two children, [redacted] Besides the children's expected testimony, the Government has evidence that DNA consistent with the accused was found on [redacted] vaginal swab and external genital swab. The accused could not be excluded from the DNA profile found on [redacted] genital and perianal swabs. The Government recognizes that the DNA evidence collected from the two children is arguably their "linchpin" evidence. But, the Defense does not establish that their requested expert will challenge the DNA evidence found on the children.

What the Defense asserts is that the requested expert will testify about the DNA evidence found on the accused. [redacted] analysis of the DNA mixture found on the accused's scrotal swabs statistically excluded the two children as contributors. The Defense describes this evidence as exculpatory, but the Court disagrees. However, even if the [redacted] results are fully accepted, the Court still finds that Mr. [redacted] testimony regarding such results will not be helpful to the trier of fact to

understand the evidence or to determine a fact in issue. The absence of the children's DNA on the accused does not change the Government's evidence of the accused's DNA on the children.

The evidentiary posture of the case will not be altered by Mr. [redacted] testimony. The Government had previously analyzed the accused's scrotal swabs and although a DNA mixture was found, the contributors to the DNA mixture could not be interpreted. The Government's results were inconclusive as to who contributed to the DNA mixture found on the accused. The Defense evidence is more definitive that the children's DNA were not on the accused. But the probative weight of the Defense evidence is lowered with the proffered evidence that the accused had exercised, showered and changed clothes between the time of the alleged assaults and the scrotal swabs being taken. The DNA evidence collected from the accused's scrotal swabs is not "linchpin" evidence for either side.

The Court further finds that denial of the additional expert witness will not result in an unfair trial. The Defense has its own DNA expert who can testify regarding the Government's evidence. Ms. [redacted] has the ability to educate the fact-finder on how the DNA evidence should be applied or weighed in this case. An additional expert witness ultimately would not be necessary to help the trier of fact understand the evidence. While it could prove helpful for an additional expert to review the evidence in this case, the Defense has only demonstrated a mere possibility of assistance, not necessity.

Because of the low probative weight of the testimony of the requested Defense expert, any probative value of such testimony is outweighed by considerations of undue delay and confusion of the issues. The Defense has had the Government's DNA evidence for over 8 months prior to seeking the assistance of [redacted] With Mr. [redacted] not being available for the current trial dates, the time necessary to present this evidence will delay the trial for another two to five months. The accused has been in pre-trial confinement since 15 October 2019. The intervening circumstances of the accused exercising, showering and changing clothes lowers the probative weight and value of the Defense evidence. For these reasons the Court finds that the probative value of the additional expert testimony is substantially outweighed by considerations of undue delay and danger of confusion of the issues.

4. **Ruling**. The Defense motion is DENIED.

So ordered this 4th day of January, 2021.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

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

UNITED STATES	)	
	)	**RULING – AMENDED DEFENSE MOTION FOR APPROPRIATE RELIEF (CONTINUANCE REQUEST)**
v.	)	
	)	
MICHAEL A. TRUE	)	
CPL/E-4 USMC	)	**6 JANUARY 2021**

1. **Nature of Motion**. On 5 January 2021, the Defense moved the Court for a continuance in this case. The Government did not oppose the motion.

2. **Findings of Fact**.

a. The accused is charged with 10 specifications of child rape, one specification of sexual assault of a child, two specifications of sexual abuse of a child, three specifications of communicating a threat, three specifications of extortion, four specifications of obstruction of justice, one specification of abusive sexual contact, one specification of assault consummated by a battery upon a spouse and one specification of domestic violence in violation of Articles 120, 120b, 115, 127, 131b, 128b and 128, Uniform Code of Military Justice. All the charges were referred to General Court-Martial on 4 March 2020.

b. The case was originally docketed for trial 13-17 July 2020. Due to the Covid-19 pandemic, the Court redocketed the trial for 21-25 September 2020. On 30 August 2020, the Court granted a Government request to continue the trial to 18-22 January 2021. The current trial dates are 15 – 27 January 2021.

c. The Defense has not previously submitted a continuance request.

d. On 27 November 2019 and 28 January 2020, USACIL provided DNA reports in this case. The reports show that a DNA profile consistent with the accused was found on both the vaginal swab and external genital swab samples taken from [redacted] one of the alleged child victims. The USACIL reports also show that the accused could not be excluded from the partial Y-STR DNA profile found on the external genital swabs and perianal swabs taken from [redacted] the other alleged child victim in this case. Lastly, the USACIL reports show that a DNA mixture was detected from the scrotal swabs of the accused and it was interpreted as originating from two individuals. However, USACIL could not interpret the contributing profile not assumed to be the accused.

e. The alleged child victims in this case, [redacted] made their disclosures on 29 September 2019. Both children underwent a child forensic interview with Ms. [redacted] on 30 September 2019. [redacted] underwent a second forensic interview with Ms. [redacted] on 21 November 2019.

f. On 5 March 2020, the day after referral of charges, the convening authority approved Ms. [redacted] to serve as a Defense expert consultant in the field of forensics and DNA. Ms [redacted] was initially approved for 10 hours of pre-trial consultation. On 4 May 2020, the Court granted an additional 10 hours of consultation with Ms. [redacted] bringing the total hours of approved defense consultation with Ms. [redacted] to 20 hours.

