[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Chege	Daniel	K.	[redacted]	Cpl E-4
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

MALS-16, MAG-16, 3D MAW	U.S. Marine Corps	MCAS Miramar, California
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM)
(GCM, SPCM, or SCM)

COURT-MARTIAL

Convened by Commanding General
(Title of Convening Authority)

3rd Marine Aircraft Wing
(Unit/Command of Convening Authority)

Tried at

MCAS Miramar; MCB Camp Pendleton, California
(Place or Places of Trial)

On 28 July; 3 September; 19 & 30 November; 1-3, 6-8 December 2021
(Date or Dates of Trial)

Companion and other cases: None.
(Rank, Name, DOD ID No., (if applicable), or enter "None")

[redacted]

CONVENING ORDER

UNITED STATES MARINE CORPS
3D MARINE AIRCRAFT WING
MARINE CORPS AIR STATION MIRAMAR
P. O. BOX 452022
SAN DIEGO, CA 92145-2022

IN REPLY REFER TO
5800
SJA
GCMCO #1A-21
23 NOV 21

GENERAL COURT-MARTIAL AMENDING ORDER 1A-21

The following members are detailed to the General Court-Martial convened by General Court-Martial convening order 1-21, dated 4 Aug 2021, for the trial of U.S. v. Corporal Daniel K. Chege, USMC.

Lieutenant Colonel [redacted] USMC;
Lieutenant Colonel [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Chief Warrant Officer 2 [redacted] USMC;
Warrant Officer [redacted] USMC;
Master Gunnery Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Gunnery Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Sergeant [redacted] USMC.

The following members previously detailed to the General Court-Martial convened by order 1-21, dated 4 Aug 2021, have been relieved for the trial of U.S. v. Corporal Daniel K. Chege, USMC.

Colonel [redacted] USMC;
Lieutenant Colonel [redacted] USMC;
Lieutenant Colonel [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC; and
Captain [redacted] USMC.

[redacted]

The court-martial as amended and relieved is comprised of:

Lieutenant Colonel [redacted] USMC;

000710

Appellate Exhibit XLVI (46)
Page 1 of 2

UNITED STATES MARINE CORPS
3D MARINE AIRCRAFT WING
MARINE CORPS AIR STATION MIRAMAR
P. O. BOX 452022
SAN DIEGO, CA 92145-2022

Lieutenant Colonel [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Chief Warrant Officer 2 [redacted] USMC;
Warrant Officer [redacted] USMC;
Master Gunnery Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Gunnery Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Sergeant [redacted] USMC.

No alternate member is authorized if excess members remain upon completion of the voir dire process.

[redacted]
B. J. GERING [redacted]
Major General
U.S. Marine Corps
Commanding General

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
CHEGE, Daniel K.	[redacted]	Cpl	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Marine Aviation Logistics Squadron 16, Marine Aircraft Group 16, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, California	01 Aug 16	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	None.	$2,713.50	IHCA N/A	18 Jun 20 - 19 Jun 20 19 Jun 20 - Present

II. CHARGES AND SPECIFICATIONS

10. **CHARGE: VIOLATION OF THE UCMJ, ARTICLE 120**

Specification 1 (Sexual Assault): In that Corporal Daniel K. Chege, U.S. Marine Corps, on active duty, did, at or near San Diego, CA, on or about 5 July 2019, on divers occasions, commit a sexual act upon Lance Corporal [redacted] U.S. Marine Corps, by penetrating Lance Corporal [redacted]s vulva with said accused's penis, without the consent of Lance Corporal [redacted].

Specification 2 (Sexual Assault): In that Corporal Daniel K. Chege, U.S. Marine Corps, on active duty, did, at or near San Diego, CA, on or about 5 July 2019, on divers occasions, commit a sexual act upon Lance Corporal [redacted], U.S. Marine Corps, by penetrating Lance Corporal [redacted]'s vulva with his body part to wit: his hand, with an intent to arouse the sexual desire of Lance Corporal [redacted], without the consent of Lance Corporal [redacted]

(END)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-4	HqHqRon, MCAS Miramar

d. SIGNATURE OF ACCUSER	e. DATE
[redacted]	20210316

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 16th day of MARCH, 20 21, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

A. L. SWINK	HqHqRon, MCAS Miramar
Typed Name of Officer	*Organization of Officer*
CAPTAIN, USMC	TRIAL COUNSEL
Grade and Service	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*
[redacted]	

DD FORM 458, MAY 2000

ORIGINAL

12. On 17 March , 20 21 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of ~~Immediate Commander~~

MAG-16, 3d MAW, MCAS Miramar, CA
Organization of Immediate Commander

CAPTAIN, USMC

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1518 hours, 16 March 20 21 at MAG-16
Designation of Command or

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

FOR THE[1] COMMANDING OFFICER

S. R. MCKENNA
Typed Name of Officer

LEGAL OFFICER
Official Capacity of Officer Signing

CAPTAIN, USMC

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Third Marine Aircraft Wing, MCAS Miramar	San Diego, CA	JUN 10 2021

Referred for trial to the General court-martial convened by GCMCO #1-19

Dated 15 January 20 19 subject to the following instructions[2]

by
Command or Order
of

C. J. Mahoney
Typed Name of Officer

Commanding General
Official Capacity of Officer Signing

Major General

[redacted]

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

S. L. BRIDGES
Typed Name of Trial Counsel

FIRST LIEUTENANT, USMC
Grade or Rank of Trial Counsel

[redacted]

FOOTNOTES *1 – When 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

ORIGINAL

TRIAL COURT MOTIONS & RESPONSES

UNITED STATES **v.** **DANIEL K. CHEGE** **CORPORAL** **U.S. MARINE CORPS**	)	**GOVERNMENT MOTION FOR APPROPRIATE RELIEF (COMPEL DISCOVERY)** **26 July 2021**

1. **Nature of Motion.** In accordance with Rules for Courts-Martial (R.C.M.) 906(b)(7) , 701(g)(3)(A), and 701(g)(3)(D), the Government moves the Court to order the Naval Criminal Investigative Service (NCIS) to provide Trial Counsel a copy of NCISRA PENSACOLA CASE FILE: [redacted]

2. **Summary of Facts.**

a. LCpl [redacted] is the named victim in the charge and specifications of violations of Article 120, UCMJ (Sexual Assault) in the case of United States v. Corporal Daniel K. Chege, USMC.

b. LCpl [redacted] was also a named victim in an investigation of Private First Class [redacted] USMC for alleged violations of Article 120, UCMJ (Abusive Sexual Contact).

c. A four page NCIS summary of this investigation was disclosed to Defense by Trial Counsel. (Encl 1, 2)

d. On 7 May 2021, Defense requested the Government to produce the "entire NCIS Agent case file related to the investigation of PFC [redacted]" (Encl 3)

e. On 19 May 2021, the request was granted by Trial Counsel. (Encl 4)

f. On 24 May 2021, Trial Counsel emailed a request to NCIS to obtain a copy of the requested file. (Encl 5)

g. On 26 May 2021, Trial Counsel provided NCIS a written request which included the discovery request by Defense and the Government's response granting the request. (Encl 5)

h. On 27 May 2021, NCIS informed Trial Counsel that NCIS would "need a court order compelling the disclosure of the other case involving V/[redacted](Encl 5)

3. **Statement of Law.** R.C.M. 701(g)(3)(A) permits a military judge to order a party to permit discovery in order to comply with R.C.M. 701. Further, R.C.M. 701(g)(3)(D) permits a military judge to "enter such other order as is just under the circumstances."

4. **Discussion.** Here, the Government disclosed a part of the NCIS investigation requested by Defense. Additionally, Government granted the Defense request for the complete case file in accordance with R.C.M. 701(a)(2)(A)(i). In light of NCIS's response to Trial Counsel's request, the Government now seeks the aid of the Court in fulfilling its disclosure obligation.

5. **Burden of Proof.** The burden of proof is on the moving party to demonstrate by a preponderance of the evidence why such order is just under the circumstances. *See* R.C.M. 905(c) and 701(g)(3)(D).

6. **Relief Requested.** The Government respectfully requests the Court order NCIS to provide Trial Counsel a copy of NCISRA PENSACOLA CASE FILE: [redacted]

7. **Evidence.**

- Enclosure 1: TSO Discovery Receipt dated 16 March 2021
- Enclosure 2: Closed NCIS ROI dated 27 July 2020 [redacted]
- Enclosure 3: Defense Supplemental Discovery Request dated 7 May 2021

- Enclosure 4: Government Supplemental Discovery Response dated 19 May 2021

- Enclosure 5: Emails between Trial Counsel and NCIS regarding disclosure of NCISRA PENSACOLA CASE FILE: S[redacted]PFC[redacted]

[redacted]

8. **Oral Argument.** The Government does not desire oral argument on this motion.

[redacted]
A. L. SWINK
Captain, USMC
Trial Counsel

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

U N I T E D S T A T E S **v.** **DANIEL K. CHEGE** **CORPORAL, USMC**	**GOVERNMENT MOTION FOR APPROPRIATE RELIEF** **(Excludable Delay)** **6 JULY 21**

1. **Nature of Motion.** In accordance with WJCR 6.18, the Government moves the Court for a finding of 22 days of excludable delay attributable to the defense in the above captioned case.

2. **Summary of Facts.**

a. On 17 June 2021, Government requested the Court docket the arraignment in the above captioned case on 28 June 2021.

b. On 18 June 2021, the request was approved by the Court and arraignment was docketed for 28 June 2021.

c. On 21 June 2021, defense provided notice to the Court that the accused was hospitalized, and the 28 June 2021 arraignment would need to be continued.

d. On 23 June 2021, the defense provided the Court further information and stated that the accused would likely be unavailable until 10 July 2021.

e. On 23 June 2021, the Court cancelled the arraignment docketed for 28 June 2021.

f. On 1 July 2021, Government and defense submitted a joint motion for docketing to the Court with proposed trial milestones.

g. On 6 July 2021, the Court denied the joint motion for docketing.

h. Government intends to file a request, in accordance with WJCR 6.7, to docket an arraignment in the above captioned case for 20 July 2021.

3. **Statement of Law.** In the discussion for Rule for Courts-Martial 707, contained in the Manual for Courts-Martial (2019), "time requested by the defense" and "time to secure the availability of the accused" are reasons to grant a delay. Once a case is referred to court-martial, the decision to grant or deny a reasonable delay is a matter within the sole discretion of the military judge. Such a determination is to be based on the facts and circumstances then existing.

4. **Relief Requested.** The Government respectfully requests the court find excludable delay attributable to the defense for the 22 day period from 28 June 2021 to 20 July 2021.

[redacted]
A. L. SWINK
Captain, USMC
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. Daniel K. Chege Corporal U.S. Marine Corps	DEFENSE MOTION IN LIMINE TO SUPPRESS (Statements Made To Complaining Witness And [redacted] During Phone Calls) Date: 18 Aug 2021

I hereby certify that all required redactions have been made to the attached documents per Article 140a, UCMJ, JAGINST 5800.7f, and Rule 7, WJC-NMCTJ.

[redacted] 18 August 2021

Signature **Date**

Jonathan R. Walther
Print Name

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. Daniel K. Chege Corporal U.S. Marine Corps	DEFENSE MOTION IN LIMINE TO SUPPRESS (Statements Made To Complaining Witness And [redacted] During Phone Calls) Date: 18 Aug 2021

Issue Presented

Pursuant to Article 31(b) and M.R.E. 305(c), Defense respectfully requests this Court suppress any and all statements made by Corporal Daniel Chege (1) to Ms. [redacted] on 19 May 2020 and (2) to Detective [redacted] on 16 June 2020. Ms. [redacted] was an active-duty U.S. Marine at the time of the call. She called Corporal Chege at the direction of law enforcement and utilized a document, created by law enforcement, during the call. This document included fact-specific questions, answers to the suspect's expected questions, and other instructions and techniques to side-step denials or apologies. It was designed to elicit a confession. Detective [redacted] contemporaneously wrote down questions to be asked during the call. Detective [redacted]'s call with Corporal Chege was derivative of the aforementioned call. The question for the Court is whether a reasonable person in the suspect's position would have perceived the conversation with Ms. [redacted] as more than a casual conversation leading to the belief that she was acting on behalf of law enforcement. If answered in the affirmative, all statements made to Ms. [redacted] should be suppressed as they were acquired in violation of Article 31(b) rights and all statements made to Detective [redacted] should be suppressed as fruit from that poisonous tree.

1. Background:

Ms. [redacted] alleges that Corporal Chege sexually assaulted her at an off-base home on 4 July 2019. Both were active duty U.S. Marines up until Ms. [redacted] exited the service in April 2021.

[redacted] Police Department ([redacted]PD) investigated. [redacted]PD met with Ms. [redacted] on 19 May 2020 record a phone call with Corporal Chege.[1] Ms. [redacted] began setting up the call a day prior texting Corporal Chege asking if he could "talk."[2] He then tried calling Ms. [redacted] who ignored the call and texted "try later."[3] She followed up saying she would "call [tomorrow]" and asked when he usually "wake[s] up."[4] Finding that unusual, Corporal Chege responded "Why not just call when you get off work?"[5] She came up with an excuse and convinced him to receive a call from her the next day.[6] She then asked again when he planned to wake up so she could solidify a time for the call.[7] He replied with "1130."[8] Prior to 19 May 2020, Corporal Chege and Ms. [redacted] had not spoken on the phone in the preceding six months except for 16 seconds on 6 March 2020.[9] The pre-text call then occurred at approximately 1130 on 19 May 2020.

In relation to this call, the government produced a document titled "Pre-Text Questions for [redacted]." created by Detective [redacted] for Ms. [redacted][10] This document includes instructions for Ms. [redacted] to follow during the call. It instructs her to "lie[]" if Corporal Chege asks about "police involvement" or if the call is being "recorded."[11] The document teaches interrogation techniques such as starting with "rapport" building and "some casual conversation" before asking "the questions

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[1] *See* Enclosure A at BS 14.
[2] Enclosure B page 406.
[3] *See id.*
[4] *See id.* at 405.
[5] *Id.* at 404.
[6] *Id.*
[7] *See id.* at 403.
[8] *Id.*
[9] *See* Enclosure C at 52.
[10] *See* Enclosure D at BS 283-85.
[11] *Id.* at BS 283.

about what happened."[12] The document details verbatim questions to ask to start the conversation as well as questions to ask at the "crux" of the call.[13] It provides sample questions and responses based on what Corporal Chege may foreseeably say.[14] The document states Detective [redacted] "may ask [redacted] to ask a question" during the call.[15] Uniform Victim Advocate Gunnery Sergeant [redacted] confirmed Detective [redacted] wrote notes down during the call which we believe to have been questions for Ms. [redacted] to ask.[16]

Based on the transcript of the pre-text phone call, it is clear Ms. [redacted] used the document during the call. For example, the document states in bold to "[e]xplain to [Corporal Chege] how the anniversary is coming up…, and you began reflecting on the last year;" Ms. [redacted] states on the call "[a]nd, like, you know, like, the Fourth of July is coming up" and then "I'm just thinking about last year's."[17] The document states "we need to articulate the **UNABLE TO CONSENT PART**;" and Ms. [redacted] on the call explicitly asks about her ability/inability to "consent" at two separate parts, the first time as a presumed fact in a compound question.[18]

On 16 June 2020, Corporal Chege called Detective [redacted] in a response to a voicemail Detective [redacted] left him; Detective [redacted] did not advise Corporal Chege of any rights.[19] Detective [redacted] informed Corporal Chege that he was investigating a case involving Corporal Chege and Ms. [redacted] from 4 July 2019 which alerted Corporal Chege to the fact that Ms. [redacted] had likely relayed information from the prior 19 May call to Detective [redacted].[20] Detective [redacted] then questioned Corporal Chege about the alleged incident.[21] Detective [redacted] injected facts into the

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[12] *Id.*
[13] *Id.* at BS 283-84.
[14] *See id.* at BS 284-85.
[15] *Id.* at BS 285.
[16] *See* Enclosure E.
[17] *Compare* Enclosure D at BS 283 and Enclosure F at BS 326-27.
[18] *Compare* Enclosure D at BS 284 (emphasis in original) and Enclosure F at BS 333, 35. Defense invites the Court to note the use of the word "we" in the document, which highlights the role the detective plays in the call.
[19] *See* Enclosure G at BS 21; *see, generally*, Enclosure H at BS 286-323.
[20] *See id.* at BS 287.
[21] *See, generally, id.* at BS 287-323

conversation learned from the prior unlawful interrogation with Ms. [redacted] that had not yet been conveyed to Detective [redacted] before that prior call.[22]

2. Call Between Corporal Chege and Ms. [redacted]

A. Discussion of the Law:

Article 31(b) warnings are required when "'(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.'" *United States v. Pearson*, 81 M.J. 592, 602-03 (N-M Ct. Crim. App. 2021) (quoting *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014)). Rank or billet disparity between the questioner and the suspect is not required. *See United States v. Johnstone*, 5 M.J. 744, 746 n.1 (A.F.C.M.R. 1978) *aff'd by U.S. v. Johnstone*, 11 M.J. 88 (C.A.A.F. 1981) (finding an Article 31(b) violation despite the questioner having "no [sic] position of authority over [the suspect]").

In cases with informants, the second requirement involves a two-prong test based on a totality of the circumstances where the requirement is met if (1) "the [questioner] is participating in an official military law enforcement or disciplinary investigation or inquiry" and (2) "a reasonable person in the [suspect's] position would have concluded that [the questioner] was acting in an official law enforcement or disciplinary capacity." *Pearson*, 81 M.J. 592, 604 (emphasis removed); *United States v. Salas*, No. 201700190, 2018 CCA LEXIS 555, at *17 (N-M Ct. Crim. App. Dec. 3, 2018) (citing *Jones*, 73 M.J. at 362) (finding the questioner to have satisfied the first prong since he was acting as an informant for NCIS but failed the second prong because the conversation was nothing more than a casual conversation between friends).

[22] *Compare id.* at BS 301, 309 and Enclosure F at 333 (both Enclosures discussing (1) positioning of the alleged victim which until the call was believed to be on her side and (2) absence of a condom which was never mentioned in any report before these calls).

Pearson makes clear the first prong is met when "civilian" law enforcement uses a "military member" in furtherance of a "civilian investigation." *Pearson*, 81 M.J. 592, 611 n.44 (N-M Ct. Crim. App. 2021) (citing *United States v. King*, 34 C.M.R. 7, 8-11 (C.M.A. 1963)).[23] Military courts have readily found the first prong satisfied when an alleged victim agrees to contact an alleged suspect in concert with investigators. *United States v. Kmet*, No. ACM 38755, 2016 CCA LEXIS 339, at *10 and *13 (A.F. Ct. Crim. App. June 2, 2016) (citing *Jones*, 73 M.J. at 361).

The second prong focuses on whether a reasonable person in the suspect's position would have perceived the questioning to be more than a "casual conversation." *United States v. Cox*, No. 201700197, 2018 CCA LEXIS 523, at *13 (N-M Ct. Crim. App. Nov. 1, 2018) (citing *United States v. Cohen*, 63 M.J. 45, 49-50 (C.A.A.F. 2006)).[24] Regarding this standard, in *Johnstone*, the AFCA found, and the CMA affirmed, that a questioner did not "simply engage the accused in [casual] conversation" when the questioner (1) asked questions "calculated to evoke incriminating responses" and (2) "***of utmost importance***, the . . . questions . . . were propounded on specific instructions from [investigators]." *Johnstone*, 5 M.J. at 747 (emphasis added). In *Johnstone*, "all admissions made by the accused during the discussion were made in response to specific questions." *Id.* at 745. Thus, the specificity of the questions are relevant and the source of the questions is of ***utmost importance***.

Further, as mentioned, there are cases where the first prong is met because the questioner is working in concert with investigators but the second *Jones* prong fails due to the casual nature of the conversation. In *Salas* and *Kmet*, while multiple factors were considered by the courts, two were

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[23] In *King*, civilian law enforcement conducted an interrogation through a military member which the Court found to trigger Article 31(b) rights. *See id.* The Court reasoned that the rights were triggered because "an enlisted member of the Air Force, [i]s clearly 'subject to this chapter,' and, suspecting accused of the very offenses with which he was ultimately charged, interrogated [the accused] concerning these crimes." *King*, 34 C.M.R. at 11. The Court's focus in *Pearson* appears to be whether there is a nexus between the civilian investigation and the military. The nexus here is abundantly clear considering the call occurred between two military members while both were on base; additionally, the incident itself stemmed from what began as a military work function.

[24] Prior to July 21, 2014, the second requirement was governed by *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) in which the second prong was a subjective standard. *Jones* changed the subjective language to the objective reasonable person standard. *Jones*, 73 M.J. at 362. *Jones* made no change to the focus on the "casual conversation" language used in *Cohen*, a case frequently cited in the *Jones* opinion, and subsequently focused on by *Cox*.

identical across the two cases which cut against the suspects: (1) the conversations occurred in person in a "public location,"[25] and (2) nothing about the set-up of the meetings was inconsistent with past behavior between the respective questioners and suspects.[26] Notably, *Salas* also included the fact that the suspect there had already once confided in the questioner about the alleged acts, making it even less unusual for the questioner to have brought the incident up.[27] Therefore, the privacy of the conversation and the set-up are pertinent to the second *Jones* prong.

B. Argument:

i. The Questioning by Ms. [redacted] Readily Meets the First, Third, and Fourth Article 31(b) Requirements as Well as the First *Jones* Prong.

Ms. [redacted] was an active-duty Marine on 19 May 2020. At that time, she suspected Corporal Chege of having allegedly sexually assaulted her on 4 July 2019. Her questioning was intended to elicit statements concerning that alleged sexual assault.[28] Therefore, like in *Jones* where "the only question remaining . . . is whether [the questioner] interrogated or requested any statement from [the suspect]" because "[the questioner] was subject to the UCMJ, suspected [the suspect] of the crime, and the statement he elicited pertained to the offense for which [the suspect] was suspected," here too the second requirement is all that remains here. *Jones*, 73 M.J. at 363. Unlike in *Jones*, the issue here is even narrower.

Ms. [redacted] was indisputably participating in an official military investigation as discussed in *Pearson*, *King*, *Salas*, and *Knet*. [redacted]PD used Ms. [redacted] as an [redacted] by directing her to set up the recorded call with Corporal Chege. Using Ms. [redacted] as an [redacted] is highly akin to investigators in *Knet* in that both there and here, the questioner was the alleged victim. *Kmet*, 2016 CCA LEXIS 339, at *13. And like in *Salas*, here too the questioner was a fellow Marine who knew the suspect for some

[25] *Salas*, 2018 CCA LEXIS 555, *17; *Kmet*, 2016 CCA LEXIS 339, at *13.
[26] *See Salas*, 2018 CCA LEXIS 555, *17-18; *Kmet*, 2016 CCA LEXIS 339, at *14.
[27] *Salas*, 2018 CCA LEXIS 555, *18.
[28] *See* Enclosure D at BS 285 (making apparent the intent of the call was to get at the least, "small admissions" but at the most a "complete confession").

time and was directed by investigators to question the suspect. *See Salas*, 2018 CCA LEXIS 555, at *17. Further, like in *King* where civilian investigators interviewed a military member using another military member as a proxy, which created a nexus to the military thus necessitating Article 31(b) rights, here too a civilian detective utilized Ms. [redacted] a member of the armed forces, to interrogate Corporal Chege. *Pearson* used *King* to prevent situations exactly like this one from skirting Article 31(b) rights simply because the detective was a civilian. *See Pearson*, 81 M.J. at 611 n.44.

For the forgoing reasons, the only arguable issue remaining in this case which Article 31(b) rights turn on is the second *Jones* prong.

ii. A Reasonable Person in Corporal Chege's Position Would Have Perceived the Questioning to be More Than a Casual Conversation, Satisfying the Second *Jones* Prong and Thus Necessitating Article 31(b) Rights Advisement.

Ms. [redacted] questioning of Corporal Chege would have alerted a reasonable person in his position that the discussion was more than a casual conversation and therefore she was acting in an official law enforcement capacity. In fact, the questioning was eerily similar to the questioning in *Johnstone* where it amounted to more than a casual conversation. Like there, where the questions were calculated to elicit incriminating responses and of ***utmost importance*** to the court were developed by investigators, here too Ms. [redacted] questions were calculated to elicit incriminating responses and were developed by investigators.[29] In fact, the conversation was orchestrated to "start" as a "casual conversation" before morphing into the "The crux of it."[30] Like in *Johnstone* where incriminating statements were made in response to specific questions, here too responses were only incriminating when viewed in context of the questions.[31]

[29] *See, generally,* Enclosure D at BS 283-85.
[30] *Id.* at BS 283.
[31] *See, e.g.*, Enclosure F at BS 333 (answering to question regarding whether Corporal Chege "feel[s] bad" but with lack of "consent" built into the question as a presumed fact); 335-36 (answering to a specific question about "consent"). Specific questions were therefore a "but-for" cause of the admissions.

Not only does *Johnstone* inform us these facts indicate more than a casual conversation, but the instructions to Ms. [redacted] indicate Detective [redacted] believed Corporal Chege would have thought it was more than a casual conversation. It reads "[i]f he asks about police involvement or if you are recording the call, it is ok to deny that."[32] That prediction shows this type of questioning orchestrated in this manner would cause a reasonable suspect to conclude police are likely involved or the call is being recorded; that is wholly inconsistent and inapposite a reasonably foreseeable reaction to merely a casual conversation. Ms. [redacted] did not simply ask what happened. She drilled down on elements of the alleged offense such as the word in bold and all caps—"**CONSENT**."[33] Thus, like in *Johnstone*, this was far more than a casual conversation to a reasonable person in the suspect's position.

However, not only is this case *similar* to *Johnstone*, but it is also *dissimilar* to *Salas* and *Knet* in ways that make it even more persuasive that a reasonable person in the suspect's position would have known Ms. [redacted] was acting on behalf of law enforcement. While the questioners in *Salas* and *Knet* questioned the suspects in public places with no expectation of privacy, the questioner here conducted the conversation telephonically and at a pre-planned time.

Further, while the set-up for the meet-up scenarios in those two cases were in line with the ordinary course of the relationships and were seemingly usual generally, the set-up of the pre-textual call in this case was highly unusual in the course of Corporal Chege and Ms. [redacted] relationship and generally. Corporal Chege and Ms. [redacted] simply did not have phone conversations in at least the six months leading up to the pre-text call barring a 16 second conversation in March 2020; so having the pretext conversation over a call as the chosen medium was unusual. Additionally, it would have been unusual to a reasonable person for Ms. [redacted] to ask to talk, then ignore the call, and then be unwilling to take a call at the next most obvious time—when she got off work. Lastly, it is irregular that the call

[32] Enclosure D at BS 283.
[33] *Id.* at BS 284 (emphasis in original).

was set for a specific time the next day rather than being flexibly tied to an event such as getting off work. In total, the conversation was clearly private as opposed to in *Salas* and *Kent*; and the set-up, unlike in those cases, was highly irregular and unusual. It would have led a reasonable person in the suspect's position to conclude Ms. [redacted] was acting on behalf of law enforcement.

For the forgoing reasons, Ms. [redacted] was required to read Article 31(b) rights to Corporal Chege before interrogating him about the alleged sexual assault. Given that no rights warning was given, Corporal Chege's statements should be excluded under M.R.E. 305(a).

3. Call Between Corporal Chege and Detective [redacted]

A. Discussion of the Law:

"Evidence[34] derivative of an unlawful . . . interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). Whether such evidence is derivative depends on whether "the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *United States v. Hale*, No. ARMY 20180407, 2021 CCA LEXIS 274, at *56 (A. Ct. Crim. App. June 3, 2021) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

B. Argument:

Corporal Chege would not have made the incriminating statements he made to Detective [redacted] had he not discussed the same matters with Ms. [redacted] It is unreasonable to assume Corporal Chege would have voluntarily discussed details of the alleged incident with Detective [redacted] had Corporal Chege not thought Ms. [redacted] had already relayed statements Corporal Chege made to her on the 19 May 2019 call. While this alone makes the conversation with Detective [redacted] fruit from the

[34] "Fruit of the poisonous tree" doctrine applies equally to "testimonial" evidence as it does to tangible evidence. *United States v. Jones*, 64 M.J. 596, 601 (A. Ct. Crim. App. 2007) (quoting *Murray v. United States*, 487 U.S. 533, 536-37 (1988).

poisonous tree, the dependence of the Detective [redacted] call on the Ms. [redacted] call is further underscored by the reality that Detective [redacted] had to inject facts obtained only from the Ms. [redacted] call into his call with Corporal Chege to elicit certain statements. This includes both mentioning of the position Ms. [redacted] was in during the alleged encounter and the presence or absence of a condom.

For the foregoing reasons, any and all statements made by Corporal Chege to Detective [redacted] on the 16 June 2020 call should be suppressed as fruit from the poisonous tree—the interrogation by Ms. [redacted] of Corporal Chege in violation of his Article 31(b) rights.

4. Relief Requested:

The Defense respectfully requests the Court grant this Motion to Suppress under Mil. R. Evid. 305(a) and (c) and suppress any and all statements made by Corporal Daniel Chege (1) to Ms. [redacted] on 19 May 2020 and (2) to Detective [redacted] on 16 June 2020.

5. Burden of Proof and Standard of Proof:

For the issue regarding whether Corporal Chege's right against self-incrimination was violated, the burden is on the Government to establish the admissibility of the evidence. Mil. R. Evid. 304(f)(6). The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Mil. R. Evid. 304(f)(7). The standard as to any factual issue necessary to resolve this motion is by a preponderance of the evidence.

6. Evidence: Evidence to be submitted with this motion is enclosed:

Encl (A): Excerpt From [redacted]PD Investigator Follow Up (BS 000014)
Encl (B): Excerpt From Ms. [redacted]s Cellubrite Texts (Redacted)
Encl (C): Excerpt From Ms. [redacted]s Cellubrite Calls (Redacted)
Encl (D): Pre-text Call Instructions and Questions for Ms. [redacted] (BS 000283-85)
Encl (E): Prover Notes Regarding Call Between Defense Counsel and UVA GySgt [redacted] (Redacted)
Encl (F): Transcript of Pretext Call Between Ms. [redacted] and Corporal Chege (BS 000324-38)
Encl (G): Excerpt From [redacted]PD Investigator Follow Up (BS 000021)
Encl (H): Transcript of Call Between Detective [redacted] and Corporal Chege (BS 000286-323)

7. Argument: The defense requests oral argument.

[redacted]

J.R. WALTHER
Captain, USMC
Defense Counsel

****

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing counsel via electronic mail on 18 Aug 2021.

[redacted]

J.R. WALTHER
Captain, USMC
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. Daniel K. Chege Corporal U.S. Marine Corps	GENERAL COURT-MARTIAL GOVERNMENT RESPONSE TO DEF MOTION TO SUPPRESS STATEMENTS **Article 140a, UCMJ Pleading/Exhibit Redaction Certification**

I hereby certify that all required redactions have been made to the attached documents per Article 140a, UCMJ, JAGINST 5800.7f, and Rule 7, WJC-NMCTJ.

BRIDGES.SARAH.LYNN.[redacted] Digitally signed by BRIDGES.SARAH.LYNN.[redacted] Date: 2021.08.25 14:41:22 -07'00' 25 August 2021

Signature **Date**

Sarah Bridges
Print Name

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

UNITED STATES **v.** **DANIEL K. CHEGE** **CORPORAL** **U. S. MARINE CORPS**	)	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS ACCUSED'S STATEMENTS IN [redacted]PD PRETEXT CALL AND INTERVIEW** **25 August 2021**

1. **Nature of Response.** This is the Government's response to the Defense motion to suppress (1) the Accused's statements made to [redacted] (hereinafter "the Victim"), a former Lance Corporal (LCpl), during a pretext phone call regarding the Accused's sexual assault of the Victim, and (2) statements made to Detective [redacted], [redacted] Police Department ([redacted]PD), during a phone interview. The Government respectfully requests that Defense's motion be **DENIED**, and that the statements of the Accused made to the Victim and to Detective [redacted] be ruled admissible under Military Rules of Evidence (Mil. R. Evid.) 304.

2. **Summary of Facts.**

a. The Accused is charged with two violations of Article 120 for the sexual assault of the Victim by (1) penetrating her vulva with his penis without her consent, and (2) by penetrating her vulva with his hand with the intent to arouse the sexual desire of the Victim, without her consent.

b. On 7 April 2020, Major (Maj) [redacted], MALS-16, notified Naval Criminal Investigative Services (NCIS) that the Victim unrestricted her report of sexual assault against the Accused. Because the incident occurred off base, [redacted]PD maintained primary investigative authority. NCIS only opened a limited assistance investigation to "provide any requested

assistance to the [PD] and provide the command with details pertaining to the investigation…" (Encl. 10).

c. PD assigned Detective to the case, , in late April 2020. He interviewed the Victim, participated in pretext call with the Victim and the Accused, and subsequently interviewed the Accused over the phone. Victim reported that after a unit party on 4 July 2019 and into the morning of 5 July 2019, the Accused penetrated her vagina with his penis and with his fingers while she pretended to be asleep. (Encl. 11).

d. On 18 May 2020, the Victim met with Detective at NCIS Miramar to conduct a pretext call with the Accused. Only Detective , the Victim, and her Uniformed Victim Advocate (UVA), Gunnery Sergeant (GySgt) were physically present; the Victim could not make contact with the Accused, so they texted to set up a time to speak on 19 May 2020. (Encls. 11, 12).

e. On 19 May 2020, the same three individuals were physically present for a successful pretext call between the Victim and the Accused. The Victim and the Accused spoke for approximately twenty-four minutes, and the Victim used her cellphone to call him. Detective recorded the call. (Encls. 11, 13).

f. The Victim informed the Accused she wanted to talk about the incident because she recently had seen him around the workplace. She additionally stated she wanted to speak with him so she "could move past it," and that she did not want to meet in person. The Accused asked if she was scared of him, and she said yes. (Encls. 11, 13).

g. Prior to the phone call, the Victim and the Accused were in frequent contact via text messaging. Their conversations included topics such as work, meeting up for dinner, making plans to hang out at the barracks, borrowing each other's vape, giving each other car rides, and

buying each other food. The Accused started many of the conversations between the two. (Encl. 14)

h. On 16 June 2020, the Accused called Detective [redacted] back after the detective left him a voicemail. They spoke for approximately fifty minutes over the phone about both the Victim's report, and the Accused's account of the incident. (Encl. H to Def. Mot.)

i. On 19 June 2020, the Victim met with the Deputy District Attorney (DDA) and Detective [redacted] at the [redacted]PD Headquarters. The DDA asked the Victim follow-up questions, and she additionally provided contact information for witnesses from the party. (Encl. 15).

j. On 8 July 2020, Detective [redacted] informed NCIS that the [redacted] District Attorney declined prosecution. NCIS and [redacted]PD conducted official case turnover on 14 July 2020. (Encl. 16).

k. The Victim worked as a hydraulic mechanic aboard MCAS Miramar. (Encl. 17).

3. Discussion.

a. Applicable Law.

Pretext phone calls between service members with law enforcement present are common practice. *See e.g. United States v Vazquez*, 73 M.J. 683 (A.F.C.C.A. 2014); *United States v. Roblero*, 2017 CCA Lexis 168 (A.F.C.C.A. 2017); *United States v. Jimenez-Victoria*, 75 M.J. 768 (C.A.A.F. 2016).

"Article 31(b), UCMJ, warning requirements provide members of the armed forces with statutory assurance that the standard military requirement from a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked." *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000) (citation omitted). The Court of Appeals for the Armed Forces (hereinafter "C.A.A.F.") has found that "were these textual

predicates applied literally, Article 31(b) would potentially have a comprehensive and unintended reach into all aspects of military life and mission." *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014), *citing United States v. Cohen,* 63 M.J. 45, 49 (C.A.A.F.).

"Article 31(b), UCMJ, warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *Id.* Under Article 31(b)'s second requirement, "rights warnings are only necessary if the person conducting the questioning is participating in an official *military* law enforcement or disciplinary investigation or inquiry." *See United States v. Pearson,* 81 M.J. 592, 604 (N.M.C.C.A. 2021). Civilian law enforcement officials therefore are not required to advise a military member pursuant to Article 31(b) unless "they acting as a knowing agent of a person subject to the UCMJ or of a military unit." *See id.* at 603.[1] Only if a military member uses his or her *military status* in furtherance of a civilian investigation are rights warnings required. *See id.* at 604.[2]

If a military member acts an "informant," C.A.A.F established another prong in addition to "official participation in a military law enforcement investigation"; the second question is whether a reasonable person in the accused's position would have concluded the questioner acted in an official law enforcement capacity. *See United States v. Salas,* 2018 CCA Lexis 555, at *17 (N.M.C.A.A. 2018), *citing Jones*, 73 M.J. at 362. In cases involving a *military* investigation and a

[1] *Id.* ("CAAF has clarified these requirements, holding that: civilian investigators working in conjunction with military officials must comply with Article 31: (1) when the scope and character of the cooperative efforts demonstrate that the two investigations merged into an indivisible entity and (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military.")

[2] *See also id.* at n44 ("*See United States v. King,* 14 C.M.A. 227, 34 C.M.R. 7, 8-11 (C.M.A. 1963) ("at the request of a local law enforcement officer, an active duty Air Policeman from the appellant's military installation who served as a liaison officer between the installation and the local community, was asked to come to the district attorney's office to talk to or question the appellant regarding allegations that the appellant had sexually molested his 14-year-old niece").

victim, courts, to include C.A.A.F, found the second prong failed "because there was not an element of coercion based on 'military rank, duty, or other similar relationship.'" *See e.g., United States v. Rios,* 48 M.J. 261, 264 (C.A.A.F. 1998); *United States v. Martin,* 21 M.J. 730, 732 (N.M.C.M.R. 1985). At least one court agreed with the *Rios* and *Martin* courts, even when it was a military investigation and a military victim. *See United States v. Bishop,* 76 M.J. 627, 643 (A.F.C.C.A. 2017) ("The mere fact that A1C JS was a security forces member is not determinative of whether she was acting as an agent of the Government during the text exchange...A1C JS was present at AFOSI as a crime victim...She had no training or prior experience as an agent or informant for AFOSI...").

Courts have held that a reasonable person would not perceive the questioner to be acting in a law enforcement capacity when the accused outranked the questioner, the nature of the exchange was personal and informal, and where the questioner expressed sadness or emotions over what occurred. *See e.g., Bishop,* 76 M.J. at 643 ("The nature of the exchange was personal and informal, with A1C JS asking questions about events she could not remember and expressing sadness at what occurred"); *Martin,* 21 M.J. at 732 ("Thus, we find that appellant had no rational basis to believe his conversations with Mrs. M were anything more than private, emotion-ridden colloquies...so that Article 31, UCMJ, did not apply to them").[3]

b. **Analysis.**

Article 31(b) rights were not required because the pretext call was part of a civilian law enforcement investigation wherein the Victim did not use her status as a military member to question the Accused.

[3] *Martin* cited *United States v. Duga,* 10 M.J. 206, 210 (C.M.A. 1981), which held the second prong was subjective rather than objective. However, *Martin* court's findings are similar to that of the 2017 *Bishop* court.

The defense misstated the law as outlined in *Pearson* and *King*. First, the *Pearson* court did not hold that the "first prong is met when 'civilian' law enforcement uses a 'military member' in furtherance of a 'civilian investigation.'" Rather, the court found that "rights warnings are only necessary if the person conducting the questioning is participating in an official *military* law enforcement…investigation…" 81 M.J. at 604. The *Pearson* court also *distinguished* from *King*, which found that a military member, who was asked to come to the District Attorney's office during a joint civilian-military investigation to question the accused, should have read an Article 31(b) warning because he acted in his military capacity as an Air Policeman.

None of these facts are analogous with our present case. This was a civilian investigation, not military. The [redacted]PD maintained primary investigative authority until 14 July 2020 when Detective [redacted] transferred the case file to an NCIS agent; the pretext call occurred on 19 May 2020, during which only the Victim, her UVA, and Detective [redacted] were present. Detective [redacted] and his colleagues completed all investigative actions, to include interrogating the Accused, liaison with DDA, and conducting witness interviews. NCIS did not complete any investigative actions prior to 14 July 2020. Since the [redacted]PD investigation was conducted with an eye towards civilian prosecution, and NCIS was not involved in the investigative steps, the Victim therefore did not participate in an official *military* investigation when she called the Accused.

Additionally, the Victim did not use her "military status" to when talking with the Accused. She was a Lance Corporal and a [redacted] Unlike the Sergeant in *King*, who was an Air Policeman and the liaison officer with civilian authorities, the Victim worked with Detective [redacted] solely in her capacity as a victim; her actions instead comport with that of the victim in *Bishop*. Because the Victim did not participate in an official military law enforcement

investigation and did not use her military status to question the Accused, the analysis should cease, and all statements made by the Accused should be admissible under Mil. R. Evid. 304.

> Assuming *arguendo* the Victim acted as an [redacted] the second prong fails because the conversation between the Victim and the Accused was informal and casual, and the Victim expressed sadness and confusion over what occurred.

A reasonable person would not have perceived the Victim to be acting in a law enforcement capacity at the time of the pretext call. Similar to *Martin, Bishop,* and *Rios*, there was not an element of coercion based on "military rank, duty, or other similar relationship"; in fact, the Accused outranked the Victim. He held a position of authority over her as demonstrated by their messages where he would provide her work updates and taskers.

Additionally, the Victim and the Accused held a casual, informal conversation, which comported with the nature of their relationship. During the pretext call, the Victim voiced confusion and sadness over what occurred between them. She expressed, on several occasions, she wanted to talk with him so she could "move past it," or words to that effect. The Victim also reasonably explained why she sought to talk in May 2020, having seen the Accused around the workplace with increased frequency. When the Accused asked if she wanted to talk in person, she responded in the negative, and he followed up and asked if she feared him; the Victim said she did, and the Accused readily stated he understood. The Victim also texted the Accused for "help with something" on 18 May, and he agreed without issue to a call the next day. While the text messaging lessened between them, they frequently discussed meeting up for dinner or barracks hangouts with fellow Marines, sharing a vape, picking up each other food, and giving each other rides. Under the totality of these circumstances, a reasonable person would not believe the Victim questioned him for law enforcement purposes.