g. The Defense had not sought any additional pre-trial consultation hours with Ms. [redacted] until November 2020 when they requested the Convening Authority fund Ms [redacted] as an expert witness for trial. The Defense request for expert witness included a request for two additional hours of pre-trial telephonic consultation with Ms. [redacted] as well as her trial presence.

h. In April 2020, Dr. [redacted] began consulting with the Defense as a granted expert in forensic psychology. Dr. [redacted] was initially approved for 20 hours of pre-trial consultation and it appears that on 13 July 2020 she was approved for an additional 20 hours, bringing the total hours of approved defense consultation with Dr [redacted] to 40 hours. On 24 July 2020, Dr. [redacted] testified at an Article 39(a) hearing regarding a Defense motion to compel additional consultation hours over the 40 approved hours. At the time of the 24 July hearing, Dr. [redacted] had used approximately 18 hours of the 40 approved hours. During those 18 hours, she had reviewed the videos of the child forensic interviews. In response to the Court's questions, Dr. [redacted] stated that she was willing to work with the Court to do a "20 hour slot" to report what she had done and what more needed to be done, so "the Court is knowing that it's not wasting its money in any type of fashion."

i. In denying the Defense motion to compel additional consultation hours, the Court noted that Dr. [redacted] still had 22 unused hours. The Court stated that the Defense was granted leave to seek more time once Dr. [redacted] utilized those remaining 22 hours.

j. As of October 2020, it appears that Dr. [redacted] had used approximately 36 consultation hours.

k. On 9 November 2020, the Defense requested the Convening Authority fund Dr. [redacted] as an expert witness at trial. The Defense requested funding for Dr. [redacted] travel, per diem and fees for five days of trial observation/testimony. The Defense did not request that the Convening Authority fund additional pre-trial consultation hours with Dr. [redacted] in this request.

l. After the Convening Authority only approved four of the five requested trial observation/testimony days for Dr. [redacted], the Defense moved to compel the additional trial day in its 10 December 2020 Motion for Additional Funding for Expert Witnesses. At the same time, and for the first time since July, the Defense moved to compel an additional 40 hours of pre-trial consultation with Dr. [redacted]

m. The December filings were established in advance of a 21 December 2020 Article 39(a) hearing.

n. Ms. [redacted] was identified in initial discovery as the individual who completed the intake portion of the Hawaii State Medical Record and Sexual Assault Information Forms for both [redacted] and [redacted] upon their arrival at [redacted] on 30 September 2019. Ms. [redacted] signed both BS01-0010 and BS01-0031. NCIS reported in both BS01-008 and BS01-0030 that they obtained the State of Hawaii Sexual Assault Forensic Examination Kit and all associated paperwork from Ms. [redacted], who they identified as a Case Worker, Sexual Assault Response Team.

o. On 4 January 2021, the Court ruled that an expert witness from [redacted] was not necessary.

p. The accused has been in pre-trial confinement since 15 October 2019.

3. **Statement of the Law**

Article 40, Uniform Code of Military Justice provides that "[t]he military judge. . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." In determining whether a continuance is appropriate under the circumstances of a particular case, the factors articulated in *U.S. v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) are particularly helpful. The factors are "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *Id.*

4. **Analysis and Conclusions of Law**

The Defense has not established reasonable cause to justify a continuance.

First, the Defense claims it has had insufficient opportunity to prepare for trial. The Defense argues that consultation funding for Dr. [redacted] has been an ongoing point of litigation since summer 2020 and that the granted hours have been insufficient. However, the Government had approved 40 consultation hours with Dr. [redacted] and as of mid-December 2020, the Defense had used 38 hours of the granted time. The Defense says that they have had to "triage" the insufficient time given, but since July 2020, the Court had granted leave to the Defense to request additional time once Dr. [redacted] utilized the last "20 hour slot." There has been no ongoing litigation regarding consultation funding for Dr. [redacted] The Defense used its 40 consultation hours, then asked the Convening Authority to fund Dr. [redacted] as an expert witness. The only Defense request for additional consultation hours since July was made directly to the Court on 10 December. This 10 December motion requested 40 additional hours with Dr. [redacted]. The Court granted 10 additional hours of consultation with Dr. [redacted] because the Defense admitted at the 21 December Article 39(a) hearing that during the last 10 months since this case was referred, and during the last five months since Dr. [redacted] had reviewed the videos of the child forensic

interviews, they had not yet spoken to the two child forensic interviewers, [redacted] and [redacted]. Despite asking for 40 consultation hours, the Defense now states that Dr. [redacted] is unavailable for even 10 hours of consultation prior to the current trial dates.

Second, the Defense claims that there are still outstanding issues they need to resolve regarding the DNA evidence in this case. The Defense makes no claim that they had insufficient time to consult with Ms. [redacted] their DNA expert. Regardless, the Court granted 10 additional hours with Ms. [redacted] because it believes the DNA evidence in this case is significant. However, it is the DNA evidence found on the children that is significant. What the Defense seeks a continuance for is to pursue additional information regarding DNA evidence found on the accused. The Defense has had the Government's DNA evidence for over 10 months. It took nine months before the Defense decided to investigate the DNA evidence further. What the Defense discovered to the Government the month prior to trial, information regarding the accused's scrotal swabs, the Court found to have low probative value.

Lastly, the state of the Government's evidence in this case has remained fairly constant. The Government's evidence has been through an Article 32 preliminary hearing. The parties conducted four Article 39(a) hearings to litigate 17 motions. The Court does not find any issue of surprise or issues regarding the nature of the evidence in this case that would necessitate a continuance. Despite the Defense arguments to the contrary, there is no new evidence or new witness that is of such significance that it would alter the evidentiary landscape in the case. The articulated bases for this request are inadequate to establish reasonable cause for a continuance.

This is the first continuance requested by the Defense. The Government does not oppose the request and indicates that its witnesses are all available on the requested trial dates of 12-24 March 2021. The Court will grant the Defense continuance and set new trial dates for 12-24 March 2021. Final pre-trial matters will be due 26 February 2021. Members questionnaires will be due by 5 March 2021. The Defense is directed to provide the Court with an acknowledgement signed by the Accused that he has been consulted regarding this continuance and that he consents to the delay.

5. **Ruling**. The Defense motion for a continuance is GRANTED.

So ordered this 6th day of January 2021.

[redacted]

ANN K. MINAMI
CAPT, JAGC, USN
Military Judge

Appellate Exhibit XCV
Page 4 of 4

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
TRUE, MICHAEL, A.	Marine Corps	E-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
[redacted]	General	Judge Alone - MJA16	Mar 15, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	16 Years	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
516	0	516 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
MANN, MELANIE, J.	Marine Corps	O-5	Mar 15, 2021	

37. NOTES: The accused is prohibited to receive, posses, ship, or transport firearms or ammunition pursuant to 18 USC 922g(1). Forum was Judge Alone pursuant to the plea agreement.

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 plea GUILTY findings GUILTY	120b	Specification 1:	**Not Guilty**	Not Guilty			120BB1
		Offense description	Rape of a child				
		Specification 2:	**Not Guilty**	Not Guilty			120BB1
		Offense description	Rape of a child				
		Specification 3:	**Not Guilty**	Not Guilty			120BB1
		Offense description	Rape of a child				
		Specification 4:	**Guilty**	Guilty			Empty
		Offense description	Sexual abuse of a child involving sexual contact				
		Specification 5:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by using force against any person				
		Specification 6:	**Guilty by E&S**	Guilty by E&S			120BB3
		Offense description	Sexual assault of a child				
		Exceptions and Substitutions	Except for the words "between on or about 1 August 2019 and on or about 7 September 2019"; substituting the words "on or about 29 September 2019".				
		Specification 7:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by using force against any person				
		Specification 8:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by using force against any person				
		Specification 9:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by using force against any person				
		Specification 10:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by using force against any person				
		Specification 11:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by threatening or placing that child in fear				
		Specification 12:	**Not Guilty**	Not Guilty			120BB2
		Offense description	Rape of a child by threatening or placing that child in fear				
		Specification 13:	**Not Guilty**	Not Guilty			Empty
		Offense description	Sexual abuse of a child involving sexual contact				
Charge II plea Not Guilty findings Not Guilty	115	Specification 1:	**Not Guilty**	Not Guilty			134-X2
		Offense description	Communicating a threat				
		Specification 2:	**Not Guilty**	Not Guilty			134-X2
		Offense description	Communicating a threat				
		Specification 3:	**Not Guilty**	Not Guilty			134-X2
		Offense description	Communicating a threat				
Charge III							

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
plea W&D findings W&D	119b	Specification 1:	Not Guilty	W/D			134-F2
		Offense description:	Child endangerment by design				
		Withdrawn and Dismissed:	Without Prejudice				
		Specification 2:	Not Guilty	W/D			134-F2
		Offense description:	Child endangerment by design				
		Withdrawn and Dismissed:	Without Prejudice				
Charge IV plea Not Guilty findings Not Guilty	127	Specification 1:	Not Guilty	Not Guilty			127---
		Offense description:	Extortion				
		Specification 2:	Not Guilty	Not Guilty			127---
		Offense description:	Extortion				
		Specification 3:	Not Guilty	Not Guilty			127---
		Offense description:	Extortion				
Charge V plea Not Guilty findings Not Guilty	131b	Specification 1:	Not Guilty	Not Guilty			134-U2
		Offense description:	Obstructing justice				
		Specification 2:	Not Guilty	Not Guilty			134-U2
		Offense description:	Obstructing justice				
		Specification 3:	Not Guilty	Not Guilty			134-U2
		Offense description:	Obstructing justice				
		Specification 4:	Not Guilty	Not Guilty			134-U2
		Offense description:	Obstructing justice				
Additional Charge plea Not Guilty findings Not Guilty	128	Specification:	Not Guilty	Not Guilty			Empty
		Offense description:	Simple assault upon a child under the age of 16 or spouse or intimate partner or immediate family meml				
Additional Charge I plea Not Guilty findings Not Guilty	120	Specification:	Not Guilty	Not Guilty			120AA4
		Offense description:	Abusive sexual contact without the consent of the other person				
Additional Charge II plea Guilty findings Guilty	128b	Specification:	Guilty by E&S	Guilty by E&S			128B1A
		Offense description:	Domestic Violence - commission of violent offense				
		Exceptions and Substitutions:	Expect for the word "strangle", substituting the words "touched the shoulders of". Of the expected words, NOT GUILTY; of the specification as excepted and substituted, GUILTY.				