In support of their argument regarding the second prong, the defense counsel relies heavily upon *United States v. Johnstone,* 5 M.J.744 (A.M.C.R. 1978). *Johnstone* is entirely distinguishable. In *Johnstone,* the questioner worked as a *trained informant* for the Office of Special Investigations (OSI); he worked in this capacity for approximately five months. An OSI agent directed him to go to the accused's room and ask him questions about stolen government property. The court found that the questioner did not act on personal motivations but rather in an official law enforcement capacity; it concluded he therefore should have read the accused his rights.

Here, the Victim, in her capacity as a crime victim, acted with personal motivation in order to receive answers about the night in question. Unlike the questioner in *Johnstone,* the Victim did not receive any training as an [redacted] nor did she act in such capacity at all, let alone for multiple months. She also called the Accused on the phone rather than speak to him in his barracks room. Therefore, this reliance on *Johnstone* is misplaced and does not support suppression in the present case.

Assuming the court finds reason to suppress the pretext call, Detective [redacted] questioned the Accused about information he received from the initial report.

The phone interview between the Accused and Detective [redacted] should not be suppressed because Detective [redacted] asked him questions reasonably derived from the Victim's report. The defense argues the Accused's statements are fruit from the poisonous tree because the Accused "would not have made the incriminating statements…to Detective [redacted] had he not discussed the same matters with [the Victim]. It is unreasonable to assume [the Accused] would have voluntarily discussed details of the alleged incident with Detective [redacted] had [the Accused] not thought [the Victim] already relayed [the] statements…" The government does not follow this logic, nor does the defense cite any evidence in support of their argument. A proffer to the court is

not evidence. Additionally, the defense argues Detective [redacted] mention of the Victim's body positioning on the couch and asking about a condom were facts only obtained from the Victim; however, these are questions Detective [redacted] as a trained detective, could have reasonably asked on his own based on her initial report of sexual assault. The defense's own exhibit shows that the vast majority of Detective [redacted] questions did not come from the pretext call. Again, assuming *arguendo* the pretext call is somehow suppressed, the Accused's statements made to Detective [redacted] are not fruit of the poisonous tree and should be ruled admissible.

4. **Relief Requested.** The Government respectfully requests that the Defense motion be **DENIED**, and that the Court find that the statements of the Accused made to the Victim and to Detective [redacted] are admissible under MRE 304.

5. **Burden of Proof and Evidence.**

a. **Burden of Proof.** Pursuant to M.R.E. 304(f)(6)-(7), the Government bears the burden of proof, and the standard of proof is by a preponderance of the evidence.

b. **Evidence.** The Government offers the following as evidence in support of this response:

- Enclosure 10: NCIS Executive Summary, 28May20
- Enclosure 11: [redacted]PD Investigation
- Enclosure 12: Pretext Call Text Messages
- Enclosure 13: Pretext Call Audio[4]
- Enclosure 14: Victim, Accused Text Message Chain
- Enclosure 15: [redacted]PD Follow-up Investigation
- Enclosure 16: NCIS Case Notes
- Enclosure 17: [redacted]PD Incident Report

[continues on the next page]

[4] The government has included the audio instead of the transcript in order to best demonstrate the casual nature of the conversation.

6. **Oral Argument**. The Government requests oral argument.

[redacted]
S. L. BRIDGES
First Lieutenant, USMC
Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served on the Court and opposing counsel electronically on 25 August 2021.

[redacted]
S. L. BRIDGES
First Lieutenant, USMC
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

WESTERN JUDICIAL CIRCUIT

GENERAL COURT MARTIAL

UNITED STATES vs. DANIEL K. CHEGE LANCE CORPORAL U.S. Marine Corps	DEFENSE MOTION TO COMPEL EXPERT WITNESS (Dr. [redacted] PSY.D.) 18 August 2021

Issue Presented

This is a case about an accused who has allegedly twice confessed to committing a sexual assault. The complaining witness claims that Corporal Chege sexually assaulted her while she pretended to be asleep after an alcohol-fueled party. After not reporting the sexual assault for seven months, and after having consensual sex with Corporal Chege, the complaining witness reported the sexual assault. Dr. [redacted] is an expert in the area of sexual offender risk recidivism and will be crucial in the Defense's preparation for a possible sentencing case. Are Corporal Chege's most basic constitutional rights violated when he is deprived of the opportunity to consult with a forensic and clinical psychologist and potentially present evidence in extenuation and mitigation?

1. Summary of Relevant Facts

Corporal Chege is charged with two specifications for violating Article 120, UCMJ. The specifications allege that Corporal Chege penetrated the complaining witness's vulva with his penis and his hand. The complaining witness is alleging that Corporal Chege sexually assaulted

her on 5 July 2019.[1] According to the complaining witness, her and Corporal Chege were intoxicated. When she was pretending to be asleep, Corporal Chege allegedly sexually assaulted her.[2]

Prior to and after the sexual assault, the complaining witness and the Corporal Chege remained friends. The complaining witness admits that she and Corporal Chege kissed and had consensual sex after the alleged sexual assault. The complaining witness even continued to share her vape with Corporal Chege.[3]

On 2 August 2021, defense counsel requested the Convening Authority grant Dr. [redacted] as an expert consultant and/or witness in the field of forensic psychology for purpose of sex offender risk recidivism.[4] The Government denied the Defense's request for funding on 10 August 2021.

2. Discussion of the Law

The Sixth Amendment guarantees the right to effective assistance of counsel. Article 46, UCMJ, affords parties to the court-martial equal opportunity to obtain witnesses and other evidence. When necessary for an adequate defense, servicemembers are entitled to expert assistance.[5] In order to obtain a requested expert, the defense must show both 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.[6] In order to satisfy the first prong, the defense must show (1) why expert assistance is needed; (2) what the expert assistance would accomplish for the accused;

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[1] *See* Complaining Witness Interview attached as Enclosure 2 to Defense's M.R.E. 412 Motion.

[2] *Id.*

[3] *See* Summary of Facts in Defense's M.R.E. 412 Motion.

[4] Encl. 1.

[5] *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citing *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986)).

[6] *Freeman*, 65 M.J. at 458.

and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.[7]

A. Dr. [redacted] Will Directly Be Able to Evaluate and Testimony Regarding Corporal Chege's Risk and Recidivism for Committing a Sexual Offense

Dr. [redacted] will allow the Defense to educate members on sex offender risk recidivism. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This is a fundamental element of due process of law."[8]

Dr. [redacted] will various testing and assessments on Corporal Chege to ascertain his risk of offending, and to evaluate his prospects for successfully completing any sex offender treatment. This is important because the Government intends to prove a sexual assault allegation, which carries serious, life-long collateral consequences. Indeed, the Government's strongest pieces of evidence is Corporal Chege allegedly admitting to the alleged misconduct. Inevitably, the Government will call Corporal Chege a predator because he allegedly sexually assaulted the complaining witness while she was intoxicated and pretended to be asleep.

Dr. [redacted] testimony is critical in assisting the Defense in understanding and presenting a sentencing case. For a recidivism analysis, a substantial amount of factors make this case unique: a consensual romantic relationship leading up to the alleged sexual assault, consensual sex after the alleged sexual assault, the presence of alcohol during the alleged sexual assault, and the sharing of vapes. Moreover, Corporal Chege allegedly admitting to the misconduct when confronted by law enforcement informs the risk and recidivism analysis.

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[7] *Id.* (citing *United States v. Bresnahan*, 62. M.J. 137, 143 (C.A.A.F. 2005) (holding that denial of expert denied defense opportunity "to explore a reasonable issue that went to the center of the Government's case")).

[8] *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007).

If called as a witness, Dr. [redacted] could explain to members the substantial amount of factors underly any contention that Corporal Chege is a predator or a threat to the community. Dr. [redacted] will also be able to perform psychological evaluations, including Risk assessment, on Corporal Chege that the Defense would use during the presentencing case. The risk and recidivism tools will go to directly countering the Government's narrative that society needs to be protected from Corporal Chege because he is a predator.

B. Defense Counsel Are Unable to Gather and Present Testimony on Sexual Offender Risk and Recidivism

Defense counsel lacks the scientific expertise and training necessary to interpret and digest the psychological studies and research in preparation of this case. The Defense cannot hope to review the body of research, scholarly articles, or technical information to become sufficiently conversant with the material and convey this information to members. No member of the Defense has sufficient experience in clinical and forensic psychology, deviant sexual disorders, or sexual offender risk recidivism. We have commenced our own research, but internet medical databases only provide generalizations. Even with those generalizations, no member of the Defense counsel will be able to sit on the witness stand and present this evidence.

The Defense needs an expert consultant to understand, **present**, or challenge evidence in this case. Specifically, the evidence of Corporal Chege's alleged confession the Government intends on presenting during trial will immediately prejudice the factfinder against Corporal Chege. With Dr. [redacted] the Defense will be able to effectively present a case in extenuation and mitigation by explaining that Corporal Chege does not present a high risk for sexual offense recidivism.

Lastly, the Defense does not have the knowledge or expertise to perform psychological evaluation of Corporal Chege to present during a possible presentencing case. Therefore, an expert consultant is both relevant and necessary to the Defense's case.

C. Denial of Dr. [redacted] Would Result in a Fundamentally Unfair Trial.

Denying Corporal Chege the opportunity to present a defense that directly rebuts the Government's theory that Corporal Chege is a predator would cause a fundamental unfair trial. Dr. [redacted] would allow the Defense to confront the Government's evidence that Corporal Chege is at risk for recidivism and, therefore, should receive more time in confinement. Dr. [redacted] if called as a witness, would allow the Defense to educate members and the court on the difference between normative and deviant sexual behavior, sexual offender risk recidivism how such classifications are made.

Without Dr. [redacted] the Defense could not provide an accurate picture of what Corporal Chege's risk of recidivism for a sexual offense. While the Government has evidence to argue that general and specific deterrence require more confinement, the Defense does not have a witness or scientific evidence to rebut the Government's argument. Dr. [redacted] assistance will allow the Defense to present a competent and substantive extenuation and mitigation argument.

3. **Relief Requested:** The defense respectfully requests the Court order the convening authority to appoint Dr. [redacted] as an expert consultant and witness, and to approve expenditures of at least [redacted] for 32 hours of consultation.

4. **Burden of Proof and Standard of Proof:** The defense, as the moving party, carries the burden of persuasion. R.C.M. 905(c)(2). The burden of proof with respect to any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1).

5. **Evidence:** Defense encloses the following in support of its motion:

(1) Defense Request for Expert Witness.

(2) Government's Denial of Defense's Expert Request

The defense also intends to call Dr. [redacted] as a witness during the 39(a) session or supplement this motion with an affidavit from Dr. [redacted]

6. **Argument:** The defense requests oral argument on this motion if opposed.

Dated this 18th day of August 2021.

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 18th day of August 2021.

Dated this 18th day of August 2021.

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT WITNESS (Sex Offender Risk and Recidivism - Dr. [redacted]) 25 AUGUST 2021

1. **Nature of the Response**. The Government hereby opposes the Defense motion to compel a forensic psychologist as an expert consultant in the field of sex offender risk and recidivism. Because the Defense has not shown why said expert is necessary, their motion should be **DENIED**.

2. **Facts.**

a. The Accused is charged with two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ).

b. On 2 August 2021, the Defense requested funding from the Convening Authority for an expert consultant in recidivism, Dr. [redacted] (Encl. 25).

c. On 10 August 2021, the Convening Authority denied the Defense request. (Encl. 26).

3. **Discussion and Analysis.**

Uniform Code of Military Justice (UCMJ) Article 46 provides that trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. This generally includes the right to expert assistance. "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2001) (internal citations omitted). "Necessity" is more "than a mere possibility of assistance from a requested expert." *Id; see also United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) ("[t]he defense's stated desire to 'explor[e] all

possibilities, however, does not satisfy the requisite showing of necessity."). The accused must show a reasonable probability exists both 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." *Bresnahan,* 62 M.J. at 143. To show that an expert would assist the Defense, the Defense must show "(1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused, and (3) why the defense counsel are unable to gather and present the evidence that the expert assistance would be used to develop." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (internal citation omitted).

The U.S. Court of Appeals for the Armed Forces (C.A.A.F.) has drawn a sharp distinction between necessity and helpfulness and concluded that an accused's trial is not fundamentally unfair simply because the Government did not pay for an expert to screen or evaluate evidence. *See, e.g.*, *Freeman,* 65 M.J. at 459 (affirming the military judge's denial of a motion to compel expert assistance where, "[a]lthough it is by no means clear that the expert would add anything that could not be expected of experienced defense counsel, we also accept arguendo that Appellant's counsel could benefit from the consultant's assistance."); *Bresnahan*, 62 M.J. at 143 (affirming the military judge's denial of a motion to compel expert assistance while accepting, arguendo, that the expert in question "possessed knowledge and expertise in the area of police coercion beyond that of the defense counsel and that the defense counsel could benefit from his assistance."). Just because a case deals with difficult or complex issues does not mean that defense is automatically entitled to an expert. *See United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Additionally, Defense Counsel are expected to educate themselves regarding relevant issues when defending a case in order to obtain competence. *See United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).

R.C.M. 1001(d) allows for Defense to submit evidence in extenuation or mitigation in the presentencing phase of a case. R.C.M. 1001(d)(3) allows for Defense to request that the rules of evidence by relaxed during presentencing to allow for an even broader spectrum of evidence without challenge to reliability or authenticity. *See United States v. Saferite*, 59 M.J. 270, 273 (CAAF 2004).

Defense fails in its burden under the first and third prongs of the *Freeman* test. Although somewhat unclear as to the specific use of Dr. [redacted] assistance, the Defense's motion seems to suggest that her expertise will be used for both presentencing and on the merits; specifically, to "understand, present, or challenge evidence in the case." Def. Mot. 4. Defense argues that they "[do] not have the knowledge or expertise to perform psychological evaluation of Corporal Chege to present during a possible presentencing case." Def. Mot. 4. Finally, Defense's motion also argues that Dr. [redacted] assistance will allow the Defense to "effectively present a case in extenuation and mitigation by explaining that Corporal Chege does not present a high risk for sexual recidivism." Def. Mot. 4. These arguments are without merit.

a) **The Defense has failed to demonstrate why expert assistance is necessary under *Freeman*.**

First, it is important to note that in its own case-in-chief and presentencing case the Government is not calling any expert witness to testify about the Accused's potential likelihood of recidivism, *nor is the Government presenting any evidence of recidivism*. Expert testimony from Dr. [redacted] would be therefore unnecessary in the Defense's own case-in-chief and presentencing case, as there would be no Government expert or recidivism evidence of any kind for the Defense to counter. Likewise, there is no need for Dr. [redacted] to perform a psychological evaluation and present her findings.

b) **The Defense has failed to demonstrate why the Defense Counsel are unable to gather and present the evidence that the expert assistance would be used to develop under *Freeman*.**

Defense Counsel are more than capable of collecting and presenting evidence in presentencing regarding the Accused's rehabilitative potential or to argue that he poses no danger to society. It is a basic, reoccurring function of any Defense Counsel's practice to present evidence relevant under applicable sentencing factors. The Defense Counsel are able to do so through a variety of methods articulated in R.C.M. 1001(d). These include introducing extenuation and mitigation evidence via witnesses, affidavits, documentary evidence, and an unsworn statement of the accused. Given the range of evidence normally admissible in presentencing, Defense has not articulated why an expert is necessary for this purpose, nor why Defense Counsel is incapable of presenting an effective presentencing case. While every case is different, the facts in this case are not so significantly distinct or complex that Defense would be unable to present an effective presentencing case, should it be necessary. Finally, the Defense has failed to cite any case law which discusses why an expert in recidivism—or otherwise—is necessary to present a presentencing case.

c) **The Defense has failed to demonstrate that denial of expert assistance would result in a fundamentally unfair trial under *Bresnahan*.**

While this expert testimony might be useful for the accused, it is not necessary and its denial will not cause a fundamentally unfair trial. The Defense does not cite any case law that discusses why an expert in recidivism is necessary to ensure a fair trial. However, earlier in their motion, Defense cites *United States v. McAllister* 64 M.J. 248, 249 (C.A.A.F. 2007). The Court in *McAllister* stated, "[the Defense] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.* at 249. However,

McAllister is immediately distinguishable from the present case as it speaks to the Court's refusal to permit a re-test of a deoxyribonucleic acid (DNA) sample and corresponding expert assistance. *Id.* In *McAllister*, the military judge did not "properly afford assistance" to the Defense to re-examine DNA found under the victim's fingernails. *Id.* at 252. Had the military judge done so, the discovery of "DNA from three previously unidentified individuals would have been presented to the members," and this evidence "could have been used by defense to attack the thoroughness of the original test and the weight that the members should accord that...evidence." *Id.* There is no such risk for significant impact to the evidentiary posture in the present case. Whether or not Corporal Chege may reoffend in the future does not impact the fact-finding in the case on the merits. Denial of Dr. [redacted] will not result in a fundamentally unfair trial.

4. Evidence. In support of its motion, the Government offers the following:

a. Enclosure (25): Defense Request of 2 August 2021.
b. Enclosure (26): Convening Authority Response of 10 August 2021.

5. Relief Requested. The Government respectfully requests that this Court **DENY** the Defense motion to compel.

6. Burden of Proof. The Defense bears the burden by a preponderance of the evidence.

7. Oral Argument. The Government requests oral argument.

[redacted]
A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on 25 August 2021.

[redacted]
A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

WESTERN JUDICIAL CIRCUIT

GENERAL COURT MARTIAL

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. Marine Corps	DEFENSE MOTION TO COMPEL EXPERT WITNESS (Dr. [redacted] 18 August 2021

Issue Presented

This is a case about an alleged sexual assault after instances of consensual kissing and consensual sex. The complaining witness claims that Corporal Chege sexually assaulted her while she pretended to be asleep after an alcohol-fueled party. After not reporting the sexual assault for months, and after having consensual sex with Corporal Chege, the complaining witness reported the sexual assault. In a pretext phone call, a deferential Corporal Chege allegedly admits to the complaining witness's narrative that he sexually assaulted her the prior year. Are Corporal Chege's most basic constitutional rights violated when he is deprived of the opportunity to consult with a forensic and clinical psychologist and potentially present testimony to explain alcohol blackouts, alcohol's impact on memory and suggestibility?

1. Summary of Relevant Facts

"Do you remember, like, last year?"—asked the complaining witness during a pretextual phone call aimed at getting Corporal Chege to admit to a sexual assault.[1] A hesitant Corporal Chege says, "Vaguely . . . . Was that the time Herman threw up?"[2] The complaining witness

[1] *See* Enclosure F to Defense's Motion to Suppress, at 4.

[2] *See id.* at 4-5.

says, "**no** . . . this was before that" and goes on to describe a day at the beach.[3] Corporal Chege, apparently remembering the description, says "So it was Fourth of July?"[4] The complaining witness says "yes" and "do you remember what happened between us?"[5] Corporal Chege again responds with "Vaguely" and then the complaining witness says "I'm trying to put it together for you. I know."[6]

On 19 May 2021, after almost a year of consensual kissing, consensual sex, consuming alcohol together, and sharing vape pens, Corporal Chege believes he is having a private conversation with an intimate friend of his. The complaining witness, however, is seeking to get Corporal Chege to admit to an alleged sexual assault that happened seven months ago. After being intoxicated on that Fourth of July in 2019, Corporal Chege says that his memory is "foggy"[7] and "hazy,"[8] that he gets "some flashbacks about it because [he is like], 'Did I do what I think I did or did I not?"[9] The rest of the pretextual phone consists of Corporal Chege describing himself having a memory blackout, says that he "tried something," and says that he "just [does not] remember" some parts the complaining witness is describing.[10]

On 2 August 2021, defense counsel requested the convening authority grant Dr. [redacted] as an expert consultant and/or witness in the field of forensic psychology.[11] Specifically, the

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3 *Id.* at 5.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 6.

9 *Id.*

10 *Id.*

11 Encl. 1.

Defense requested Dr. [redacted] to consult in the area of alcohol blackouts, alcohol's impact on memory, and suggestibility. The Government denied the Defense's request for funding on 10 August 2021.

2. Discussion of the Law

The Sixth Amendment guarantees the right to effective assistance of counsel. Article 46, UCMJ, affords parties to the court-martial equal opportunity to obtain witnesses and other evidence. When necessary for an adequate defense, servicemembers are entitled to expert assistance.[12] In order to obtain a requested expert, the defense must show both 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.[13] In order to satisfy the first prong, the defense must show (1) why expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.[14]

A. Dr. [redacted] Will Directly Be Able to Speak to Why Corporal Chege Would Acquiesce to Complaining Witness's Narrative

Dr. Simpson will allow the Defense to educate members on alcohol related blackouts, alcohol's impact on memory and suggestibility. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to

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[12] *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citing *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986)).

[13] *Freeman*, 65 M.J. at 458.

[14] *Id.* (citing *United States v. Bresnahan*, 62. M.J. 137, 143 (C.A.A.F. 2005) (holding that denial of expert denied defense opportunity "to explore a reasonable issue that went to the center of the Government's case")).

present his own witnesses to establish a defense. This is a fundamental element of due process of law."[15]

Here, Dr. [redacted] will be critical for the Defense to rebut any evidence that Corporal Chege confessed to sexually assaulting the complaining witness on the pretextual phone call. Both the complaining witness and Corporal Chege were heavily intoxicated the night of the alleged sexual assault. For over seven months after the alleged assault, the complaining witness and Corporal Chege carried on a normal relationship—albeit one that included consensual sex, consuming alcohol together, and sharing a vape together. With the passing of time and alcohol's impact on memory, Dr. [redacted] will be able to provide an explanation as to why Corporal Chege's memory is "hazy" and "foggy."

Additionally, Dr. [redacted] will be able to explain why—after months passed and after having consensual sex—Corporal Chege would adopt the complaining witness's version of what happened that night. Dr. [redacted] will be able to explain impact on memory and suggestibility both on the complaining witness's and Corporal Chege's memory. Dr. [redacted] will be able to assist the Defense in explaining how their friendship and subsequent consensual sex may have had an impact in Corporal Chege's willingness to adopt the complaining witness's narrative.

Regarding the complaining witness, Dr. [redacted] will allow the Defense to explain why—after seven months and consensual sex—the complaining witness remembers that Corporal Chege sexually assaulted her. If called as a witness, Dr. [redacted] could explain to members that due to suggestibility and an alcohol-induced blackout, Corporal Chege may have adopted the complaining witness's version of events—even if it did not actually happen.

B. Defense Counsel Are Unable to Gather and Present Testimony on Alcohol-induced blackouts, alcohol's impact on memory, and suggestibility

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[15] *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007).

Defense counsel lacks the scientific expertise and training necessary to interpret and digest the psychological studies and research in preparation of this case. The Defense cannot hope to review the body of research, scholarly articles, or technical information to become sufficiently conversant with the material and convey this information to members. No member of the Defense has sufficient experience in clinical and forensic psychology, alcohol-induced blackouts, alcohol's impact on memory, and suggestibility of witnesses. We have commenced our own research, but internet medical databases only provide generalizations.

The Defense needs an expert consultant to understand, **present**, or challenge evidence in this case. Specifically, the audio of Corporal Chege's alleged confession is Government's strongest piece of evidence. The Defense does not have the tools or scientific training to explain to the members the complicated topic of alcohol-induced blackouts and the suggestibility of witnesses. In his own words, Corporal Chege was so intoxicated that he blacked out. Moreover, considering the consensual sexual relationship they had, Corporal Chege could have been highly suggestible when the complaining witness claimed he sexually assaulted her.

Defense will not be able to present scientific research and conclusions to the members regarding alcohol-induced blackouts and suggestibility. Therefore, an expert consultant is both relevant and necessary to the Defense's case.

C. Denial of Dr. [redacted] Would Result in a Fundamentally Unfair Trial.

Denying Corporal Chege the opportunity to present a defense that directly rebuts the Government's theory that Corporal Chege confessed to sexually assaulting the complaining witness would violate his constitutional right to present a defense. Dr. [redacted] will give the Defense an opportunity to present scientific evidence and expert testimony that the pretextual phone call is not what it purports to be—that is, that the pretextual phone call is the confluence of alcohol-induced blackout and the suggestibility of Corporal Chege.

Dr. [redacted] if called as a witness, would allow the Defense to educate members on alcohol related blackouts, alcohol's impact on memory, and suggestibility.

3. Relief Requested: The defense respectfully requests the Court order the convening authority to appoint Dr. [redacted] as an expert consultant and witness, and to approve expenditures of at least [redacted] This includes 15 hours of reviewing the discovered material [redacted] two days of pretrial consultation with the defense team [redacted] five days of trial testimony or in-court consultation [redacted] and two days of travel [redacted]

4. Burden of Proof and Standard of Proof: The defense, as the moving party, carries the burden of persuasion. R.C.M. 905(c)(2). The burden of proof with respect to any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1).

5. Evidence: Defense encloses the following in support of its motion:

(1) Defense Request for Expert Witness.

(2) Government's Denial of Defense's Expert Request.

The defense also intends to call Dr. [redacted] as a witness during the 39(a) session or supplement this motion with an affidavit from Dr. [redacted]

6. Argument: The defense requests oral argument on this motion if opposed.

Dated this 18th day of August 2021.

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps
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 this 18th day of August 2021.

Dated this 18th day of August 2021.

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT WITNESS (Forensic Psychiatry - Dr. [redacted] 25 AUGUST 2021

1. **Nature of the Response**. The Government hereby opposes the Defense motion to compel a forensic psychologist as an expert witness. Because the Defense has not shown why said expert is necessary, their motion should be **DENIED**.

2. **Facts.**

   a. The Accused is charged with two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ).

   b. On 2 August 2021, the Defense requested funding from the Convening Authority for an expert witness in forensic psychology, Dr. [redacted] (Encl. 27).

   c. On 10 August 2021, the Convening Authority denied the Defense request. (Encl. 28).

3. **Discussion and Analysis.**

Uniform Code of Military Justice (UCMJ) Article 46 provides that trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. This generally includes the right to expert assistance. "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2001) (internal citations omitted). "Necessity" is more "than a mere possibility of assistance from a requested expert." *Id; see also United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) ("[t]he defense's stated desire to 'explor[e] all

possibilities, however, does not satisfy the requisite showing of necessity."). The accused must show a reasonable probability exists both 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." *Bresnahan,* 62 M.J. at 143. To show that an expert would assist the Defense, the Defense must show "(1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused, and (3) why the defense counsel are unable to gather and present the evidence that the expert assistance would be used to develop." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (internal citation omitted).

The U.S. Court of Appeals for the Armed Forces (C.A.A.F.) has drawn a sharp distinction between necessity and helpfulness and concluded that an accused's trial is not fundamentally unfair simply because the Government did not pay for an expert to screen or evaluate evidence. *See e.g., Freeman,* 65 M.J. at 459 (affirming the military judge's denial of a motion to compel expert assistance where, "[a]lthough it is by no means clear that the expert would add anything that could not be expected of experienced defense counsel, we also accept arguendo that Appellant's counsel could benefit from the consultant's assistance."); *Bresnahan*, 62 M.J. at 143 (affirming the military judge's denial of a motion to compel expert assistance while accepting, arguendo, that the expert in question "possessed knowledge and expertise in the area of police coercion beyond that of the defense counsel and that the defense counsel could benefit from his assistance."). Just because a case deals with difficult or complex issues does not mean that defense is automatically entitled to an expert. *See United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Additionally, Defense Counsel are expected to educate themselves regarding relevant issues when defending a case in order to obtain competence. *See United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).

R.C.M. 1001(d) allows for Defense to submit evidence in extenuation or mitigation in the presentencing phase of a case. R.C.M. 1001(d)(3) allows for Defense to request that the rules of evidence by relaxed during presentencing to allow for an even broader spectrum of evidence without challenge to reliability or authenticity. *See United States v. Saferite*, 59 M.J. 270, 273 (CAAF 2004).

a) The Defense has failed to demonstrate why expert assistance is necessary under *Freeman*.

Here, the Defense failed to show why an expert witness is necessary to present 1) testimony as to alcohol related blackouts and alcohol's impact on memory and "why…the complaining witness remembers that Corporal Chege sexually assaulted her." Def. Mot. 4.

First, Defense asserts that Dr [redacted] will be used to "educate members on alcohol related blackouts, [and] alcohol's impact on memory and suggestibility." Def. Mot. 4. The Defense Counsel also asserts, "both the complaining witness and Corporal Chege were heavily intoxicated on the night of the alleged sexual assault" and that "due to suggestibility and an alcohol-induced blackout, Corporal Chege may have adopted the complaining witness's version of events. Def. Mot. 4. There is no evidence, to include blood alcohol content (BAC), how many drinks each individual had, what types of drink, how fast they drank, whether they ate, etc., which affirmatively prove that both the Victim and the Accused were "heavily intoxicated" or experiencing a "black-out." The only evidence of the Accused's alleged intoxication are his own statements to the Victim and Detective [redacted] (Encls. F, H to Def. MTS); however, these statements are not evidence of being "heavily intoxicated" or "blacked out." There are several reasons why the Accused may say he was "blacked out," to include minimizing his own guilt. Additionally, the Victim makes clear she does not know how much she drank. (Encl. 11 to Gov. Resp. to Def. MTS). In fact, what the evidence shows is the Accused and the Victim both recall specific details of the

incident, which corroborate the other. (Encls. F, H to Def. MTS). In the pretext call, the Accused even offers his own facts before the Victim prompts him. For example, the Victim says she was facing the couch, and the Accused responds, "No. You were on your back." (Encl. F to Def. MTS). The Accused also makes comments like, "I mean, it's a little bit foggy for me, but I'm pretty sure I know what happened." (Encl. F to Def. MTS). It is therefore unclear from defense's motion what exactly Dr. [redacted] expert assistance regarding alcohol-related blackouts and suggestibility can accomplish for the Accused in this case.

More importantly, if defense counsel intends to argue that both the Accused and the Victim were "heavily intoxicated," and that the Accused adopted the Victim's story due to his intoxication level, they did not show how expert assistance is needed for such an argument. Defense counsel can readily argue in closing, based on the Accused's recorded statements to the Victim and the detective, and the Victim's expected testimony, that they were "heavily intoxicated" on the night in question, may not recall all the details of the incident, and that the Accused therefore adopted the Victim's version of events Dr. [redacted] expert assistance is not necessary to make this argument.

The Defense also asserts that Dr. [redacted] will aid in explaining "why…the complaining witness remembers that Corporal Chege sexually assaulted her." Def. Mot. 4. Based on this vague assertion, the Government fails to see how Dr. [redacted] expert assistance is needed. Additionally, the Government fails to see what Dr. [redacted] expert assistance would even accomplish for the Accused regarding this matter. It appears defense counsel want to argue that it is "unusual" the Victim remembers the sexual assault based on her alleged level of intoxication. They will have the opportunity to cross the Victim on this issue, if they so choose, in front of the

members. Therefore, defense counsel failed to show how they need *expert* assistance to make such an argument.

b) The Defense has failed to demonstrate why the Defense Counsel are unable to gather and present the evidence that the expert assistance would be used to develop under *Freeman*.

The Defense has likewise failed to demonstrate that they are unable to gather and present the evidence that the expert assistance would be able to develop. First, the Defense has the ability to consult with the Marine Corps Air Station (MCAS) Miramar Senior Defense Counsel, the Regional Defense Counsel, and most importantly, [redacted] the Defense Services Organization Highly Qualified Expert. Ms. [redacted] is an expert in the area of criminal defense involving sex offenses, and more specifically, sex offenses involving alcohol. Defense counsel's ability to consult with all of these more senior, experienced counsel, including an expert in criminal defense involving sex offenses, demonstrates their ability to gather and present this evidence.

c) The Defense has failed to demonstrate that denial of expert assistance would result in a fundamentally unfair trial under *Bresnahan*.

While this expert testimony might be useful for the accused, it is not necessary and its denial will not cause a fundamentally unfair trial. The Defense does not cite any case law that discusses why an expert in "alcohol blackouts, alcohol's impact on memory, and suggestibility" is necessary to ensure a fair trial. Def. Mot. 4. Instead, the Defense vaguely asserts that "denying Corporal Chege the opportunity to present a defense...would violate his constitutional right to present a defense." Def. Mot. 5. Without argument based upon facts or case law as to how The Accused's constitutional rights could be violated, the defense failed to demonstrate the risk of fundamental unfairness. It also worth noting that the Government will not be utilizing an expert in the same or similar field.

4. **Evidence.** In support of its motion, the Government offers the following:

a. Enclosure (27): Defense Request of 2 August 2021.
b. Enclosure (28): Convening Authority Response of 10 August 2021.

5. **Relief Requested.** The Government respectfully requests that this Court **DENY** the Defense motion to compel.

6. **Burden of Proof.** The Defense bears the burden by a preponderance of the evidence.

7. **Oral Argument.** The Government requests oral argument.

[redacted]
A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on 25 August 2021.

[redacted]
A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	DEFENSE MOTION IN LIMINE TO EXCLUDE PORTIONS OF ACCUSED'S STATEMENTS DURING PRETEXT CALL AND CALL WITH DETECTIVE 8 September 2021

Issues Presented

Not every statement by the accused is admissible at trial. First, any statements during Corporal Chege's conversations where he debates whether or not to exercise his rights under the Fifth or Sixth Amendments to the U.S. Constitution are inadmissible.[1] Second, the Court of Appeals for the Armed Forces "has been resolute in rejecting the admissibility of so-called human lie detector testimony" by law enforcement because it usurps the members' exclusive function to weigh evidence and determine credibility.[2] Should the Government be allowed to admit portions of the conversations where Corporal Chege asks about exercising his right to counsel, where the [redacted]PD detective makes statements amounting to human lie detector testimony, and where Corporal Chege makes statements that could incite an emotional response from members?

[1] *See, e.g.*, *United States v. Moran*, 65 M.J. 178, 182 (C.A.A.F. 2007) (improper to bring to the attention of the triers of fact that an accused asserted his constitutional or statutory rights to counsel); M.R.E. 301(f)(2).
[2] *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014); *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (human lie detector testimony places a "stamp of truthfulness on a witness' story").

I. Summary of Relevant Facts

On 19 May 2021, the complaining witness and an [redacted]PD detective conducted a pretext phone call with Corporal Chege.[3] During this phone call, the complaining witness states that she is "just trying to get your perspective on everything."[4] In response Corporal Chege says, among other things, that "It was hellish. It was evil. It was just vile."

On 16 June 2021, Corporal Chege was interviewed by the [redacted]PD detective. During the interview, Corporal Chege discusses his concerns on incriminating himself and his options to seek legal counsel.[5] The [redacted]PD detective also opines during the call that Corporal Chege is remorseful about what he allegedly did to the complaining witness and that makes Corporal Chege human—not a monster. Lastly, during the call, the [redacted]PD detective and Corporal Chege have a conversation regarding the logistics of turning himself in, including topics on bail, obtaining an attorney, informing Corporal Chege's command, and how long he would be detained.

II. Discussion Of The Law

Military Rules of Evidence 401, 402, and 403 govern the admissibility of relevant evidence. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.[6] Irrelevant evidence is not admissible.[7] Relevant evidence may still be excluded if its probative value is substantially outweighed by a danger of unfair prejudice.[8]

A. Corporal Chege's Statements That He Did Something Hellish, Evil, and Vile.

[3] Encl. A.
[4] *Id.* at 11.
[5] Encl. B. at 6.
[6] Mil. R. Evid. 401.
[7] Mil. R. Evid. 402.
[8] Mil. R. Evid 403.

The Government should be prohibited from introducing Corporal Chege's statements that what he did was hellish, evil, and vile because the probative value of those statements is substantially outweighed by a danger of unfair prejudice. During Corporal Chege's pretextual phone call with the complaining witness, she tells Corporal Chege that she is "trying to get [his] perspective on everything."[9] In response, Corporal Chege explains "It was hellish. It was evil. I was just vile."[10]

M.R.E. 403 provides that "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasiing time, or needlessly presenting cumulative evidence." In *United States v. Owens*, the court explained that unfair prejudice occurs when evidence may be "used for something other than its logical probative force."[11]

To determine whether evidence should be excluded under M.R.E. 403, courts use the factors set out in *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005). According to CAAF, courts should consider: "the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time need to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties." *Id.*

Here, Corporal Chege's "hellish," "evil," and "vile" statements have a risk of unfair prejudice—that is, a factfinder will likely use his gratuitous adjectives "for something other than its logical, probative force."[12] First, it is unclear precisely what Corporal Chege is describing as

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[9] Encl. A. at 11.
[10] *Id.*
[11] 16 M.J. 999, 1002 (A.C.M.R. 1983).
[12] *Owens*, 16 M.J. at 1002.

"hellish," "evil," and "vile." Second, Corporal Chege's gratuitous adjectives do not provide the Government with any reliable evidence concerning the charged misconduct. Presenting these statements to the factfinder will raise "[t]he possibility that the factfinder might dramatically overestimate the value of the evidence or be confused as to its probative meaning"[13] because Corporal Chege is simply not clear as to what he did and what was "hellish," "evil," and "vile." The members will react emotionally to these statements and will simply assume that Corporal Chege is referring to penetration.

Moreover, the *Berry* factors points to excluding Corporal Chege's "hellish," "evil," and "vile" statements. What inference or purpose could these statements serve, other than to prejudice the factfinder against Corporal Chege? The only possible legal relevance of Corporal Chege's statements are to prove that he sexually assaulted the complaining witness without her consent. Since the Government has not provided any M.R.E. 404(b) notice to the Defense, Coporal Chege's statements are not relevant for any "consciousness of guilt" purposes.

To prove consent, the Government has other less prejudicial evidence to present on the issue of consent—including Corporal Chege's statements. Corporal Chege's statements to the detective and complaining witness provide the Government with many opportunities to present less prejudicial evidence, without the distracting the factfinder with Corporal Chege's "hellish," "evil," and "vile" statements. Thus, the Government should not be permitted to introduce these statements at trial.

B. Statements during [redacted] PD's Call with Corporal Chege Regarding Obtaining Legal Counsel

The U.S. Constitution and Article 31, UCMJ, make clear that the accused exercising his right to counsel or his right to remain silent are irrelevant to guilt or innocence. Military Rule

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[13] *Id.*

of Evidence 301(f)(2) prohibits the fact that the accused exercised those rights from being admitted at trial. The presumption of innocence is a first principle of our justice system.

During Corporal Chege's call with a [redacted]PD detective, he express concerns with the detective about incriminating himself.[14] Corporal Chege even asks the detective about whether he "should be seeking legal counsel." Moreover, Corporal Chege is concerned that if he invokes his right to an attorney, whether that would cause the detective to place him under arrest.

In each of these segments, the clear implication is that Corporal Chege is deciding whether or not to invoke his constitutional rights. The Court of Appeals for the Armed Forces has recognized "that to many...the invocation by a suspect of his constitutional and statutory rights to...counsel equates to a conclusion of guilt – that a truly innocent accused has nothing to hide behind assertion of these privileges."[15] That thinking cannot be cured by a members' instruction. The Government should not be permitted to introduce this evidence at trial.

C. Comment by the [redacted]PD Detective on Corporal Chege's Remorsefulness for Poor Decisions Is Irrelevant and Constitutes Improper "Human Lie Detector" Evidence.

The prohibition of human lie detector testimony applies to all witnesses.[16] Here, the [redacted]PD detective opines several times throughout the call that Corporal Chege is not a monster because he feels remorse for what happened—i.e., bolstering the complaining witness's claim that she was sexually assaulted. The factfinder should not be presented with evidence from the [redacted]PD detective that bolsters the complaining witness's claim through Corporal Chege's alleged remorsefulness.

First, the [redacted]PD detective claims that Corporal Chege is not a "bad guy" and that "I think maybe you made some poor decisions at the time. And I'm pretty sure you probably, like

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[14] Encl. b at 6.

[15] *Moran*, 65 M.J. at 178.

[16] *See, e.g.*, *United States v. Smith*, 2014 CCA LEXIS 602, at *8 (N-M Ct. Crim. App. Aug. 21, 2014) (NCIS Special Agent's testimony that he felt the accused was lying not admissible).

you said, feel remorseful for those said decisions. . . . I have what she told me happened, okay?" In other words, from the very beginning of the call the [redacted]PD detective is informing Corporal Chege that—based on the complaining witness's story—Corporal Chege made poor decisions that he feels remorse for. Later in the call, the [redacted]PD detective again bolsters the credibility of the complaining witness. According to the [redacted]PD detective, Corporal Chege is "owning it, which is the first step" and that "if you were a monster, you wouldn't care at all, and that doesn't seem to be the case, okay?"

Rather than judge the credibility of the complaining witness's allegations with facts, the [redacted]PD detective has subtly bolstered the complaining witness's allegations with Corporal Chege's alleged remorsefulness. The Government should not be allowed to sneak in through audio evidence what would otherwise be improper testimonial evidence if said by a [redacted]PD detective at trial. Even if not technically human lie detector *testimony*, the effect of allowing the factfinder to listen to the [redacted]PD detective repeatedly bolster the alleged victim's honesty and claim Corporal Chege is feeling remorse for what occurred is hardly probative and certainly unfairly prejudicial.[17] These are precisely the type of opinions that the Court of Appeals for the Armed Forces has repeatedly said members should not hear.

D. Discussions with Corporal Chege and the [redacted]PD Regarding Logistics of Turning Himself In, Bail, and Informing Command are Irrelevant

During their call, Corporal Chege and the [redacted]PD detective shift their conversation to "next steps."[18] Everything after this point in the conversation is irrelevant to this case. Corporal Chege and the [redacted]PD detective discuss topics such as what Corporal Chege might tell his command, when he would talk to his parents, whether he will detained for one day, whether he

[17] *See* M.R.E. 401 and 403.