MILITARY JUDGE ALONE SEGMENTED SENTENCE					
SECTION J - SENTENCING					
CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I plea GUILTY findings GUILTY	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
	Specification 3:	N/A	N/A	N/A	N/A
	Specification 4:	16 Years	All other charges	N/A	N/A
	Specification 5:	N/A	N/A	N/A	N/A
	Specification 6:	16 Years	All other charges	N/A	N/A
	Specification 7:	N/A	N/A	N/A	N/A
	Specification 8:	N/A	N/A	N/A	N/A
	Specification 9:	N/A	N/A	N/A	N/A
	Specification 10:	N/A	N/A	N/A	N/A
	Specification 11:	N/A	N/A	N/A	N/A
	Specification 12:	N/A	N/A	N/A	N/A
	Specification 13:	N/A	N/A	N/A	N/A
Charge II plea Not Guilty findings Not Guilty	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A			

Specification 3:	Example: all others	Example: I.2, I.4, II.1	

SECTION J - SENTENCING

~~Charge III~~ plea W&D findings W&D	Specification 1:	Example: all others	Example: I.2, I.4, II.1
	Specification 2:	Example: all others	Example: I.2, I.4, II.1
Charge IV plea Not Guilty findings Not Guilty	Specification 1:	Example: all others	Example: I.2, I.4, II.1
	Specification 2:	Example: all others	Example: I.2, I.4, II.1
	Specification 3:	Example: all others	Example: I.2, I.4, II.1
Charge V plea Not Guilty findings Not Guilty	Specification 1:	Example: all others	Example: I.2, I.4, II.1
	Specification 2:	Example: all others	Example: I.2, I.4, II.1
	Specification 3:	Example: all others	Example: I.2, I.4, II.1
	Specification 4:	Example: all others	Example: I.2, I.4, II.1
Additional Charge plea Not Guilty findings Not Guilty	Specification:	Example: all others	Example: I.2, I.4, II.1
Additional Charge I plea Not Guilty findings Not Guilty	Specification:	Example: all others	Example: I.2, I.4, II.1
Additional Charge II plea Guilty findings Guilty	Specification:	Example: all others	Example: I.2, I.4, II.1

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
TRUE, MICHAEL A.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	20150810	5 YRS

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
[redacted]	General	Judge Alone - MJA16	15-Mar-2021

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.

SNM requested, through counsel, suspension of the 3 month sentence he received as a result of his plea to violating Article 128b. The crime victim did not submit any request or matters for the convening authority.

24. Convening Authority Name/Title	25. SJA Name
B.N. WOLFORD Commanding General 3d Marine Logistics Group	[redacted] Lieutenant Colonel Staff Judge Advocate, 3d Marine Logistics Group

26. SJA signature	27. Date
[redacted]	Apr 22, 2021

SECTION B - CONVENING AUTHORITY ACTION

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

In the approved pretrial agreement, the convening authority agreed to a minimum sentence of dishonorable discharge, confinement for 16 years, adjudged reduction to E-1, and no adjudged forfeitures or fines. I reviewed the clemency request, statement of trial results, and the pretrial agreement. The 3 months of confinement Detailed Defense Counsel requested to be suspended runs concurrent with the 16 year total confinement sentence, as negotiated in the pretrial agreement. The clemency request was denied via separate correspondence because it was not in the best interest of justice, the crime victims, and good order and discipline.

In the case of U.S. v. Cpl True, I have decided to take no action on the findings and sentence of the accused.

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:

Not Applicable.

30. Convening Authority's signature	31. Date
Wolford.Brian.N.[redacted] Digitally signed by Wolford.Brian[redacted] Date: 2021.04.22 14:13:24 +09'00'	Apr 22, 2021

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

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
TRUE, MICHAEL A.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	20150810	5 YRS

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
[redacted]	General	Judge Alone - MJA16	15-Mar-2021

SECTION B - ENTRY OF JUDGMENT

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

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

Charge I: Violation of Article 120b, UCMJ
Plea: Guilty Finding: Guilty
Specification 1: Rape of a child
Plea: Not Guilty Finding: W/D
Specification 2: Rape of a child
Plea: Not Guilty Finding: W/D
Specification 3: Rape of a child
Plea: Not Guilty Finding: W/D
Specification 4: Sexual abuse of a child involving sexual contact
Plea: Guilty by exception Finding: Guilty by exception*
Specification 5: Rape of a child by using force against any person
Plea: Not Guilty Finding: W/D
Specification 6: Sexual assault of a child
Plea: Guilty by E&S Finding: Guilty by E&S**
Specification 7: Rape of a child by using force against any person
Plea: Not Guilty Finding: W/D
Specification 8: Rape of a child by using force against any person
Plea: Not Guilty Finding: W/D
Specification 9: Rape of a child by using force against any person
Plea: Not Guilty Finding: W/D
Specification 10: Rape of a child by using force against any person
Plea: Not Guilty Finding: W/D
Specification 11: Rape of a child by threatening or placing that child in fear
Plea: Not Guilty Finding: W/D
Specification 12: Rape of a child by threatening or placing that child in fear
Plea: Not Guilty Finding: W/D
Specification 13: Sexual abuse of a child involving sexual contact
Plea: Not Guilty Finding: W/D

* Continued on page 4

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

Military Judge adjudged the following sentence:
-Dishonorable Discharge, Reduction to E-1 and Confinement as follows:

Charge I, Specification 4: 16 Years

Charge I, Specification 6: 16 Years

Additional Charge II, Sole Specification: 3 Months

All periods of confinement to run concurrently for total confinement of 16 Years.

The accused will be credited with having served 517 days of confinement.