[18] Encl. B at 26.

will be able to make bail, and whether he would obtain an attorney.[19] After the "next steps," nothing in the rest of this conversation "has any tendency to make a fact more or less probable than it would be without the evidence." Thus, this portion of the [redacted]PD detective's conversation with Corporal Chege is inadmissible.

III. Relief Requested.

The defense respectfully requests that the Court, pursuant to M.R.E. 301, 401, 402, and 403, preclude the Government from presenting portions of Corporal Chege's conversations where (1) he deliberates exercising his constitutional rights to a lawyer or his right against self-incrimination; (2) [redacted]PD opines on the remorsefulness of Corporal Chege; (3) Corporal Chege's hellish, evil, and vile statements; and (4) discussions with [redacted]PD regarding the logistics of Corporal Chege turning himself in.

IV. Burden of Proof and Standard of Proof.

As the proponent of the evidence, the Government bears the burden of establishing how its proposed evidence complies with M.R.E. 301, 401, 402, 403, and 404(b) by a preponderance of the evidence, at which time the burden of persuasion shifts to the defense.

V. Evidence

a. Enclosure A: Transcript of Pretext Call

b. Enclosure B: Transcript of [redacted]PD's Interview with Corporal Cege

VI. Argument: Oral argument is requested.

Dated this 8th Day of September, 2021

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps
Detailed Defense Counsel

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[19] Encl. B at 26-37.

CERTIFICATE OF SERVICE

A true copy of this motion was served by email on 8 Sept 2021.

[redacted]

J. M. ORTIZ
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES **v.** **DANIEL K. CHEGE** **CORPORAL** **U.S. Marine Corps**	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE (EXCLUDE PORTIONS OF ACCUSED'S STATEMENTS DURING PRETEXT CALL AND CALL WITH DETECTIVE)** **15 September 2021**

1. Nature of the Response. The Government hereby opposes the Defense motion to exclude portions of the Accused's statements during the pretext phone call and portions of the Accused's call with Detective [redacted] Police Department ([redacted]PD). Because (1) the Accused's statements to the Victim during the pretext call and his statements to the detective are relevant under Military Rules of Evidence (M.R.E.) 401, and because (2) the detective did not give "human lie detector testimony," the Defense's motion should be **DENIED**.

2. Facts.

a. The Accused is charged with two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ).

b. On 19 May 2020, a pretext phone call was conducted between Victim and the Accused. (Encl. A to Def. Mot.)

c. The Accused admitted to penetrating Victim's vagina with his fingers and penis. He described his actions as "hellish," "evil," and "vile." (Encl. A to Def. Mot.)

d. On 16 June 2020, Detective [redacted] telephonically interviewed the Accused. (Encl. B to Def. Mot.)

e. During the interview, the Accused admitted to trying to have sex with Victim, to forcing himself on her, and to doing so without her consent. (Encl. B to Def. Mot.)

f. While talking to the detective, the Accused speaks hypothetically about seeking legal counsel, but he does not invoke any right to counsel. (Encl. B to Def. Mot.)

g. The detective also makes a few comments about how he does not think the Accused is a "bad guy" and that he thinks the Accused feels remorse for "some poor decisions" at the time. The detective mentions he does not think the Accused is a "monster," but rather a " made a bad decision." Some of these comments were made after the Accused said, "You know, I screwed up. I know that for a fact. I know for a fact I screwed up," and after the Accused says he was trying to have sex with the Victim. (Encl. B to Def. Mot.)

3. **Discussion and Analysis.**

Evidence is relevant if a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action. Mil. R. Evid. 401. The test of logical relevance is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence. *See United States v. Schlamer*, 47 M.J. 670, 681 (N-M. Ct. Crim. App. 1997). The relevance standard is a low threshold. *See United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010).

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

Human lie detector *testimony*, which is inadmissible at trial, is elicited when a witness provides "an opinion as to whether [a] person was truthful in making a specific statement regarding

a fact at issue in the case." *See e.g., United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014); *United States v. Martin*, 75 M.J. 321, 324 (C.A.A.F. 2016). [Emphasis added]. However, there is no litmus test for determining whether a witness has offered "human lie detector evidence." *See United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005). If a witness does not expressly state that he believes a person is truthful, the testimony is examined to determine if it is the "functional equivalent of" human lie detector *testimony*. *See United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007). [Emphasis added]. *Testimony* is the functional equivalent of human lie detector testimony when it invades the unique province of the court members to determine the credibility of witnesses, and the substance of the testimony leads the members to infer that the witness believes *the victim* is truthful or deceitful with respect to an issue at trial. *See United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010); *Brooks*, 64 M.J. at 329. [Emphasis added].

a) The Accused's voluntary statements to the Victim that the sexual assault was "hellish," "evil," and "vile" are highly probative as to lack of consent.

The Accused's statements that his sexual assault of the Victim was "hellish," "evil," and "vile" are relevant evidence. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence inn determining the action." Mil. R. Evid. 401. In the present case, the Accused's comments that his actions were "hellish," "evil," and "vile" are relevant because this evidence makes it more probable that he did not have the Victim's consent, a fact in consequence. By using these adjectives to describe the sexual assault, the Accused readily admitted that he knew acted unlawfully and without her consent. These self-descriptions also are relevant to show he did not have a reasonable mistake of fact as to consent. It is the Government's position that these the Accused's statements make the fact the Victim did not consent "more probable than it would be without the evidence." Mil. R. Evid. 401.

Defense argues that the Government should be prohibited from introducing the "hellish," "evil," and "vile" statements because they have a risk of "unfair prejudice." Mil. R. Evid. 403. Of note, the Defense does not argue that the evidence is not relevant under either M.R.E. 401. Instead, they argue that the probative value of the statements is "substantially outweighed by the risk of unfair prejudice." Def. Mot. at 3; Mil. R. Evid. 403. However, the Defense fails to demonstrate how said the probative value is substantially outweighed by unfair prejudice.

Defense cites *United States v. Owens* and argues, "unfair prejudice occurs when evidence may be "used for something other than its logical probative force."" Def. Mot. at 3; *United States v. Owens*, 16 M.J. 999, 1002 (A.C.M.R. 1983). However, the present case is immediately distinguishable, because in *Owens,* the Court evaluated whether or not evidence unfairly prejudiced the Accused when it was offered for the limited purpose of impeachment, coupled with a limiting instruction, to assess the credibility of the Defendant as a witness. *Id.* at 1000. The evidence included his purposeful concealment of prior arrests and convictions when applying for the position of Chief Warrant Officer. *Id.* at 1001-02. The Court ruled that because there were no eyewitnesses to the crime other than the Defendant and his wife, the issue of his credibility was a critical one; the evidence was relevant and proper. *Id.* at 1002-03.

The "logical probative force" in the present case goes to the question of consent, a fact in consequence. It is unclear how this evidence may be mistakenly used by the members and what exactly the "unfair prejudice" is. The Defense's argument for excluding this evidence consists solely of "undefined, conclusory references to the prejudicial effects" rather than a "pointed demonstration of the evidence's unfairly prejudicial impact on the court members' ability to properly evaluate all evidence and reach an appropriate, accurate, result." 1 Military Rules of Evidence Manual § 403.02 (2021). Moreover, because there were no eyewitnesses to the sexual

assault in the present case, the issue of consent is "a critical one," and therefore, any statements by the Accused on the issue have "substantial probative value." *Id.* at 1003.

Additionally, the Defense asserts, "it is unclear precisely what Corporal Chege is describing" when he used the words "hellish," "evil," and "vile." Def. Mot. at 3. To the contrary, it is very clear he is talking about the sexual assault of the Victim. The Victim stated, "[redacted]" Def. Encl. A at 8. The Accused responded, "I tried to. I tried." *Id.* The Accused goes on to state "it's not like it was a comfortable position, but I tried hard. Like, I really tried to, but I couldn't…I used my hands, but there was no way to get us into a comfortable position." *Id.* at 9. When asked if he felt bad because "[redacted]" the Accused responded "yes, I feel terrible." *Id.* at 10. The Victim then requested his "perspective on everything," and he responded "my perspective is that I am a piece of shit…It was hellish. It was evil. It was vile." *Id.* at 11. The Accused, within a matter of minutes, describes the sexual assault as "hellish," "evil," and "vile." No confusion exists about what he is talking about on the phone call.

Finally, with regard to the factors outlined in *United States v. Berry*, the Defense argues that the Government has less prejudicial evidence to present on the issue of consent. 61 M.J. 91, 95 (C.A.A.F. 2005). Once more, the Defense has failed to articulate beyond "undefined, conclusory references" how the evidence is unfairly prejudicial and has failed to articulate what other evidence the Government could offer. Instead, the Defense suggests vaguely that the Government could use "Corporal Chege's statements." Def. Mot. at 4. The Accused's statements that the sexual assault was "hellish," "evil," and "vile" are part and parcel to his overall confession. Simply put, the Accused's statement, as a party-opponent, describing his actions in this manner

may be "prejudicial" to his case, but it is not *unfairly* prejudicial. Therefore, this statement is relevant and should be admissible at trial.

b) The Accused did not invoke his right to counsel under the 6th Amendment and therefore his Constitutional Rights and Article 31 are not violated under *Moran*.

The Accused's statements that he "[did not] want to incriminate [himself]" and questioning whether he should seek legal counsel, are relevant evidence in the present case. Encl. B to Def. Mot. at 6. These statements, considered within the context of the entire phone call, clearly demonstrate he voluntarily spoke to the detective and are therefore highly probative.

The Defense argues that the Accused's statements imply whether or not he is "deciding to invoke his Constitutional rights," and that the statements are protected under *Moran*. Def. Mot. at 5; *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007). However, the Court in *Moran* speaks exclusively to the *invocation* of constitutional rights and that it is "improper to bring to the attention of the triers of fact...that an accused...asserted his right to counsel." *Id.* at 182. [Emphasis added]. An assertion of a right to counsel did not occur in the present case. Including his mere inquiries as to those rights to counsel therefore does not violate M.R.E. 301. Additionally, the Accused hypothetically asked about counsel at the beginning of the phone call. He then proceeds to speak voluntarily to the detective telephonically. The voluntariness of his statements is relevant, and therefore his inquiries should be admissible at trial.

c) Detective [redacted] comments are not testimonial and do not improperly bolster the Victim.

The Defense asserts that the statements made by Detective [redacted] to include that the Accused is "owning it, which is the first step" is improper *testimony*. Def. Mot. at 6. On the contrary, these statements are not testimonial evidence, and therefore are not "human lie detector" evidence. Human lie detector evidence is occurs when a witness provides "an opinion as to

whether [a] person was truthful in making a specific statement regarding a fact at issue in the case" or "the functional equivalent." *Martin*, at 324. Not only is Detective [redacted] not providing *testimony* during this interview, he also does not provide an opinion as to whether [Corporal Chege] was truthful. Instead, Detective [redacted] offers opinions as to the Accused's character to include that he does not think he is a "bad guy," and that "I think you're a good person that made a bad decision." Encl. B to Def. Mot. at 8, 11. When offered at trial, the detective's statements and questions to the Accused during the call will only be included for effect on the listener and therefore will *not* be evidence and *not* testimonial. *Even if* these statements were testimonial, they do not rise to the level of offering an opinion as to the Accused's truthfulness.

The Defense also argues that this *testimony* is "precisely the type of opinions that the Court of Appeals for the Armed Forces has repeatedly said members should not hear." Def. Mot. at 6. However, this broad assertion does not cite any case law or other appropriate reference to support that the detective's statements during a phone interview are (1) testimonial, and (2) human lie detector testimony. The Defense fails to make a proper argument that the statements by Detective [redacted] should be excluded.

d) The Accused statements to Detective [redacted] as to turning himself in, bail, and notifying his command are relevant to show both the voluntariness of his statement and his knowledge that the Victim did not consent.

First, there is very little specificity as to what evidence the Defense believes should be excluded. The Defense argues that everything after the Accused inquires as to the "next step" is "irrelevant." Encl. B to Def. Mot. at 26; Def. Mot. at 6. Defense fails to show why statements contained within the interview's transcript pages 26-37 are not relevant. As previously discussed, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Mil. R. Evid.

403. Facts in consequence are was a sexual act committed on the Victim, and was the act done without her consent. At the beginning of this portion of the interview, the Accused inquires as to whether it will be a "book and release" scenario once he turns himself in, or if he can expect to "sit there and wait for a trial date." Encl. B to Def. Mot. at 26. This clearly shows he understands what could happen to him because he did not have her consent when he penetrated the Victim with his fingers and penis. Additionally, the Accused remarks, "I'm probably going to get kicked out of the military, which is only fair." Encl. B to Def. Mot. at 29. He acknowledges he was wrong for failure to obtain her consent for the digital and penile penetration. This portion of the interview is relevant, probative, and should be admissible at trial.

4. **Evidence.** The Government does not offer any evidence.

5. **Relief Requested.** The Government respectfully requests that this Court **DENY** the Defense motion to exclude portions of the Accused's statements and of the detective's statements.

6. **Burden of Proof.** The Defense bears the burden by a preponderance of the evidence.

7. **Oral Argument.** The Government requests oral argument.

[redacted]
A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on 15 September 2021.

[redacted]

A. B. BRUTON
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 23 September 2021

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of the second Article 39(a) from 24 September 2021 to 4 October 2021 and adjustment of the 4 October 2021 Final Pretrial Matters milestone in the Trial Management Order (TMO) from 4 October 2021 to 7 October 2021.

II. Summary of Facts

1. On 20 September 2021, Defense notified the Court that Corporal Chege was admitted to [redacted] on 20 September 2021.
2. Upon a Motion for Appropriate Relief filed by Defense on 21 September 2021, the Court granted a continuance of the previously scheduled 22 September 2021 Art. 39(a) hearing to 24 September 2021.
3. On 23 September 2021, Corporal Chege underwent an [redacted] requiring anesthesia at approximately 1100.
4. Defense informed the Court on 23 September 2021 that Corporal Chege will not be released on 23 September 2021.

5. Additionally, the Defense informed the Court that due to Corporal Chege's medical condition and the medication he was on, even if he were released on 24 September 2021, he would likely not be able to participate in the hearing that same day.
6. On 23 September 2021, Defense Counsel consulted with Trial Counsel to discuss an alternate date for the Art. 39(a).
7. The TMO establishes a milestone of 4 October 2021 for Final Pretrial Matters.
8. An R.C.M. 802 telephonic conference took place on 23 September 2021 with the Military Judge, Trial Counsel, Defense Counsel, and Victim's Legal Counsel.
9. During the R.C.M. 802 conference, the Military Judge and Counsel discussed Corporal Chege's condition and future availability for counsel.

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)). The Confrontation Clause of Amendment VI to the United States Constitution guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970). Further, R.C.M. 804(a) states "The accused shall be present at . . . every stage of the trial including sessions conducted under Article 39(a)."

A delay is in order in the present case due to the medically-induced unavailability of the accused, Corporal Chege. Corporal Chege has a constitutional right to be present at the Art. 39(a) hearing. He has not expressly waived this right; nor is his expected absence the result of any

fault of his own. Corporal Chege is currently in the hospital [redacted] He is being treated with [redacted] and [redacted] and the doctors attempt to ascertain the root cause of the issue. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Weisbeck*, 50 M.J. at 466.

IV. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled 24 September 2021 Art. 39(a) to the following date:

- 4 October 2021

The Defense additionally requests that as a result of the foregoing change, the Military Judge change the Final Pretrial Matters milestone in the TMO from 4 October 2021 to the following date:

- NLT 1200 on 7 October 2021

V. Argument: No oral argument is requested.

Dated this 23rd day of September 2021

[redacted]

J. R. Walther
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 this 23rd day of September 2021.

Dated this 23rd day of September 2021.

[redacted]

J. R. WALTHER
Captain, U.S. Marine Corps

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 24 September 2021

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of trial from 12-15 October 2021 to 15-19 November 2021 and adjustment of the 7 October 2021 Final Pretrial Matters milestone from 7 October 2021 to 3 November 2021.

II. Summary of Facts

1. On 20 September 2021, Defense notified the Court that Corporal Chege was admitted to [redacted] on 20 September 2021.
2. On 23 September 2021, Corporal Chege underwent an [redacted]
3. Following the [redacted] doctors suggested Corporal Chege have his [redacted] however, due to certain risks, doctors are uncertain about the optimal timing of the procedure.
4. An Art. 39(a) was scheduled for 24 September 2021 after the Court granted a continuance from 22 September 2021 due to Corporal Chege's hospitalization.
5. Defense Counsel, Trial Counsel, and VLC consulted with the Court during an R.C.M. 802 conference via telephone on 23 September 2021.

6. During the telephone conference, it was determined all parties were available on 4 October 2021 for the Art. 39(a); parties also discussed being available for possible new trial dates of 15-19 November 2021 given Corporal Chege's medical status.
7. Upon a Motion for Appropriate Relief filed by Defense on 23 September 2021, the Court granted a continuance of a previously scheduled 24 September 2021 Art. 39(a) to 4 October 2021 and the Final Pretrial Matters milestone from 4 October 2021 to 1200 on 7 October 2021.
8. Corporal Chege was still hospitalized as of 24 September 2021.
9. Defense Counsel, Trial Counsel, and the VLC consulted with the Court during an R.C.M. 802 conference via telephone on 24 September 2021.
10. During the telephone conference, parties again discussed with the Court moving the trial from 12-15 October 2021 to 15-19 November 2021.
11. After the telephone conference, Defense Counsel and Trial Counsel agreed on a new Final Pretrial Matters milestone of 3 November 2021.

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)). The Confrontation Clause of Amendment VI to the United States Constitution guarantees the accused's right to be present in the courtroom

at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970). Further, R.C.M. 804(a) states "The accused shall be present at . . . every stage of the trial."

A delay is in order in the present case due to the medical condition of the accused, Corporal Chege. Corporal Chege has a constitutional right to be present at trial. He has not expressly waived this right; nor is his expected absence the result of any fault of his own. Due to the uncertainty of when or if Corporal Chege will [redacted] in the near future, it is unlikely he will be able to meaningfully participate at trial if held on 12-15 October 2021. Corporal Chege is currently in the hospital [redacted] Doctors are currently recommending removing his [redacted] in an attempt to ward off follow-on [redacted] complications. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Weisbeck*, 50 M.J. at 466.

IV. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled 12-15 October 2021 trial to the following date:

- 15-19 November 2021

The Defense additionally requests that as a result of the foregoing change, the Military Judge change the Final Pretrial Matters milestone from 7 October 2021 to the following date:

- 3 November 2021

V. Argument: No oral argument is requested.

Dated this 24th day of September 2021

[redacted]

J. R. Walther
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 this 24th day of September 2021.

Dated this 24th day of September 2021.

[redacted]

J. R. WALTHER
Captain, U.S. Marine Corps

****

Court Ruling

The above request is approved/~~disapproved/approved in part~~.

The dates of trial in the subject case are **15-19 November 2021**.

The deadline for Final Pretrial Matters in the subject case is **3 November 2021**.

POTEET.DEREK.ANDREW.[redacted] Digitally signed by POTEET.DEREK.ANDREW.[redacted] Date: 2021.09.24 14:54:50 -07'00'

Date: **24 September 2021**

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 7 October 2021

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of the second Article 39(a) from 8 October 2021 to 1400 on 28 October 2021.

II. Summary of Facts

1. Throughout the last three months, Corporal Chege has been hospitalized on multiple occasions primarily because of issues with his [redacted]
2. Most recently, he was hospitalized at [redacted] on 28 September 2021.
3. On 30 September 2021, Corporal Chege was transferred to [redacted] in San Diego for more specialized care.
4. On the evening of 6 October 2021, Corporal Chege was released from [redacted] Hospital, put on three weeks of convalescent leave, and prescribed [redacted] among other medications.
5. Corporal Chege is directed to take the [redacted] every four hours until the pain, caused by [redacted] is manageable.

6. Doctors expect to be able to [redacted] in 2-3 weeks depending on how quickly the [redacted] mature to a point of being able to be drained.
7. Defense Counsel do not believe Corporal Chege can meaningfully participate in a hearing while under the influence of [redacted]
8. On 7 October 2021, Defense Counsel consulted with Trial Counsel and Victim's Legal Counsel regarding an alternative date for the second Art. 39(a); all parties agreed they are available at 1400 on 28 October 2021.
9. On 7 October 2021, Defense Counsel informed the Court of the foregoing medical updates and the necessity for a continuance.

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)). The Confrontation Clause of Amendment VI to the United States Constitution guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970). Further, R.C.M. 804(a) states "The accused shall be present at . . . every stage of the trial including sessions conducted under Aricle 39(a)."

A delay is in order in the present case due to the medical condition of the accused, Corporal Chege. Corporal Chege has a constitutional right to be present at the Art. 39(a). He has not expressly waived this right; nor is his expected absence the result of any fault of his own. Due to the influence of prescribed [redacted] Corporal Chege would be unable to meaningfully

participate in the currently scheduled Art. 39(a) hearing on 8 October 2021. Defense expects that he will likely no longer be under the influence of prescribed [redacted] on the proposed date of 28 October 2021. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Weisbeck*, 50 M.J. at 466.

IV. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled 8 October 2021 Art. 39(a) to the following date:

- 1400 on 28 October 2021

V. Argument: No oral argument is requested.

Dated this 7th day of October 2021

[redacted]

J. R. Walther
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 this 7th day of October 2021.

Dated this 7th day of October 2021.

[redacted]

J. R. WALTHER
Captain, U.S. Marine Corps

****

Court Ruling

The above request is ~~approved/disapproved~~/approved in part.

The date of the second Art. 39(a) ~~trial~~ in the subject case is no longer 8 Oct 21.

A telephonic R.C.M. 802 conference will be held at 0830 on 8 Oct 21 to discuss the scheduling of the second Art 39(a) session. Victim Legal Counsel is currently scheduled to be in trial on 28 Oct 21.

POTEET.DEREK.ANDREW.[redacted]

Digitally signed by POTEET.DEREK.ANDREW.[redacted]
Date: 2021.10.07 17:16:25 -07'00'

Date: 7 October 2021

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 21 October 2021

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of the second Article 39(a) from 25 October 2021 to 9 November 2021, adjustment of the 7 November 2021 Final Pretrial Matters milestone to 7 days before the determined trial date, and continuance of the trial dates from 15-19 November 2021 to 18-21 January 2021.

II. Summary of Facts

1. Throughout the last three to four months, Corporal Chege has been hospitalized on multiple occasions primarily because of issues with his [redacted] and [redacted]
2. Defense respectfully invites the Court to consider the facts stated in Defense prior continuance motions since the current factual situation is related to those facts.
3. Most recently, Corporal Chege was hospitalized at [redacted] on 17 October 2021 due to an additional episode of [redacted]
4. On 18 October 2021, he was transferred to [redacted] for more specialized care.

5. As of 21 October 2021, Corporal Chege is still a patient at [redacted] it is possible he will be released 21 or 22 October 2021.
6. When discharged, Corporal Chege is expected to again be prescribed [redacted] every four hours until the pain, caused by [redacted] is manageable.
7. Additionally, Corporal Chege will be on two different [redacted] for some period of time to counteract his [redacted] dropping down to one drug when appropriate since the drugs take weeks to fully take effect.
8. Doctors cannot [redacted] due to the damage such a procedure would cause to the [redacted]
9. Doctors now believe the [redacted] should not be operated on until 4-6 weeks after an episode of [redacted] subsides; as the [redacted] returns to normal size, some of the pain caused by the [redacted] should subside.
10. Defense Counsel do not believe Corporal Chege can meaningfully participate in a hearing while under the influence of [redacted]
11. On 21 October 2021, Defense Counsel consulted with Trial Counsel regarding an alternative date for the second Art. 39(a); Defense Counsel and Trial Counsel agree the Art. 39(a) should be moved to 9 November 2021.
12. On 21 October 2021, Defense Counsel also consulted with Trial Counsel regarding alternative trial dates; Defense Counsel and Trial Counsel agree the trial should be continued but disagree on dates.
13. Trial Counsel is available for trial 29 November to 3 December 2021, 6-10 December 2021, and 18-21 January 2022. One Defense Counsel has a week-long duty from 29 November to 3 December in Virginia. Defense Counsel has Regional Defense Counsel training on 9-10 December 2021 and a separate trial on 13-17 December 2021. One

Defense Counsel will be in Germany for work during 6-8 December.

14. On 21 October 2021, Victim's Legal Counsel (VLC) informed Defense Counsel and Trial Counsel that Ms. [redacted] is available on 9 November 2021 for the proposed Art. 39(a) hearing and all proposed trial dates of 29 November to 3 December, 6-10 December, and 18-21 January 2022. VLC is on leave 29 November.

15. On 21 October 2021, Defense Counsel informed the Court of the foregoing medical updates and the necessity for a continuance.

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)). The Confrontation Clause of Amendment VI to the United States Constitution guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970). Further, R.C.M. 804(a) states "The accused shall be present at . . . every stage of the trial including sessions conducted under Aricle 39(a)."

A delay is in order in the present case due to the medical condition of the accused, Corporal Chege. Corporal Chege has a constitutional right to be present and fully participate at the Art. 39(a) hearing and trial. He has not expressly waived this right; nor is his expected inability to participate the result of any fault of his own. Due to the influence of prescribed [redacted] Corporal Chege would be unable to meaningfully participate in the currently

scheduled Art. 39(a) hearing on 25 October 2021. Defense expects that he will likely no longer be under the influence of prescribed [redacted] on the proposed date of 9 November 2021 assuming his pain subsides to a great enough extent. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Weisbeck*, 50 M.J. at 466.

IV. Prior Continuances.

The following number of previous continuances were all requested by Defense Counsel:

- Art. 39(a) continuances – 5
- Trial continuances – 1

V. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled 25 October 2021 Art. 39(a), 15-19 November 2021 trial dates, and 7 November 2021Final Pretrial Matters to the following dates:

- Art. 39(a) to 9 November 2021
- Trial Dates to 18-21 January 2021
- Final Pretrial Matters to 7 days before the determined trial start date

VI. Argument: No oral argument is requested.

Dated this 21st day of October 2021

[redacted]

J. R. Walther
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court, opposing counsel, and Victim's Legal Counsel Capt Kimberly Martinez this 21st day of October 2021.

Dated this 21st day of October 2021.

[redacted]

J. R. WALTHER
Captain, U.S. Marine Corps

****

Opposing Party Response

1. Trial Counsel does **not** oppose this continuance request with respect to the Art. 39(a) session.

2. Trial Counsel **does** oppose this continuance request with respect to the trial dates and proposes 29 November to 3 December 2021.

3. Trial Counsel does **not** oppose this continuance request with respect to the Final Pretrial Matters milestone.

4. Trial Counsel does **not** request oral argument but will file a motion in response if the Court deems it necessary.

[redacted]

Date: 20211021

S.L. BRIDGES
Captain
U.S. Marine Corps
Trial Counsel

****

Court Ruling

The above request is ~~approved/disapproved~~/approved in part.
A telephonic R.C.M. 802 conference will be held at 0900 on 25 Oct 21.
39a will be held on 9 Nov 21 and/~~or~~

~~Trial will commence on _____ and/or~~

Final Pretrial Matters will be due on 22 Nov 21.

POTEET.DEREK.ANDREW.[redacted] Digitally signed by POTEET.DEREK.ANDREW[redacted] Date: 2021.10.22 13:27:50 -07'00'

Date: 22 October 2021

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES vs. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 5 November 2021

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of the second Article 39(a) from 9 November 2021 to 0730 at Camp Pendleton on 19 November 2021.

II. Summary of Facts

1. Throughout the last four months, Corporal Chege has been [redacted] on multiple occasions primarily because of issues with his [redacted] and [redacted]
2. Defense respectfully invites the Court to consider the facts stated in Defense prior continuance motions since the current factual situation is related to those facts.
3. Most recently, Corporal Chege was [redacted] on 1 November 2021 due to an additional episode of [redacted]
4. On 2 November 2021, he was transferred to [redacted] for more specialized care.

5. As of 5 November 2021, Corporal Chege is still a patient at [redacted] he is not expected to be released today due to the continued [redacted] and his corresponding pain levels.
6. When discharged, Corporal Chege is expected to again be prescribed [redacted] every four hours until the pain, caused by [redacted] is manageable.
7. Additionally, Corporal Chege will continue to be on two different [redacted] drugs for some period of time to counteract his [redacted]
8. Doctors [redacted] due to the damage such a procedure would cause to the [redacted]
9. Doctors now believe the [redacted] should not be operated on until 4-6 weeks after an episode of [redacted] subsides; as the [redacted] returns to normal size, some of the pain caused by the [redacted] should subside.
10. Defense Counsel do not believe Corporal Chege can meaningfully participate in a hearing while under the influence of [redacted]
11. On 3 November 2021, Defense Counsel updated opposing counsel and this Court of Corporal Chege's current hospitalization.
12. On 4 November 2021, Defense Counsel consulted with Trial Counsel regarding an alternative date for the second Art. 39(a); Defense Counsel and Trial Counsel agree the Art. 39(a) should be moved to 0730 at Camp Pendleton on 19 November 2021.
13. The complaining witness is available 19 November 2021. The Victim's Legal Counsel has another engagement on 19 November 2021 which can be de-conflicted with an early start time of the Art. 39(a).

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)). The Confrontation Clause of Amendment VI to the United States Constitution guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970). Further, R.C.M. 804(a) states "The accused shall be present at . . . every stage of the trial including sessions conducted under Aricle 39(a)."

A delay is in order in the present case due to the medical condition of the accused, Corporal Chege. Corporal Chege has a constitutional right to be present and fully participate at the Art. 39(a) hearing. He has not expressly waived this right; nor is his expected inability to participate the result of any fault of his own. Due to the influence of prescribed [redacted] Corporal Chege would be unable to meaningfully participate in the currently scheduled Art. 39(a) hearing on 9 November 2021. Defense expects that he will likely no longer be under the influence of prescribed [redacted] on the proposed date of 19 November 2021 assuming his pain subsides to a great enough extent. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Weisbeck*, 50 M.J. at 466.

IV. Prior Continuances.

The following number of previous continuances were all requested by Defense Counsel:

- Art. 39(a) continuances – 6

- Trial continuances – 2

V. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled 9 Novebmer 2021 Art. 39(a) to the following time, location, and date:

- 0730 at Camp Pendleton on 19 November 2021

VI. Argument: No oral argument is requested.

Dated this 5th day of November 2021

[redacted]

J. R. Walther
Captain, U.S. Marine Corps
Detailed Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court, opposing counsel, and Victim's Legal Counsel Capt Kimberly Martinez this 5th day of November 2021.

Dated this 5th day of November 2021.

[redacted]

J. R. WALTHER
Captain, U.S. Marine Corps

****

Opposing Party Response

1. Trial Counsel does **not** oppose this continuance request for the Article 39a session.

4. Trial Counsel does **not** request oral argument.

[redacted]

Date: 20211104

S. L. BRIDGES
Captain
U.S. Marine Corps
Trial Counsel

****

Court Ruling

The above request is approved/~~disapproved/approved in part.~~

39a will be held on 19 Nov 21 at 0730, on board Camp Pendleton.

POTEET.DEREK.ANDREW.[redacted]
Digitally signed by POTEET.DEREK.ANDREW.[redacted]
Date: 2021.11.05 11:17:42 -07'00'

Date: 5 November 2021

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES vs. DANIEL K. CHEGE Corporal U.S. Marine Corps	**DEFENSE MOTION TO DISMISS** 1 December 2021

Issue Presented

Whether a fair trial can be achieved after a defense witness's testimony has been materially altered by a complaining witness?

1. Summary of Relevant Facts:

a) Ms. [redacted] alleges that Corporal Chege sexually assaulted her at an off-base home on 4 July 2019.

b) Ms. [redacted] made a restricted report on 4 February 2020.

c) Ms. [redacted] made the report unrestricted

d) Lance Corporal [redacted] was present at the gathering at the off-base home with Corporal Chege and Ms. [redacted].

e) Lance Corporal [redacted] and Corporal Chege were roommates in early 2020.

f) Lance Corporal [redacted] was interviewed by Defense Counsel and a prover on 29 July 2021.

g) On 30 November 2021, Defense Counsel called witness, Lance Corporal [redacted]

h) Lance Corporal [redacted] informed Defense Counsel that the last time he spoke to Ms. [redacted] was 45 minutes prior when she visited him at his barracks room after court proceedings had concluded for the day.

2. Discussion of the Law

.3. **Application**

P

4. **Relief Requested:** The defense respectfully requests the Court dismiss with prejudice the charge and 2 specifications.

5. **Burden of Proof and Standard of Proof:** The defense, as the moving party, carries the burden of persuasion. R.C.M. 905(c)(2). The burden of proof with respect to any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1).

6. **Evidence**

The defense offers the following evidence in support of the motion:

Testimony from Corporal [redacted]

The defense offers the following references for its motions

Reference A: Charge Sheet

6. **Argument:** The defense requests oral argument.

Dated this 1st day of December 2021.

Katherine Donnelly

K. F. DONNELLY
Captain, U.S. Marine Corps
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 19th day of October 2021.

Dated this 1st of December 2021.

Katherine Donnelly

K. F. DONNELLY
Captain, U.S. Marine Corps
Defense Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

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

UNITED STATES	)	
	)	VICTIMS' LEGAL COUNSEL
V.	)	NOTICE OF APPEARANCE
	)	ON BEHALF OF
DANIEL K. CHEGE	)	LANCE CORPORAL [redacted] USMC
CORPORAL, USMC	)	
	)	
	)	

1. I am Captain Kimberly D. Martinez, U.S. Marine Corps, Victims' Legal Counsel, Marine Corps Air Station Miramar. I am admitted to practice law and currently in good standing in the state of California, and although not appearing as a trial or defense counsel, 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 Lance Corporal [redacted] a named victim in this case.

2. On 20 June 2021, I, Captain Kimberly D. Martinez, Marine Corps Victims' Legal Counsel Organization, was detailed to represent Lance Corporal [redacted] USMC, 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. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice.

4. Lance Corporal [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.

5. To permit a meaningful exercise of Lance Corporal [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 Lance Corporal [redacted] rights and privileges are addressed (if not already shared with VLC).

6. Lance Corporal [redacted] recognizes that she has limited standing in this court-martial and reserves the right to make factual statements and legal arguments herself or through counsel.

7. My current contact information is as follows:

[redacted]

APPELLATE EXHIBIT V (5)

PAGE 1 OF 2

Respectfully submitted this 23rd day of July 2021,

[redacted]

K. D. MARTINEZ
Captain, USMC

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on 23 July 2021.

[redacted]

K. D. MARTINEZ

APPELLATE EXHIBIT V

PAGE 2 OF 2

COURT RULINGS & ORDERS

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

UNITED STATES v. **DANIEL K. CHEGE** **CORPORAL** **U.S. MARINE CORPS**	**ORDER** **Defense Continuance Request** **31 August 2021**

I. Nature of Order. Pursuant to Rule For Courts-Martial 906(b)(l) and Uniform Rule 11.1, the Defense requested a continuance of the 31 August 2021 Article 39(a) session.

II. Summary of Facts

a) On 30 August 2021, defense counsel notified the Court by email that Corporal Chege was admitted to [redacted] on 29 August 2021.

b) Defense counsel informed the Court that they were uncertain if Corporal Chege would be released before the Article 39(a) session currently docketed for 1400 on 31 August 2021.

c) Additionally, defense counsel informed the Court that due to the accused's medical condition and the medication he has been prescribed, even if he were released before the hearing, he may be unable to participate meaningfully at the time scheduled.

d) On the afternoon of 30 August 2021, the Military Judge, defense counsel Captain Ortiz and Captain Walthers, and trial counsel Captain Briggs, held an R.C.M. 802 conference via telephone to discuss the emergent defense request and the accused's medical situation. Defense counsel requested continuance of the Article 39(a) session to Friday, 3 September 2021, which trial counsel did not oppose. The Military Judge stated this would be approved and directed defense counsel to submit a draft order to this effect.

III. Order

Accordingly, the Court **ORDERS** that the Article 39(a) session scheduled for 31 August 2021 is hereby continued to 3 September 2021 to begin at 1000 at MCAS Miramar.

So **ORDERED** this 31st day of August 2021.

[redacted]

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	**ORDER** Defense Continuance Motion 21 September 2021

I. Nature of Order. Pursuant to Rule for Courts-Martial 906(b)(l), defense counsel today filed a motion for continuance of the 22 Sep 21 Article 39(a) session to 24 September 2021.

II. Summary of Facts

a) On 20 September 2021, defense counsel notified the Court that Corporal Chege was admitted to [redacted] on 20 September 2021, and they were uncertain whether Corporal Chege would be released before 0900 on 22 September 2021.

b) Defense counsel informed the Court that Corporal Chege is expected to [redacted] on either 21 or 22 September 2021 [redacted]

c) Additionally, defense counsel informed the Court that due to Corporal Chege's medical condition and the medication he was on, even if he were released before the scheduled Art. 39(a) session, he would likely not be able to participate in the hearing.

d) On 21 September 2021, after consulting with trial counsel and the Court regarding availability, defense counsel filed the present motion for continuance of the Art. 39(a) session.

e) On 21 September 2021, trial counsel and victim legal counsel each informed the Court they do not oppose the defense continuance motion and they are available on the date requested.

III. Court Order

Accordingly, the unopposed defense motion is **GRANTED**. The Court hereby **ORDERS** that the Art. 39(a) session previously set for 22 Sep 21 by the Trial Management Order is now continued to 0900 on 24 September 2021.

So **ORDERED** this 21st day of September 2021.

[redacted]

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	**ORDER** Defense Continuance Motion 23 September 2021

I. Nature of Order. Pursuant to Rule for Courts-Martial 906(b)(l), defense counsel today filed a motion for continuance of the 24 Sep 21 Article 39(a) session to 4 October 2021 and adjustment of the Final Pretrial Matters milestone in the Trial Management Order (TMO).

II. Summary of Facts

(a) On 20 September 2021, defense counsel notified the Court that Corporal Chege was admitted to [redacted] on 20 September 2021 and, because of the [redacted] on 21 Sep 21 defense counsel filed a Motion for Appropriate Relief seeking continuance to 24 Sep 21 of the Art. 39(a) session which had been previously scheduled for 22 Sep 21.

(b) On 21 Sep 21, the Court granted the defense continuance request.

(c) The Trial Management Order established 4 Oct 21 as the due date for Final Pretrial Matters and 12-15 Oct 21 as the dates for trial on the merits.

(d) On 23 September 2021, defense counsel notified opposing counsel and the Court that Corporal Chege remained hospitalized and had undergone an [redacted] requiring [redacted] on 23 Sep 21, that Corporal Chege would not be released on 23 September 2021, and that due to Corporal Chege's medical condition and the medication he was on, even if he were released on 24 Sep 21, he would be unable to participate in the Art. 39(a) hearing that day.

(e) On 23 Sep 21, defense counsel suggested that counsel and the Court hold an R.C.M. 802 conference to discuss a continuance, and consulted with trial counsel regarding alternate dates.

(f) A telephonic R.C.M. 802 conference took place on 23 Sep 21 in which trial and defense counsel, victim legal counsel, and the Military Judge participated, discussing Corporal Chege's condition, his anticipated significant [redacted] and the impact on scheduled dates in this case, the availability of counsel and witnesses for alternate dates, and the feasibility of the current scheduled trial dates. Trial counsel and victim legal counsel did not oppose the defense's proposed

continuance of the Art. 39(a) date and Final Pretrial Matters deadline. During the discussion, trial counsel and victim legal counsel expressed opposition to continuance of the trial date.

III. Court Order

For the foregoing reasons, the unopposed defense motion is **GRANTED**, and the Court hereby **ORDERS** that the Article 39(a) session previously moved to 24 September 2021 is now hereby continued to 4 October 2021 at 0900, and the deadline for submission of Final Pretrial Matters is now NLT 1200 on 7 October 2021.

So **ORDERED** this 23rd day of September 2021.

[redacted]

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	**ORDER** **Defense Motion For Appropriate Relief (Continuance Request)** 3 October 2021

I. Nature of Order. Pursuant to Rule For Courts-Martial 906(b)(l), defense counsel requested a continuance of the 4 October 2021 Article 39(a) session to 8 October 2021.

II. Summary of Facts

(a) On 1 October 2021, defense counsel notified the Court that Corporal Chege was again admitted to [redacted] on 28 September 2021.

(b) Defense counsel further notified the Court as follows: (i) on 30 September 2021, the doctors at [redacted] determined they could not provide Corporal Chege with the specialized care required for his condition and arranged for Corporal Chege to be transported to a [redacted] California; (ii) on 1 October 2021, doctors advised Corporal Chege that they would assess his condition to determine if [redacted] would be required and/or if a change in medication is necessary; and (iii) in the evening of 1 October 2021, Corporal Chege was advised that he would be required to be monitored over the weekend.

(c) On 1 October 2021, defense counsel further notified the Court that defense counsel consulted with trial counsel to discuss an alternate date for the Art. 39(a) session, and defense counsel and trial counsel are available to conduct the Art. 39(a) session on 8 Oct 21.

III. Court Order

Based on the foregoing representations of counsel, the defense motion for continuance is **GRANTED**. Accordingly, it is **ORDERED** that the Art. 39(a) session previously scheduled for 4 Oct 21 is hereby continued to 0900 on 8 October 2021.

So **ORDERED** this 3rd day of October 2021.

[redacted]

D. A. Poteet
Lieutenant Colonel
U.S. Marine Corps
Military Judge

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

UNITED STATES v. DANIEL K. CHEGE CORPORAL U.S. MARINE CORPS	**ORDER** Defense Continuance Motion 25 October 2021

I. Nature of Order. This matter is before the Court on a motion by defense counsel for continuance. The Court previously approved the request in part, and hereby acts on the remaining aspects of the motion.

II. Summary of Facts

(a) Aspects of this case have been continued multiple times because of the medical situation of the accused.