Plea Agreement:
Pursuant to the plea agreement, The mandatory minimum sentence of a dishonorable discharge will be adjudged. The minimum confinement that may be awarded is 16 years and the maximum confinement that shall be awarded is 16 years. No fine shall be adjudged. Reduction to E-1.

Convening Authority's Action:
The sentence as adjudged is ordered executed. The 3 months of confinement Detailed Defense Counsel requested to be suspended runs concurrent with the 16 year total confinement sentence and is denied. Accordingly, I take no action on this case.

Sentence after CA's Action:
Dishonorable Discharge, Reduction to E-1, and16 years confinement,

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

N/A

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

N/A

15. Judge's signature:	16. Date judgment entered:
[redacted]	6 May 2021

17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

18. Judge's signature:	19. Date judgment entered:

11. Findings (Continued)

Charge II: Violation of Article 115, UCMJ
Plea: Not Guilty Finding: W/D
Specification 1: Communicating a threat
Plea: Not Guilty Finding: W/D
Specification 2: Communicating a threat
Plea: Not Guilty Finding: W/D
Specification 3: Communicating a threat
Plea: Not Guilty Finding: W/D

Charge IV: Violation of Article 127, UCMJ
Plea: Not Guilty Finding: W/D
Specification 1: Extortion
Plea: Not Guilty Finding: W/D
Specification 2: Extortion
Plea: Not Guilty Finding: W/D
Specification 3: Extortion
Plea: Not Guilty Finding: W/D

Charge V: Violation of Article 131b, UCMJ
Plea: Not Guilty Finding: W/D
Specification 1: Obstructing justice
Plea: Not Guilty Finding: W/D
Specification 2: Obstructing justice
Plea: Not Guilty Finding: W/D
Specification 3: Obstructing justice
Plea: Not Guilty Finding: W/D
Specification 4: Obstructing justice
Plea: Not Guilty Finding: W/D

Additional Charge: Violation of Article 128, UCMJ
Plea: Not Guilty Finding: W/D
Specification: Simple assault of a child under the age of 16 or spouse or intimate partner or immediate family member
Plea: Not Guilty Finding: W/D

Additional Charge I: Violation of Article 120, UCMJ
Plea: Not Guilty Finding: W/D
Specification: Abusive sexual contact without the consent of the other person
Plea: Not Guilty Finding: W/D

Additional Charge II: Violation of Article 128b, UCMJ
Plea: Guilty Finding: Guilty
Specification: Domestic Violence - commission of violent offense
Plea: Guilty by E & S Finding: Guilty by E & S***

*Except for the words "abuse, humiliate, harass, and degrade [redacted] and".

**Except for the words "between on or about 1 August 2019 and on or about 7 September 2019", substituting the words "on or about 29 September 2019".

***Except for the word "strangle", substituting the words "touched the shoulders of ". Of the expected words , NOT GUILTY; of the specification as excepted and substituted, GUILTY.

APPELLATE INFORMATION

IN UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	NMCCA No. 202100152 **APPELLANT'S MOTION FOR FIRST ENLARGEMENT** Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, March 15, 2021, and possibly additional unknown dates before a General Court-Martial convened by Commanding General, 3d Marine Logistics Group; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN presiding

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

COMES NOW the undersigned and respectfully moves for a first enlargement of time to file a brief and assignments of error. The current due date is August 3, 2021. The number of days requested is thirty. The requested due date is September 3, 2021

The current status of the case:

1. The Record was docketed on June 4, 2021.

2. The Moreno III date* is January 4, 2023.

3. Corporal True is confined. He was sentenced to sixteen years' confinement.

4. The Record contains 462 pages of transcript and 2,642 pages of unsealed transcript and exhibits. The uploaded scanned record only contains 299 pages, and the other pages are only in the hard copy record (counsel was able to make a copy). Additionally, there are approximately sixteen sealed exhibits.

5. Counsel has not completed her review of the record of trial.

Good cause exists for granting the requested enlargement because counsel needs additional time to finish reviewing the record of trial, research identified issues, and brief any assignments of error for this Court's review. This case is complex.

Respectfully submitted.

_____/s/_____
Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

* 18 months from docket date.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court via email on July 29, 2021, that a copy was uploaded into the Court's case management system on July 29, 2021, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on July 29, 2021.

_____/s/_____

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

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 1st EOT (Finnen)

Signed By: [redacted]

RECEIVED
July 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 1st EOT (Finnen)

To This Honorable Court

Attached please find a motion for a first enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

[redacted]

Subject: RULING - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 1st EOT (Finnen)

Signed By: [redacted]

MOTION GRANTED
July 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 1st EOT (Finnen)

To This Honorable Court

Attached please find a motion for a first enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

IN UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	NMCCA No. 202100152 **APPELLANT'S MOTION FOR SECOND ENLARGEMENT** Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, March 15, 2021, and possibly additional unknown dates before a General Court-Martial convened by Commanding General, 3d Marine Logistics Group; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN presiding

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

COMES NOW the undersigned and respectfully moves for a second enlargement of time to file a brief and assignments of error. The current due date is September 3, 2021. The number of days requested is thirty. The requested due date is October 3, 2021.

The current status of the case:

1. The Record was docketed on June 4, 2021.

2. The Moreno III date* is January 4, 2023.

3. Corporal True is confined. He was sentenced to sixteen years' confinement.

4. The Record contains 462 pages of transcript and 2,642 pages of unsealed transcript and exhibits. The uploaded scanned record only contains 299 pages, and the other pages are only in the hard copy record (counsel was able to make a copy). Additionally, there are approximately sixteen sealed exhibits.