(b) On 21 October 2021, defense counsel filed the most recent continuance request because the accused had again been [redacted] seeking continuance of the trial dates, an Article 39(a) hearing, and the Final Pretrial Matters deadline. The defense filing noted that trial counsel opposes the motion only as to the particular proposed trial dates of 18-21 Jan and that trial counsel proposes instead trial dates of 29 Nov to 3 Dec 21.

(c) On 22 October 2021, the Court approved the request in part. The Court continued a previously re-scheduled Article 39(a) session from 25 Oct 21 to 9 Nov 21. The Court modified the Trial Management Order deadline for Final Pretrial Matters to instead be due on 22 Nov 21. In order to discuss the trial dates, the Court directed that a telephonic R.C.M. 802 conference be held on 25 Oct 21.

(d) During the telephonic R.C.M. 802 conference on 25 October 2021, defense counsel discussed the [redacted] of the accused, including the accused being discharged from the hospital, being on convalescent leave, likely [redacted] in early December 2021 if the accused has recovered [redacted] and physician concerns about the medical situation of the accused. Victim Legal Counsel noted a potential scheduling conflict involving another case on 9 Nov 2021, and separate potential schedule conflicts on 29 Nov 21. In mitigation of the VLC's potential 9 Nov 21 scheduling conflict, the parties discussed holding the re-scheduled Article 39(a)

session on board MCB Camp Pendleton beginning at 0730, which no party opposed. Defense counsel requested the January trial dates listed in their motion. Trial counsel proposed trial dates of 30 Nov through 3 Dec 21 in light of the VLC schedule conflict.

III. Court Order

In light of the foregoing, the Court hereby **ORDERS** as follows:

(a) The Article 39(a) session on 9 November 2021 shall take place on board MCB Camp Pendleton at 0730;

(b) The defense continuance request of 21 Oct 21, as to the trial dates, is **GRANTED IN PART** and accordingly this case is hereby set for trial on 30 November through 3 December 2021;

(c) The defense continuance request of 21 Oct 21 is **DENIED IN PART** to the extent the motion requested a longer continuance than the Court has granted.

So **ORDERED** this 25th day of October 2021.

[redacted]

D. A. POTEET
Lieutenant Colonel
U.S. Marine Corps
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
Chege, Daniel K.	Marine Corps	E-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
3d Marine Aircraft Wing	General	Enlisted Members	Dec 8, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	2 years	Total forfeitures	None	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
0	0	0 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

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

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Poteet, Derek A.	Marine Corps	O-5	Dec 8, 2021	POTEET.DEREK.ANDREW [redacted] Digitally signed by POTEET.DEREK.ANDREW.[redacted] Date: 2021.12.08 18:12:16 -08'00'

37. NOTES: The offenses at Specs. 1 & 2 of the Charge constitute unreasonable multiplication of charges for sentencing; the MJ merged them into one offense for sentencing purposes.

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge	120	Specification 1:	**Not Guilty**	Guilty			120AA2
		Offense description	Sexual assault without the consent of the other person o/a 5 July 2019				
		Specification 2:	**Not Guilty**	Guilty			120AA2
		Offense description	Sexual assault without the consent of the other person o/a 5 July 2019				

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
Chege, Daniel K.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
MALS-16, MAG-16, 3D MAW	1-Aug-2016	5 yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
3D MAW	General	Enlisted Members	8-Dec-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.

- The SJA consulted with the Convening Authority and explained his clemency authority under Art. 60, UCMJ.

- The accused waived his right to submit matters pursuant to R.C.M. 1106.

- The victim did not submit any matters pursuant to R.C.M. 1106A.

24. Convening Authority Name/Title	25. SJA Name
Major General B. J. Gering/Commanding General	Colonel [redacted]

26. SJA signature	27. Date
[redacted]	Jan 7, 2022

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.]

The accused waived his right to submit matters pursuant to R.C.M. 1106.
The victim did not submit any matters pursuant to R.C.M. 1106A.
The sentence is approved as adjudged.

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

N/A

30. Convening Authority's signature	31. Date
[redacted]	JAN 11 2022

32. Date convening authority action was forwarded to PTPD or Review Shop. JAN 11 2022

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
Chege, Daniel K.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
MALS-16, MAG-16, 3D MAW	1-Aug-2016	5 yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
3d Marine Aircraft Wing	General	Enlisted Members	8-Dec-2021

SECTION B - ENTRY OF JUDGMENT

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

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

Charge: Violation of the UCMJ, Article 120
Plea: Not Guilty Finding: Guilty
Specification 1: Sexual assault without consent by penetrating [redacted] vulva with his penis on divers occasions or about 5 July 2019
Plea: Not Guilty Finding: Guilty*
Specification 2: Sexual assault without consent by penetrating [redacted] vulva with his hand on divers occasions or about 5 July 2019
Plea: Not Guilty Finding: Guilty*

* After announcement of findings, the military judge found, without objection, that the offenses charged in specification 1 and specification 2 of the Charge constitute unreasonable multiplication of charges for sentencing. Accordingly, the military judge merged the two specifications into one offense for sentencing.

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.

The Members with Enlisted Representation (unitary sentencing) adjudged the following sentence:
- Dishonorable discharge, Confinement for 2 years, Forfeiture of all pay and allowances, and Reduction to grade E-1.*

Plea Agreement:
- There was no plea agreement. The trial was fully contested.

Convening Authority:
- On 11 January 2022, the Convening Authority approved the sentence as adjudged.

Pretrial Confinement Credit:
- The accused is entitled to zero days of pretrial confinement credit. As referenced in blocks 8 and 9 of the charge sheet, the accused turned himself in to civilian authorities and remained in the hands of civilian authorities from 18-19 June 2020 pursuant to a civilian law enforcement investigation of the same misconduct. The civilian confinement took place prior to preferral of the military charges against the accused. As noted at transcript pages 1191-92, the defense agreed the accused is entitled to no pretrial confinement credit.

* The military judge instructed the Members prior to deliberation on sentence that the offenses charged in specification 1 and specification 2 of the Charge are one offense for sentencing purposes.

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)

Not requested. On 16 December 2021, the accused waived his right to submit matters pursuant to R.C.M. 1106.

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

N/A

15. Judge's signature:	16. Date judgment entered:
POTEET.DEREK.ANDREW.[redacted] Digitally signed by POTEET.DEREK.ANDREW.[redacted] Date: 2022.03.20 17:24:51 -07'00'	Mar 20, 2022

17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

18. Judge's signature:	19. Date judgment entered:

APPELLATE INFORMATION

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Daniel CHEGE** Cpl (E-4) U.S. Marine Corps *Appellant*	NMCCA No. 202200079 **APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS IN THE RECORD OF TRIAL** Tried at Marine Corps Base Camp Pendleton on July 28, 2021, September 3, 2021, November 19 and 30, 2021, and December 6-8, 2021 before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek Poteet, U.S. Marine Corps, Military Judge, presiding

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

COMES NOW the undersigned and respectfully moves, pursuant to Rule 6.2(c) of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure to examine sealed portions of the transcript and exhibits in the record of trial.

1. Specifically, counsel requests to examine the following:

a. Transcript pages 174-286, closed Mil. R. Evid. 412 hearings.

b. Appellate Exhibit I, Evidence in Support of trial counsel Mil. R. Evid. 412 filings.

c. Appellate Exhibit II, Evidence in Support of defense Mil. R. Evid. 412 filings.

d. Appellate Exhibit XI, Defense Motion to Admit Mil. R. Evid. 412 Evidence.

e. Appellate Exhibit XII, Government Response to Defense Mil. R. Evid. 412 Motion.

f. Appellate Exhibit XV, Defense Motion to Compel Production of Witnesses (related to Appellate Exhibit XI).

g. Appellate Exhibit XVI, Government Response to Defense Motion to Compel Witnesses.

h. Appellate Exhibit XXI, Victim's Legal Counsel (VLC) Response to Defense Mil. R. Evid. Hearing.

i. Appellate Exhibit XXV, Defense Motion to Compel HBJ for Mil. R. Evid. 412 Hearing.

j. Appellate Exhibit XXVI, Government Response to Defense Motion to Compel HBJ.

k. Appellate Exhibit XXXVI, VLC Response to Defense Motion to Compel HBJ.

2. With regard to sealed portions of the transcript:

a. Trial counsel and trial defense counsel were present during the closed sessions transcribed on pages 174-286 in the record of trial.

b. The contents of the sealed portions of the transcript are subject to the following colorable claim of privilege: None.

c. Access to the sealed portions of the transcript by appellate defense counsel is necessary for the following reason:

(1) To ensure issues are properly raised with the court on behalf of my client.

d. Undersigned counsel does not seek to copy the sealed portions of the transcript.

3. With regard to sealed exhibits:

a. Appellate Exhibits I, II, XI, XII, XV, XVI, XXI, XXV, XXVI, XXXVI

(1) were released to trial and trial defense counsel.

(2) were not reviewed by the military judge in camera.

(3) are subject to the following colorable claim of privilege: None.

(4) Access to the sealed exhibits by appellate defense counsel is necessary for the following reason:

(a) To ensure issues are properly raised with the court on behalf of my client.

(5) Undersigned counsel does not seek to copy the sealed exhibits.

4. Absent further order of the Court, undersigned counsel will otherwise ensure continued compliance with any protective orders issued by the military judge in this case.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on May 3, 2022, that a copy was uploaded into the Court's case management system on May 3, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] on May 3, 2022.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 2 - US v. Chege - NMCCA 202200079 - Motion to Examine Sealed
Date: Tuesday, May 3, 2022 11:20:57 AM

RECEIVED
MAY 3 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]

Subject: FILING - Panel 2 - US v. Chege - NMCCA 202200079 - Motion to Examine Sealed

Good Afternoon Clerk of Court,

Please see the attached motion to examine sealed in the case of US v. Cpl Chege. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]

[redacted]

Subject: RULING - RECEIPT - FILING - Panel 2 - US v. Chege - NMCCA 202200079 - Motion to Examine Sealed
Date: Tuesday, May 3, 2022 12:26:00 PM

MOTION GRANTED
3 MAY 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]

Subject: RECEIPT - FILING - Panel 2 - US v. Chege - NMCCA 202200079 - Motion to Examine Sealed

RECEIVED
MAY 3 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 - US v. Chege - NMCCA 202200079 - Motion to Examine Sealed

Good Afternoon Clerk of Court,

Please see the attached motion to examine sealed in the case of US v. Cpl Chege. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity

[redacted]

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

Before Panel No. 2

UNITED STATES

Appellee

v.

Daniel K. CHEGE
Corporal (E-4)
U.S. Marine Corps

Appellant

NMCCA No. 202200079

APPELLANT'S MOTION FOR SECOND ENLARGEMENT OF TIME

Tried at Marine Corps Air Station Miramar, California on July 28, September 3, November 19 and 30, December 1-3 and 6-8, 2021, before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek A. Poteet, U.S. Marine Corps, Military Judge presiding

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

COMES NOW the undersigned and respectfully moves for a second enlargement of time to file a brief and assignments of error. The current due date is July 12, 2022. The number of days requested is thirty. The requested due date is August 12, 2022.

Status of the case:

1. The Record of Trial was docketed on April 13, 2022.
2. The Moreno date is October 13, 2023.
3. Corporal Chege is currently confined.
4. The record consists of 1,375 transcribed pages and 2,239 total pages.
5. Counsel has not reviewed the record.

Good cause is required in this case because counsel requires further time to consult with his client, adequately review the file for error, and draft a brief if necessary. Appellant has been consulted and concurs with the enlargement request.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.

[redacted]
Christopher B. Dempsey
LT, 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 foregoing was electronically filed with the Court on July 6, 2022, that a copy was uploaded into the Court's case management system on July 6, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] on July 6, 2022.

[redacted]
Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - Second Enlargement Request
Date: Wednesday, July 6, 2022 10:38:13 AM

MOTION GRANTED
6 JULY 2022
United States Navy-Marine Corps
Court of Criminal Appeals

v/r,

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

[redacted]

Subject: FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - Second Enlargement Request

Good Afternoon Clerk of Court,

Please see the attached reply in the case of US v. Cpl Chege. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity

[redacted]

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

Before Panel No. 2

UNITED STATES
Appellee

v.

Daniel K. CHEGE
Corporal (E-4)
U.S. Marine Corps
Appellant

NMCCA No. 202200079

APPELLANT'S MOTION FOR THIRD ENLARGEMENT OF TIME

Tried at Marine Corps Air Station Miramar, California on July 28, September 3, November 19 and 30, December 1-3 and 6-8, 2021, before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek A. Poteet, U.S. Marine Corps, Military Judge presiding

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

COMES NOW the undersigned and respectfully moves for a third enlargement of time to file a brief and assignments of error. The current due date is August 12, 2022. The number of days requested is thirty. The requested due date is September 12, 2022.

Status of the case:

1. The Record of Trial was docketed on April 13, 2022.
2. The Moreno date is October 13, 2023.
3. Corporal Chege is currently confined.
4. The record consists of 1,375 transcribed pages and 2,239 total pages.
5. Counsel has reviewed the record.

Good cause is required in this case because counsel requires further time to consult with his client, adequately review the file for error, and draft a brief. Specifically, counsel has begun drafting the brief and this case presents complex legal issues which require significant research and analysis. Appellant has been consulted and concurs with the enlargement request.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.

[redacted]

Christopher B. Dempsey
LT, 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 foregoing was electronically filed with the Court on August 5, 2022, that a copy was uploaded into the Court's case management system on August 5, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] on August 5, 2022.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - Third Enlargement Request
Date: Friday, August 5, 2022 12:57:40 PM

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

v/r,

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

[redacted]

Subject: FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - Third Enlargement Request

Good Morning Clerk of Court,

Please see the attached request for a third enlargement in the case of US v. Cpl Chege. Thank you.

Very Respectfully,

Christopher B. Dempsey

LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity


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

Before Panel No. 2

UNITED STATES

Appellee

v.

Daniel K. CHEGE
Corporal (E-4)
U.S. Marine Corps

Appellant

NMCCA No. 202200079

APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME

Tried at Marine Corps Air Station Miramar, California on July 28, September 3, November 19 and 30, December 1-3 and 6-8, 2021, before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek A. Poteet, U.S. Marine Corps, Military Judge presiding

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

COMES NOW the undersigned and respectfully moves for a fourth enlargement of time to file a brief and assignments of error. The current due date is September 12, 2022. The number of days requested is fourteen. The requested due date is September 26, 2022.

Status of the case:

1. The Record of Trial was docketed on April 13, 2022.
2. The Moreno date is October 13, 2023.
3. Corporal Chege is currently confined.
4. The record consists of 1,375 transcribed pages and 2,239 total pages.
5. Counsel has reviewed the record.

Good cause is required in this case because counsel requires further time to consult with his client, adequately review the file for error, and draft a brief. Specifically, counsel has nearly finalized the brief. But due to the complex nature and significant number of the errors presented in the record, Counsel requires additional time to thoroughly research and present the issues appropriately. This brief is currently counsel's top priority. Since the last request for enlargement, counsel:

- Filed a supplement to a petition with CAAF.
- Filed two reply briefs.
- Was on leave from August 11-15, 2022.
- Began teaching a course at the Naval Academy two days a week.
- Conducted a PRT as an ACFL.

Counsel is also currently drafting a brief assigning error and a reply brief in separate cases. Appellant has been consulted and concurs with the enlargement

request.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.

[redacted]
Christopher B. Dempsey
LT, 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 foregoing was electronically filed with the Court on September 7, 2022, that a copy was uploaded into the Court's case management system on September 7, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division (DACCode46@navy.mil) on September 7, 2022.

[redacted]
Christopher B. Dempsey
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[redacted]

Subject: Re: FILING - Panel 2 - U.S. v. Chege- NMCCA 202100079 - Appellant"s Motion for Fourth Enlargement
Date: Wednesday, September 7, 2022 9:52:07 AM

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

v/r,

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

[redacted]

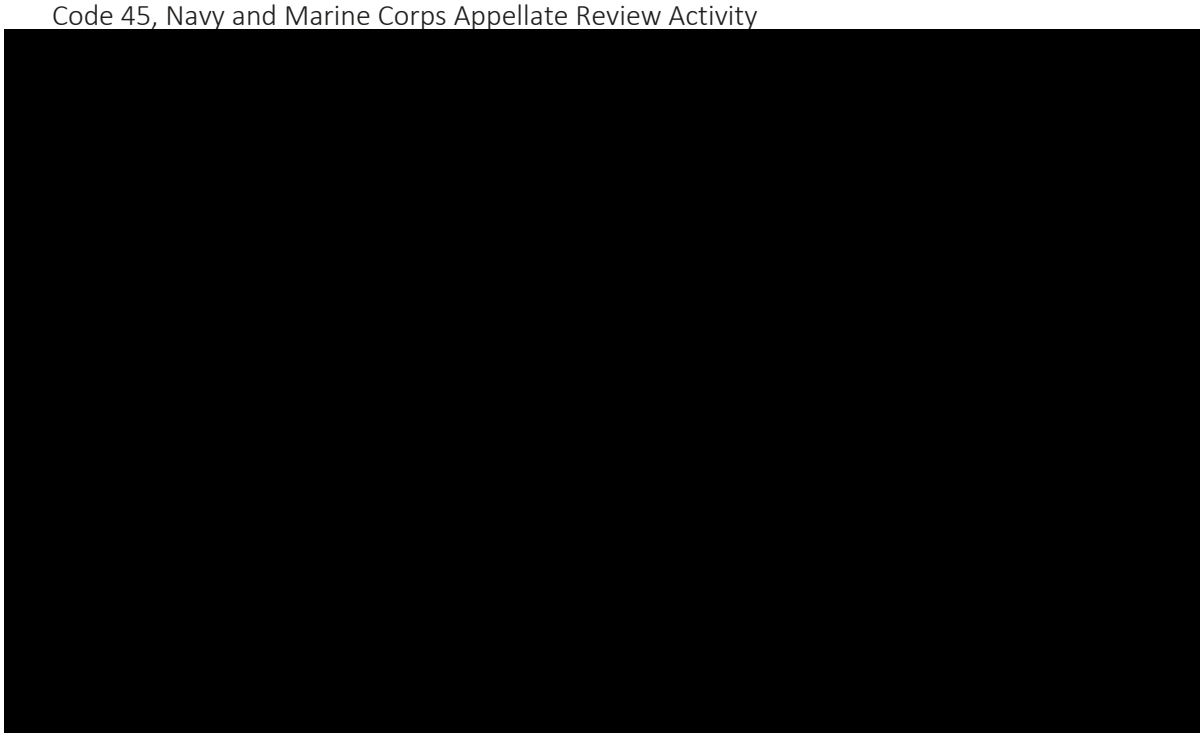
Subject: FILING - Panel 2 - U.S. v. Chege- NMCCA 202100079 - Appellant's Motion for Fourth Enlargement

Good Morning Clerk of Court,

Please find attached Appellant's Motion for a Fourth Enlargement in the case of US v. Cpl Chege requesting a fourteen day extension. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity



IN UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES
Appellee

v.

Daniel K. CHEGE
Corporal (E-4)
U.S. Marine Corps
Appellant

NMCCA No. 202200079

MOTION TO FILE PLEADING CONTAINING SEALED MATERIALS

Tried at Marine Corps Air Station Miramar, California on 28 July, 3 September, 19 and 30 November, 1-3 and 6-8 December 2021, before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek A. Poteet, U.S. Marine Corps, Military Judge, presiding

COMES NOW Appellant, pursuant to Rule 17.6 of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure, in conjunction with Appellant's Brief and Assignments of Error, and files this motion to file his Brief and Assignments of Error containing materials sealed by a military judge.

These sealed materials must be included in Appellant's Brief and Assignment of Error as they provide the basis for an assignment of error that would likely result in the findings being set aside if granted.

Respectfully submitted.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
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Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on September 26, 2022, that a copy was uploaded into the Court's case management system on September 26, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted]

[redacted]

Christopher B. Dempsey
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1254 Charles Morris Street, SE
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IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Daniel K. CHEGE** Corporal (E-4) U.S. Marine Corps *Appellant*	NMCCA No. 202200079 **APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Tried at Marine Corps Air Station Miramar, California on 28 July, 3 September, 19 and 30 November, 1-3 and 6-8 December 2021, before a General Court-Martial convened by Commanding General, 3rd Marine Aircraft Wing, Lieutenant Colonel Derek A. Poteet, U.S. Marine Corps, Military Judge, presiding

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

Christopher B. Dempsey
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1254 Charles Morris Street, SE
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[redacted]

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[redacted]

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WAS APPELLANT'S TRIAL DEFENSE COUNSEL INEFFECTIVE FOR NOT SEEKING CREDIT FOR THE TIME APPELLANT SPENT IN CIVILIAN PRETRIAL CONFINEMENT?

Statement of Statutory Jurisdiction

The judgment entered into the record for Appellant includes a sentence of dishonorable discharge and two years' confinement. Accordingly, this Court has jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1]

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of sexual

[1] 10 U.S.C. § 866(b)(3) (2019).

assault in violation of Article 120, UMCJ.[2] The members sentenced Appellant to a dishonorable discharge, two years' confinement, reduction to pay grade E-1, and forfeiture of all pay and allowances.[3] The convening authority (CA) approved the sentence, and the military judge entered it into judgment.[4]

Introduction

After the complaining witness checked into the same command as Appellant in May 2019, the two developed a friendship that blossomed into a sexual relationship. Over the next couple of months they became close and kissed several times. After a Fourth of July party where they both drank alcohol, they had a sexual encounter on a friends couch while other Marines were sleeping nearby. A few weeks later, in August, they went to Appellant's barracks room and had sex in his bed.

Immediately after having sex with Appellant in August, the complaining witness called her friend, had him meet her at Appellant's barracks at 0400, and told him the sex had not been consensual and that she pretended to be asleep. The friend was sure she was alleging an assault that had just occurred, as she

[2] R. at 1196.
[3] R. at 1374.
[4] Convening Authority's Action (Jan. 11, 2022); Entry of Judgment (Mar. 20, 2022).

distinguished it from an earlier nonconsensual sexual encounter she had with Appellant in July.

Seven months later, the complaining witness altered her story. She decided her sexual encounter with Appellant in August had been consensual and reported their earlier encounter in July only as a sexual assault. She alleged that during the consensual sex with Appellant in August, she remembered that Appellant had sexually assaulted her in July on the couch near the other Marines while she pretended to be asleep. To support this new claim, she confronted Appellant in a recorded telephone call and lied to him (despite being explicitly advised not to) that she had been asleep and thus unable to consent. Based on this lie, Appellant, who initially expressed his belief that she had been awake but did not remember much of the encounter, apologized and agreed he must have wronged her because she had been asleep and thus unable to consent. He then expressed in detail the guilt he felt about her (false) revelation that she had not been able to consent to their encounter.

At trial, the complaining witness testified that she had in fact been awake throughout the encounter near other sleeping Marines, but that she did not say or do anything to inform Appellant she did not consent. Nevertheless, the military judge refused to instruct the members on the defense of mistake of fact as to consent.

[redacted]

Just before trial, in violation of the military judge's order, the complaining witness discussed the case with a Defense witness, Lance Corporal (LCpl) Hotel, whose testimony then materially changed to become more favorable to the Prosecution. LCpl Hotel lied about this interaction during his testimony on the issue, denying any such conversation occurred. When his lie was made clear through the statement of another witness who observed the conversation, LCpl Hotel invoked his right to remain silent and refused to testify further.

As she sat in the courtroom listening to LCpl Hotel's false testimony about their case-related discussion and a Defense request for discovery of her digital communications, the complaining witness used her cell phone to delete her

conversation history with him on Snapchat. When recalled to testify about the matter, she denied any witness tampering or substantive case discussion occurred.

Upon reviewing her phone and discovering she had used her phone to delete her communications with LCpl Hotel, the Defense moved to compel the communications from Snapchat and requested a continuance or abatement to obtain them in order to show grounds for a mistrial and further impeach the credibility of her testimony, on which the entire case turned. The military judge addressed the issue by creating a Catch-22.[5] He summarily denied both the Defense motion to compel the Snapchat records and its request for a continuance or abatement to enable it to obtain this direct evidence of witness tampering by the complaining witness. And then he subsequently ruled that, lacking such direct evidence (which he had refused either to compel or grant a continuance/abatement for the Defense to obtain), the Defense could not argue in closing that any witness tampering by the complaining witness had occurred.

[5] Catch-22, a phrase from the novel *Catch-22* (1961) by Joseph Heller, is a "problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Webster's Ninth New Collegiate Dictionary* 215 (9th ed. 1991), *quoted in United States v. Warner*, 62 M.J. 114, 122 n.39 (C.A.A.F. 2005).

Statement of Facts

A. The complaining witness had a consensual sexual relationship with Appellant.

The complaining witness and Appellant spent a lot of time together after she checked into the shop where he served as supervisor in May 2019.[6] They frequently hung out together.[7] Over the next couple of months, they kissed several times.[8] These kisses, which the complaining witness later described as "friendly," lasted around 30 seconds each.[9]

On the Fourth of July 2019, the complaining witness and Appellant attended a house party.[10] After drinking alcohol at the party, they both slept on the same "L" shaped couch with other people present in the room.[11] The complaining witness explained that the alcohol probably had a strong effect on her because it was the second time she drank.[12] During the night, they had a sexual encounter on the couch.[13] The complaining witness gave no indication, to Appellant or anyone else, in the following days that anything about the encounter had been

[6] R. at 693-94.
[7] R. at 693-94, 751-52.
[8] R. at 753-54, 763, 774-75, 782-83.
[9] R. at 775, 782-83
[10] R. at 694-95
[11] Def. Ex. C; R. at 694-99, 710, 733-35.
[12] R. at 764-65.
[13] R. at 700-12, 742-46, 780-81.

nonconsensual.[14] To the contrary, the following morning she told her friend, LCpl Hotel, that she intended to get a ride home with Appellant.[15]

A few weeks later, in August 2019, the complaining witness accompanied Appellant to his barracks room, where they had a second sexual encounter in his bed.[16] Immediately afterwards, she called a friend, Corporal (Cpl) Golf, and asked him to come pick her up.[17] Corporal Golf could tell she was in distress and "instantly" drove to meet her.[18] When Cpl Golf arrived around 0400, she told him the sex with Appellant had not been consensual and that "she had been taken advantage of" while pretending to be asleep.[19] Corporal Golf testified he was "100 percent" sure that she described the alleged assault as having just occurred, and that she distinguished it from an earlier nonconsensual sexual encounter she had with Appellant in July.[20]

The complaining witness later denied making this allegation to Cpl Golf. Instead, she maintained that the alleged assault she told Cpl Golf about from the night in Appellant's barracks room in August had been consensual and the only

[14] R. at 710, 765-66.
[15] App. Ex. XLIX at 2. She later testified that she drove herself to the party. R. at 695.
[16] R. at 713-19.
[17] R. at 719-22, 1063-76.
[18] R. at 1063.
[19] R. at 1064-65.
[20] R. at 1064-66, 1072-73.

nonconsensual encounter had occurred weeks earlier in July.[21] She eventually testified that in the middle of having sex with Appellant in August, which she now described as consensual, her memories came back that their July encounter had not been consensual.[22] This is the story she told the authorities in February 2020 when she reported only their July encounter as a sexual assault.[23] After this was reported, Cpl Gold testified that he felt "manipulated."[24]

The complaining witness testified that she believed she told someone about the incident in July shortly after it happened, but could not "specifically remember who."[25] She later admitted that the only reason her allegation was reported to the authorities was because her supervisor learned about it and was a mandatory reporter.[26] She advised she made this late report because reporting earlier had not crossed her mind and asserted a fear of not being believed by the members of her shop.[27]

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[21] R. at 713-22.
[22] R. at 716-19.
[23] R. at 766.
[24] R. at 1067.
[25] R. at 710.
[26] R. at 766-67.
[27] R. at 767, 773, 782.

B. The complaining witness testified that during their July encounter she was awake but pretended to be asleep and said nothing to Appellant while they were having sex.

At trial, the complaining witness testified that while they were on the "L" shaped couch in a room where other people were sleeping, Appellant whispered her name and shook her to get her attention, but that she pretended to be asleep.[28] She testified that while she was on her back he removed her shorts and underwear, then penetrated her vagina with his fingers, and then he moved her onto her side and put his penis inside her vagina.[29] She testified that he then left, returned shortly after, removed her shorts and underwear out of the way "again" and again inserted his fingers and penis into her vagina.[30] She testified that he then pulled her onto his lap and kissed her, that she did not kiss him back, and that he then put her back down on the couch.[31]

She testified that throughout this time she made no effort to convey her lack of consent to Appellant, did not seek assistance from any of the other people in the room (who she knew were sleeping), and instead remained nonreactive and pretended to be asleep.[32] She added that she did this despite not being "afraid."[33]

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[28] R. at 700-01, 736.
[29] R. at 701-04.
[30] R. at 704-07.
[31] R. at 708-09.
[32] R. at 701-09, 733-35, 742-45, 750-51, 781.
[33] R. at 746.

She initially reported being unsure if her eyes were open or not, but acknowledged she knew it was Appellant who returned to the couch.[34] She testified that she then remained on the couch with Appellant for the rest of the night, had an unspecified conversation with him in the morning, and did not report the encounter as a sexual assault for seven months.[35]

C. When the complaining witness told him during a controlled call ten months later that she had been asleep and thus unable consent, Appellant, who did not fully remember the encounter, apologized and allowed her to fill in "the blanks" of his memory.[36]

After reporting her allegation in February 2020, the complaining witness made a phone call to Appellant that was monitored and recorded by a San Diego police detective.[37] After speaking with the complaining witness, Appellant was telephonically interviewed by the same police detective a month later.[38] During each call, Appellant spoke about the encounter and had little recollection of what occurred due to his state of intoxication.[39] He told the police detective that the

[34] R. at 705-06, 743-44, 750-51.
[35] R. at 710, 747-48, 765-66.
[36] Pros. Exs. 1, 4; Pros. Ex. 5 at 6.
[37] Pros. Exs. 1, 4; R. at 710-12; R. at 730-33. This was the first time that the complaining witness discussed that night with Appellant. R. at 1088.
[38] Pros. Exs. 2, 5.
[39] Pros. Ex. 4 at 7, 12; Pros. Ex. 5 at 5-6.

complaining witness had called and "helped me fill in some of the blanks"[40] and that "from what she told me of what she felt," I "forced myself upon her . . . ."[41]

The complaining witness "filled in the blanks" during her call as follows. She initially told Appellant that she could not remember much of what happened between them on the Fourth of July, to which he responded that he, too, had a "hazy" memory of the encounter, was not sure if he did what he thought he did, and remembered touching her.[42] Appellant stated he was "pretty sure I know what happened," but when she asked him "why it happened" Appellant was confused.[43] She then said, "I'm just trying to move past it. That's all."[44] He responded that he could "offer an apology . . . [b]ecause, you know, obviously you wouldn't be talking to me about it . . . if I didn't grieve you in some type of way, you know?"[45] She responded that she just wants to "talk to [him] about it and figure out what really happened" so she can "move on past it."[46]

Then she asked, "[d]id you know that I was sleeping, like?"[47] He responded intently, "[n]o."[48] Then he addressed her (false) suggestion that she had in fact

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[40] Pros. Ex. 5 at 6.
[41] Pros. Ex. 5 at 10.
[42] Pros. Ex. 4 at 6-7.
[43] Pros. Ex. 4 at 6-7; Pros. Ex. 1 at 07:24-07:50 (Video Rec'g of Controlled Call).
[44] Pros. Ex. 4 at 7.
[45] Pros. Ex. 4 at 7.
[46] Pros. Ex. 4 at 7-8.
[47] Pros. Ex. 4 at 8.
[48] Pros. Ex. 4 at 8; Pros. Ex. 1 at 09:44-09:49.

been asleep by saying he was "gone" at that point, had limited memory, and lacked self-control.[49] When she developed this suggestion by asking if they had sex, he responded that they tried to, but he was unable to get them into a comfortable enough position to do so, at one point asking himself, "[w]hat the f[***] am I doing?"[50]

She then built upon the suggestion by asking, "[d]o you feel bad because you know that I wasn't, like, consenting and I couldn't consent?"[51] He responded, "[y]es. I feel terrible. And that's what I'm saying: [l]ike, if I could take it back, I would, but I can't. That makes me feel even worse for it."[52] He said he remembered coming back from the bathroom and trying to have sex again, and that his penis barely went into her vagina, but "couldn't go in."[53] He later explained, "I'm not saying you didn't feel what you felt, because obviously you did . . . [b]ut for my haziness, for my hazy recollection, I don't remember being inside."[54] Nevertheless, he said what he did "was hellish. It was evil. It was just vile."[55] She then continued to lay on the (false) suggestion that she had been asleep by stating "I was sleeping and, like, I woke up to that" to which he responded "I know

[49] Pros. Ex. 4 at 8-9.
[50] Pros. Ex. 4 at 9-10.
[51] Pros. Ex. 4 at 11.
[52] Pros. Ex. 4 at 11.
[53] Pros. Ex. 4 at 11.
[54] Pros. Ex. 4 at 13.
[55] Pros. Ex. 4 at 12.

. . . why did I do that?" and that despite his hazy memory he would not be able to "forget that."[56]

The complaining witnessed then hammered home the false suggestion by asking, "[s]o you knew that I couldn't consent?"[57] He responded by parroting back the false narrative, "I did what I did knowing you couldn't [consent]," and said he "let the devil take over."[58] Right before hanging up, he said, "[T]hank you for calling me out . . . it's like '[s***]. What the f[***] did I do,' you know?"[59]

During his interview with the police detective the following month, after describing how the complaining witness "helped me fill in some of the blanks,"[60] Appellant walked through the encounter to the best of his ability, but was adamant that he did not remember penetrating her with his fingers or penis.[61] He said he remembered trying to wake her up and her not responding, then trying to go back to sleep, then "wak[ing] up and that's when I find myself trying to penetrate her."[62] He said he remembered thinking, "[m]y gosh. What am I doing? This is heinous. This is disgusting."[63] He acknowledged he probably touched her vagina with his

[56] Pros. Ex. 4 at 12.
[57] Pros. Ex. 4 at 13-14.
[58] Pros. Ex. 4 at 14.
[59] Pros. Ex. 4 at 14.
[60] Pros. Ex. 5 at 6.
[61] Pros. Ex. 5 at 6-27.
[62] Pros. Ex. 5 at 13, 16-17.
[63] Pros. Ex. 5 at 10.

hand but that he primarily recalled his penis uncomfortably rubbing on her shorts, which made him realize what he was doing.[64]

He said he remembered putting her into a comfortable "position where she could fall asleep" when they were done, before "coddl[ing]" her to apologize.[65] While these statements implied she had been awake at the time and thus able to consent, he then parroted back her suggestion from the controlled call, telling the detective "[y]es" when he was asked "[b]ecause at the end of the day, you know she couldn't consent to anything, right?"[66]

Prior to making the controlled call, the complaining witness was advised "We need to articulate the **UNABLE TO CONSENT PART** . . . ."[67] She was also explicitly advised: "*do not lie* about the details of the crime."[68] During the call, the detective wrote out several questions ("because he [did not] want to generate false information") for the complaining witness to repeat if she felt appropriate and some of these centered on the erroneous fact that she was asleep and unable to consent.[69] She acknowledged receiving these "little notes" to repeat if she felt appropriate and testified she did not repeat many of the notes on the call.[70]

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[64] Pros. Ex. 5 at 16-17, 20-21, 25.
[65] Pros. Ex. 5 at 22-23.
[66] Pros. Ex. 5 at 26.
[67] Def. Ex. F at 2.
[68] Def. Ex. F. at 2 (emphasis added); R. at 845-46, 877-78.
[69] Def. Ex. E; R. at 858-60, 872-73.
[70] R. at 732.

However, the complaining witness knew the controlled call would be "substantial" evidence given her late report and she did elect to ask several of the untruthful questions surrounding her being asleep and unable to consent, even after having been explicitly advised to not lie.[71]

D. An expert for the Defense explained suggestibility and the risk factors that could lead to an internalized false confession.

The case was tried at court-martial, where the Defense presented the testimony of an expert forensic psychologist in the areas of memory formation and retrieval, alcohol related blackouts, suggestibility, and false confessions.[72] The expert explained how internalized false confessions can and do occur, as shown by a significant amount of research, and laid out three factors that can lead to a false criminal memory: blackout, suggestive questioning, and a trusted source.[73]

E. The military judge denied a Defense requested instruction on mistake of fact as to consent, stating this case mirrored that of *United States v. Norton*.[74]

At the close of the evidence, the Defense requested a mistake of fact as to consent instruction based on the complaining witness having actually been awake during the encounter, Appellant's belief the encounter was consensual, and other

[71] Def. Exs. E, F; Pros. Ex. 4; R. at 732, 845-46.
[72] R. at 901-41, 953-93.
[73] R. at 901-41, 953-93.
[74] *United States v. Norton*, No. 202000046, 2021 CCA LEXIS 375 (N-M. Ct. Crim. App. July 29, 2021) (unpublished).

circumstances, such as their prior romantic relationship.[75] The military judge, after initially including it, was advised by the trial counsel of *United States v. Norton*, in which this Court found a mistake of fact as to consent instruction was not required where all the military judge had before him was the appellant's statement that he believed the complaining witness was asleep at the time of the offense.[76] The military judge found the case to be "very close to being squarely on this issue."[77] He further stated that "there is no evidence before the Court as to the subjective state of mind of the accused at the time of the offense suggesting that he was under the impression that he believed she was consenting."[78] He then declined to instruct the members on the defense of mistake of fact as to consent.[79]

[redacted]

[redacted]

[redacted]

[redacted]

G. The complaining witness tampered with the testimony a Defense witness, materially changing it to be more favorable to the Prosecution, and then destroyed the evidence of her tampering.

The day before trial began, in violation of the military judge's order, the complaining witness discussed her case with LCpl Hotel, a Defense witness.[90] At an Article 39(a) session, LCpl Hotel testified that they briefly met up, but denied discussing the case with her.[91] He denied even seeing her at the time the conversation occurred and denied that she had asked him to alter his testimony.[92]

Another Marine who was present during the conversation, LCpl Lima, testified that he and the complaining witness dropped off a Chick-fil-A meal for LCpl Hotel.[93] He testified on direct that after they dropped off the food, the

[88] R. at 276-78.
[89] R. at 281.
[90] R. at 723-25. The military judge's order was "to not discuss her testimony or her knowledge of the case with anyone other than victim legal counsel or counsel for either side." R. at 688.
[91] R. at 568-89, 598-605.
[92] R. at 573-74, 585-86, 592.
[93] R. at 598-99, 603.

complaining witness spoke one-on-one with LCpl Hotel.[94] When cross-examined by the Government, LCpl Lima testified that the complaining witness and LCpl Hotel had only exchanged a "[g]ood night."[95]

As she sat listening to this witness testimony and a Defense request for discovery of her digital communications with LCpl Hotel, the complaining witness used her phone to block LCpl Hotel from her Snapchat account and then later unblocked him, which deleted their conversation history.[96] She testified:[97]

> Q. You blocked Lance Corporal Hotel while you were sitting in this very courtroom?
>
> A. Yes.
>
> Q. After defense counsel had accused you in open court of tampering with the witness?
>
> A. Yes.
>
> Q. That witness, Lance Corporal Hotel?
>
> A. Yes.

She testified that she had other reasons for blocking and re-adding him other than destroying evidence; however, she did not provide any.[98]

After the hearing concluded, LCpl Lima recanted and advised that he had provided false testimony about the complaining witness' discussion with LCpl

[94] R. at 598-99.
[95] R. at 603-06.
[96] R. at 726-27, 769-71, 1053-55.
[97] R. at 727.
[98] R. at 770-71.

Hotel.[99] He stated that she had in fact discussed the case with LCpl Hotel and that "he suspected it concerned details they had been instructed not to discuss . . . ."[100] He also stated that the complaining witness and LCpl Hotel had apologized for getting him involved.[101]

Lance Corporal Lima's admitted perjury made clear that LCpl Hotel had also lied in his testimony that the complaining witness had not discussed the case with him.[102] The complaining witness subsequently admitted as much, testifying that LCpl Hotel had lied as follows:[103]

> Q. During Lance Corporal Hotel's testimony, he said you and him did not talk on Tuesday evening when you brought him chow?
>
> A. Yes.
>
> Q. That was a lie?
>
> A. Yes.
>
> Q. Because you did talk to Lance Corporal Hotel?
>
> A. I did, yes.
>
> Q. He also testified that you and Lance Corporal Hotel never talked about specifics of this case?
>
> A. Yes.
>
> Q. That was a lie?
>
> A. Yes.

[99] App. Exs. LIV, LV.
[100] App. Exs. LIV, LV.
[101] App. Ex. LV.
[102] R. at 1053-55.
[103] R. at 1053.

She further admitted that she had violated the military judge's instruction by discussing the case with LCpl Hotel.[104] She testified that all they had discussed was another person who she was not sure was a witness, and she denied telling either LCpl Hotel or LCpl Lima to lie or alter their testimony.[105]

After the complaining witness had this prohibited conversation with him, LCpl Hotel materially changed his testimony to become less favorable to the Defense. Previously, he had told the Defense that another person had slept on the couch next to him along with the complaining witness and Appellant on the night of the alleged assault, and that the following morning the complaining witness had said she would get a ride home from Appellant.[106] This expected testimony supported not only that there were multiple other people in the room when the complaining witness alleged she was assaulted, but that hours later she exhibited no signs of distress, was willing to ride home with her alleged assaulter, and likely lied on the stand when she testified that she drove herself to the party.[107]

At trial, LCpl Hotel testified he no longer remembered that morning or his statement about it to the Defense.[108] He denied speaking with the complaining witness about the substance of the case, but testified that after the conversation he

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[104] R. at 723-24.
[105] R. at 726, 1055-56.
[106] App. Ex. XLIX at 2.
[107] R. at 695.
[108] App. Ex. L; R. at 571-72, 575-79.

had with the Defense, he had become much closer with the complaining witness, frequently spent time with her, and spoke with her daily, as much one or two hours a day.[109]

H. The military judge denied Defense requests to compel the production of evidence and to continue or abate the proceedings to enable it to submit direct evidence related to this witness tampering by the complaining witness.