5. Counsel has not completed her review of the record of trial. Counsel did make a copy of the unsealed portions of the trial that were not included in the scanned copy of the record of trial.

Good cause exists for granting the requested enlargement because counsel needs additional time to finish reviewing the record of trial, research identified issues, and brief any assignments of error for this Court's review. This case is complex because it involves allegations of multiple alleged child sexual assault victims.

Respectfully submitted.

_____/s/_____
Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374

* 18 months from docket date.

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court via email on August 30, 2021, that a copy was uploaded into the Court's case management system on August 30, 2021, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on August 30, 2021.

_____/s/_____

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

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 2nd EOT (Finnen)

Signed By: [redacted]

RECEIVED
Aug 30 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 2nd EOT (Finnen)

To This Honorable Court

Attached please find a motion for a second enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

[redacted]

Subject: RULING - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 2nd EOT (Finnen)

Signed By: [redacted]

MOTION GRANTED
Aug 30 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 2nd EOT (Finnen)

To This Honorable Court

Attached please find a motion for a second enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	NMCCA No. 202100152 **APPELLANT'S MOTION FOR THIRD ENLARGEMENT** Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, March 15, 2021, and possibly additional unknown dates before a General Court-Martial convened by Commanding General, [redacted]; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN presiding

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

COMES NOW the undersigned and respectfully moves for a third enlargement of time to file a brief and assignments of error. The current due date is October 3, 2021. The number of days requested is thirty. The requested due date is November 2, 2021.

The current status of the case:

1. The Record was docketed on June 4, 2021.

2. The Moreno III date[*] is January 4, 2023.

3. Corporal True is confined. He was sentenced to sixteen years' confinement.

4. The Record contains 462 pages of transcript and 2,642 pages of unsealed transcript and exhibits. The uploaded scanned record only contains 299 pages, and the other pages are only in the hard copy record (counsel was able to make a copy). Additionally, there are approximately sixteen sealed exhibits.

5. Counsel has not completed her review of the record of trial. Counsel has a copy of the unsealed portions of the trial that were not included in the scanned copy of the record of trial.

Good cause exists for granting the requested enlargement because counsel needs additional time to finish reviewing the record of trial, research identified issues, and brief any assignments of error for this Court's review. This case is complex because it involves allegations of multiple alleged child sexual assault victims and resulted in a lengthy sentence.

[*] 18 months from docket date.

Respectfully submitted.

9/28/2021

X Mary Claire Finnen

Mary Claire Finnen

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court via email on September 28, 2021, that a copy was uploaded into the Court's case management system on September 28, 2021, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on September 28, 2021.

9/28/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE [redacted]

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

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 3rd EOT (Finnen)

Signed By: [redacted]

RECEIVED
Sep 28 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 3rd EOT (Finnen)

To This Honorable Court

Attached please find a motion for a third enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

[redacted]

Subject: RULING - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 3rd EOT (Finnen)

Signed By: [redacted]

MOTION GRANTED
19 Oct 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 3rd EOT (Finnen)

To This Honorable Court

Attached please find a motion for a third enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	NMCCA No. 202100152 **APPELLANT'S MOTION TO REVIEW SEALED MATTERS** Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, March 15, 2021, and possibly additional unknown dates before a General Court-Martial convened by Commanding General, [redacted]; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Anne Minami, JAGC, USN presiding

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

COMES NOW the undersigned and respectfully moves, pursuant to Rule 6.2(c) of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure to examine a sealed portions of record of trial.

Specifically, counsel requests to examine the following:

1. **AE VIII Defense Motion for Appropriate Relief**

    a. Were the sealed matters

        i. Presented or reviewed by counsel at trial? **Yes.**

        ii. Reviewed in camera and then released to trial or defense counsel? **No.**

    b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

    c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **N/A**

    d. Is the matter the subject of a colorable claim of privilege? **No.**

    e. If so, who may hold such a privilege? **N/A**

    f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

    g. Are you seeking disclosure of this matter? **No.**

    h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

2. **AE IX Government Response to AE VIII.**

    a. Were the sealed matters

        i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a response to a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

3. **AE X-Victims' Legal Counsel Response to AE VIII.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a

proper fulfillment of counsel's responsibilities: **The sealed matters are a response to a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

4. **AE XV Defense Motion for Appropriate Relief.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **N/A**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

5. **AE XVI Government Response to AE XV.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a response to a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

6. **AE XVII Victims' Legal Counsel Response to AE XV.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are VLC's response to a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

7. **AE XVIII-Victims' Legal Counsel Response to XV (Cont.).**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are VLC's response to a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

8. **AE XLIII-Notice and Summary of Rulings, Defense Motion for Appropriate Relief (M.R.E. 513).**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters the military judge's notice and summary of rulings on the Defense motion for appropriate relief. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **N/A**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

9. **AE XLV-Defense Motion for Reconsideration of Defense Motion for Appropriate Relief.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a motion to reconsider a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

10. **AE XLVI-Government Response to AE XLV.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are the government's response to the defense's motion to reconsider a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

11. **AE XLVII-Victims' Legal Counsel's Response to AE XLV.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are the VLC's response to a defense motion for reconsideration of a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

12. **AE LXXIV-Military Judge's Ruling on Defense Motion for Reconsideration of In Camera Review of Mental Health Records.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a

proper fulfillment of counsel's responsibilities: **The sealed matters are a the military judge's ruling on a defense motion for reconsideration of a motion filed in the court below by trial defense counsel. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

13. **AE LXXXIII-Military Judge's Ruling on Defense Motion for Appropriate Relief: Pre-Admission of M.R.E. 412(b) and Defense Motion to Compel Discovery under 701.**

a. Were the sealed matters

   i. Presented or reviewed by counsel at trial? **Yes.**

   ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are the military judge's resolution of the defense's motion to admit matters under M.R.E. 412 and the defense's motion to compel**

discovery. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

14. **AE LXXXIV-Military Judge's Ruling on Defense Motion for Appropriate Relief: M.R.E. 513.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are a the military judge's ruling on defense's motion under M.R.E. 513. Access to this ruling is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **N/A**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

15. **All trial transcript from the closed hearings conducted in accordance with M.R.E. 412 and 513.**

a. Were the sealed matters

i. Presented or reviewed by counsel at trial? **Yes.**

ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are the trial transcript of all the closed hearings conducted in accordance with M.R.E. 412 and M.R.E. 513. Access to these matters is necessary to evaluate the Court's resolution of the matters raised in the motion, as well as evaluating trial defense counsel's performance.**

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **NA**

d. Is the matter the subject of a colorable claim of privilege? **No.**

e. If so, who may hold such a privilege? **N/A**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **N/A**

g. Are you seeking disclosure of this matter? **No.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **N/A**

Respectfully submitted,

Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed to the Court on November 17, 2021, that a copy was uploaded into the Court's case management system on November 17, 2021, and that a copy of the foregoing was transmitted by electronic means with the consent of the Government to Code 46 on November 17, 2021.

[redacted]

Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion to Examine Sealed Material

Signed By: [redacted]

RECEIVED
Nov 17 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion to Examine Sealed Material

To This Honorable Court

Attached please find a motion to examine sealed material ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing tomorrow when the Court opens.

Very Respectfully,

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

[redacted]

Subject: RULING - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion to Examine Sealed Material

Signed By: [redacted]

MOTION GRANTED
17 NOV 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion to Examine Sealed Material

To This Honorable Court

Attached please find a motion to examine sealed material ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing tomorrow when the Court opens.

Very Respectfully,

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

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	NMCCA No. 202100152 **APPELLANT'S MOTION FOR FOURTH ENLARGEMENT** Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, March 15, 2021, and possibly additional unknown dates before a General Court-Martial convened by Commanding General, [redacted]; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN presiding

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

COMES NOW the undersigned and respectfully moves for a fourth enlargement of time to file a brief and assignments of error. The current due date is November 2, 2021. The number of days requested is thirty. The requested due date is December 2, 2021.

The current status of the case:

1. The Record was docketed on June 4, 2021.

2. The Moreno III date* is January 4, 2023.

3. Corporal True is confined. He was sentenced to sixteen years' confinement.

4. The Record contains 462 pages of transcript and 2,642 pages of unsealed transcript and exhibits. The uploaded scanned record only contains 299 pages, and the other pages are only in the hard copy record (counsel has made a copy). Additionally, there are approximately sixteen sealed exhibits.

5. Counsel has not completed her review of the record of trial.

Good cause exists for granting the requested enlargement because counsel needs additional time to finish reviewing the record of trial, research identified issues, and brief any assignments of error for this Court's review. This case is complex because it involves allegations of multiple alleged child sexual assault victims and resulted in a lengthy sentence.

Counsel's work hours were significantly impacted in September and early October by her children's two exposures to Covid, which prevented them from attending daycare for three weeks out of those two months. Counsel has returned to normal working hours, which are approximately 40 hours per week.

* 18 months from docket date.

Counsel is currently working on completing record review and drafting assignments of error for two clients who pleaded not guilty at complex court-martials (which involve, among other things, multiple victims and DNA and mental health evidence—which are at least some of the reasons these cases are complex). She was detailed to those cases before this one, and those clients also remain confined. Client has a total of five cases in addition to this one for which she is the primary counsel. Counsel has not made significant progress in this case in the previous month because she is trying to submit other cases to this Court so that she can turn her full attention to this case; bouncing between multiple cases is challenging and Counsel tends to lose time reviewing notes and parts of the record she has already reviewed when she tries to review more than two cases at the same time. Counsel has reviewed some of the record to familiarize herself with the case.

Counsel has not had significant collateral duties over the past enlargement period. Counsel has assisted other counsel in the office by preparing for and attending approximately nine moots for four different cases. Because of the volume of oral arguments in October, most (likely all) of Code 45's attorneys prepared for and attended multiple moots in multiple cases.

Appellant has been consulted and concurs with this request for an enlargement of time.

Respectfully submitted.

10/28/2021

X Mary Claire Finnen

Mary Claire Finnen

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court via email on October 28, 2021, that a copy was uploaded into the Court's case management system on October 28, 2021, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on October 28, 2021.