When recalled to provide further testimony about the complaining witness's prohibited discussion with LCpl Hotel, both LCpl Hotel and LCpl Lima invoked their right to remain silent.[110] The Defense then requested that the CA grant the witnesses testimonial immunity so as to properly probe and develop the witness tampering issue and the credibility of the complaining witness's testimony about it.[111] The CA denied the request.[112]

Throughout this debacle, the Defense moved for discovery of digital communications, to compel production of the deleted Snapchat records from the company's servers, and also requested that the military judge continue or abate the proceedings until it could retrieve these records related to the prohibited

[109] R. at 568-93.
[110] R. at 666-68, 997-99.
[111] App. Ex. LXV; R. at 670-72, 682.
[112] App. Ex. LXV.

communications the complaining witness had with LCpl Hotel prior to the material change in his testimony.[113] The military judge denied these requests.[114]

I. The military judge then prevented the Defense from arguing that the complaining witness had tampered with its witness.

Prior to the parties' summations, the military judge advised that he would not allow the Defense to argue that the complaining witness tampered with a witness.[115] He ruled that because there was no direct evidence of witness tampering (which he had earlier denied the Defense both the ability to obtain and the time to pursue), the most the Defense could assert regarding the issue was to question whether witness tampering by the complaining witness had occurred.[116] As he told the Defense, "you can use the word [tampering] as long as there's a very clear question mark at the end of that sentence."[117]

Summary of Argument

The military judge repeatedly and erroneously denied the Defense pursuit and use of relevant, material, and vital evidence to impeach the credibility of the complaining witness, which was the foundation of the Government's case against Appellant. In doing so, he not only prevented the Defense from presenting the sort

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[113] R. at 607-14, 618-20, 652-65, 659-60, 668-73, 680-87, 997-99, 1008-09, 1030-34, 1108-09, 1127.
[114] R. at 614, 680-84, 687, 1034-35, 1127.
[115] R. at 1107-08.
[116] R. at 1107-08.
[117] R. at 1108.

of full case afforded under law, but also prevented the trier of fact from receiving an accurate depiction of the complaining witness's pattern of repeatedly and intentionally distorting the truth to save face and serve her own ends.

[redacted] Second, when evidence surfaced mid-trial that the complaining witness had tampered with a material Defense witness, and then not only lied about it but destroyed the evidence, the military judge abused his discretion in summarily refusing to grant either production of the recovered evidence from the host server or any reasonable delay or abatement to allow the Defense to pursue and obtain this material evidence to both impeach her credibility and develop grounds for a mistrial. Third, the military judge then compounded this error by preventing the Defense from even arguing that the complaining witness had tampered with LCpl Hotel's testimony—citing as his grounds the lack of the very evidence he had earlier denied the Defense the ability to pursue.

In addition, the military judge erred in misapplying *United States v. Norton* to decline to provide the required instruction on the defense of mistake of fact as to consent. Based on the evidence submitted at trial, before the complaining witness

started "filling in the blanks" during the controlled call by falsely suggesting she was asleep the whole time, Appellant responded "no" to her question about whether he knew she was asleep and gave no indication that he believed she "could not" consent, as she falsely maintained. As this defense, unlike in *Norton*, was not only raised by the evidence, but fit exactly the Defense's reasonable theory of how the evidence should be viewed, the members should have been instructed on it. The military judge's refusal to do so was erroneous.

Each of these four errors alone caused sufficient prejudice to require the setting aside of Appellant's convictions. Combined, they are precisely why the doctrine of cumulative error exists. A military judge can only make so many repeated, compounding errors in the same case before the law says enough is enough.

That said, even aside from these errors, the evidence is not legally and factually sufficient to support Appellant's convictions, which are founded on the word of a complaining witness who: after entering into a consensual sexual relationship with Appellant, first made two sexual assault allegations, then changed it to one allegation seven months later, then [redacted], and then convinced not only Appellant but a material Defense witness to change their story in support of her own. Her allegation that Appellant digitally and vaginally penetrated her

without her consent in July 2019, as a matter of both law and fact, is devoid of credibility.

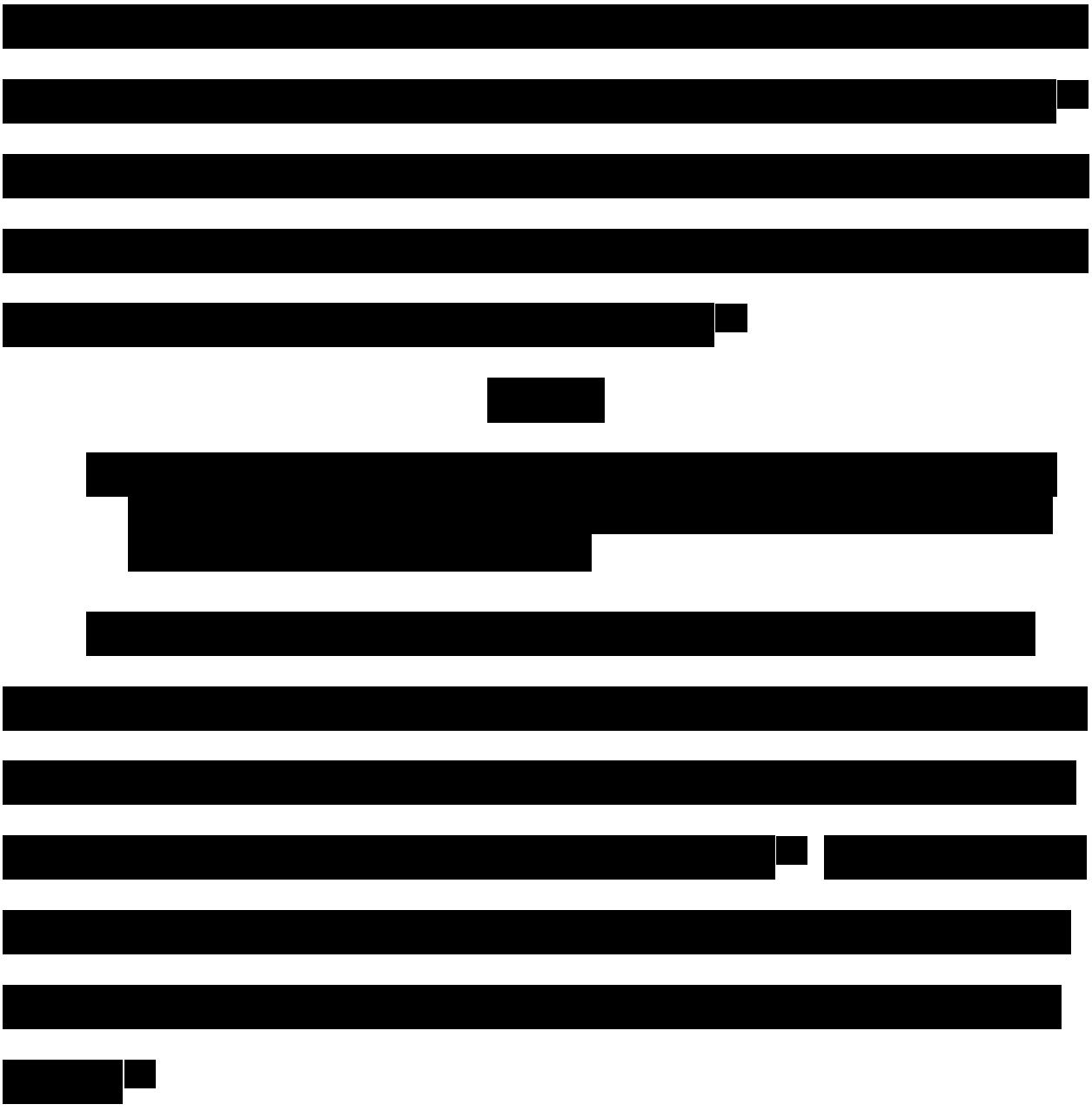
Finally, Appellant's trial defense counsel was ineffective in failing to request credit for the time Appellant spent in civilian pretrial confinement for the same alleged offenses he was later convicted of at court-martial. As such a request would have had merit and been granted if properly made, this Court should remedy the error by awarding Appellant the confinement credit he is due.

Argument

I

[redacted]

[redacted]



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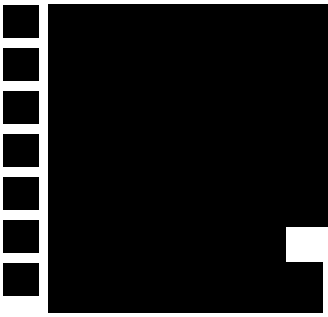

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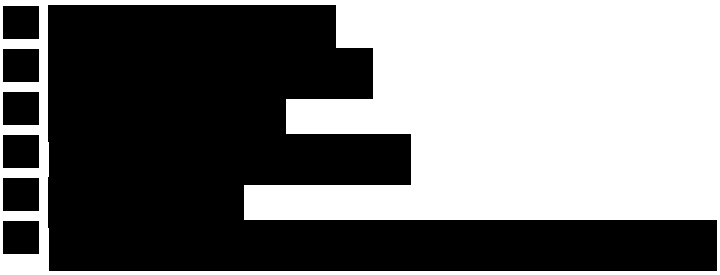

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II

The military judge abused his discretion in denying the Defense requests for production, continuance, and abatement that were focused on obtaining newly discovered evidence that the complaining witness had tampered with a Defense witness.

Standard of Review

A military judge's denial of a request for discovery or production of evidence is reviewed for an abuse of discretion,[197] as is the denial of a continuance or abatement request.[198] "A ruling based on an erroneous view of the law constitutes an abuse of discretion."[199] It is also an abuse of discretion if the military judge: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (2) "uses incorrect legal principles"; (3) "applies correct legal principles to the facts in a way that is clearly unreasonable"; or (4) "fails to consider important facts."[200] Where the military judge fails to articulate his analysis by making clear findings of fact and conclusions of law, his ruling is accorded less deference, and the appellate court examines the record to make its own assessment.[201]

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[197] *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999).
[198] *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993); *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997); *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015).
[199] *Griggs*, 61 M.J. at 406 (citing *McCollum*, 58 M.J. at 335).
[200] *Commisso*, 76 M.J. at 321 (citing *Ellis*, 68 M.J. at 344; *Solomon*, 72 M.J. at 180-81).
[201] *Collier*, 67 M.J. at 353 (citing *Bins*, 43 M.J. at 85-86).

Analysis

A. The military judge repeatedly summarily denied Defense requests to obtain Snapchat communications relating to both perjury and witness tampering by the complaining witness.

After the initial hearing on the complaining witness's prohibited conversation with LCpl Hotel, the Defense moved for a mistrial and dismissal of the case on grounds that she had tampered with his testimony, effectively denying him as a Defense witness.[202] The military judge denied the motion.[203] The Defense then requested discovery of the complaining witness's digital communications with LCpl Hotel and the military judge deferred ruling.[204]

When LCpl Lima subsequently recanted and admitted lying in his earlier testimony, the Defense renewed its motion to dismiss and request for discovery and announced that it intended to call LCpl Lima and LCpl Hotel to impeach the complaining witness as necessary.[205] The Defense then submitted a preservation request to the Government for the complaining witness's Snapchat communications with LCpl Hotel,[206] renewed its request for dismissal, and requested discovery and production of the Snapchat communications for use in

[202] R. at 607-14; App. Ex. LIII.
[203] R. at 614.
[204] R. at 618-19.
[205] R. at 652-55. The Defense alternatively asked for an abatement or a mistrial. R. at 659-60.
[206] R. at 655, 673, 680.

impeaching the complaining witness and proving she was guilty of witness tampering.[207]

When called to provide further testimony on the motion, LCpl Lima asserted his right to remain silent.[208] The Defense then renewed their motion to dismiss and requested an abatement until he could receive testimonial immunity from the CA, which was denied by the military judge.[209]

The Defense then renewed its request for dismissal, abatement, and production of the complaining witness' Snapchat communications with LCpl Hotel.[210] The military judge denied the Defense motion to dismiss, but granted production of the complaining witness's phone so that the Defense could review it for evidence of her communications with LCpl Hotel and LCpl Lima.[211]

Upon reviewing the phone, the Defense discovered that the complaining witness had blocked and re-added LCpl Hotel on Snapchat, deleting their conversation history from her phone.[212] The Defense then re-requested production of the records of the deleted communications from the Snapchat servers and other records of conversations between the complaining witness and LCpl Hotel.[213] The

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[207] R. at 652-56, 659.
[208] R. at 668.
[209] R. at 670-72, 682.
[210] R. at 673-80.
[211] R. at 680-84.
[212] R. at 684-85.
[213] R. at 686-87.

military judge summarily denied the motion, stating only that he would allow "robust cross-examination" on the matter.[214] The Government then began their case in chief.[215]

When LCpl Hotel was called to testify about the matter and, like LCpl Lima, invoked his right to remain silent, the Defense re-requested an abatement.[216] The military judge did not respond to that request.[217] The Defense then cross-examined the complaining witness about her witness tampering and she admitted she blocked LCpl Hotel on Snapchat and re-added him, discussed an aspect of the case with him, and that he lied about that conversation.[218] She also denied asking him to lie or change his testimony.[219]

She did not provide a reason for blocking and re-adding LCpl Hotel (deleting their conversation from her phone) while she sat in court during his perjury about their conversation and the Defense's motion for production of their digital communications.[220]

After the CA denied the Defense requests for immunity for LCpl Lima and LCpl Hotel, the Defense again requested an abatement to pursue its production

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[214] R. at 687.
[215] R. at 692.
[216] R. at 997-99, 1033-34.
[217] R. at 1034.
[218] R. at 722-27, 768-72, 1050-57.
[219] R. at 726-27, 768-72, 1055-57.
[220] R. at 726-26, 1050-57.

request for the Snapchat records.[221] The military judge summarily denied the request.[222]

B. The military judge abused his discretion in summarily denying the Defense's repeated requests for production of the Snapchat records and for a continuance or abatement until that occurred.

i. This evidence was relevant and necessary and to not order production was an abuse of discretion.

Article 46, UCMJ provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."[223] This equal opportunity to obtain evidence includes "the benefit of compulsory process."[224] R.C.M. 703(e)(1) provides that "[e]ach party is entitled to production of evidence which is relevant and necessary."[225] Evidence is "relevant" if it has a tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.[226] It 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."[227]

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[221] App. Ex. LXV; R. at 1108-09, 1127.
[222] R. at 1127.
[223] 10 U.S.C. § 846.
[224] *Morris*, 52 M.J. at 197 (citing R.C.M. 703(a)).
[225] R.C.M. 703(e)(1).
[226] M.R.E. 401.
[227] R.C.M. 703(e)(1), Discussion.

The military judge's repeated denials of the Defense requests to produce the Snapchat communications constitute an abuse of discretion for a number of reasons.

First, the military judge made these rulings from the bench, without citing any authority, without making any factual findings, and without rendering any legal conclusions to support them. Thus, they should be entitled to little, if any, deference.[228]

Second, the Defense established that the complaining witness's Snapchat communications with LCpl Hotel were relevant and necessary, particularly after the CA refused to grant testimonial immunity to LCpl Hotel, who, having already lied under oath about his conversation with the complaining witness, refused to testify again without it.[229] Without immunity for these witnesses, the requested communications were the only evidence with which the Defense could impeach the complaining witness's testimony that no witness tampering occurred and that her prohibited discussion of the case with LCpl Hotel had concerned only someone who they did not know was a witness. The communications she deleted from her phone thus not only had a tendency to make a fact of consequence in determining

[228] *Collier*, 67 M.J. at 353 (finding less deference afforded when military judge did not make findings of fact or conclusions of law with regard to rulings under Mil. R. Evid. 611 and 403).
[229] R. at 997-99.

the action more or less probable—that the discussion amounted to witness tampering, leading LCpl Hotel to materially change his testimony—but also was non-cumulative and would have contributed to the Defense's presentation of the case on this important matter in issue.[230] The military judge tacitly concluded these communications were both relevant and necessary when he ordered the complaining witness's phone produced so that the Defense could inspect precisely this evidence: her recent communications with LCpl Hotel and LCpl Lima.[231]

Third, when the Defense inspection of her phone revealed that the complaining witness had *deleted* her communications with LCpl Hotel, *while sitting in the courtroom* listening to his false testimony about them and the Defense request for production of those very communications, the evidence the Defense requested to be produced from Snapchat became that much more relevant and necessary. It now went not just to the credibility of the complaining witness's testimony about whether she tampered with a Defense witness on the eve of trial, but whether she then *intentionally destroyed* the evidence of her own misconduct, as the Defense claimed in its motion for mistrial and dismissal and therefore had every right to pursue. This inherent relevance and necessity can also be seen in the context of an adverse inference instruction, which exists because when a party

[230] R.C.M. 703(e)(1), Discussion.
[231] R. at 680-84.

destroys or blocks evidence, there is an intrinsic inference that that evidence was damaging to their case.[232]

Fourth, the record contains substantial evidence that the complaining witness lied during her testimony about this conversation:[233]

- LCpl Hotel initially testified that he never even saw the complaining witness on the day in question.[234]
- After he testified, LCpl Hotel then sent a Snapchat message to LCpl Lima telling him he would be called to testify for "what happened yesterday."[235]
- Both the complaining witness and LCpl Hotel apologized to LCpl Lima for getting him involved.[236]
- LCpl Lima admitted he heard the complaining witness discussing the case with LCpl Hotel, after first lying under oath about the same subject.[237]

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[232] *See United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981) ("Under normal circumstances" an inference might be drawn that the absence of certain evidence is such because it would be favorable to the accused).
[233] *See United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (articulating that the burden of persuasion for a motion to compel production includes, as a threshold matter, a showing "that the requested material exist[s].")
[234] R. at 573-74, 585-86.
[235] R. at 600-02; App. Ex. LI.
[236] App. Ex. LV.
[237] App. Exs. LIV, LV.

- The complaining witness admitted discussing the case with LCpl Hotel, but only in a very limited manner and under circumstances that did not amount to witness tampering.[238]
- After having this prohibited conversation with the complaining witness, which he then falsely testified he never had, LCpl Hotel's testimony became less favorable for the Defense.[239]
- Around the time LCpl Hotel was lying during his in-court testimony about their conversation and the Defense was requesting production of the complaining witness's digital communications with him, the complaining witness blocked him on Snapchat and then later re-added him, deleting their conversation history.[240]
- The complaining witness told LCpl Hotel that she "had to" block him, without further explanation.[241]
- In her testimony on the matter, the complaining witness maintained that she was unaware that blocking and then re-adding LCpl Hotel would delete their conversation; she stated that she had other reasons

[238] R. at 724-25, 1052.
[239] R. at 571-72, 576-79, 587; App. Ex. LXIX.
[240] R. at 726-27, 770-71, 1054-55.
[241] R. at 685, 768-71.

for blocking him, yet she did not provide any other explanation for why she had taken these actions.[242]

Under these circumstances, it beggars belief that the military judge would grant the Defense access to the complaining witness's phone, then deny production of the very same evidence from a different source once the Defense established that she had *deleted it* from her phone. The military judge's lack of any substantive analysis on the issue is thus very telling, because if he had set down even a modicum of findings and conclusions, the error would have been as glaring to him then as it should be now to this Court. As it is, his summary denial of the Defense's reasonable production request for newly discovered evidence, which he had already tacitly determined was relevant and necessary to the Defense's grounded claim of *witness tampering* (and then destruction of evidence), by the same witness on whose false, manipulative statements the entire case rested, was clearly unreasonable.

ii. The military judge similarly abused his discretion in not ordering a continuance or abatement.

The military judge also abused his discretion in denying the Defense an abatement or even the slightest continuance to pursue this evidence. As with many of his other rulings in this case, the military judge summarily ruled on the Defense

[242] R. at 768-72.

requests from the bench and provided no reasoning or analysis for his decision. His ruling therefore deserves little, if any, deference, and this Court should examine the record to make its own assessment.[243]

Several factors are used to determine whether a military judge abuses his discretion by denying a continuance.[244] These include:

> 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.[245]

These factors apply here as follows:

Factor	Applied	Favors Defense?
Surprise	All parties became aware of the need to obtain this evidence at the same time upon discovering the complaining witness had deleted it from her phone.	Yes.
Nature of any evidence involved	Digital evidence stored on an off-base server.	Yes.
Timeliness of the request	The Defense moved for a continuance to obtain the evidence immediately upon learning it had been deleted from the complaining witness's phone and only existed on the server.	Yes.
Substitute testimony or evidence	None, given its deletion from the phone, the invocation of self-incrimination rights by the other witnesses involved, and the refusal of the CA to grant them testimonial immunity.	Yes.

[243] *See Collier*, 67 M.J. at 353.
[244] *Miller*, 47 M.J. at 358.
[245] *Id*.

Availability of evidence requested	Available.[246]	Yes.
Length of continuance	Unspecified, but a preservation request had been sent early on and the evidence was readily obtainable.[247]	Yes.
Prejudice to opponent	None. While opening statements had been given, the Government had yet to begin its case-in-chief when this issue surfaced. When the final request was made, both sides had rested.	Yes.
Other continuance requests	Yes, but none on this matter. The Defense was previously granted continuance requests, which ultimately moved the trial date from 12 October to 30 November 2021, due to Appellant's health concerns.[248]	Yes.
Good faith of the moving party	Yes.	Yes.
Reasonable diligence by the moving party	Yes, the Defense moved smartly forward on this issue once it was discovered.	Yes.
Possible impact on verdict	Considerable. It involves grounds for mistrial and/or dismissal of the charges for complaining witness's tampering with a material Defense witness, and also significantly undermines her credibility, on which the entire case turns.	Yes.
Prior notice	None. The Defense took action to begin pursuing the evidence even before it became aware it had been deleted from the phone.	Yes.

As the review of these factors demonstrates, the military judge had no valid basis under law to deny any continuance—even as little as a day—to give the Defense a

[246] R. at 680.
[247] R. at 655, 673, 680.
[248] App. Exs. VIII, XXII, XXIX, XXXI, XXXIV, XXXVII.

reasonable amount of additional time to pursue and develop evidence of such import to the entire case. His summary, blanket denial of the Defense requests was clearly erroneous under the circumstances.

Even if one takes the position that the Defense did not establish that the communications still existed on the Snapchat servers, the military judge's failure to research or analyze the issue caused him to erroneously misconstrue and misapply the law. The law requires that when evidence is "destroyed, lost, or otherwise not subject to compulsory process, . . . if such evidence is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for such evidence," the military judge "*shall* grant a continuance or other relief in order to attempt to produce the evidence *or shall* abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party."[249] As discussed below, this evidence was of central importance and essential to a fair trial; had the Defense been able to prove that the complaining witness obstructed justice and committed perjury the outcome would have almost certainly been different. Therefore, a continuance was warranted to investigate its existence and, as the complaining witness deleted this key evidence, an abatement was required if it turned out the evidence was forever destroyed.

[249] R.C.M. 703(e)(2) (emphasis added).

In *United States v. Simmermacher*, the CAAF found that the military judge abused his discretion when he did not order an abatement after the government destroyed an appellant's urine sample which tested positive for cocaine.[250] The CAAF articulated that there were three factors to consider in whether an abatement should have been awarded: (1) the lost or destroyed evidence was essential to a fair trial; (2) there was no adequate substitute; and (3) the loss was not the fault of the requesting party. In *Simmermacher*, the CAAF found that (1) the sample was essential to a fair trial as the only direct evidence of cocaine use and a retest was appropriate; (2) there was no alternative to the sample itself for the purpose of retesting; and (3) the appellant did not cause the unavailability of the sample.[251]

Just as in *Simmermacher*, the three requirements of R.C.M. 703(e)(2) are satisfied here.[252] First, this evidence was essential to a fair trial as the only direct evidence of witness tampering and perjury by the complaining witness, a centrally important issue. Both the complaining witness's credibility and the materially changed testimony of LCpl Hotel went to very heart of the fairness of Appellant's trial, which was based entirely on the complaining witness's talents as a habitual liar and manipulator. Such direct evidence of her tampering with the testimony of a material Defense witness, then lying about it, then deleting the evidence of it,

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[250] *Simmermacher*, 74 M.J. at 201-03.
[251] *Id*. at 201-03.
[252] *See* R.C.M. 703(e)(2)

would have been the Defense's coup de grace to obtain either a mistrial, a dismissal, or a not-guilty finding. Second, no adequate substitute for the Snapchat evidence existed in challenging the credibility of the complaining witness's testimony regarding her prohibited discussion with LCpl Hotel because no immunity was granted to LCpl Hotel or LCpl Lima. Indeed when there is no adequate substitute, the discretion of judges is limited and they "do not have discretion to vary from the prescribed remedy."[253] "[R]obust cross-examination" on the matter, as was permitted here, is insufficient.[254] And third, the unavailability of the evidence was not Appellant's fault–the complaining witness explicitly deleted it from her phone while the Defense was simultaneously requesting discovery and production of that evidence.

A continuance or abatement is exactly what was required under these circumstances, and the military judge abused his discretion in summarily refusing to grant one.

C. Denying the Defense the ability to obtain direct evidence of witness tampering by the complaining witness prejudiced Appellant's case.

For non-constitutional evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings."[255] In conducting this

[253] *Id*. at 202.
[254] *Id*. at 202; R. at 687.
[255] *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks and citation omitted).

analysis, courts weigh "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."[256] These factors all point to prejudice on this issue.

As discussed above, the Government's entire case hinged on the credibility of the complaining witness. The only evidence outside of her testimony that was used against Appellant were his statements, which were themselves based on the complaining witness's lie during their recorded phone call that she had been asleep and thus unable to consent to their sexual encounter.

As such, the Defense case, which was focused on attacking her credibility, was unable to fully capitalize on her manipulative and deceptive nature when direct evidence of it surfaced in the courtroom, but the military judge erroneously prevented the Defense from pursuing it. While the Defense was able to present evidence of her character for untruthfulness and her lie to Cpl Golf, this evidence did not undermine her credibility to the level that evidence of witness tampering and perjury would.[257] While it was permitted to cross-examine the complaining witness on this matter, without the requested evidence or the ability to call LCpl Hotel or LCpl Lima to impeach her testimony (which made the requested evidence

[256] *Id.* (quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015)).
[257] R. at 1047-48, 1067-68.

necessary), the Defense essentially had no evidentiary fulcrum with which to adequately challenge her testimony.[258]

Additionally, as discussed below, the military judge did not even allow the Defense to argue that the complaining witness tampered with a witness directly.[259] Indeed, after the military judge compounded his error through this ruling, the Defense re-requested an abatement to allow it to go and get the evidence and was again summarily denied.[260] In other words, the military judge not only prevented the Defense from obtaining the evidence in order to the make the argument, but because the Defense did not have the evidence (which he had denied it the ability to obtain), he prevented the Defense from making the argument.

The evidence was also material. Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue."[261] A sexual assault victim's credibility is "a material fact at issue."[262]

Here, the Defense had caught the complaining witness, on whose credibility the entire case turned, in having a prohibited discussion with a material Defense

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[258] R. at 687-88.
[259] R. at 1107-08.
[260] R. at 1127.
[261] *Ellerbrock*, 70 M.J. at 318 (citations and internal quotation marks omitted).
[262] *Id*. at 319-20.

witness, changing his testimony, then lying about it, then deleting the evidence of it from her phone, while sitting in the very courtroom in which Appellant was being tried by court-martial based on her word. The evidence therefore seriously undermined her credibility, implicated her in criminal offenses, could quite conceivably have led to a mistrial if not dismissal of the case, and showed the depths of manipulative falsehood and obstruction she was capable of to serve her own ends.[263]

In this way, it also supported the Defense theory that it was only her manipulation that convinced Appellant to start making apologetic admissions, which were not only of a crime he did not commit, but were of a crime that did not actually exist. As the CAAF has specifically found, "[f]alse voluntary confessions do exist, and when their reliability is called into question, so too is their otherwise overwhelming power to prove the declarant's guilt. Moreover, the factual question whether a confession is reliable is for the members of a court-martial to decide."[264] This is precisely what the military judge deprived the Defense of the ability to present evidence to the members about, so that they could adequately assess for

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[263] *See United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999) ("'Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent a manifest injustice against the accused.' It is appropriate only 'whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.'") (quoting *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)); *United States v. Waldron*, 36 C.M.R. 126, 129 (U.S.C.M.A. 1966)).

[264] *United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002).

themselves the depths of the complaining witness's duplicity and, in turn, adequately determine how much credence to give to Appellant's statements.

Finally, the evidence was in digital format and was subject to recovery from the Snapchat servers, for which the Defense requested a preservation request be sent before even learning about the deletion. It was evidence of her discussing her case in violation of the military judge's order, with a material Defense witness, who lied about having the conversation and then materially changed his testimony to be more favorable to the complaining witness's side. It was therefore high-quality evidence, which the complaining witness had deleted from her phone, and for no good reason she could give other than to prevent it from being used in challenging her oft-repeated excuse that her latest instance of untruthfully manipulating the "facts" was all just a another misunderstanding.

In sum, the evidence the Defense sought to obtain, and was without basis denied, "made the 'likelihood of a different result . . . great enough to undermine[] confidence in the outcome of the trial.'"[265] As such, this ruling had a "substantial influence" on Appellant's convictions.

[265] *United States v. Shorts*, 76 M.J. 523, 536 (A. Ct. Crim. App. 2017) (quoting *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012)).

Conclusion

The military judge abused his discretion in denying the Defense motions for production, continuance, and abatement to obtain the evidence that the complaining witness deleted from her phone. This error materially prejudiced Appellant's substantial rights with respect to all findings of guilty. Therefore, Appellant's convictions should be set aside and dismissed.

III

The military judge erred by barring the defense counsel from arguing that the complaining witness tampered with a material Defense witness despite abundant evidence that she had done precisely that.

Standard of Review

A ruling limiting closing argument is reviewed for an abuse of discretion.[266] "A ruling based on an erroneous view of the law constitutes an abuse of discretion."[267] It is also an abuse of discretion if the military judge: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (2) "uses incorrect legal principles"; (3) "applies correct legal principles to the facts in a way that is clearly unreasonable"; or (4) "fails to consider important facts."[268]

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[266] *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016).
[267] *Griggs*, 61 M.J. at 406 (citing *McCollum*, 58 M.J. at 335).
[268] *Commisso*, 76 M.J. at 321 (citing *Ellis*, 68 M.J. at 344; *Solomon*, 72 M.J. at 180-81).

Analysis

A. An appellant's Sixth Amendment right to counsel is infringed when a judge improperly restricts counsel from presenting summation.

In *Herring v. New York*, the Supreme Court held that a judge's ruling barring a defense counsel from presenting closing argument in a bench trial violated the Sixth Amendment right to the assistance of counsel as incorporated by the Fourteenth Amendment.[269] The Court explained that "it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge."[270] The Court added that while a court may restrict arguments that "stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial," an appellant "through counsel, ha[s] a right to be heard in summation of the evidence from the point of view most favorable to him."[271]

[269] *Herring v. New York*, 422 U.S. 852, 865 (1975).
[270] *Id*. at 858.
[271] *Id*. at 862, 864; *see also Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (finding that limiting a closing argument "lessened the Government's burden of persuading the jury," requiring reversal as a "breakdown of our adversarial system").

B. The military judge infringed on Appellant's Sixth Amendment right by improperly ruling that in his summation the defense counsel could only state that "witness tampering" occurred "as long as there's a very clear question mark at the end of that sentence."[272]

Here, the military judge improperly limited the Defense's ability to argue that the complaining witness had tampered with its witness. He ruled that counsel could introduce the *question* of her witness tampering, but could not argue the conclusion that such tampering had actually occurred.[273] This is tantamount to ruling that a prosecutor's summation can introduce the question of whether a crime occurred, but cannot argue the conclusion that the accused actually committed it. The military judge's basis for this absurd ruling was that counsel could only argue conclusions to be drawn from direct evidence.[274] He stated: [275]

> So that's a different distinction. Asserting -- there is circumstantial evidence that -- there is direct evidence that inappropriate conversations were taking place. There is not direct evidence of witnesses tampering. There is something that provides a good faith basis for the defense counsel to ask the question of the members whether that -- was there witness tampering?

[272] R. at 1107-08.
[273] R. at 1107-08.
[274] R. at 1107.
[275] R. at 1107.

In clarifying, he stated "you can use the word [tampering] as long as there's a very clear question mark at the end of that sentence."[276] As with many of his other rulings, he made this ruling orally from the bench and cited no authority for the proposition that closing arguments must be based only on direct evidence.

This limitation on the Defense is an abuse of discretion because it is based on an erroneous view of the law.[277] In fact, the law does not hold that conclusions must be drawn only from direct evidence; they also can be based on circumstantial evidence.[278] The military judge's instructions in this very case explain that distinction:

> circumstantial evidence is evidence that tends to prove some other fact, from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or none [sic] existence of a fact in issue . . . . There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value it deserves.[279]

Thus, the military judge's slip in imposing this limitation on counsel—where he started to say "circumstantial evidence" and then adjusted his focus only to "direct evidence"—is telling, as it points to the correct view that because conclusions can

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[276] R. at 1108.
[277] *Griggs*, 61 M.J. at 406 (citing *McCollum*, 58 M.J. at 335).
[278] *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citing *United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014), *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)).
[279] R. at 1119-20.

be drawn from circumstantial evidence, counsel can also argue for them based on circumstantial evidence.[280]

Indeed, the CAAF has recognized that circumstantial evidence is particularly important for counsel's argument where an event occurs in private, for which there may be no direct evidence available.[281] Rather, what the law requires is only that the particular conclusion that counsel argues from circumstantial evidence be a "reasonable inference" drawn from that evidence.[282] The law also specifically recognizes that the destruction of evidence by a party can be a basis for the factfinder to reasonably infer that the missing evidence would have been adverse to the side that destroyed it.[283]

Here, as described in detail above, there is ample circumstantial evidence that the complaining witness tampered with LCpl Hotel's testimony. She met with LCpl Hotel on the eve of trial. LCpl Hotel lied about having this meeting. LCpl Lima stated the meeting occurred and involved discussion of the case. LCpl Hotel's testimony materially changed after this meeting. The complaining witness

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[280] *United States v. Young*, 470 U.S. 1, 9 n.7, 10 (1985); *United States v. Andrews*, 2017 CCA LEXIS 283, *16-17 (N-M. Ct. Crim. App. Apr. 27, 2017) (citing *United States v. Carter*, 236 F.3d 777, 784-85 (6th Cir. 2001) ("[C]ounsel has the freedom at trial to argue reasonable inferences from the evidence. . . .")).
[281] *King*, 78 M.J. at 221.
[282] *Young*, 470 U.S. at 9 n.7, 10; *Andrews*, 2017 CCA LEXIS 283 at *16-17.
[283] *See Simmermacher*, 74 M.J. at 198 (discussing adverse inference instruction given where the evidence was destroyed by the government).

deleted her Snapchat conversation with LCpl Hotel while listening to his perjured testimony on the issue. LCpl Hotel then invoked his right to remain silent. The complaining witness then took the stand and admitted deleting their conversations by blocking LCpl Hotel from her Snapchat account. While she denied doing so on purpose, she did not provide another reason (let alone a reasonable one) for blocking LCpl Hotel from her account. And this is exactly the sort of untruthful, manipulative behavior she exhibited through the reporting, investigation, and trial involving her materially altered allegation, the [redacted]

This is the proverbial smoking gun of circumstantial evidence; it is as good as it gets. And the only reason the Defense was forced to rely on circumstantial evidence in the first place is because, as discussed above, the military judge denied its request for production, continuance, and abatement in order to obtain the direct evidence from Snapchat that the complaining witness had deleted from her phone. Thus, in addition to using incorrect legal principles to curtail this fundamental right of Appellant's, protected by the Sixth Amendment, the military judge's prior erroneous rulings are the source of the very predicament that he erroneously held against the Defense. The manner in which the military judge addressed these compounding issues is a blatant abuse of discretion.

C. This error was not harmless beyond a reasonable doubt.

A ruling that infringes upon an appellant's Sixth Amendment right to be heard through counsel is tested for harmlessness beyond a reasonable doubt.[284] In *United States v. De Loach*, the D.C. Circuit held that "[w]hen an error appears during closing argument, the centrality or importance of the issue infected by the error is a significant factor in determining whether prejudice resulted."[285] In *United States v. Miguel*, the Ninth Circuit held that it would assess whether the military judge's ruling "prevented defense counsel from 'framing and giving content to the core of [the] defense.'"[286]

Here, the error cut to the core of Appellant's defense that the complaining witness was a pathological liar and manipulator, whose pattern of lies had infected every ounce of evidence in the case. The military judge's limitation on the Defense's summation provided yet another means to obfuscate her questionable credibility and prevented the Defense from arguing the reasonable inference that the evidence supported: that in knowing violation of the military judge's order, she intentionally tampered with a Defense witness, changing his testimony to be

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[284] *Bess*, 75 M.J. at 75. The Supreme Court has stated this error is not structural. *See Glebe v. Frost*, 574 U.S. 21, 23 (2014).
[285] *United States v. De Loach*, 504 F.2d 185, 191 n.14 (D.C. Cir. 1974) (reversing based on trial judge's improper restriction disallowing counsel to argue someone else committed crimes).
[286] *United States v. Miguel* 338 F.3d 995, 1002 (9th Cir. 2003) (quoting *United States v. Kellington*, 217 F.3d 1084, 1101 (9th Cir. 2000)).

more supportive of her side, and then she deleted the evidence of their complicity. This manipulative behavior went directly to her credibility, which was the heart of its case, yet the Defense was prevented from using the fruits of its cross-examination on her witness tampering by arguing for such a reasonable conclusion in its closing argument.

There is a vast difference, in both the law and in the real world, between posing the question of whether a person tampered with a Defense witness to help her case (and then covered her tracks by lying about it and deleting the evidence), and arguing that the evidence proves that she did. Had the Defense been able to *argue* that the complaining witness had tampered with LCpl Hotel's testimony to serve her own ends, just as she had manipulated Appellant's beliefs to do so, an "honest and conscientious doubt" about her credibility may well have resulted in the mind of the members.[287] But the military judge's ruling prohibited the defense from making this argument.[288] As it "prevented defense counsel from 'framing and giving content to the core of [the] defense,'"[289] it was not harmless beyond a reasonable doubt.

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[287] *United States v. Loving*, 41 M.J. 213, 281 (C.A.A.F. 1994) (explaining "reasonable doubt" standard).
[288] R. at 1141-62.
[289] *Miguel*, 338 F.3d at 1002.

Conclusion

The military judge abused his discretion in limiting the Defense's argument, and this constitutional error was not harmless beyond a reasonable doubt. As such, Appellant's convictions should be set aside and dismissed.[290]

IV

The military judge erred in not giving an instruction on mistake of fact as to consent, which was reasonably raised by the evidence.

Standard of Review

"The question of whether a jury was properly instructed [is] a question of law, and thus, review is *de novo*."[291] "If a military judge omits a required instruction that is reasonably raised by the evidence, the accused may preserve the instructional error" either by objecting or requesting the instruction to signal sufficiently that an error was made.[292] Here, Appellant requested the inclusion of an instruction on mistake of fact as to consent and was denied.[293]

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[290] 10 U.S.C. § 866.
[291] *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).
[292] *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citing *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017)).
[293] R. at 1091-98.

Analysis

A. Appellant's mistake of fact as to consent was reasonably raised by the evidence.

Mistake of fact as to consent is a defense to the offenses of sexual assault of which Appellant was convicted. This defense provides that "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense."[294] The mistake of fact "must have existed in the mind of the accused and must have been reasonable under all of the circumstances."[295] Thus, the mistake must be reasonable and Appellant must "actually or subjectively . . . infer consent based on the[] circumstances."[296]

A military judge must instruct on any affirmative or "special" defenses that are "in issue."[297] The threshold for "in issue" is low, and only requires "some evidence, without regard to its source or credibility" having been admitted.[298] The evidence need not be "compelling," as the law requires only that "some evidence is

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[294] R.C.M. 916(j)(1).
[295] R.C.M. 916(j)(1).
[296] *United States v. a*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)).
[297] R.C.M. 920(e); *see also Maynulet*, 68 M.J. at 376 (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *McDonald*, 57 M.J. at 20).
[298] R.C.M. 920(e), Discussion; *see also Maynulet*, 68 M.J. at 376 (citing *Davis*, 53 M.J. at 205)).

presented to which the fact finders might attach credit if they so desire."[299] Nor does it matter which party presented the evidence.[300] A military judge has a duty to instruct on any defense reasonably raised by the evidence, even if the instruction is not requested.[301] "Any doubt whether an instruction should be given should be resolved in favor of the accused."[302]

Here, in reliance on this Court's unpublished decision in *United States v. Norton*, the military judge denied the requested instruction, finding "there is no evidence before the Court as to the subjective state of mind of the accused at the time of the offense suggesting that he was under the impression that he believed she was consenting."[303] In *Norton*, the military judge denied the mistake-of-fact instruction based on the fact that the appellant never stated anything contrary to his belief that the complaining witness had been asleep during the sexual encounter, and was otherwise unable to recall anything lending itself to a mistake of fact as to her consent.[304] The Court concluded that while the complaining witness later testified that she had in fact only pretended to be asleep, the circumstances did not warrant a mistake-of-fact-as-to-consent instruction because there was no evidence

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[299] *United States v. Barnes*, 39 M.J. 230, 232 (C.A.A.F. 1994).
[300] R.C.M. 917(b), Discussion; *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003).
[301] R.C.M. 920 (e), *Barnes*, 39 M.J. at 232-33.
[302] *Hibbard*, 58 M.J. at 73 (citations and internal quotation marks omitted).
[303] R. at 1096.
[304] *Norton*, 2021 CCA LEXIS 375, at *7-12.

that the appellant subjectively believed the complaining witness was awake and could therefore consent to the sexual encounter.[305]

Norton is distinguishable from the facts of this case, where Appellant specifically stated, "[n]o," when the complaining witness asked him during the controlled call, "[d]id you know that I was sleeping, like?"[306] Other facts elicited during trial provide additional evidence of Appellant's belief that the complaining witness could and did consent to their July sexual encounter. During the testimony of the complaining witness, it was established that:

- Appellant and the complaining witness had a pre-existing romantic relationship.[307]
- She did not reject Appellant's advance when he put his hand on her knee early in the night.[308]
- She willingly slept next to him on the same couch.[309]
- She was sitting up alert before she lay down a few minutes before he approached her.[310]
- During the entirety of the sexual encounter, she was awake.[311]

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[305] *Id*. at *8-12.
[306] Pros. Ex. 4 at 8.
[307] R. at 753-54, 763, 774-75, 782-83.
[308] R. at 696-97.
[309] Def. Ex. C; R. at 694-99, 710, 733-35.
[310] R. at 700, 735-36.
[311] R. at 701-09, 733-35, 742-45, 750-51, 781.