10/28/2021

X Mary Claire Finnen

Mary Claire Finnen

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

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 4th EOT (Finnen)

Signed By: [redacted]

RECEIVED
Oct 28 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 4th EOT (Finnen)

To This Honorable Court

Attached please find a motion for a fourth enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

[redacted]

202100152 - Motion for 4th EOT (Finnen)

Signed By: [redacted]

MOTION GRANTED
9 NOV 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - Motion for 4th EOT (Finnen)

To This Honorable Court

Attached please find a motion for a fourth enlargement of time ICO US. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

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

Before Panel No. 2

UNITED STATES *Appellee* v. **Michael A. True** Corporal (E-4) U.S. Marine Corps, *Appellant*	**SUBMISSION OF CASE WITHOUT SPECIFIC ASSIGNMENTS OF ERROR** NMCCA Case No. 202100152 Marine Corps Base Hawaii, Hawaii on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, and 15 March 2021 before a General Court-Martial convened by Commanding General, [redacted]; military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN presiding

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

Corporal Michael True, through counsel, submits his case on its merits without specific assignment of error or brief. He has examined the record of trial and does not admit the findings and sentence are correct in law or fact.

Respectfully submitted.

[redacted]

Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100

Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were electronically delivered to the Court on December 2, 2021, that a copy was uploaded into the Court's case management system on December 2, 2021, and that a copy of the foregoing was electronically delivered to the Appellate Government Division on December 2, 2021.

[redacted]

Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - D - Merit Submission

Signed By: [redacted]

RECEIVED
Dec 02 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

[redacted]

Subject: ELECTRONIC FILING Panel 2 United States v. Cpl True NMCCA No. 202100152 - D - Merit Submission

To This Honorable Court:

Attached please find Appellant's merit submission ICO U.S. v. Cpl Michael True, NMCCA No. 202100152, for electronic filing.

Very Respectfully,

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

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES

Appellee

v.

Michael A. TRUE
Corporal (E-4)
U.S. Marine Corps
Appellant

NMCCA No. 202100152

MOTION TO WITHDRAW AS APPELLATE DEFENSE COUNSEL

Marine Corps Base Hawaii, Hawaii, on 4 May 2020, 24 July 2020, 23 September 2020, 21 December 2020, and 15 March 2021, before a General Court-Martial convened by Commanding General, [redacted] military judges Lieutenant Colonel Wilbur Lee, USMC, Captain Don King, JAGC, USN, and Captain Minami, JAGC, USN, presiding

COMES NOW undersigned counsel, pursuant to Rule 13.2 of this Court's Rules of Practice and Procedure, and requests leave to withdraw from representation in the above-captioned case.

As the reason for withdrawal, undersigned counsel submits that he will execute a permanent change of station orders on 14 January 2022. Major Mary Claire Finnen, USMC, has been assigned as successor counsel. Undersigned counseland Major Finnen have conducted a thorough turnover of Appellant's case. In addition, Appellant has been contacted and consents to undersigned counsel's withdrawal from the case.

WHEREFORE, undersigned counsel respectfully requests that this Court grant this motion.

Respectfully submitted.

Electronic original certified as true
and correct by the undersigned
Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's filing address on January 12, 2022, that a copy was uploaded into the Court's case management system on January 12, 2022, *and* that a copy of the foregoing was emailed to Director and Deputy Director, Appellate Government Division, on January 12, 2022.

Electronic original certified as true
and correct by the undersigned
Marcus N. Fulton
CAPT, JAGC, USN
Appellate Defense Counsel

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. True - NMCCA 202100152 - D Mtn to Withdraw as ADC (Fulton)

Signed By: [redacted]

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

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

[redacted]

Subject: FILING - Panel 2 - U.S. v. True - NMCCA 202100152 - D Mtn to Withdraw as ADC (Fulton)

Good afternoon,

Please see attached filing.

Very respectfully,

[redacted]
Office Manager
Navy-Marine Corps Appellate Review Activity
Appellate Defense Division (Code 45)
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

[redacted]

[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. True - NMCCA 202100152 - D Mtn to Withdraw as ADC (Fulton)

Signed By: [redacted]

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

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

[redacted]

Subject: FILING - Panel 2 - U.S. v. True - NMCCA 202100152 - D Mtn to Withdraw as ADC (Fulton)

Good afternoon,

Please see attached filing.

Very respectfully,

[redacted]
Office Manager
Navy-Marine Corps Appellate Review Activity
Appellate Defense Division (Code 45)
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

[redacted]

United States Navy–Marine Corps Court of Criminal Appeals

Before
MONAHAN, STEPHENS, and DEERWESTER
Appellate Military Judges

UNITED STATES
Appellee

v.

Michael A. TRUE
Corporal (E-4), U.S. Marine Corps
Appellant

No. 202100152

Decided: 13 June 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Wilbur Lee (arraignment and motions)
Donald C. King (motions)
Ann K. Minami (motions and trial)

Sentence adjudged 15 March 2021 by a general court-martial convened at Joint Base Pearl Harbor Hickam, Hawaii, and Marine Corps Base Hawaii, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for sixteen years, and a dishonorable discharge.

For Appellant:
Major Mary C. Finnen, USMC

This opinion does not serve as binding precedent under NMCCA Rule of Appellate Procedure 30.2(a).

PER CURIAM:

After careful consideration of the record, submitted without assignment of error, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[1]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

[redacted]

KYLE D. MEEDER
Interim Clerk of Court

[1] Articles 59 & 66, Uniform Code of Military Justice, 10 U.S.C. §§ 859, 866.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Michael A.
True,
Appellant

USCA Dkt. No. 22-0240/MC
Crim.App. No. 202100152

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is by the Court, this 24th day of August, 2022,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Finnen)
Appellate Government Counsel

REMAND

THERE WERE NO REMANDS

SUPPLEMENTAL COURT-MARTIAL ORDER