- Others were present in the room, from whom she never requested any assistance.[312]
- She had on tight jean shorts that she said he moved at least to some degree more than once, to which she did not object.[313]
- She previously reported being unsure if her eyes were open during the encounter,[314] but she testified she knew it was Appellant who returned to the couch, supporting that her eyes *were* open.[315] She also stated she knew the others in the room were asleep, again indicating she at least looked around the room at some point during the encounter.[316]
- She never reacted, resisted, or indicated any lack of consent to any acts by Appellant, which included rolling her onto her side and pulling her onto his lap and kissing her on the mouth, an act requiring the active participation of both parties.[317]

Other parts of the controlled call are also indicative of his honest belief that the encounter was consensual. When the complaining witness started asking him to explain "why" they had tried to have sex, he was at first confused and unsure

[312] R. at 733-35, 750.
[313] R. at 699-708.
[314] R. at 705, 750-51.
[315] R. at 705-06, 743-44.
[316] R. at 733-35, 750.
[317] R. at 701-09, 733-35, 742-45, 750-51, 781.

how to respond.[318] She then said she was just looking for an apology, which also made him confused but he offered one nonetheless.[319] Shortly after this, when she suggested (falsely) that she was asleep, he confirmed that he thought she was awake, reinforcing why he thought she consented and why he was confused that she was now expecting him to apologize and claiming she was asleep.[320] Then she told him that she could not consent, to which he replied in part, "[t]hat makes me feel even worse for it," indicating this was news to him.[321]

Then, during his interview with the police detective, even after emphatically apologizing and feeling eternally guilty after being accused of taking advantage of a sleeping friend (based on her lie that she was asleep), Appellant said that at the end of their encounter, he "put[] her back into a comfortable position *where she could fall asleep.*"[322] Thus, despite the sense of guilt that the complaining witness's lies had instilled in him, when speaking from his own recollection, he remembered her as being awake.

Therefore, unlike *Norton*, where the appellant never believed the complaining witness was awake, here "some evidence" was elicited, to which the members could have attached credit, establishing that Appellant had a reasonable

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[318] Pros. Ex. 4 at 7.
[319] Pros. Ex. 4 at 7.
[320] Pros. Ex. 4 at 8.
[321] Pros. Ex. 4 at 11.
[322] Pros. Ex. 5 at 22 (emphasis added).

and honest belief that the complaining witness was both awake and consenting at the time of their sexual encounter. As the defense of mistake of fact as to consent was raised by the evidence, the military judge was required to give the instruction under the law, which specifically mandates that "[a]ny doubt whether an instruction should be given should be resolved in favor of the accused."[323] The military judge's failure to give this required instruction was therefore error.

B. The error was not harmless beyond a reasonable doubt.

When a mistake of fact instruction should have been given but was not, "the test for determining whether this constitutional error was harmless is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[324]

As discussed above, Appellant's statements that the complaining witness *could not* consent were purely based on her false claim to him that she had been asleep—which was news to him.[325] Without the mistake-of-fact instruction, the members were left without the knowledge they could acquit Appellant if they found that he was in fact mistaken as to her consent. And this was exactly what Appellant's defense at trial was, that the complaining witness had consented to the

[323] *Hibbard*, 58 M.J. at 73 (quoting *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)).
[324] *DiPaola*, 67 M.J. at 102 (quoting *Chapman*, 386 U.S. at 24).
[325] Pros. Ex. 4 at 8, 12; Pros. Ex. 5 at 26.

sexual encounter, and that, at least until she started convincing him of her lie that she was asleep, Appellant believed she had consented. Because the military judge denied the instruction, the Defense was hamstrung and deprived of the ability to even make the argument that Appellant should have been acquitted on this ground. Thus, "[t]he missing instruction 'essentially undercut [a] defense theory and could very well have contributed to the finding of guilty.'"[326]

Conclusion

The military judge abused his discretion in failing to give this required instruction, and this constitutional error was not harmless beyond a reasonable doubt. As such, Appellant's convictions should be set aside and dismissed.[327]

V

Cumulative error denied Appellant a fair trial.

Standard of Review

"The cumulative effect of all plain errors and preserved errors is reviewed *de novo*."[328]

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[326] *DiPaola*, 67 M.J. 98, 103 (C.A.A.F. 2008) (quoting *United States v. Lewis*, 65 M.J. 85, 89 (C.A.A.F. 2007)).
[327] 10 U.S.C. § 866.
[328] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (citing *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999)).

Analysis

"Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[329] A finding will only be reversed if Appellant was denied a fair trial by the cumulative error.[330]

Through this series of compounding, case-dispositive errors discussed above, the military judge effectively prevented the Defense from attacking the basis of the Government's case against Appellant: the wildly questionable credibility of the complaining witness, whose lying, manipulative behavior had infected every shred of the evidence. The cumulative effect of these erroneous rulings resulted in the Defense's inability to provide a complete and adequate defense, which ultimately denied Appellant a fair trial.

The military judge allowed the members to review only a small portion of the complaining witness's credibility issues while simultaneously preventing the Defense from pursuing multiple appropriate avenues to reveal the entire picture:

- [redacted]

[329] *Id*. (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).
[330] *Id*. (citing *Banks*, 36 M.J. at 171).

[redacted]

- The Defense was blocked from obtaining evidence that she had in fact tampered with LCpl Hotel's testimony, materially changing it to become more favorable to the Government, and then deleted the evidence of their conversations to hide their complicity and false testimony.
- The Defense was not even permitted to argue the reasonable inference that witness tampering had actually occurred, since it lacked the same evidence that it had been erroneously blocked from obtaining.

Through the combination of these erroneous rulings, the lion's share of the complaining witness's pattern of manipulative, duplicitous behavior was effectively hidden from the members, who would otherwise have received "a significantly different impression of [her] credibility,"[331] on which the Charge and specifications were founded.

But the lack of a fair trial created by the military judge's series of errors did not stop there. His further failure to provide the required instruction on mistake of fact as to consent compounded this incomplete portrayal of the complaining witness, undercut Appellant's ability to argue that before she manipulated him into

[331] *Ellerbrock*, 70 M.J. at 321.

apologizing and feeling guilty based on her lie that she was asleep, he believed that she could and did consent, which under the law is a complete defense to the charged offenses.

As a result of these compounding errors, the members received the false impression of a relatively trustworthy complaining witness, were given essentially no real reason not to take her at her word that she did not consent, were led to believe that any evidence suggesting otherwise was the product of a mere misunderstanding, and were not advised of any means by which Appellant could be found not guilty if at the time he himself had reasonably believed otherwise.

Under these circumstances, one simply "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error[s]."[332] This is precisely the sort of situation for which the cumulative error doctrine exists, where a stream of ungrounded errors results in not only a skewed presentation of evidence, but an unfair limitation on arguments and instructions that virtually ensures a conviction based on only one party's view of the facts. While each of these errors standing alone warrants setting aside Appellant's convictions, should

[332] *Banks*, 36 M.J. at 171 (quoting *United States v. Yerger*, 3 C.M.R. 22, 24 (U.S. C.M.A. 1952)) (internal quotation marks omitted).

the court find otherwise, it should find that the cumulative effect of these errors "denied Appellant a fair trial."[333] It most certainly did in this case.

Conclusion

As a result of the cumulative errors by the military judge, Appellant's convictions should be set aside and dismissed.[334]

VI

The evidence is legally and factually insufficient to support Appellant's convictions because it is founded on the questionable credibility of the complaining witness.

Standard of Review

This Court reviews legal and factual sufficiency de novo.[335]

Analysis

The test for legal sufficiency "is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[336] The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members

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[333] *Pope*, 69 M.J. at 335.
[334] 10 U.S.C. § 866.
[335] 10 U.S.C. § 866; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).
[336] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt."[337] The review for both factual and legal sufficiency is limited to the evidence presented at trial.[338]

The elements of sexual assault as charged under Article 120 are: "(i) that the accused committed a sexual act upon another person; and (ii) that the accused did so without the consent of the other person."[339] Consent is evaluated by a variety of factors, including that a person cannot consent when "sleeping, unconscious, or incompetent."[340] A reasonable mistake of fact as to consent is a defense, as discussed above.[341]

As detailed above, the allegations against Appellant and any admissions made by Appellant are founded squarely on the credibility of the complaining witness. Until the pretext call occurred, Appellant did not remember much of the encounter and was surprised to learn it was allegedly not consensual.[342] With this in mind, the evidence supports that the complaining witness consented to the sexual encounter at the time, later decided that it was nonconsensual, and then filled the gaps of Appellant's memory with this false view by intentionally lying to

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[337] *Turner*, 25 M.J. at 325 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[338] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (quoting *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)).
[339] 10 U.S.C. § 920.
[340] 10 U.S.C. § 920.
[341] R.C.M. 916(j).
[342] Pros. Ex. 4.

him about what happened. This evidence, much of it discussed more fully above, includes:

- Despite admittedly kissing Appellant at length several times before the Fourth of July party, she described these instances of affection during their budding romance as "friendly"–an explicit example of revisionist history.[343]
- In June 2019, she texted Appellant that she made "irrational decisions" when she drank alcohol.[344] She later testified this was to only let him down easy after he invited her over, but then she later had consensual sex with him.[345]
- She testified that she did not recall the July encounter as being nonconsensual until she was having sex with Appellant in August.[346]
- At the time of her sexual encounter with Appellant in July, others were present in the room[347] and she had her phone, but she made no effort to request any assistance from anyone, including the police.[348]

[343] R. at 753-54, 763, 774-75, 782-83.
[344] R. at 754-55, 767-68.
[345] R. a 713, 754-55, 767-68.
[346] R. at 716-20.
[347] R. at 705, 707, 733-35.
[348] R. at 744.

- She stated Appellant removed her shorts and underwear "again" when he returned the second time, indicating that she had pulled them back up and thus was fully cognizant and capable of taking action in response to what was going on.[349]
- She remained on the couch the entire night after the alleged assault.[350]
- She gave no indication to anyone in the following days that anything untoward had occurred.[351]
- She had consensual sex with Appellant in his barracks room about a month later.[352]
- She initially reported to Cpl Golf in the middle of the night in August that the sexual encounter she had just had with Appellant was also not consensual, but later flatly denied this allegation.[353]
- She reported the July encounter as nonconsensual seven months later and only after a mandatory reporter overheard her allegation.[354]

[349] R. at 706.
[350] R. at 710.
[351] R. at 710.
[352] R. at 713-16.
[353] R. at 716-19, 1063-73.
[354] R. at 766-67.

- Appellant only adopted her story that their July encounter was not consensual because he did not fully remember it and she falsely told him she had been asleep and unable to consent.[355]
- She repeatedly told him that she "could[not]" consent, even though she was awake and aware of what was occurring.[356]

These facts all amount to one truth: the complaining witness was not honest about the encounter. It was consensual. Once her allegation became inadvertently formal, she had no choice but to stick to it, and *she knew the only way she could validate her claim was by convincing Appellant that she had been asleep and unable to consent.* Indeed she ignored the police detective's directive to not lie on the controlled call, knew the call would be "substantial" evidence after her late report, feared being labeled a liar by the members of her shop, and knew, per the instructions from the police that she "need[ed] to articulate the **UNABLE TO CONSENT PART**" to secure a conviction.[357] She wanted the conviction, not the truth.

She admitted telling Appellant that she was asleep was a lie, and there is no other basis to believe she could not consent. There is also no basis to believe she did not consent to the encounter, in a room where other people were sleeping, with

[355] Pros. Ex. 4.
[356] Pros. Ex. 4 at 11, 13.
[357] Def. Exs. E, F at 2; Pros. Ex. 4; R. at 732, 767, 773, 782, 845-46.

a person with whom she was romantically engaged at the time, where did she not report it for seven months and only did so out of necessity both to avoid a mandatory report from another person and to protect her reputation. And then, as if to underscore her utter lack of credibility, she convinced a material Defense witness to change his testimony to be more favorable to her side, got caught in doing so, and then deleted the evidence of their complicity while sitting in the courtroom.

Moreover, as discussed above, irrespective of whether she actually consented, the evidence supports that Appellant was honestly and reasonably mistaken as to her consent.[358] By any reasonable measure, there is at a minimum reasonable doubt as to whether Appellant thought the complaining witness was awake and consenting at the time and only adopted the view that she "could not" consent after taking her at her word that she was asleep (which was a lie).[359] They were in a pre-existing romantic relationship, which involved sensual kissing and continued forward to another sexual encounter weeks later; her eyes were open at least part of the time; he was kissing her at one point while she was on his lap; and *she was giving him no indication of a lack of consent*.[360]

[358] R.C.M. 916(j).
[359] Pros. Ex. 4 at 10.
[360] R. at 700-09, 736, 743-44, 750-51.

As discussed at length elsewhere, the evidence for her allegation is simply too incredible to support the legal or factual sufficiency of his convictions, even on the limited evidence that was presented to the members.

Conclusion

Appellant's convictions for sexual assault are not factually or legally sufficient. His convictions should be set aside and dismissed with prejudice.[361]

VII

Trial defense counsel was ineffective for not seeking confinement credit for Appellant's time in civilian pretrial confinement for the same offenses of which he was later convicted at court-martial.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo.[362]

Analysis

Claims of ineffective assistance of counsel are evaluated under the framework of *Strickland v. Washington*'s two part test: (1) whether defense counsel's performance was deficient, and (2) whether this deficient performance prejudiced the appellant.[363] An appellant "bears the burden of establishing the

[361] 10 U.S.C. § 866.
[362] *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021).
[363] *Id*. (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

truth of the factual matters relevant to the claim."[364] An intentional relinquishment of a known right (waiver) by counsel can amount to ineffective assistance where the waiver was not the result of a reasonable tactical decision.[365]

A prisoner is entitled to additional days of confinement credit for pretrial civilian confinement when that confinement is related to "crimes for which the prisoner was later convicted."[366]

Appellant spent two days in civilian pretrial confinement for the same offenses he was convicted of at court-martial.[367] But trial defense counsel concurred with the Government that Appellant was not entitled to any pretrial confinement credit.[368] In response, the military judge asked trial defense counsel if they were requesting credit for Appellant's time in civilian pretrial confinement:[369]

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[364] *United States v. Cooper*, 80 M.J. 664, 672 (N-M. Ct. Crim. App. 2020) (citing *Denedo v. United States*, 66 M.J. 114, 128 (C.A.A.F. 2008)).
[365] *See United States v. Garong*, 2009 CCA LEXIS 353, *4-9 (N-M. Ct. Crim. App. Oct. 6, 2009); *see also United States v. Vangelisti*, 30 M.J. 234, 241 (C.A.A.F. 1990) (Cox, J., concurring) (defining waiver).
[366] *See United States v. Atkinson*, 74 M.J. 645, 647-48 (N-M. Ct. Crim. App. 2015) (citing Department of Defense Instruction (DoDI) 1325.07 and DoDI 1325.7-M); *United States v. Speight*, 2021 CCA LEXIS 133, at *7-14 (N-M. Ct. Crim. App. Mar. 30, 2021) (unpublished).
[367] *See* Entry of Judgment ((Mar. 20, 2022); Charge Sheet.
[368] R. at 1191-92.
[369] R. at 1192.

MJ: And I note he was in the hands of civilian authorities from the 18th of June to 19 June, is that correct?

ADC: Yes, Your Honor.

MJ: Very well. But that was on the civilian aspect of the investigation, not on the current military charges?

ADC: That's correct, Your Honor.

MJ: Even though it pertained to the same underlying -- alleged offense misconduct, is that right?

ADC: Yes, Your Honor.

As the military judge's last question illustrates, everyone in the courtroom was on notice that Appellant's civilian confinement related to the same crimes for which he was later convicted at court-martial. There was no tactical justification for not seeking this credit.[370] Appellant was clearly entitled to two days' credit for his time in civilian pretrial confinement, as it was for the same underlying offense for which his military sentence was imposed.[371] His trial defense counsel were

[370] *United States v. Scott*, 81 M.J. 79, 86 (C.A.A.F. 2021) (quoting *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993)); *see also Untied States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005) (explaining that allegations of deficient performance are reviewed to determine "whether defense counsel's level of advocacy fell measurably below the performance standards ordinarily expected of fallible lawyers.") (quoting *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)).

[371] *United States v. Atkinson*, 74 M.J. 645, 647-48 (N-M. Ct. Crim. App. 2015) (citing Department of Defense Instruction (DoDI) 1325.07 and DoDI 1325.7-M); *Speight*, 2021 CCA LEXIS 133, at *7-14.

deficient in waiving his right to this credit, and this deficiency resulted in prejudice to Appellant in that he did not receive the credit to which he was entitled.[372]

Conclusion

Accordingly, this Court should grant Appellant two days' confinement credit to be credited against his sentence of confinement.[373]

Respectfully submitted.

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
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Washington, DC 20374
[redacted]

[372] Should this Court find counsel was somehow not ineffective for waiving two days' confinement credit to which Appellant was so clearly entitled, it should nevertheless decline to apply waiver under *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016), and grant the credit just as it did in *United States v. Tyndall*, No. 201900096, 2019 CCA LEXIS 476, at *9 (N-M. Ct. Crim. App. Nov. 27, 2019) (unpublished).

[373] 10 U.S.C. § 866.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on September 26, 2022, that a copy was uploaded into the Court's case management system on September 26, 2022, *and* that a copy of the foregoing was by electronic means with the consent of the Government to Appellate Government Division [redacted] on September 26, 2022.

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
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Washington, DC 20374
[redacted]

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

Before Panel No. 2

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR FIRST ENLARGEMENT OF TIME
v.	)	Case No. 202200079
Daniel K. CHEGE, Corporal (E-4) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Miramar, California, on July 28, September 3, November 19 and 30, and December 1–3 and 6–8, 2021, by a general court-martial convened by Commanding General, 3d Marine Aircraft Wing, Lieutenant Colonel D. A. Poteet, U.S. Marine Corps, presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from October 25, 2022, to November 24, 2022, to answer Appellant's Brief and Assignments of Error.

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

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

(A) This case was docketed with the Court on April 13, 2022;

(B) The *Moreno III* date is October 13, 2023;

(C) Appellant is confined with a normal release date of December 2023;

(D) The Record of Trial consists of 1375 transcribed pages and 2239 total pages;

(E) Counsel has reviewed approximately fifty percent of the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial of sexual assault. He now raises seven issues, including legal and factual insufficiency, ineffective assistance of counsel, failure to instruct on mistake of fact, denial of evidence production and argument related to allegations that the victim tampered with a defense witness, and cumulative errors.

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

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

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to November 24, 2022.

James A. Burkart Digitally signed by James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel
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Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on October 19, 2022.

James A. Burkart Digitally signed by James A. Burkart

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

[redacted]

Subject: RULING - RECEIPT - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 1st Enlarge (Burkart)
Date: Thursday, October 20, 2022 12:29:05 PM

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

[redacted]

Panel Paralegal
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1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 1st Enlarge (Burkart)

RECEIVED
OCTOBER 20 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]

Subject: FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 1st Enlarge (Burkart)

To this Honorable Court:

Please find attached the Appellee's Motion for First Enlargement of Time in United States v. Chege NMCCA No. 202200079.

Semper Fidelis,
James A. Burkart
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel (Code 46)
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1254 Charles Morris Street SE
Washington Navy Yard, DC 20374-5124
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[redacted]

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

Before Panel No. 2

UNITED STATES, Appellee v. Daniel K. CHEGE, Corporal (E-4) U.S. Marine Corps Appellant	)	APPELLEE'S MOTION FOR SECOND ENLARGEMENT OF TIME Case No. 202200079 Tried at Marine Corps Air Station Miramar, California, on July 28, September 3, November 19 and 30, and December 1–3 and 6–8, 2021, by a general court-martial convened by Commanding General, 3d Marine Aircraft Wing, Lieutenant Colonel D. A. Poteet, U.S. Marine Corps, presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from November 24, 2022, to December 24, 2022, to answer Appellant's Brief and Assignments of Error.

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

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

(A) This case was docketed with the Court on April 13, 2022;

(B) The *Moreno III* date is October 13, 2023;

(C) Appellant is confined with a normal release date of December 2023;

(D) The Record of Trial consists of 1,375 transcribed pages and 2,239 total pages;

(E) Counsel has reviewed approximately ninety percent of the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial of sexual assault. He now raises seven issues, including legal and factual insufficiency, ineffective assistance of counsel, failure to instruct on mistake of fact, denial of evidence production and argument related to allegations that the Victim tampered with a defense witness, and cumulative errors.

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

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

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to December 24, 2022.

[redacted]
JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
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Navy-Marine Corps Appellate
Review Activity
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Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on October 18, 2022.

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

[redacted]

Subject: RULING - RECEIPT - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 2d Enlarge (Burkart)
Date: Friday, November 18, 2022 12:00:49 PM

MOTION GRANTED
18 NOVEMBER 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]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 2d Enlarge (Burkart)

[redacted]

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

Before Panel No. 2

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR THIRD ENLARGEMENT OF TIME
v.	)	Case No. 202200079
Daniel K. CHEGE, Corporal (E-4) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Miramar, California, on July 28, September 3, November 19 and 30, and December 1–3 and 6–8, 2021, by a general court-martial convened by Commanding General, 3d Marine Aircraft Wing, Lieutenant Colonel D. A. Poteet, U.S. Marine Corps, presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from December 24, 2022, to January 23, 2022, to answer Appellant's Brief and Assignments of Error.

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

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

(A) This case was docketed with the Court on April 13, 2022;

(B) The *Moreno III* date is October 13, 2023;

(C) Appellant is confined with a normal release date in December 2023;

(D) The Record of Trial consists of 1,375 transcribed pages and 2,239 total pages;

(E) Counsel has reviewed the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial of sexual assault. He now raises seven issues, including legal and factual insufficiency, ineffective assistance of counsel, failure to instruct on mistake of fact, denial of evidence production and argument related to allegations that the Victim tampered with a defense witness, and cumulative errors.

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

Good cause exists for this Third Enlargement. During the previous Enlargement, Counsel completed approximately twenty-five percent of the Answer. Counsel needs additional time to further research the issues, finish drafting the Answer, and ensure the Answer completely and accurately represents the United States' settled position on the Appellant's Assignments of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to January 23, 2022.

[redacted]

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

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on December 19, 2022.

[redacted]

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

[redacted]

Subject: GRANTED - RECIEVED - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 3d Enlarge (Burkart)
Date: Tuesday, December 20, 2022 12:35:58 PM

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

Very Respectfully,

[redacted]

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

[redacted]

Subject: RECIEVED - FILING - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 3d Enlarge (Burkart)

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

Before Panel No. 2

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR FIFTH ENLARGEMENT OF TIME
v.	)	Case No. 202200079
Daniel K. CHEGE, Corporal (E-4) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Miramar, California, on July 28, September 3, November 19 and 30, and December 1–3 and 6–8, 2021, by a general court-martial convened by Commanding General, 3d Marine Aircraft Wing, Lieutenant Colonel D. A. Poteet, U.S. Marine Corps, presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from February 22, 2023, to March 24, 2023, to answer Appellant's Brief and Assignments of Error.

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

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

(A) This case was docketed with the Court on April 13, 2022;

(B) The *Moreno III* date is October 13, 2023;

(C) Appellant is confined with a normal release date in December 2023;

(D) The Record of Trial consists of 1,375 transcribed pages and approximately 2,239 total pages;

(E) Counsel has reviewed the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial of sexual assault. He now raises seven issues, including legal and factual insufficiency, ineffective assistance of counsel, failure to instruct on mistake of fact, denial of evidence production and argument related to allegations that the Victim tampered with a defense witness, and cumulative errors.

B. Good cause exists in light of the need to finalize drafting and receive supervisory review.

Good cause exists for this Fifth Enlargement. During the previous Enlargement, Counsel completed an initial draft of the Answer and received preliminary supervisory feedback. Counsel needs additional time to conduct additional research on some substantive issues, edit the draft of the Answer, receive additional supervisory review and comments, and ensure the Answer completely and accurately represents the United States' settled position on the Appellant's Assignments of Error. Absent extraordinary circumstances, the United States will file during this Enlargement.

Conclusion

The United States respectfully requests the Court grant this Motion and extend the time to file its Answer to March 24, 2023.

James A. Burkart Digitally signed by James A. Burkart

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Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on February 14, 2023.

James A. Burkart Digitally signed by James A. Burkart

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

[redacted]

Subject: RULING - RECEIPT - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 5th Enlarge (Burkart)
Date: Thursday, February 16, 2023 10:35:56 AM

MOTION GRANTED
16 FEBRUARY 2023
United States Navy-Marine Corps
Court of Criminal Appeals
Absent extraordinary circumstances as determined by the Court, this will be the FINAL Enlargement

Very Respectfully,

[redacted]

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

[redacted]

Subject: RECEIPT - Panel 2 - U.S. v. Chege - NMCCA 202200079 - G - Mot 5th Enlarge (Burkart)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Daniel K. CHEGE,** Corporal (E-4) U.S. Marine Corps Appellant	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** USCA Dkt. No. 24-0088/MC Crim.App. Dkt. No. 202200079

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES COURTS OF APPEALS

STATUTES

OTHER AUTHORITIES

Issues Presented

I.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE THAT THE COMPLAINING WITNESS MADE A FALSE ALLEGATION OF SEXUAL ASSAULT AGAINST ANOTHER MARINE?

II.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE REQUESTS FOR PRODUCTION, CONTINUANCE, AND ABATEMENT TO PURSUE NEWLY DISCOVERED EVIDENCE THAT THE COMPLAINING WITNESS HAD TAMPERED WITH A DEFENSE WITNESS?

III.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN PREVENTING THE DEFENSE FROM ARGUING IN CLOSING THAT THE COMPLAINING WITNESS HAD TAMPERED WITH A DEFENSE WITNESS?

IV.

DID THE MILITARY JUDGE ERR IN NOT INSTRUCTING ON MISTAKE OF FACT AS TO CONSENT?

V.

DID THE CUMULATIVE EFFECT OF THESE ERRORS DENY APPELLANT A FAIR TRIAL?

Introduction

Appellant was accused of sexually assaulting his former romantic partner while she pretended to be asleep on a couch they shared after a party wound down on the Fourth of July. At trial, the military judge made several rulings against the Defense that prevented the Defense from promoting their theory that the complaining witness was a manipulative liar and that this allegation was just another example of that behavior.

Among these decisions, the military judge (1) [redacted] and (2) declined to order production, a continuance, or an abatement after a mid-trial discovery that the complaining witness had deleted her Snapchat conversation history with a defense witness she was accused of tampering *while she sat in the courtroom during a discussion regarding its production*.

And compounding these erroneous rulings, the military judge oddly did not permit the Defense to argue that the complaining witness had actually tampered with the defense witness, and further declined to give a mistake of fact as to

[1] R. at 281.

consent instruction despite evidence requiring it. At a minimum, these mistakes amounted to cumulative error.

The result of this case was an injustice to Appellant. But the misapplication of the law through several erroneous rulings also deviated from this Court's precedent in egregious ways and in doing so has created precarious precedent for future appellants.[2] These rulings should be corrected.

Statement of Statutory Jurisdiction

This case fell within the lower court's jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), as the approved sentence includes a dishonorable discharge.[3] Appellant's petition for grant of review was timely filed on February 9, 2024, properly bringing the case within this Court's jurisdiction under Article 67(a)(3), UCMJ.[4]

Statement of the Case

A panel of officer and enlisted members sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, UMCJ.[5] The members sentenced Appellant to two years' confinement, reduction to E-1, forfeiture of all pay and allowances, and a

[2] C.A.A.F. R. at 21(b)(5)(B)(i).
[3] 10 U.S.C. § 866(b)(3) (2018).
[4] 10 U.S.C. § 867(a)(3) (2018).
[5] R. at 1196.

dishonorable discharge.[6] The convening authority (CA) approved the sentence, and the military judge entered it into judgment.[7]

On October 13, 2023, the lower court affirmed the findings and sentence.[8] Appellant's request for reconsideration *en banc* was denied on December 12, 2023. Appellant petitioned this Court for review on February 9, 2024.

Statement of Facts

A. The complaining witness had a consensual sexual relationship with Appellant.

The complaining witness and Appellant spent a lot of time together after she checked into the shop where he served as supervisor in May 2019.[9] They frequently hung out together and kissed several times.[10]

On the Fourth of July, they went to a house party where they drank alcohol and slept on the same "L" shaped couch.[11] During the night, they had sex on the couch and in the following days the complaining witness gave no indication to Appellant or anyone else had been nonconsensual.[12] In fact, the following morning

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[6] R. at 1374.
[7] Convening Authority's Action (Jan. 11, 2022); Entry of Judgment (Mar. 20, 2022).
[8] *United States v. Chege*, No. 202200079, slip. op. (N-M. Ct. Crim. App. Oct. 13, 2023) (unpublished).
[9] R. at 693-94.
[10] R. at 693-94, 751-753, 763, 775, 782.
[11] Def. Ex. C; R. at 694-99, 733-34.
[12] R. at 700-13, 733-36, 742-45, 765-66, 781.

she told her friend, Lance Corporal (LCpl) Hermon, that she intended to get a ride home with Appellant.[13]

A few weeks later, in August, the complaining witness had sex with Appellant a second time, this time in his barracks room.[14] Afterwards, she called her friend, Corporal (Cpl) Hutchens, and asked him to come pick her up.[15] When Cpl Hutchens arrived around 0400, she told him Appellant had "taken advantage of" her while she pretended to be asleep.[16] She also told him her earlier sexual encounter with Appellant in July had not been consensual either.[17]

But when making a report six months later, in February 2020, the complaining witness decided that the sex in August had been consensual, but that the sex in July had not.[18] She now maintained that *while she was having consensual sex with Appellant* in August she remembered the sex with him in July was nonconsensual.

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[13] App. Ex. XLIX at 2. She later testified that she drove herself to the party. R. at 695.
[14] R. at 713-16.
[15] R. at 719-722.
[16] R. at 1064-65.
[17] R. at 1064-66, 1072-73.
[18] R. at 766.

B. The complaining witness testified that during their July encounter she was awake but pretended to be asleep and said nothing to Appellant while they were having sex.

At trial, the complaining witness testified that while they were on the "L" shaped couch in a room where other people were sleeping, Appellant whispered her name and shook her to get her attention; moved her shorts and underwear out of the way and penetrated her vagina with his fingers and his penis on two separate occasions; pulled her onto his lap and kissed her; and put her back down on the couch.[19]

She testified that throughout this time she made no effort to convey her lack of consent to Appellant, did not seek assistance from any of the other people in the room, and instead remained nonreactive and pretended to be asleep.[20]

C. When the complaining witness told him during a controlled call ten months later that she had been asleep and thus unable consent, Appellant, who did not fully remember the encounter, apologized and allowed her to fill in "the blanks" of his memory.[21]

After reporting this allegation, the complaining witness made a phone call to Appellant that was monitored by a police detective, who advised her: "*do not lie* about the details of the crime."[22] During the call she told Appellant she could not

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[19] R. at 700-09, 736.[20] R. at 700-09, 733-36, 742-45, 750, 781.
[20] R. at 700-09, 733-36, 742-45, 750, 781.
[21] Pros. Ex. 4; Pros. Ex. 5 at 6.
[22] Def. Ex. F. at 2 (emphasis added); Def. Ex. E; Pros. Exs. 1, 4; R. 710-12, 730-33 845-46, 877-78. This was the first time that the complaining witness discussed that night with Appellant. R. at 1088.

remember much of what happened during their encounter on the Fourth of July, to which he responded that he, too, had a hazy memory of the encounter.[23] She then asked him, "Did you know that I was sleeping . . . ?"[24] He responded, "No."[25] She then repeatedly suggested she had been asleep during their sexual activity and eventually asked him, "Do you feel bad because you know that I wasn't, like, consenting and I couldn't consent?"[26] As he became more and more apologetic in the face of her false claim that she had been asleep, she asked, "So you knew that I couldn't consent?"[27] He responded by parroting back her false narrative, apologized for his actions, and said he "let the devil take over."[28]

Appellant was telephonically interviewed by the same police detective a month later.[29] He told the detective he had little recollection of what occurred during the encounter due to intoxication, but that the complaining witness had called and "helped [him] fill in some of the blanks."[30] Appellant stated that he would do "whatever it takes" to make things right and his effort to align his memory with her fabrication is apparent throughout each statement.[31]

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[23] Pros. Ex. 4 at 6-7.
[24] Pros. Ex. 4 at 8.
[25] Pros. Ex. 4 at 8; Pros. Ex. 1 at 09:44-09:49 (Rec'g of Controlled Call).
[26] Pros. Ex. 4 at 9-11.
[27] Pros. Ex. 4 at 12-13.
[28] Pros. Ex. 4 at 14.
[29] Pros. Ex. 5.
[30] Pros. Ex. 4 at 7, 12; Pros. Ex. 5 at 5-6.
[31] Pros. Ex. 5 at 11, 26.

D. [redacted]

[redacted]

[32] R. at 173-286.
[33] R. at 208, 212; App. Ex. II at 25.
[34] App. Ex. XLI; R. at 208, 211.
[35] R. at 223-25.
[36] R. at 209, 211-12.
[37] R. at 276-77.

E. The complaining witness tampered with the testimony of a Defense witness, materially changing it to be more favorable to the Government, and then destroyed the evidence of her tampering.

The day before trial, in violation of the military judge's order, the complaining witness discussed her case with LCpl Hermon, the defense witness she had told the morning following the sexual encounter with Appellant that she intended to get a ride home with Appellant (whom she later alleged had just assaulted her).[38] After the complaining witness spoke to him on the eve of trial, LCpl Hermon told the Defense he no longer remembered that particular morning or his prior statement about it.[39]

At an Article 39(a) session to ascertain whether the complaining witness had improperly tampered with his testimony, LCpl Hermon denied discussing the case with her, denied even seeing her at the time the conversation occurred, and denied that she had asked him to alter his testimony.[40] After the hearing concluded, however, another Marine who was present stated that the complaining witness did in fact discuss the case with LCpl Hermon and that they had later apologized for

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[38] R. at 723-25, 599. The military judge's order was "to not discuss her testimony or her knowledge of the case with anyone other than victim legal counsel or counsel for either side." R. at 688.
[39] App. Ex. L; R. at 571-72, 575-79.
[40] R. at 568-89, 592, 598-605.

getting him involved.[41] Thereafter, LCpl Hermon invoked his Fifth Amendment right not to testify further about the matter.[42]

The complaining witness was also called and testified that LCpl Hermon had lied during his testimony; that they had, in fact, discussed the case in violation of the military judge's instruction; but that she did not influence his testimony.[43] She further admitted that, *as she was sitting in the courtroom* listening to LCpl Hermon's testimony on the witness tampering issue and the Defense was requesting discovery of their digital communications, *she used her cell phone to block LCpl Hermon from her Snapchat account and then later unblocked him, which deleted their conversation history*.[44] When asked why she destroyed evidence of her conversations with LCpl Hermon in this manner while sitting in the courtroom, she never provided a reason.[45]

F. The military judge repeatedly summarily denied Defense requests to obtain Snapchat communications relating to both perjury and witness tampering by the complaining witness.

The Defense thereupon moved to dismiss the case on grounds that the complaining witness had tampered with the testimony of LCpl Hermon, a defense

[41] App. Ex. LV.
[42] R. at 999.
[43] R. at 723-24, 1053.
[44] R. at 726-27, 770-71, 1053-55.
[45] R. at 770-71.

witness.[46] The Defense also requested production of the Snapchat communications for use in impeaching the complaining witness and proving she was guilty of witness tampering.[47] The Defense alternatively requested that the case be continued or abated so that it could secure production of the complaining witness's Snapchat communications with LCpl Hermon.[48] These motions were raised and re-raised at several points as these allegations developed through the course of trial.[49] The military judge denied the motions, stating simply that he would allow "robust cross-examination" on the matter.[50] But without evidence with which to challenge the veracity of the complaining witness's testimony, the Defense's cross-examination was forced to take her at her word.

Subsequently, the military judge ruled that because there was no direct evidence of witness tampering (which he had denied the Defense any ability or time to pursue), the most the Defense could argue in closing regarding the issue was to question whether witness tampering by the complaining witness had occurred.[51] He told the Defense that "you can use the word [tampering] as long as there's a very clear question mark at the end of that sentence."[52]

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[46] App. Ex. LIII; R. at 607-14.
[47] R. at 652-56, 659.
[48] App. Ex. LXV; R. at 673-80, 999, 1108-09, 1127.
[49] R. at 618-19, 673-80, 686-87, 1108-09, 1127.
[50] R. at 687, 1030-31, 1127.
[51] R. at 1107-08.
[52] R. at 1108.

Reasons to Grant Review

I.

APPELLANT WAS UNCONSTITUTIONALLY DENIED THE OPPORTUNITY TO CROSS-EXAMINE THE COMPLAINING WITNESS ABOUT HER FALSE ALLEGATION OF SEXUAL ASSAULT AGAINST ANOTHER MARINE

This Court has held that "evidence of an alleged victim's prior accusation of sexual assault is . . . admissible if the prior accusation is shown to be false."[53] This is because Military Rule of Evidence 412 provides that while "[e]vidence offered to prove that a victim engaged in other sexual behavior" is generally not admissible in a trial involving a sexual offense, there is an exception for "evidence the exclusion of which would violate the accused's constitutional rights,"[54] including an accused's Sixth Amendment right to confront and cross-examine the witnesses against him.[55]

An accused must present more evidence of falsity than a mere denial from the person accused.[56] [redacted]

[53] *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017).
[54] Mil. R. Evid. 412(b)(3).
[55] *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)).
[56] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000); *Erikson*, 76 M.J. at 235-36.

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[57] App. Ex. XLI; R. at 208, 211.
[58] R. at 223-25.
[59] R. at 209, 211-12.
[60] R. at 276-77.
[61] R. at 277.

[redacted]

[62] *Chege*, slip. op. at 8 (citing R. at 211-12).
[63] R. at 276-78.
[64] *See Ellerbrock*, 70 M.J. at 319 (citing *United States v. Smith*, 68 M.J. 445, 448-49 (C.A.A.F. 2010) (finding that protecting an established relationship can provide a motive to lie about a consensual sexual encounter).
[65] *Chege*, slip. op at 10.

[redacted]

[66] *Cf. Erikson*, 76 M.J. at 235-36 (finding it important that the complaining witness denied her sexual assault allegation was false even in the face of conflicting evidence).
[67] *United States v. Gaddis*, 70 M.J. 248, 254, 256 (C.A.A.F. 2011) (citing *United States v. Dickerson*, 530 U.S. 428, 437, 444 (2000); *United States v. Banker*, 60 M.J. 216, 222-23 (C.A.A.F. 2004)).
[68] R. at 281; *see also* R. at 278.
[69] M.R.E. 412(c)(3).

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE REQUESTS FOR PRODUCTION, CONTINUANCE, AND ABATEMENT FOCUSED ON OBTAINING NEWLY DISCOVERED EVIDENCE THAT THE COMPLAINING WITNESS HAD TAMPERED WITH A DEFENSE WITNESS.

Article 46, UCMJ provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."[70] This equal opportunity to obtain evidence includes "the benefit of compulsory process."[71] R.C.M. 703(e)(1) provides that "[e]ach party is entitled to production of evidence which is relevant and necessary."[72]

Here, the military judge repeatedly denied the Defense the ability to pursue evidence of the complaining witness's prohibited communications with a defense witness even after the complaining witness admitted she had deleted *while sitting in the courtroom*. These circumstances fly in the face of Appellant's right to due process and a fair trial, and the Court should take this opportunity to ensure military judges exercise proper control over the integrity of the court-martial process.

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[70] Article 46, UCMJ, 10 U.S.C. § 846 (2018).
[71] *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1997) (citing R.C.M. 703(a)).
[72] R.C.M. 703(e)(1).

Here, the military judge's handling of the issue was erroneous in a number of ways that the Court should address for judges and practitioners alike. First, contrary to the military judge's view, the complaining witness's Snapchat communications with LCpl Hermon became relevant and necessary the moment the CA refused to grant testimonial immunity to LCpl Hermon, who, having already lied under oath about his conversation with the complaining witness, thereafter invoked his right to remain silent.[73] Without immunity for this witness, the requested communications were the only evidence with which the Defense could impeach the complaining witness's testimony that no witness tampering had occurred. Indeed, the military judge himself had already tacitly concluded these communications were both relevant and necessary when he ordered the complaining witness's phone produced so that the Defense could inspect precisely this evidence: her recent communications with LCpl Hermon.[74]

Second, when the Defense inspection of her phone revealed that the complaining witness *had deleted* her communications with LCpl Hermon, while sitting in the courtroom listening to his false testimony about them and the Defense's request for production of those very communications, the evidence the Defense requested to be produced from Snapchat became that much *more* relevant

[73] App. Ex. LXV.
[74] R. at 680-84.

and necessary. It now went not just to the credibility of the complaining witness's testimony about whether she tampered with a Defense witness on the eve of trial, but whether she then *intentionally destroyed* the evidence of her own misconduct, as the Defense claimed in its motion for mistrial and dismissal and therefore had every right to pursue.[75]

Third, the record contains substantial evidence that the complaining witness lied during her testimony about this conversation.[76] Perhaps most egregiously, in her testimony on the matter, the complaining witness maintained that she was unaware that blocking and then re-adding LCpl Hermon would delete their conversation and she stated that she had other reasons for blocking him, yet she *never provided any other explanation for why she had taken these actions*.[77] Moreover, after having this prohibited conversation with the complaining witness, which he then falsely testified he never had, LCpl Hermon's testimony became less favorable for the Defense.[78]

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[75] *See United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981) ("Under normal circumstances" an inference might be drawn that the absence of certain evidence is such because it would be favorable to the accused).
[76] *See United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (articulating that the burden of persuasion for a motion to compel production includes, as a threshold matter, a showing "that the requested material exist[s].")
[77] R. at 770-71. When asked why, she responded: "[t]hat's not why I blocked him[,]" "[i]t was not with the intention to delete the conversations[,]" and "[t]hat's not why." R. at 770-71.
[78] R. at 571-72, 576-79, 587; App. Ex. LXIX.

Under these circumstances, it defies belief that the military judge would grant the Defense access to the complaining witness's phone, but then deny production of the very same evidence from a different source once the Defense established that she had *deleted it* from her phone. Thus, his summary denial of the Defense's reasonable production request for newly discovered evidence was clearly erroneous.

The NMCCA's opinion skirted the significance of this issue by erroneously concluding that "the Defense successfully impeached" the complaining witness absent these messages.[79] This conclusion misapprehends what "impeachment" means: "[t]he act of discrediting a witness by catching the witness in a lie . . . ."[80] Here, the military judge denied the Defense the opportunity even to pursue, much less obtain, contrary evidence with which to impeach the complaining witness on the issue of tampering with a defense witness, whose testimony was going to support that she was intending to get a ride home from Appellant the morning after he supposedly assaulted her (during which time she was awake and yet said or did nothing to discourage his actions or express her lack of consent). Thus, the Defense did *not* "successfully impeach[]" the complaining witness because it could not actually prove that she was lying by introducing contrary evidence.[81]

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[79] *Chege*, slip op. at 16.
[80] *Impeachment*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[81] *Chege*, slip op. at 16

Fourth, the military judge also abused his discretion in denying the Defense an abatement or *any* continuance to pursue this evidence. This Court has outlined several factors to determine whether a military judge abuses his discretion by denying a continuance.[82] All of these factors favored a continuance here. The military judge had no valid basis under law to summarily deny any continuance—even as little as a day—to give the Defense a reasonable amount of additional time to pursue and develop evidence of such import to the case.

Even assuming that under the time constraints of the ongoing trial (which the military judge did nothing to ameliorate) the Defense did not establish that the communications still existed on the Snapchat servers, this has little effect on the analysis. The law requires that when evidence is "destroyed, lost, or otherwise not subject to compulsory process, . . . if such evidence is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for such evidence," the military judge "*shall* grant a continuance or other relief in order to attempt to produce the evidence *or shall* abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the

[82] *Miller*, 47 M.J. at 358 (outlining the following factors: surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of evidence requested, prejudice to opponent, other continuance requests, good faith of the moving party, reasonable diligence by the moving party, possible impact on verdict, and prior notice).

requesting party."[83] A continuance or abatement is exactly what was required under these circumstances, and the military judge abused his discretion in summarily refusing to grant either. A continuance was warranted to investigate its existence and, as the complaining witness deleted this key evidence, an abatement was required if it turned out the evidence was forever destroyed.

In *United States v. Simmermacher*, this Court found that the military judge abused his discretion when he did not order an abatement after the government destroyed an appellant's urine sample which tested positive for cocaine.[84] The Court articulated three factors to consider in whether an abatement should have been awarded: (1) the lost or destroyed evidence was essential to a fair trial; (2) there was no adequate substitute; and (3) the loss was not the fault of the requesting party.[85]

Here, the Snapchat evidence was essential to a fair trial as the only direct evidence of witness tampering and perjury by the complaining witness. No adequate substitute for the evidence existed, in which case the discretion of judges is limited and they "do not have discretion to vary from the prescribed remedy."[86] "[R]obust cross-examination" on the matter, as was permitted here, is

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[83] R.C.M. 703(e)(2) (emphasis added).
[84] *United States v. Simmermacher*, 74 M.J. 196, 201-03 (C.A.A.F. 2015).
[85] *Id*. at 202.
[86] *Id*.

insufficient.[87] And the unavailability of the evidence was not Appellant's fault—the complaining witness admitted deleting it from her phone during an open court session while the Defense was simultaneously requesting discovery and production of the very same evidence.

In justifying the military judge's abdication of his duty to ensure a fair trial, the NMCCA's reasoning creates an impossible situation for practitioners. If applied to other cases, when trial defense counsel are alerted mid-trial to the existence of extremely probative evidence and request an order for the production of that evidence, their motion will fail if they cannot prove the evidence exists beyond what is available to them in that moment. But then if they seek a continuance to gather more evidence to support what the trial court finds lacking in their production request, they will also be denied that continuance. The military judge's rulings, and the NMCCA opinion's misapprehension of the procedural law underpinning them, overlook the practical realities of trial litigation and create a self-fulfilling prophecy that denies trial litigators the ability to pursue potentially trial-altering evidence.

[87] *Id.*; R. at 687.

This Court should address such a departure from precedent, statute, and common sense and re-calibrate the court-martial process toward ensuring fairness and justice for all participants.[88]

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY BARRING THE DEFENSE FROM ARGUING THE COMPLAINING WITNESS HAD TAMPERED WITH A DEFENSE WITNESS.

Analysis

While a trial judge may restrict arguments that "stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial," an appellant "through counsel, ha[s] a right to be heard in summation of the evidence from the point of view most favorable to him."[89]

Here, after preventing the Defense from getting the evidence to prove it, the military judge improperly limited the Defense from even *arguing* that the complaining witness had tampered with its witness.[90] He ruled that because there was no direct evidence of witness tampering (which he had earlier denied the Defense both the ability to obtain or the time to pursue), the most the Defense

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[88] C.A.A.F. R. at 21(b)(5)(B)(i).
[89] *Herring v. New York*, 422 U.S. 852, 862-65 (1975); *see also Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (finding that limiting a closing argument "lessened the Government's burden of persuading the jury," requiring reversal as a "breakdown of our adversarial system");
[90] R. at 1107-08.

could assert regarding the issue was to question whether witness tampering by the complaining witness had occurred.[91] As he told the Defense, "you can use the word [tampering] as long as there's a very clear question mark at the end of that sentence."[92]

This Court should explain to the military justice community that placing such a limitation on the Defense is an abuse of discretion because it is based on an erroneous view of the law.[93] As this Court is aware, the law does not hold that conclusions must be drawn only from direct evidence, but may also can be based on circumstantial evidence.[94] Indeed, this Court has specifically recognized that circumstantial evidence is particularly important for counsel's argument where an event occurs in private, for which there may be no direct evidence available.[95] Rather, what the law requires is only that the particular conclusion that counsel argues from circumstantial evidence be a "reasonable inference" drawn from that evidence.[96]

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[91] R. at 1107-08.
[92] R. at 1108.
[93] *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)).
[94] *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citing *United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014), *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)).
[95] *King*, 78 M.J. at 221.
[96] *Young*, 470 U.S. at 9 n.7, 10.

Here, there is ample circumstantial evidence that the complaining witness tampered with LCpl Hermon's testimony, including but not limited to: she talked with him on the eve of trial in violation of the military judge's order not to discuss the case with other witnesses; he then changed his expected testimony to be more favorable to her side; he then lied under oath about talking to her; she then deleted their Snapchat conversation history while sitting in the courtroom listening to him commit perjury; he then invoked his Fifth Amendment privilege to testify further when his perjury came to light; she then could give no explanation as to why she would delete their Snapchat conversation history. And in a case premised from day one on the complaining witness's lie that she had been asleep during her sexual encounter with Appellant, not letting the Defense argue she tampered with a defense witness was not harmless beyond a reasonable doubt.[97]

IV.

THE MILITARY JUDGE ERRED IN NOT GIVING AN INSTRUCTION ON MISTAKE OF FACT AS TO CONSENT.

Mistake of fact as to consent is a defense to the offenses of sexual assault of which Appellant was convicted. This defense provides that "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused

[97] C.A.A.F. R. at 21(b)(5)(B)(i).

believed them, the accused would not be guilty of the offense."[98] The mistake of fact "must have existed in the mind of the accused and must have been reasonable under all of the circumstances."[99] Thus, the mistake must be reasonable and Appellant must "actually or subjectively . . . infer consent based on the[] circumstances."[100]

A military judge must instruct on any affirmative or "special" defenses that are "in issue."[101] The threshold for "in issue" is low, and only requires "some evidence, without regard to its source or credibility" having been admitted.[102] "Any doubt whether an instruction should be given should be resolved in favor of the accused."[103]

Here, Appellant offered more than "some evidence" that a mistake of fact as to consent existed. When the complaining witness called Appellant out of the blue some ten months after their first sexual encounter to *falsely* claim (by her own later admission) she had been asleep and thus unable to consent, the first words out of

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[98] R.C.M. 916(j)(1).
[99] R.C.M. 916(j)(1).
[100] *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)).
[101] R.C.M. 920(e); *see also United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).
[102] R.C.M. 920(e), Discussion; *see also Maynulet*, 68 M.J. at 376 (citing *Davis*, 53 M.J. at 205)).
[103] *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003) (citations and internal quotation marks omitted).

Appellant's mouth were disbelief. She asked him, "Did you know that I was sleeping, like?"[104] He responded, "No."[105]

And there was good reason for Appellant's disbelief in the complaining witness' substantially delayed, false claim that she was asleep and therefore unable to consent. At the time, the two had a pre-existing romantic relationship; she did not reject his advance earlier in the night when he put his hand on her knee; she then slept next to him on the same couch; she was actually awake (by her own admission) during the sexual activity; she never once reacted, resisted, or expressed any lack of consent to any acts by him, which included rolling her onto her side, pulling her onto his lap, and kissing her on the mouth; the following morning she gave no indication anything untoward had occurred; and thereafter the two of them not only continued their relationship, but had another consensual sexual encounter (by her own admission) a few weeks later.[106]

These facts establish at least "some evidence" of an honest and reasonable belief of consent. And other parts of the controlled call in addition to Appellant's direct assertion that he believed she was awake support his honest belief that the encounter was consensual.[107] For example, when the complaining witness started

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[104] Pros. Ex. 4 at 8.
[105] Pros. Ex. 4 at 8.
[106] App. Ex. XLIX at 2; R. at 696-96, 700-10, 713-16, 733-36, 743, 750, 753, 763, 775, 782.
[107] *Chege*, slip. op. at 23-24.

asking him to explain "why" they had tried to have sex, he was at first confused and unsure how to respond.[108] She then said she was just looking for an apology, which also made him confused but he offered one nonetheless.[109] Shortly after this, when she suggested (falsely) that she was asleep, he confirmed that he thought she was awake, reinforcing why he thought she consented and why he was confused that she was now expecting him to apologize and claiming she was asleep.[110] Then she told him that she could not consent, to which he replied in part, "[t]hat makes me feel even worse for it," indicating this was news to him.[111] It was only after the initial confrontation—where every statement he made was infected with the memory-altering lie that she, his ex-lover and friend, had actually been asleep—that he made anything resembling an "admission."

Then, during his interview with the police detective, even after emphatically apologizing and feeling eternally guilty after being accused of taking advantage of a sleeping friend (based on her lie that she was asleep), Appellant said that at the end of their encounter, he "put[] her back into a comfortable position *where she could fall asleep.*"[112] Thus, despite the sense of guilt that the complaining witness's lies had instilled in him, when speaking from his own recollection and

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[108] Pros. Ex. 4 at 7.
[109] Pros. Ex. 4 at 7.
[110] Pros. Ex. 4 at 8.
[111] Pros. Ex. 4 at 11.
[112] Pros. Ex. 5 at 22 (emphasis added).

trying to reconcile the complaining witness' narrative, he still remembered her as being awake. Unlike the cases cited by the NMCCA, there is evidence here that offers far more than "no insight as to whether the appellant honestly believed the victim was consenting."[113]

Yet the NMCCA supported the military judge's decision not to instruct the members on the defense of mistake of fact as to consent.[114] The Defense had specifically requested a mistake of fact as to consent instruction based on the complaining witness having actually been awake during the encounter, Appellant's belief that the encounter was consensual, and other circumstances such as their prior romantic relationship.[115] And the military judge, after initially including it, ultimately changed his mind and ruled that "there is no evidence before the Court as to the subjective state of mind of the accused at the time of the offense suggesting that he was under the impression that he believed she was consenting."[116]

Indeed, in an effort to salvage this error, the NMCCA only compounded the issue by finding "the evidence *tends* to support the opposite conclusion,"[117]

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[113] *Chege*, slip. op. at 21-24 (citing *United States v. Norton*, No. 202000046, 2021 CCA LEXIS 375 (N-M Ct. Crim. App. July 29, 2021) (unpublished); *Jones*, 49 M.J. at 91).
[114] R. at 1098.
[115] R. at 1091-98.
[116] R. at 1096.
[117] *Chege*, slip. op. at 23.

applying "some evidence" not as a legal threshold, but instead as a balancing test. This is an incorrect view of the law. Indeed, the NMCCA's view that the evidence only "tends" to support the conclusion that Appellant was not mistaken is telling, as it (correctly) implies that there is also evidence that tends to support the other conclusion, that he *was* mistaken.

And the mistake-of-fact issue was the crux of the case. This Court should grant review to correct the lower court on when an instruction for mistake of fact as to consent is required, as it was here.[118]

V.

CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

"Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[119] A finding will only be reversed if Appellant was denied a fair trial by the cumulative error.[120]

This is the case for the Court to address cumulative error. Through this series of compounding, case-dispositive errors discussed above, the military judge effectively prevented the Defense from attacking the basis of the Government's

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[118] C.A.A.F. R. at 21(b)(5)(B)(i).
[119] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).
[120] *Id*. (citing *Banks*, 36 M.J. at 171).

case against Appellant: the wildly questionable credibility of the complaining witness, whose lying, manipulative behavior had infected every aspect of the evidence. The cumulative effect of these erroneous rulings resulted in the Defense's inability to provide a complete and adequate defense, which ultimately denied Appellant a fair trial.

Under these circumstances, one simply "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error[s]."[121] While each of these errors standing alone warrants setting aside Appellant's convictions, this Court should at least grant review to evaluate if the cumulative effect of these errors "denied Appellant a fair trial."[122]

Relief Requested

This Court should grant Appellant's petition for review.

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[121] *Banks*, 36 M.J. at 171 (quoting *United States v. Yerger*, 1 C.M.A. 288, 290, 3 C.M.R. 22, 24 (1952)) (internal quotation marks omitted).
[122] *Pope*, 69 M.J. at 335.

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Appendix

1. *United States v. Chege*, No. 202200040, slip. op., 83 M.J. 685 (N-M. Ct. Crim. App. May 23, 2023) (unpublished).

2. *United States v. Norton*, No. 202000046, 2021 CCA LEXIS 375 (N-M Ct. Crim. App. July 29, 2021) (unpublished).

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I certify that the foregoing was electronically delivered to this Court, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on March 4, 2024.

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United States Navy–Marine Corps Court of Criminal Appeals

Before
HACKEL, KISOR, and BLOSSER
Appellate Military Judges

UNITED STATES
Appellee

v.

Daniel K. CHEGE
Corporal (E-4), U.S. Marine Corps
Appellant

No. 202200079

Decided: 13 October 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Derek Poteet

Sentence adjudged 8 December 2021 by a general court-martial convened at Marine Corps Air Station Miramar, California, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for two years, forfeiture of all pay and allowances, and a dishonorable discharge.

For Appellant:
Lieutenant Christopher B. Dempsey, JAGC, USN

For Appellee:
Lieutenant Colonel James A. Burkart, USMC
Lieutenant Gregory A. Rustico, JAGC, USN

Senior Judge HACKEL delivered the opinion of the Court, in which Senior Judge KISOR and Judge BLOSSER joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

HACKEL, Senior Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice [UCMJ],[1] for penetrating the vulva of Lance Corporal [LCpl] Jane[2] with his penis and his hand without her consent.

Appellant asserts seven assignments of error [AOEs]: (1) the military judge abused his discretion by excluding evidence that the victim made a false accusation of sexual assault against another Marine after reporting the allegation against Appellant; (2) the military judge abused his discretion by denying the Defense requests for production, continuance, and abatement based on newly discovered evidence that the victim had tampered with a defense witness; (3) the military judge erred by preventing the Defense from arguing that the victim tampered with a defense witness; (4) the military judge erred by not instructing the members on a mistake of fact defense; (5) the aforementioned cumulative errors denied Appellant a fair trial; (6) the evidence is not legally and factually sufficient to support Appellant's conviction; and (7) Appellant's trial defense counsel was ineffective for not seeking credit for time Appellant spent in civilian pretrial confinement.[3] We find no prejudicial error and affirm.

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[1] 10 U.S.C. § 920.

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[3] On 15 May 2023, Appellant filed a motion for expedited review of his seventh AOE. Appellant asserted, and the Government conceded, that Appellant was entitled to two days of pretrial confinement credit for time spent in civilian custody. On 16 May 2023, this Court ordered that Appellant be credited with two days of confinement credit and that the United States certify that its order had been complied with. On 31 May 2023, the United States certified that Appellant received two days of pretrial confinement credit and was released from confinement on 27 May 2023. As Appellant has

I. BACKGROUND

Appellant became familiar with LCpl Jane in May of 2019 after she first arrived at Marine Corps Air Station Miramar, California, where Appellant served as her supervisor. This was her first duty station. Appellant and LCpl Jane began to socialize, occasionally getting food and spending time together outside of work. Between May and June 2019, LCpl Jane and Appellant kissed on four occasions. On 4 July 2019, LCpl Jane and Appellant attended a party at a fellow Marine's home in San Diego where they both consumed alcohol. LCpl Jane testified that this was the second time she had consumed more than one drink in a party setting. LCpl Jane recalled feeling "slightly tipsy" but "not really drunk."[4]

LCpl Jane testified that during the party, she and Appellant did not interact, kiss, or flirt with each other. She recalled that, at one point during a group conversation, Appellant leaned forward to speak to another person and put his hand on LCpl Jane's thigh. She testified that this made her feel uncomfortable. That night, LCpl Jane decided to sleep at the house where the party had taken place. She slept on one side of an L-shaped sofa and Appellant slept on the other side. In addition to LCpl Jane and Appellant, there were two other people asleep in the same room. LCpl Jane testified that she slept wearing a t-shirt, jean shorts, and underwear.

LCpl Jane testified that after she had lain down and closed her eyes to sleep, she heard Appellant whisper her name and begin to shake her. She did not respond to Appellant and testified that she believed Appellant would "leave [her] alone" if she continued to ignore him.[5] Appellant moved LCpl Jane's shorts and underwear to the side and then penetrated her vagina with his fingers. LCpl Jane testified that she continued to pretend to be asleep and that she "disconnected from the situation. [She] froze."[6] Appellant then removed his fingers and repositioned LCpl Jane to her side, moving her midsection closer to the edge of the couch before getting behind her and penetrating her vagina with his penis. LCpl Jane testified she continued to not react and still felt "frozen."[7] After some time—characterized by LCpl Jane as "not long"—Appellant

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already received confinement credit, his seventh AOE has been resolved and is, therefore, moot. *See United States v. Dedolph*, No. 202100150, 2022 CCA LEXIS 658, at *30 (N-M Ct. Crim. App. Nov. 15, 2022).

[4] R. at 696.

[5] R. at 701.

[6] R. at 702.

[7] R. at 704.

left the room and went into the kitchen. He then returned to the sofa, positioned himself behind LCpl Jane, and penetrated her vagina with his fingers again. LCpl Jane testified at this point that she still felt frozen and had not reacted or indicated that she was awake. Appellant then penetrated her vagina with his penis for a second time. LCpl Jane testified that Appellant then pulled her onto his lap and tried to kiss her. LCpl Jane stated that she did not kiss him back or react and kept her body limp. Appellant then put her back on her side of the couch and went to sleep.

At trial, LCpl Jane testified that she did not consent to any of Appellant's sexual acts. She explained that she did not try to get help from the other people sleeping in the room because she knew they were asleep and unaware of what was happening. She also stated that she felt "completely dead . . . [she] wasn't feeling anything or thinking anything."[8] LCpl Jane did not recall speaking with Appellant the next morning.

The following month, in August 2019, LCpl Jane engaged in consensual sex with Appellant after consuming alcohol with him in his barracks room. During trial, LCpl Jane explained that having sex with Appellant "gave [her] . . . a sense of empowerment"[9] and "control of [her] own feelings."[10] She also testified that having sex at that time "allowed [her] to feel the feelings that [she'd] been suppressing"[11] since the incident in July 2019. Afterwards, she felt "awful…[l]ike really, really upset."[12] She got dressed, left Appellant's barracks room, and called her friend, Corporal [Cpl] Golf. Understanding that LCpl Jane was upset, Cpl Golf drove to meet her outside of the barracks building and spoke with her. He testified that LCpl Jane stated Appellant had just sexually assaulted her. At trial, Cpl Golf distinguished her description of the August sexual encounter with the subject of the instant court-martial, which occurred in July. LCpl Jane provided conflicting testimony, stating that that she did not tell Cpl Golf that the sex with Appellant in August was an assault or nonconsensual, and that Cpl Golf was confused or misremembered their discussion.

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[8] R. at 705.

[9] R. at 779.

[10] R. at 784.

[11] R. at 779.

[12] R. at 779.

LCpl Jane reported the sexual assault to law enforcement in February 2020. As part of law enforcement's investigation, LCpl Jane conducted a pretext phone call with Appellant. During the call, LCpl Jane confronted Appellant about having sex with her while she was asleep in July 2019. Appellant stated that he "didn't have any self-control in that moment."[13] Appellant also stated that he "barely" penetrated her vagina with his penis.[14] Appellant acknowledged that he "did what he did knowing" that LCpl Jane did not consent. He concluded that the "fault is on me . . . if I could take it back, I would because there's no way I should have done that."[15]

Nearly one month later, law enforcement interviewed Appellant about the alleged sexual assault. When given an opportunity to tell his side of the story, Appellant made a number of additional incriminating statements. He admitted that he tried to "wake her up," and "talk to her;"[16] that he "forced [him]self upon her in a way that – you know, [he] was trying to have sex with her;"[17] and that he put his hand inside her shorts and was "feeling her vagina with [his] hand."[18] Appellant stated that during the encounter LCpl Jane was "not responding."[19] He also recalled "trying to penetrate" her vagina with his penis though he could not recall whether it happened.[20] He further stated that he tried to hold her to "show some remorse."[21] Appellant admitted "I remember one point just coming to and just realizing, 'My gosh. What am I doing? This is heinous. This is disgusting.'"[22]

Additional facts, including facts related to events during Appellant's court-martial, necessary to resolve specific assignments of error are included in the discussion, infra.

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[13] Pros. Ex. 4 at 9.

[14] Pros. Ex. 4 at 11.

[15] Pros. Ex. 4 at 9.

[16] Pros. Ex. 5 at 13.

[17] Pros. Ex. 5 at 10.

[18] Pros. Ex. 5 at 13.

[19] Pros. Ex. 5 at 13; 16-17.

[20] Pros. Ex. 5 at 12, 17.

[21] Pros. Ex. 5 at 21.

[22] Pros. Ex. 5 at 10.

II. DISCUSSION

A. The Military Judge did not Abuse his Discretion by Excluding Evidence that LCpl Jane made a False Allegation of Sexual Assault

In a pretrial Article 39(a) session, trial defense counsel moved to admit evidence that LCpl Jane had previously made a false sexual assault allegation. The military judge denied the motion.

1. Standard of Review and the Law

We review a military judge's decision to admit or exclude evidence, including putting limitations on the scope of cross-examination, for an abuse of discretion.[23] An abuse of discretion occurs when (1) the ruling is predicated on findings of fact clearly unsupported by the evidence; (2) the military judge used incorrect legal principles; (3) the military judge applied correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge failed to consider important facts.[24] This standard is highly deferential and recognizes that a judge has a range of choices available and will not be reversed so long as the decision falls within that range.[25] Indeed, the "challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[26]

Military Rule of Evidence [Mil R. Evid.] 412 provides that evidence of a victim's sexual behavior is generally inadmissible. Rule 412(b)(3) creates an exception to that general provision for evidence "the exclusion of which would violate the accused's constitutional rights."[27] Contemplated within Mil. R. Evid. 412(b)(3) is an accused's Sixth Amendment right to confrontation via cross-examination.[28] To establish that exclusion of certain evidence would violate the constitutional rights of an accused, the accused bears the burden of demonstrating "that the evidence is relevant, material, and favorable to his defense, and thus . . . is necessary."[29] "The term 'favorable' is synonymous with

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[23] *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000).

[24] *See United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

[25] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

[26] *McElhaney*, 54 M.J. at 130.

[27] Mil. R. Evid. 412(b)(3).

[28] *United States v. Erikson*, 76 M.J. 231, 235 (C.A.A.F. 2017).

[29] *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010).

'vital.'"[30] If evidence is determined to meet the criteria of Mil. R. Evid. 412(b)(3), the military judge must then conduct a Mil. R. Evid. 403 balancing test to determine whether the evidence regarding the alleged victim's sexual behavior outweighs the risk of "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."[31] When offering evidence of a false allegation of sexual assault under Mil. R. Evid. 412(b)(3), an accused bears the burden of demonstrating that the false allegation was, in fact, both *false* and an *allegation*.[32]

In *Erikson*, the Court of Appeals for the Armed Forces [CAAF] examined whether the military judge erred in excluding evidence that the victim had previously made a false accusation of sexual contact against another Soldier. There, the defense made a pretrial motion to admit evidence that a prior accusation of sexual assault made by the victim in that case was false. The defense argued that the false accusation provided evidence of the victim's modus operandi and "how she accuses other men of assaulting her even when untrue."[33] The military judge convened an Article 39(a), UCMJ, session where he heard evidence, including: (1) a summary court-martial acquittal; (2) a denial by the accused Soldier; (3) testimony from an individual who was present at the time the assault was alleged and denied seeing an assault, and; (4) testimony from the victim denying that the prior accusation was false.[34] The CAAF determined:

> The military judge was in the best position to determine the credibility of these witnesses, and there is no evidence before this Court to suggest that his conclusion that [the victim] was more credible than the prior accused was clearly erroneous.…the military judge was correct in concluding that the summary court-martial acquittal …was not dispositive of the falsity of the allegation. Second, he was correct in concluding that the denial by the prior accused was no more persuasive here than in *McElhaney*. And third, the military judge did not abuse his discretion

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[30] *Erikson*, 76 M.J. at 235.

[31] Mil. R. Evid. 403.

[32] *See Erikson*, 76 M.J. at 235-36 (citing *McElhaney*, 54 M.J. at 127, 130).

[33] *Erikson*, 76 M.J. at 233.

[34] *Id*. at 236.

> in finding that [the victim] was more credible than the witnesses who testified on behalf of the defense.[35]

Ultimately, the CAAF determined that it was not error to exclude the evidence at trial.[36]

2. Additional Facts

At Appellant's court-martial, the Defense moved to admit several pieces of evidence under Mil. R. Evid. 412, including that LCpl Jane "made a false sexual assault allegation against another Marine."[37] In its motion, the Defense stated that while it was "still investigating and attempting to gather evidence on this issue . . . it will seek to introduce evidence that [LCpl Jane] made a false accusation against another person—namely, Sergeant [[Sgt] Mike]."[38] The military judge held an Article 39(a) session and heard testimony from LCpl Jane and Corporal [Cpl] Foxtrot. Cpl Foxtrot testified about a conversation he had in November or December 2020 with LCpl Jane. Cpl Foxtrot was in a romantic relationship with LCpl Jane during the time when this conversation occurred. He testified that LCpl Jane had told him that she had had sex with Sgt Mike: "I can't remember what she said verbatim, but she did…describe it as nonconsensual. She said that she had no ability—she didn't—she wasn't able to say, 'No.'"[39] Cpl Foxtrot admitted that he could not "remember exactly what was said."[40]

The military judge also questioned Cpl Foxtrot. When asked whether his memory of this conversation with LCpl Jane was "a clear memory or not a clear memory," Cpl Foxtrot replied, "Well, I do remember specifically she—[LCpl Jane] told me it was nonconsensual, and [Sgt Mike] told me that it was consensual."[41]

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[35] *Id*. at 235.

[36] *Id*. at 236.

[37] App. Ex. XI at 1.

[38] App. Ex. XI at 13.

[39] R. at 208.

[40] R. at 209.

[41] R. at 211-12.

In contrast, LCpl Jane testified that the encounter with Sgt Mike in 2020 was consensual and that she did not ever tell anyone that it was a nonconsensual encounter.[42] She testified that Cpl Foxtrot's recollection was incorrect:

> I told him that it wasn't something that I had wanted, and what I had meant by that was, when it happened, it wasn't, like, planned. It wasn't something that I was thinking about. It was something that just happened. I wasn't telling him that we had – or that, for me, it was nonconsensual.[43]

In his findings, the military judge explained that this evidence was "highly distinguishable" from the charged offense.[44] If offered at trial, the military judge found that it would likely be distracting, noting both that this incident took place "a year and a half after the charged incident," and that it would "require a trial within a trial . . . it would require the members to make a determination between two witnesses."[45] To that end, the military judge identified, based on his observations of the testimony, that the discrepancy in testimony could simply be the result of a misunderstanding, noting that both witnesses "could very well be testifying sincerely as to what they believe happened during that conversation." The military judge also found that counsel may wish to explore Cpl Foxtrot's motivation in testifying "to the extent that [Cpl Foxtrot]'s relationship with [LCpl Jane] apparently is not ongoing," which would be distracting.[46]

Conducting an analysis under Mil. R. Evid. 403, the military judge expressed concern over the relative probative value of the evidence. He concluded that this evidence required "a trial within a trial"[47] and that this type of evidence "appears to the Court to be squarely the type of evidence that [Mil. R. Evid.] 412 is...intended...to exclude."[48] The military judge excluded the evidence regarding LCpl Jane's sexual encounter with Sgt Mike.

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[42] R. at 223.

[43] R. at 225.

[44] R. at 276.

[45] R. at 277.

[46] R. at 278.

[47] R. at 277.

[48] R. at 278.

3. Analysis

We find that the military judge did not abuse his discretion. As a preliminary matter, Appellant "was required to establish the falsity" of LCpl Jane's purported subsequent sexual assault allegation for it to be potentially admissible under Mil. R. Evid. 412.[49] The military judge carefully considered testimony of LCpl Jane and Cpl Foxtrot at an Article 39(a), UCMJ, session and placed his findings orally on the record. The evidence of falsity presented by Appellant was relatively weak, consisting only of Cpl Foxtrot's testimony about his conversation with LCpl Jane wherein he remembered her saying the sexual encounter with Sgt Mike was nonconsensual. In contrast, Cpl Foxtrot also testified that Sgt Mike told him the encounter with LCpl Jane was consensual. LCpl Jane agreed with Sgt Mike that their encounter was consensual and testified she did not make an allegation of sexual assault in her conversation with Cpl Foxtrot. On this evidence, the military judge found "based on the Court's evaluation of [LCpl Jane] and [Cpl Foxtrot's] tone and [LCpl Janes] demeanor and comportment during her testimony . . . that both [Cpl Foxtrot] and [LCpl Jane] could very well be testifying sincerely as to what they believe happened during that conversation, and what was said during that conversation." As the person best suited to make assessments about witness credibility, the military judge is entitled to deference absent clearly erroneous factual determinations. Like in *Erickson*, there is no evidence before this Court to suggest the military judge's finding was clearly erroneous.[50]

It is clear from our review that, having found the proffered "false allegation" lacked credibility, the military judge then properly determined that permitting the Defense to present this theory would waste time and create substantial risk of confusing the members. The proof offered in Appellant's case seems particularly weak when compared with the facts in *Erikson*, where to prove falsity the defense offered "(1) a summary court-martial acquittal; (2) the prior accused's testimony denying the assault; (3) the testimony of a person who was present in the room at the time of the alleged incident and who denied seeing any sexual assault occurred."[51] It is clear that the CAAF recognized, as do we, that the military judge's determination at the trial level respecting the credibility of testimony and the impact of evidence on a trial under the Mil. R. Evid. 403 framework is entitled to great deference. Despite Appellant's take on

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[49] *Erikson*, 76 M.J. at 236.

[50] *Id*.

[51] *Erikson*, 76 M.J. at 236.

the evidence, an abuse of discretion requires more than a mere difference of opinion.[52]

The military judge did not exhibit an erroneous view of the law, nor was his decision "arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[53] We therefore decline Appellant's invitation to disturb the military judge's ruling.

B. The Military Judge did not Abuse his Discretion by Denying the Defense Requests for Production, Continuance, and Abatement Related to Allegations of Witness Tampering

At trial, LCpl Jane allegedly tampered with a witness. The military judge denied trial defense counsel's requests for production of evidence, continuance, and abatement related to the alleged tampering. Before this Court, Appellant argues that it was an abuse of discretion for the military judge to deny the Defense request for production of "Snapchat communications" and to deny the Defense requests for continuance and abatement.[54]

1. Standard of Review and the Law

We review a military judge's decision on production of evidence for an abuse of discretion.[55] Similarly, a military judge's ruling on whether to grant an abatement or continuance are reviewed for an abuse of discretion.[56] As discussed above, this is a highly deferential standard that recognizes an abuse of discretion only where: (1) the ruling is predicated on findings of fact clearly unsupported by the evidence; (2) the military judge used incorrect legal principles; (3) the military judge applied correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge failed to consider important facts.[57]

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[52] *See, e.g., United States v. Black*, 82 M.J. 447, 453 (C.A.A.F. 2022).

[53] *Black*, 82 M.J. at 453.

[54] Appellant Brief at 48.

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

[56] *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015).

[57] *See Commisso*, 76 M.J. at 321.

With regard to the production of evidence at the trial level, parties are "entitled to the production of evidence which is relevant and necessary."[58] Evidence is relevant if it has any tendency to make a fact more or less probable, and that fact is one of consequence in determining the action.[59] 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."[60] Movants must also demonstrate that the evidence requested actually exists.[61]

With regard to a request for a continuance, a military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just."[62] Our superior court identified several non-dispositive factors to assess whether a continuance was appropriate in a given case, including: surprise, the nature of any evidence involved, the timeliness of the request, the length of continuance, prejudice to the opponent, whether the moving party received prior continuances, whether the moving party was acting in good faith, the use of reasonable diligence by the moving party, any possible impact on the verdict, and prior notice.[63]

With regard to abatement, we examine the strictures of Rule for Courts-Martial [R.C.M.] 703(e)(2), which provides that parties are not entitled to evidence which has been "destroyed, lost, or otherwise not subject to compulsory process."[64] The rule establishes three criteria for relief as an exception to that general principle:

> [I]f [(1)] such evidence is of such central importance to an issue that it is essential to a fair trial, and [(2)] if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evi-

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[58] Rule for Courts-Martial [R.C.M.] 703(e).

[59] Mil. R. Evid. 401.

[60] R.C.M. 703(e) Discussion.

[61] *See United States vs. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

[62] R.C.M. 906(b)(1).

[63] *See United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

[64] R.C.M. 703(e)(2).

> dence or shall abate the proceedings, unless [(3)] the unavailability of the evidence is the fault of or could have been prevented by the requesting party.[65]

Abatement is an appropriate remedy only if each of the three criteria has been satisfied.[66] The CAAF has noted that military judges have "broad discretion" in determining whether an adequate substitute under factor (2) is available.[67]

2. Additional Facts

During his court-martial, Appellant alleged that LCpl Jane tampered with the testimony of LCpl Hotel, who was LCpl Jane's close friend. Notes from a July 2021 pretrial interview with trial defense counsel indicated LCpl Hotel would testify that LCpl Jane told him that she would get a ride from Appellant the morning after the sexual assault.[68] LCpl Hotel did not review the interview notes for accuracy. On the eve of trial, trial defense counsel again interviewed LCpl Hotel, who denied stating that LCpl Jane discussed getting a ride with Appellant.

Appellant had planned to call LCpl Hotel to testify regarding the morning immediately following the sexual assault, but Appellant claimed that LCpl Hotel had changed his story after having conversations with LCpl Jane against the military judge's orders. These conversations, which took place between July and December 2021, formed the basis for Appellant's motion for a dismissal with prejudice. During a subsequent interview with Appellant's counsel the day before trial, LCpl Hotel stated that he did not remember any conversations regarding LCpl Jane getting a ride with Appellant.[69]

On the second day of trial, shortly after the members were impaneled, LCpl Hotel testified during an Article 39(a) session that he did not believe that LCpl Jane ever told him that she was going to get a ride with Appellant. He explained that any reference he might have made to LCpl Jane getting a ride from Appellant was a hypothetical explanation for how she got home following the assault.[70] He testified that he did not discuss his testimony with LCpl Jane nor did they discuss him altering his testimony.

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[65] *Id*.

[66] *Simmermacher*, 74 M.J. at 201 n.5.

[67] *Id*. at 202.

[68] App. Ex. XLIX at 2.

[69] App. Ex. L.

[70] R. at 586-87.

LCpl Hotel stated that between July and December 2021 he had told LCpl Jane that he was going to be a witness, but he denied providing any details to her. Otherwise, he claimed that they did not discuss the details of the court-martial, aside from LCpl Jane's feelings of stress and anxiety over the legal proceedings.

Another Marine, LCpl Lima, witnessed a conversation between LCpl Hotel and LCpl Jane when LCpl Lima and LCpl Jane dropped off some food for LCpl Hotel the day before trial. LCpl Lima testified at the Article 39(a) session that while he did witness LCpl Hotel and LCpl Jane speaking privately, they had only exchanged greetings and bid each other a good night.

LCpl Jane was present in the courtroom during LCpl Lima's testimony. After hearing the Defense make a request for her communications with LCpl Hotel, LCpl Jane used her phone to block and then unblock LCpl Hotel on Snapchat, which resulted in their conversation history being deleted from her cell phone. Separately, after the conclusion of the Article 39(a) session, LCpl Lima recanted his testimony in an interview with the Defense and admitted that LCpl Jane had actually discussed the case with LCpl Hotel. LCpl Lima stated that he had heard enough details of the case to know that their conversation was about the case. LCpl Lima stated that both LCpl Jane and LCpl Hotel apologized for getting LCpl Lima involved in the case.

When LCpl Hotel and LCpl Lima were recalled to provide further testimony in light of these revelations, they both invoked their right to remain silent.[71] The Defense requested a grant of testimonial immunity for both witnesses to further develop the facts relating to the conversation at issue. The Defense requested that the proceedings be abated until the trial court received an answer on the immunity question from the convening authority. The military judge denied the Defense motion for abatement pending the resolution of the immunity request. The convening authority denied the request on 6 December 2021.[72] The military judge later denied Appellant's motion to dismiss, finding that Appellant failed to carry his burden.

While this litigation was on-going, Appellant initially requested discovery of digital "communications between [LCpl Jane], [LCpl Hotel], and [LCpl

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[71] R. At 668, 999. Although LCpl Hotel invoked his right to remain silent after being informed that there was an allegation that he gave false testimony. The military judge ruled that Appellant could still call LCpl Hotel to testify about the sexual assault itself. Appellant did not recall LCpl Hotel. R. at 1031-32.

[72] *See* App. Ex. LXV.

Lima]," arguing that there was some circumstantial evidence that there had been witness tampering.[73] Following the Defense interview with LCpl Lima whereby he recanted his earlier testimony, Appellant clarified the discovery request: "we would like discovery on all of their conversations. We're going to send a preservation request to Snapchat . . . my inference is that there is a lot of information that will be found in their communications about this case."[74]

The Government contested the motion, arguing that the Defense presented no evidence of what "occurred in the Snapchats," focusing on the court's admonition to the witnesses "to not discuss *the facts of the case*."[75] Further, the Government argued that issuing a warrant to Snapchat would necessitate a continuance of potentially months, given the proximity to the winter holidays. No evidence was offered by either party regarding whether—and to what extent—Snapchat would still possess the evidence being sought.

The military judge suggested that LCpl Jane allow her Victims' Legal Counsel [VLC] to search her phone for any pertinent messages. In response, the Defense requested a continuance and an abatement until "we have that immunity, where they can take the stand, and until we have that discovery."[76] Further, the Defense argued that a review of LCpl Jane's phone would be insufficient as Snapchat messages were frequently deleted. Further, he clarified that his discovery request was for "everything, including text messages, social media messages, messages through Facebook messenger, Instagram, and Snapchat."[77]

The military judge partially granted Appellant's discovery request to the extent discovery would involve LCpl Jane and her VLC searching her phone for pertinent electronic messages sent during the relevant timeframe with either LCpl Hotel or LCpl Lima. The military judge also stated that he would allow Appellant "robust impeachment" of LCpl Jane.[78] The following day, the Defense became aware that LCpl Jane had blocked LCpl Hotel on Snapchat. Later that day, the Defense informed the military judge that it had also become aware of a text message from LCpl Jane to LCpl Hotel sent the previous day

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[73] R. at 618.

[74] R. at 655-56.

[75] R. at 676 (emphasis added).

[76] R. at 679.

[77] R. at 680.

[78] R. at 683.

that stated, "I had to block you on Snapchat . . . but I added you back."[79] The Defense proffered that such a course of action had the effect of deleting the conversation history within the Snapchat application.

Pointing to the deletion of Snapchat conversation history as evidence of "an attempt to cover her tracks," trial defense counsel then argued that the Defense would need the previously requested discovery to adequately impeach LCpl Jane.[80] The military judge denied that motion and stated that "the right to robust cross-examination is going to include cross-examining regarding the text message that you mentioned stating, 'I had to block you on Snapchat but I added you back.'"[81] The military judge also found that there were ample grounds for impeachment to discuss LCpl Jane's conversations with LCpl Hotel.

The Defense successfully impeached LCpl Jane on these issues. During her testimony, she stated that it was "a lie" when LCpl Hotel testified that they did not talk about the court-martial when she and LCpl Lima brought him food.[82] She also offered that it was "a lie" when LCpl Hotel stated that he and LCpl Jane never discussed specific details of the court-martial.[83] While LCpl Jane admitted that her conversations with LCpl Hotel were a violation of the military judge's order, she maintained that their conversation was limited to a discussion of a third-party who she was unsure was a witness. She also denied asking LCpl Hotel or LCpl Lima to alter their testimony. LCpl Jane admitted that she blocked and unblocked LCpl Hotel, but claimed that the resulting deletion of their conversation history was unintentional.[84]

Additionally, the Defense inquired about whether LCpl Jane knew that LCpl Hotel would purportedly testify that she told him that she would be getting a ride with Appellant the morning after the sexual assault. LCpl Jane maintained that she did not know any aspects of LCpl Hotel's testimony. LCpl Jane denied asking LCpl Hotel to change his testimony. After the Defense rested its case, Appellant requested a ruling on the request for an abatement of the proceedings for discovery of evidence that would tend to prove the allegations of witness tampering. The military judge denied that request.

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[79] R. at 685.

[80] R. at 686.

[81] R. at 687.

[82] R. at 1053.

[83] R. at 1053.

[84] R. at 1054-55.

3. Analysis

As the moving party, Appellant bore the burden to show, by a preponderance of the evidence, that the Snapchat messages between LCpl Jane and LCpl Hotel existed and, if so, that they were both relevant and necessary. As a threshold matter, we find that Appellant failed to carry his burden. We recognize that LCpl Jane's actions during court would have resulted in Snapchat messages between her and LCpl Hotel being deleted, had any existed at the time. However, Appellant was unable to establish the relevance of any such messages. At an earlier point in the litigation, the military judge inquired about the nature of LCpl Hotel's communications with LCpl Jane:

> MJ: Okay. And you indicated that you messaged at least once per day with [LCpl Jane], but some days you talked for an hour or two per day –
>
> LCpl Hotel: Yes.
>
> MJ: – is that telephone conversation or is it texting for an hour or two?
>
> LCpl Hotel: I would say both. Sometimes we message – we usually text – is our main way of communicating.[85]

This interaction is the only one presented on the record that clearly establishes indicia of the means of communication used between LCpl Jane and LCpl Hotel. It is unclear what precisely texting means in this context—whether it be SMS text messages or messages sent through a social media application like Snapchat. Due to the discovery directed by the military judge, the evidence established that LCpl Jane sent a text message to LCpl Hotel stating words to the effect of, "'I had to block you on Snapchat but I added you back.'"[86] This text message is itself probative of the fact that LCpl Jane and LCpl Hotel communicate via text messages. It is also probative of the fact that LCpl Hotel and LCpl Jane may have communicated on Snapchat, though the nature of those communications—whether they be photos or videos or written messages—is unclear.

Finally, the Defense questioned LCpl Jane about the purported deletion:

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[85] R. at 580-81.

[86] R. at 687.

Defense Counsel:	So, . . . that last question, by blocking him, it deleted the conversation history?
[LCpl Jane]:	Yes. And again, I was unaware that it would delete the history.[87]

From this interaction, it is clear that the action taken by LCpl Jane deleted the conversation history between her and Appellant. However, it is unclear whether that conversation history contained photos, videos, or written messages. More importantly, it is also unclear whether the conversation history was pertinent to Appellant's court-martial. And trial defense counsel asked LCpl Jane no questions to resolve this ambiguity.

To borrow from trial defense counsel's own statements, it appears from the record that the existence, relevance, and necessity of text messages was merely an "inference" made by the Defense that there was "a lot of information that will be found in their communications about this case."[88] Further, trial defense counsel failed to present evidence that any of the messages, if they existed, sought in the discovery request would be found on Snapchat servers. Consequently, Appellant did not show that the purported communications were relevant and necessary and should have been produced through compulsory process. We therefore hold that the military judge did not abuse his discretion in denying Appellant's motion to compel production.

With regard to Appellant's request for a continuance and abatement, we likewise find that the military judge did not abuse his discretion. A military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just."[89] Abatement is appropriate where the lost evidence is of central importance to a fair trial, no adequate substitute exists, and the unavailability of the evidence was not the fault of the requesting party.[90] Military judges have "broad discretion" in the determination of whether adequate substitutes exist.[91] Here, we find that the military judge's ruling provided an adequate alternative to an extended discovery process.

As a preliminary matter, we note that the Defense requested the messages for the purpose of impeachment. Insofar as the purported messages are of claimed central importance to a fair trial, the significance of the messages

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[87] R. at 1054-55.

[88] *See* R. at 655-56.

[89] R.C.M. 906(b)(1).

[90] *See* R.C.M. 703(e)(2).

[91] *Simmermacher*, 74 M.J. at 201 n.5.

would be rooted in their impeachment value. Here, the military judge allowed for limited discovery of the contents of LCpl Jane's phone and allowed the Defense robust cross-examination of LCpl Jane on the matter. Indeed, LCpl Jane admitted through cross-examination before the members that she talked to LCpl Hotel about the trial in violation of the military judge's order and that her actions deleted conversation history with LCpl Hotel.

Not only did the Appellant fail to make the required showing that the evidence necessitating the requested delay existed, but the military judge also provided an adequate substitute for the processes requested by Appellant. The military judge developed a clear record and did not fail to consider any important facts. The military judge's ruling was not based on findings of fact clearly unsupported by the evidence, nor was the military judge's application of legal principles incorrect or unreasonable.[92] We find that the military judge did not abuse his discretion in denying the Defense requests for continuance and abatement. Even assuming that the military judge erred by not granting the requests for continuance and abatement, we find that no error caused material prejudice to the substantial rights of Appellant.

C. The Military Judge did not Abuse his Discretion by Preventing Appellant from Arguing that LCpl Jane Tampered with a Witness's Testimony

1. Standard of Review and the Law

Rulings regarding closing argument are reviewed for an abuse of discretion.[93] The Supreme Court has recognized that a judge in a criminal case "must be and is given great latitude in controlling the duration and limiting the scope of closing."[94] Military judges are afforded deference over what arguments to allow in closing argument because of their responsibility to exercise "reasonable control of the proceedings."[95] The CAAF has held that "[c]losing arguments

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[92] *See Commisso*, 76 M.J. at 321.

[93] *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016).

[94] *United States v. Payne*, No. 200501454, 2009 CCA LEXIS 107, at *11 (N-M Ct. Crim. App. Apr. 7, 2009) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

[95] R.C.M. 801(a)(3).

by counsel are limited 'to evidence in the record and to such fair inferences as may be drawn therefrom.'"[96]

2. Additional Pertinent Facts

Prior to closing arguments, trial defense counsel indicated in an Article 39(a) session that he wished to refer to LCpl Jane's interactions with LCpl Hotel as "witness tampering" during his closing argument.[97] The Government objected. Appellant argued that witness tampering was a reasonable inference given the deletion of the Snapchat messages and LCpl Jane's violation of the military judge's order. The military judge found that while inappropriate conversations in violation of his instructions had taken place, there was no direct evidence of witness tampering. The military judge ruled that Appellant could raise the specter of witness tampering by allowing Appellant to "assert that there was a witness who was tainted."[98] Appellant could also pose the question about whether "witness tampering" occurred "as long as there [was] a very clear question mark at the end of that sentence," but could not "assert [witness tampering] as a conclusion."[99]

During closing argument, the Defense was allowed to posit to the members questions regarding why LCpl Jane would delete her messages, why LCpl Jane would speak to a defense witness in violation of the military judge's instructions, and asked the members to consider "what she is trying to hide."[100] The Defense also argued that because of LCpl Jane's "knowing violation," the members did not get to hear from LCpl Hotel.[101] The Defense suggested to the members that these actions were the result of LCpl Jane believing that the accusations against Appellant were not true.

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[96] *United States v. Robles-Ramos*, 47 M.J. 474, 476-77 (C.A.A.F. 1998) (quoting *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993)).

[97] R. at 1103-04.

[98] R. at 1107-08.

[99] R. at 1108.

[100] R. at 1161-62.

[101] R. at 1162.

3. Analysis

Accused have a constitutional right to present argument through counsel before deliberation on findings at a court-martial.[102] Closing arguments may include comment regarding "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence."[103] However, this right is not absolute. A military judge may place appropriate limits on closing argument so long as their actions "prevent unnecessary waste of time," "promote the ascertainment of truth," and "avoid undue interference with the parties' presentations or the appearance of partiality."[104] "The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter."[105]

In this case, the military judge permitted defense counsel to raise the issue of witness tampering by inference only – allowing defense counsel to suggest that tampering may have occurred so long as there was a clear "question mark" at the end of the inference. The military judge's decision was predicated on his finding that, while his order was violated by inappropriate conversations, the Defense presented no direct evidence that witness tampering occurred. Based on our review of the record, we find this decision was supported by the record. And we do not find that that military judge erred by his decision to limit the Defense to make arguments supported by "evidence in the record and … such fair inferences as may be drawn therefrom.'"[106] Under the totality of the circumstances, considering the leeway provided to the Defense in cross-examination and closing argument, the military judge's actions were not an abuse of his discretion.

D. The Military Judge Did Not Err by Failing to Provide an Instruction on Mistake of Fact as to Consent

1. Standard of Review and the Law

Whether a military judge properly instructed a panel is an issue of law that this Court reviews de novo. A military judge must provide instruction on any

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[102] *See* R.C.M. 919(a).

[103] R.C.M. 919 discussion.

[104] R.C.M. 801(a)(3) discussion.

[105] R.C.M. 801(a)(3) discussion.

[106] *Robles-Ramos*, 47 M.J. at 476-77 (quoting *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993)).

affirmative or "special" defenses that are "in issue" in a case.[107] A matter is put into issue when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."[108] This is a relatively low standard, which does not require that the evidence raising an issue be compelling,[109] and "any doubt about whether an instruction should be given should be resolved in favor of the accused."[110]

Mistake of fact as to consent is an affirmative defense to the offense of sexual assault without consent—the offense of which Appellant was ultimately convicted. The affirmative defense relieves an accused of criminal liability if the accused who, "as a result of ignorance or mistake," held "an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense."[111] The offense of sexual assault without consent is a general intent offense. As this Court identified in *Norton*, where an appellant was convicted of a general intent crime, the mistake of fact "must have existed in the mind of the accused and must have been reasonable under all of the circumstances."[112] Reasonableness under all of the circumstances requires that "some evidence must show that Appellant's mistake of fact was not only reasonable, but that Appellant did in fact honestly infer consent based on the circumstances."[113] The second element is not self-proving. Indeed, our superior court has found that evidence can exist to meet the first prong of objective reasonableness, but that same evidence does not necessarily offer insight into an appellant's subjective inferences related to consent.[114]

2. Analysis

During an Article 39(a) session held before the military judge provided findings instructions to the members, the military judge heard argument on the

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[107] R.C.M. 916.

[108] R.C.M. 920(e) discussion.

[109] *United States v. Barnes*, 39 M.J. 230, 232 (C.A.A.F. 1994) (citation and internal quotation omitted).

[110] *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003).

[111] R.C.M. 916(j)(1).

[112] *United States v. Norton*, No. 202000046, 2021 CCA LEXIS 375, at *8 (N-M Ct. Crim. App. July 29, 2021) (citing R.C.M. 916(j)(1)).

[113] *Norton*, 2021 CCA LEXIS 375, at *8 (citing *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998)) (cleaned up).

[114] *See, e.g., United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995).

Defense's proposed mistake of fact instruction. The Government, relying on this Court's decision in *Norton*, argued that there was no evidence that, at the time of the offense, Appellant was under a mistaken belief that LCpl Jane consented. The Government argued that it was not enough to put mistake of fact in issue that LCpl Jane and Appellant had kissed on previous occasions. The Defense argued that, unlike in *Norton* where the victim and the appellant had previously dated and then ended their relationship, here the preexisting relationship was on-going. Therefore, there was some evidence of consent. Defense counsel argued:

> There exists [evidence] that…those acts…were consensual. And so, to not allow the mistake of fact instruction would be to assume that in that moment, [Appellant] believed that consensual acts were actually unconsensual, and that he did not mistake that they were consensual…It seems to be a paradox that is…essentially creating a criminal mens rea in a situation where there is not actually a crime committed because of the consent instruction.[115]

The military judge reasoned that, "as a first initial matter, there is no evidence before the Court as to the subjective state of mind of the accused at the time of the offense suggesting that he was under the impression that he believed that [LCpl Jane] was consenting."[116] After reviewing this Court's decision in *Norton*, the military judge denied the request for a mistake of fact instruction.

We find that the military judge's denial of the instruction was proper. This case is similar to both *Norton* and *United States v. Jones*, where the evidence provided "no insight as to whether the appellant honestly believed the victim was consenting."[117] Here, not only is the record devoid of any evidence or testimony sufficient to raise the issue that Appellant may have actually held the requisite honest and subjective belief, but the evidence tends to support the opposite conclusion. Appellant's statements on the matter are found in the recording of his pretext phone conversation with LCpl Jane and subsequent interview with law enforcement, neither of which weigh in favor of the mistake of fact instruction. We do not find any evidence that Appellant indicated he

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[115] R. at 1097.

[116] R. at 1096,

[117] *Norton*, 2021 CCA LEXIS 375, at *9 (citations and internal quotation omitted).

held a subjective mistaken belief as to consent contained in either conversation. In fact, Appellant made statements which indicated he believed that LCpl Jane was unable to consent to sexual activity because she was asleep.

Even if we were to assume that some evidence existed to put the mistake of fact defense in issue, we are convinced that any instructional error was harmless beyond a reasonable doubt. "A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."[118] After careful review of the record and the evidence presented at trial, we are convinced beyond a reasonable doubt that, had the mistake of fact instruction been given, the members would have reached the same outcome.

E. Cumulative Error

1. Standard of Review and the Law

We review claims of cumulative error de novo.[119] Under the doctrine of cumulative error, the existence of errors—none of which merit reversal individually—in combination merit the disapproval of a finding or sentence.[120] Errors asserted that are without merit are, plainly, insufficient to invoke the doctrine.[121] Reversal under the cumulative error doctrine is the remedy only when a court determines that the cumulative errors denied an appellant a fair trial.[122] "[A]ppellate courts are far less likely to find cumulative error where the record contains overwhelming evidence of a defendant's guilt."[123]

2. Analysis

The doctrine of cumulative error allows this Court to reverse a conviction even if errors do not merit reversal individually.[124] After careful review, we find no errors occurred in this case that are prejudicial, either alone or in the

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[118] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

[119] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

[120] *See Pope*, 69 M.J. at 335.

[121] *See United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

[122] *Pope*, 69 M.J. at 335.

[123] *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011).

[124] *United States v. Dominguez*, 81 M.J. 800, 822-23 (N-M. Ct. Crim. App. 2021) (*citing United States v. Banks* 36 M.J. 150 (C.A.A.F. 1992)).

aggregate. Appellant received a fair trial. This assignment of error is therefore without merit.[125]

F. Legal and Factual Sufficiency

1. Standard of Review and the Law

Appellant argues that the evidence presented at his court-martial is legally and factually insufficient to support his convictions. We review questions of legal and factual sufficiency de novo.[126] To determine legal sufficiency, we examine whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[127] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[128]

In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.[129] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[130] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[131]

2. Analysis

To prove the first specification of sexual assault, the Government had to prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon LCpl Jane by penetrating her vulva with his penis and (2) Appellant did

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[125] *See United States v. Tapp*, 83 M.J. 600, 624 (N-M Ct. Crim. App. 2023).

[126] Article 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[127] *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

[128] *United States v. Guttierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (cleaned up).

[129] *Turner*, 25 M.J. at 325.

[130] *Washington*, 57 M.J. at 399.

[131] *United States v. Rankin*, 63 M.J. 552, 557 (N-M Ct. Crim. App. 2006).

so without the consent of LCpl Jane.[132] To prove the second Specification of sexual assault, the Government had to prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon LCpl Jane by penetrating her vulva with his hand and (2) Appellant did so without the consent of LCpl Jane.[133]

The evidence of Appellant's guilt in this case—including LCpl Jane's testimony, admissions made by Appellant during his pretext phone conversation with LCpl Jane, and the admissions made by Appellant to law enforcement—is overwhelming. Appellant made several admissions, all of which were corroborated by LCpl Jane's testimony, including: that he penetrated her vagina with his penis, that he acted while believing that LCpl Jane could not consent, that he tried to wake LCpl Jane before he penetrated her vulva, that he felt her vagina with his hand, and that LCpl Jane was not responding during this time.

Considering this evidence in the light most favorable to the Government, we conclude that a reasonable fact-finder could have found all the essential elements of both Specifications of the offense beyond a reasonable doubt. The evidence is legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence before us and making allowances for not having personally observed the trial, we are similarly convinced of Appellant's guilt beyond a reasonable doubt. The evidence is thus factually sufficient to support the conviction.

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[132] Article 120, UCMJ.

[133] Article 120, UCMJ.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, 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.[134]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[134] Articles 59 & 66, UCMJ.

United States v. Norton

United States Navy-Marine Corps Court of Criminal Appeals

July 29, 2021, Decided

No. 202000046

Reporter
2021 CCA LEXIS 375 *; 2021 WL 3197192

UNITED STATES, Appellee v. Jared T. NORTON, Information Systems Technician Second Class (E-5), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 30.2.

Subsequent History: Petition for review filed by *United States v. Norton, 2021 CAAF LEXIS 863, 2021 WL 4770073 (C.A.A.F., Sept. 27, 2021)*

Motion granted by *United States v. Norton, 2021 CAAF LEXIS 857 (C.A.A.F., Sept. 28, 2021)*

Motion granted by *United States v. Norton, 2021 CAAF LEXIS 911, 2021 WL 5450170 (C.A.A.F., Oct. 14, 2021)*

Motion granted by *United States v. Norton, 2021 CAAF LEXIS 962 (C.A.A.F., Nov. 2, 2021)*

Motion granted by *United States v. Norton, 2021 CAAF LEXIS 968, 2021 WL 5774544 (C.A.A.F., Nov. 3, 2021)*

Motion granted by *United States v. Norton, 2021 CAAF LEXIS 1038 (C.A.A.F., Dec. 1, 2021)*

Review denied by *United States v. Norton, 2021 CAAF LEXIS 1052 (C.A.A.F., Dec. 7, 2021)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Michael J. Luken. Sentence adjudged 15 October 2019 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer and enlisted members. Sentence approved by the convening authority: reduction to E-1, confinement for five years, and a dishonorable discharge.

Core Terms

sentence, remembered, sexual, asleep, military, barracks, circumstances, consenting, mistake of fact, sexual assault, beyond a reasonable doubt, entry of judgment, penetrated, honestly, kissing, sex, text message, instruct, guilt, infer, penis

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

A military court of criminal appeals reviews the propriety of instructions given by a trial court de novo.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Trial Procedures > Instructions > Special Defenses

Military & Veterans Law > ... > Trial Procedures > Instructions > Elements of the Offense

Military & Veterans Law > ... > Trial Procedures > Instructions > Lesser Included Offenses

Military & Veterans Law > Military Justice > Defenses > Ignorance & Mistake

HN2[] **Sentences, Deliberations, Instructions &**

Voting

A military judge must instruct on the elements of the offenses and any affirmative, or special, defenses under R.C.M. 916, Manual Courts-Martial, that are in issue. R.C.M. 920(e), Manual Courts-Martial. A matter is in issue when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. R.C.M. 920(e), Discussion. It is not necessary that the evidence which raises an issue be compelling, and the instructional duty arises whenever some evidence is presented to which the fact finders might attach credit if they so desire. A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. R.C.M. 916(b), Discussion. The military judge has a sua sponte duty to instruct on any defenses reasonably raised by the evidence, even if those instructions are not requested. R.C.M. 920(e). Any doubt whether an instruction should be given should be resolved in favor of the accused.

Criminal Law & Procedure > Defenses > Consent

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Justice > Defenses > Ignorance & Mistake

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN3[] Defenses, Consent

Mistake of fact as to consent is an affirmative defense to the offense of sexual assault by bodily harm in violation of Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920. This defense provides that it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. R.C.M. 916(j)(1), Manual Courts-Martial. As the offense of sexual assault by bodily harm requires general intent, the mistake of fact must have existed in the mind of the accused and must have been reasonable under all of the circumstances. In other words, some evidence must show that appellant's mistake of fact was not only reasonable, but that appellant did in fact honestly and subjectively infer consent based on the circumstances.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

HN4[] Harmless & Invited Error, Constitutional Rights

A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN5[] Judicial Review, Standards of Review

A military court of criminal appeals reviews issues of legal and factual sufficiency de novo.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] Trial Procedures, Burdens of Proof

To determine legal sufficiency, a military court of criminal appeals asks whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. In conducting this analysis, the court must draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7[] Trial Procedures, Burdens of Proof

In evaluating factual sufficiency, a military court of criminal appeals determines whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, the court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate function, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN8[] Judicial Review, Clemency & Parole

Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, mandates that a military court of criminal appeals only approve those findings and sentences that are correct in law and fact and that on the basis of the entire record, should be approved. § 866(d)(1). In exercising this function, the court seeks to assure that justice is done and that the accused gets the punishment he deserves. This requires an individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender. Despite the discretion inherent in this responsibility, the court may not engage in acts of clemency. The court may consider other court-martial sentences when determining sentence appropriateness for any case, but is required to only in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN9[] Sentences, Deliberations, Instructions & Voting

The entry of judgment placed into the record of trial must correctly reflect the results of the court-martial. R.C.M. 1111(a)(2), Manual Courts-Martial.

Counsel: For Appellant: Bethany L. Payton-O'Brien, Esq., Lieutenant Megan E. Horst, JAGC, USN.

For Appellee: Lieutenant Catherine M. Crochetiere, JAGC, USN; Lieutenant Joshua C. Fiveson, JAGC, USN.

Judges: Before GASTON, STEWART, and HOUTZ Appellate Military Judges. Senior Judge GASTON delivered the opinion of the Court, in which Judges STEWART and HOUTZ joined. Judges STEWART and HOUTZ concur.

Opinion by: GASTON

Opinion

GASTON, Senior Judge:

Appellant was convicted, contrary to his pleas, of sexual assault in violation of *Article 120*, Uniform Code of

Military Justice [UCMJ].[1]

He asserts four assignments of error [AOEs], which we renumber as follows: (1) the military judge committed prejudicial error by denying a Defense request for an instruction on the defense of mistake of fact as to consent; (2) the evidence is legally and factually insufficient to support Appellant's conviction; **[*2]** (3) the sentence is inappropriately severe; and (4) the Entry of Judgment inaccurately reflects the adjudged findings. We find merit in Appellant's fourth AOE, order correction of the Entry of Judgment in our decretal paragraph, and affirm the findings and sentence.

I. Background

Appellant and Cryptologic Technician Technical Second Class [CTT2] Hotel[2] met in 2017 while attending entry-level training. They became friends and spent time together frequently. When CTT2 Hotel completed training and was to be stationed in Norfolk, Virginia, she reached out to Appellant, who was already in the Norfolk area. He helped her get acquainted with the area when she arrived there, and the two socialized several times a week for three weeks after CTT2 Hotel's arrival. The relationship then turned from a friendship into a dating relationship, which CTT2 Hotel testified lasted exactly three days because she "wasn't that interested."[3] During those three days, they went on two dates and had consensual sexual intercourse in Appellant's barracks room. The day after they had consensual sex, CTT2 Hotel broke off their romantic relationship, stating she was not that into Appellant and that it was like being with **[*3]** a family member. Afterwards, the two still socialized a few times a week.

About two weeks after they had consensual sex, Appellant invited CTT2 Hotel to attend a barbeque with some of his co-workers and then spend the night in his barracks room afterwards. CTT2 Hotel agreed to stay in Appellant's barracks room because she was too young to drink legally and did not want to get in trouble for returning to her ship drunk. CTT2 Hotel testified that she did not hug or kiss Appellant at the barbecue, but Appellant's best friend testified that the two were holding hands and flirting and that there "was obviously something going on between them."[4] Another partygoer observed CTT2 Hotel sitting on Appellant's lap and thought he remembered them kissing.

After the barbeque, CTT2 Hotel went back to Appellant's barracks room and fell asleep with Appellant in his twin bed while both were facing away from each other and fully clothed. CTT2 Hotel woke up to Appellant kissing her cheek, lips, and neck, but pretended to remain asleep. She testified that while she remained unresponsive, Appellant felt her chest above her dress, reached over her side to rub her clitoris underneath her underwear, and penetrated **[*4]** her with his fingers, and she could hear and feel him masturbating. Appellant then rolled her onto her back, took off her underwear, and penetrated her vulva with his penis. He then stopped, put her underwear back on, pulled her dress back down, and rolled her to face away from him again. During the encounter, CTT2 Hotel did not open her eyes or respond verbally or physically and remained motionless like a "ragdoll."[5] She testified that she did not push Appellant off or tell him to stop because she had previously experienced violence from her ex-husband whenever she tried to stop him or push him off.

Afterwards, CTT2 Hotel waited about an hour, pretended to wake up, and suggested the two go get coffee as a ruse to get back to her car and her ship. After Appellant dropped her off at her ship, she sent him a series of confrontational text messages beginning with the statement, "I know what you did last night." Appellant responded, "[I don't know] what came over me," "I honestly don't know why I did that," and "I feel f[***]ing terrible and regret and all that other s[***]."[6] CTT2 Hotel then texted that Appellant was a "rapist" and asked whether he knew "what its [sic] called when you have **[*5]** sex with someone who is LITTERALLY [sic] passed out and can't move."[7] Appellant was apologetic, said he felt ashamed, and said he "wanted something with [CTT2 Hotel] and threw it away for [his] self pleasure."[8]

After CTT2 Hotel told several people on her ship what happened and made an unrestricted report of sexual

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[1] *10 U.S.C. § 920*.

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[3] R. at 454-55.

[4] R. at 1099.

[5] R. at 469.

[6] Pros. Ex. 1 at 1.

[7] Pros. Ex. 1 at 1, 3.

[8] Pros. Ex. 1 at 2.

assault, the Naval Criminal Investigative Service [NCIS] opened an investigation and interviewed Appellant later that same evening. The interview was video-recorded, but due to a technical issue was not audio-recorded. During the interview, after waiving his rights, Appellant admitted having vaginal sex with CTT2 Hotel in his barracks room while he believed her to be asleep.

Several months later, NCIS interviewed Appellant a second time, which was both audio-and video-recorded. After again waiving his rights, Appellant said that after CTT2 Hotel came back with him to his barracks room, they both went to sleep, and the next thing he remembered was being on top of her and ejaculating. He said he penetrated CTT2 Hotel's vagina with his penis while she was asleep and only stopped because he ejaculated. When asked whether at any point he had any reason to believe CTT2 Hotel was consenting **[*6]** to sexual activity, Appellant stated he did not. In a written statement, he stated that he carried CTT2 Hotel back to his barracks room because she was intoxicated from the party and later "felt a sexual urge and realized that [he] had penetrated her vagina with [his] penis while she was asleep."[9]

At trial, Appellant testified he did not remember most of what happened and had relied on the explanations of CTT2 Hotel and the NCIS agents to fill in the gaps. He testified he remembered snapshots from the barbecue, his car, CTT2 Hotel and him leaning on each other on the way into his barracks room, and nothing else until waking up the next day. He testified that he did not know what he was apologizing for in his text messages to CTT2 Hotel, that he did not think he was a rapist, and that he did not know what CTT2 Hotel was talking about when she texted him about having sex with someone who was passed out. He testified he did not remember interacting with CTT2 Hotel in an intimate manner at the barbecue and did not remember her giving him "a feeling that she wanted to be intimate in any way."[10]

II. Discussion

A. Findings Instructions

Appellant asserts the military judge erred in denying a Defense **[*7]** request for an instruction on the defense of mistake of fact as to consent. *HN1*[↑] We review the propriety of instructions given by the trial court de novo.[11]

HN2[↑] The military judge must instruct on the elements of the offenses and any affirmative, or "special," defenses under Rule for Courts-Martial [R.C.M.] 916 that are "in issue."[12] "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."[13] "It is not necessary that the evidence which raises an issue be compelling," and "the instructional duty arises whenever some evidence is presented to which the fact finders might attach credit if they so desire."[14] "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial."[15] The military judge has a sua sponte duty to instruct on any defenses reasonably raised by the evidence, even if those instructions are not requested.[16] "Any doubt whether an instruction should be given should be resolved in favor of the accused."[17]

HN3[↑] Mistake of fact as to consent is an affirmative defense to the offense of sexual assault by bodily harm of which Appellant was convicted. This defense provides that "it is a defense to an offense that **[*8]** the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense."[18] As the offense of sexual assault by bodily harm of which Appellant was convicted requires general intent, the mistake of fact "must have existed in the mind of the accused and must have been reasonable under all of the circumstances."[19] In other words, some evidence

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[9] Pros. Ex. 6.

[10] R. at 1009.

[11] *United States v. Quintanilla, 56 M.J. 37, 83 (C.A.A.F. 2001)*.

[12] R.C.M. 920(e).

[13] R.C.M. 920(e), Discussion.

[14] *United States v. Barnes, 39 M.J. 230, 232 (C.A.A.F. 1994)* (citations and internal quotation marks omitted).

[15] R.C.M. 916(b), Discussion.

[16] R.C.M. 920(e); *Barnes, 39 M.J. at 232-33*.

[17] *United States v. Hibbard, 58 M.J. 71, 73 (C.A.A.F. 2003)* (citations and internal quotation marks omitted).

[18] R.C.M. 916(j)(1).

[19] *Id.*

must show that Appellant's mistake of fact was not only reasonable, but that Appellant did in fact honestly and "subjectively . . . infer consent based on the[ ] circumstances."[20]

Here, the military judge gave an instruction on the defense of consent, but not mistake of fact as to consent. In discussing the matter with the parties, the military judge focused on the requirement that such mistake must be not just reasonable, but honestly held, as demonstrated by "evidence tending to show that, at the time of the alleged offense, the accused mistakenly believed."[21] In reviewing the evidence adduced at trial regarding any mistake on the part of Appellant, the military judge reasoned:

> All I have is his word—his statement **[*9]** saying he believes she was asleep. A person asleep cannot consent. When I consider the evidence from [CTT2 Hotel], she testified that there was nothing there that she did to lead—that would lead him or someone else to believe that she was consenting by laying there pretending to be asleep. As for the conduct earlier in the evening, the kissing was a peck, different than arguably the relationship prior. While individuals claim to have seen them arms around each other or being—acting like a couple, that doesn't go directly to consent at the—and what belief the accused held at the time. *I have nothing on the record showing me that the accused mistakenly believed, at the time of the offense, that he, in fact, believed that she was consenting*.[22]

We find the military judge's denial of the mistake-of-fact-as-to-consent instruction was proper under the circumstances. This case is analogous to *United States v. Jones*, where the victim kissed the appellant and did not say "no" to oral sex, and there were objective circumstances that a reasonable person might rely on to infer consent, but no evidence that the appellant honestly believed the victim was consenting at the time he later tried to insert **[*10]** his penis in her vagina and she was pushing him off and saying "no."[23] Because the evidence provided "no insight as to whether [the] appellant actually or subjectively did infer consent based on these circumstances," the court held the mistake-of-fact-as-to-consent instruction was not warranted.[24]

Similarly, the record here is devoid of any evidence showing that Appellant actually held an honest, subjective belief that CTT2 Hotel consented to sexual intercourse at the time. There are circumstances bearing on whether a reasonable person in Appellant's shoes may have inferred consent, such as Appellant and CTT2 Hotel's consensual sexual relationship two weeks before, some flirtation and kissing at the barbecue, and the fact that CTT2 Hotel agreed to spend the night in Appellant's twin bed, where their previous consensual sexual encounter had occurred. However, Appellant's assertions in his text messages to CTT2 Hotel, his statements to NCIS, and his testimony at trial repeatedly confirm that from what he remembered of the events, he did not possess an actual, honest, subjective belief that CTT2 Hotel consented to sexual intercourse of the sexual act. The only evidence before us of Appellant's **[*11]** state of mind at the time is that he subjectively believed CTT2 Hotel did not or could not consent to engage in sexual intercourse with him because she was asleep.

Appellant argues he presented "some evidence" of his subjective mistaken belief through the testimony of his expert forensic psychologist. The expert testified essentially that based on Appellant's trial testimony that he could not remember what occurred, we do not know what happened during Appellant's blackout state, including whether Appellant in fact believed at the time that CTT2 Hotel was consenting. However, we find the *lack* of evidence of a subjective mistake of fact as to consent--a blackout state where nothing is remembered--is not "some" evidence that Appellant honestly believed CTT2 Hotel consented. To the contrary, it provides "no insight as to whether [A]ppellant actually or subjectively did infer consent."[25] As such, it is insufficient to raise the mistake-of-fact-as-to-consent defense.

Even assuming some evidence existed that Appellant possessed such a subjective belief, we are convinced any instructional error was harmless beyond a reasonable doubt.[26] ***HN4***[⬆] A constitutional error is

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[20] *United States v. Jones, 49 M.J. 85, 91 (C.A.A.F. 1998)*.

[21] R. at 1165.

[22] R. at 1165-66 (emphasis added).

[23] *Jones, 49 M.J. at 87*.

[24] *Id. at 91* (quoting *United States v. Willis, 41 M.J.435, 438 (C.A.A.F. 1995)*).

[25] *Jones, 49 M.J. at 91*.

[26] *See United States v. Davis, 73 M.J. 268, 271 (C.A.A.F.*

harmless if it is "clear beyond a **[*12]** reasonable doubt that a rational jury would have found the Based on the overwhelming defendant guilty absent the error . . . ."[27] evidence of Appellant's guilt, we are convinced beyond a reasonable doubt that even if a mistake-of-fact-as-to-consent instruction had been given, the members would have reached the same outcome.[28]

B. Legal and Factual Sufficiency

Appellant asserts the evidence is legally and factually insufficient to support his conviction. *HN5*[] We review such issues de novo.[29]

HN6[] To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[30] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[31]

HN7[] In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.[32] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption **[*13]** of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[33] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[34]

In order to prove the offense of sexual assault by bodily harm of which Appellant was convicted, the Government was required to prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon CTT2 Hotel by causing penetration, however slight, of her vulva with his penis; (2) he did so by causing bodily harm--an offensive touching--to CTT2 Hotel, to wit: doing so without her consent.[35] The proof of Appellant's guilt in this case—including CTT2 Hotel's testimony, the incriminating text messages between Appellant and CTT2 Hotel the following morning, and Appellant's two confessions to NCIS—is overwhelming. Appellant's testimony at trial that he did not remember what occurred from the time he and CTT2 Hotel walked into his barracks room until he woke up the next day is contradicted by his statements to NCIS that he remembered going to sleep with CTT2 Hotel, remembered being on top of her, remembered **[*14]** penetrating her while he believed she was asleep, and remembered ejaculating. His testimony is also contradicted by his text messages to CTT2 Hotel stating, "I honestly don't know why I did that," apologizing after CTT2 Hotel called him a "rapist," and admitting he "wanted something with [CTT2 Hotel] and

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2014) ("Where an instructional error raises constitutional implications, the Court has traditionally tested the error for prejudice using a harmless beyond a reasonable doubt standard.") (internal citations and quotation marks omitted).

[27] *United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)* (quoting *Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*).

[28] Without listing it as a separate AOE, Appellant also asserts the military judge compounded the instructional error by naming CTT2 Hotel in his instruction on prior consistent statements but not in his instruction on prior inconsistent statements, and thus did not "adequately instruct on CTT2 Hotel's credibility." Appellant's Br. at 44. The military judge stated that he did not specifically name CTT2 Hotel or any other witness in the instruction on prior inconsistent statements because multiple witnesses met the definition of having given such a statement throughout the trial-- including Appellant—and that he specifically named CTT2 Hotel in the instruction on prior consistent statements "not to grant favor but instead to instruct the members on how they may use that very limited statement . . . ." R. at 1168. We find the military judge did not err in making this determination. *See United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

[29] *Article 66(c), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

[30] *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*).

[31] *United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015)* (citation and internal quotation marks omitted).

[32] *Turner, 25 M.J. at 325*.

[33] *Washington, 57 M.J. at 399*.

[34] *United States v. Rankin, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006)*.

[35] *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, para. 45.b.(3)(b).

threw it away for [his] self pleasure."[36]

Considering the evidence in the light most favorable to the Prosecution, we conclude a reasonable fact-finder could have found all the essential elements of this offense beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we, too, are convinced of Appellant's guilt beyond a reasonable doubt.

C. Sentence Appropriateness

HN8[↑] *Article 66, UCMJ*, mandates that we only approve those findings and sentences that are "correct in law and fact" and that "on the basis of the entire record, should be approved."[37] In exercising this function, we seek to assure that "justice is done and that the accused gets the punishment he deserves."[38] This requires an **[*15]** "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender."[39] Despite the discretion inherent in this responsibility, we may not engage in acts of clemency.[40] We may consider other court-martial sentences when determining sentence appropriateness for any case, but are required to only "in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases."[41]

Here, Appellant received reduction to E-1, confinement for five years, and a dishonorable discharge for sexually assaulting a fellow service member when he believed her to be asleep. Sexual assault carries a mandatory minimum sentence of dishonorable discharge and a maximum punishment that includes 30 years' confinement. After reviewing the record as a whole, we find that the sentence is correct in law, appropriately reflects the matters in extenuation and mitigation presented, and should be approved.

D. Entry of Judgment

HN9[↑] The entry of judgment placed into the record of trial must correctly "reflect the results of the court-martial **[*16]** . . . ."[42] Here, the Entry of Judgment incorrectly reflects that Appellant was found guilty of abusive sexual contact under Specification 1 of the Charge, an offense of which he was acquitted at trial. Appellant alleges no prejudice from this scrivener's error, and we find none, but he is entitled to have court-martial records that correctly reflect the content of his proceeding.[43] We take such corrective action below.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, 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.[44] In accordance with R.C.M. 1111(c)(2), we modify the Entry of Judgment and direct that it be included in the record.

The findings and sentence are **AFFIRMED**.

Judges STEWART and HOUTZ concur.

FINDINGS

The following are the Accused's pleas and the Court's findings to all offenses the convening authority referred to trial:

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

Plea: Not Guilty.

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[36] Pros. Ex. 1 at 2.

[37] *10 U.S.C. § 866(d)(1)*; *see also United States v. Tardif, 57 M.J. 219, 221-22 (C.A.A.F. 2002)*.

[38] *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*.

[39] *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (citation and internal quotation marks omitted).

[40] *United States v. Nerad, 69 M.J. 138, 145 (C.A.A.F. 2010)*.

[41] *United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001)*.

[42] R.C.M. 1111(a)(2).

[43] *United States v. Crumpley, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998)*.

[44] *Articles 59*, *66, UCMJ*.

Finding: Guilty.

Specification 1: Abusive Sexual Contact on or about 15 April 2018.

Plea: Not Guilty.

Finding: Not Guilty.

Specification 2: Sexual Assault on or about 15 April [*17] 2018.

Plea: Not Guilty.

Finding: Guilty.

SENTENCE

On 15 October 2019, officer and enlisted members sentenced the Accused to the following:

Reduction to pay grade E-1.

Confinement for 5 years.

A dishonorable discharge.

End of Document

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Daniel K. CHEGE,** Corporal (E-4) U.S. Marine Corps Appellant	**MOTION TO FILE SEALED MATERIAL** USCA Dkt. No. 24-0088/MC Crim.App. Dkt. No. 202200079

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW the undersigned and respectfully moves, pursuant to Rule 30 of the Rules of Practice and Procedure for the Court of Appeals for the Armed Forces, to file a Supplement to Appellant's Petition containing sealed material. One issue Appellant seeks review on requires consideration of sealed material. This issue focuses on the military judge's misapplication of the law in denying a motion under Military Rule of Evidence 412. As such, this material must be referenced in his Supplement.

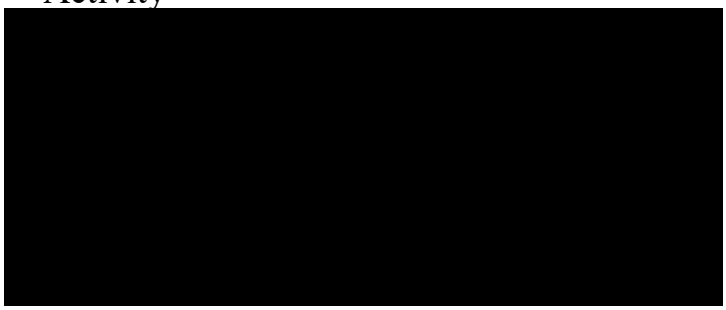
WHEREFORE, Appellant respectfully requests that this Court grant this motion to file a Supplement containing sealed material.

[redacted]
CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on March 4, 2024.

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity



IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **Daniel K. CHEGE,** Corporal (E-4) U.S. Marine Corps, *Appellant*	**MOTION TO WITHDRAW AS APPELLATE DEFENSE ATTORNEY** Crim. App. Dkt. No. 202200079 USCA Dkt. No. 24-0088/MC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rules 16 and 30 of this Court's Rules of Practice and Procedure, the undersigned counsel hereby requests leave to withdraw from representation in the above-captioned case.

As the reason for withdrawal, undersigned counsel submits that he will be starting parental leave on or about March 11, 2024. During this period, undersigned counsel's ability to manage cases will be limited. Counsel will then execute permanent change of station orders on or about June 1, 2024. Lieutenant Jesse Neumann, JAGC, USN, has been assigned as successor counsel. Undersigned counsel and LT Neumann 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.

The undersigned counsel has delivered a copy of this motion to the Appellant in accordance with Rule 16.

[redacted]
Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on March 11, 2024.

[redacted]
Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)

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

IN REPLY REFER TO
5814
40/ 202200079
6 May 24

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

Subj: NOTIFICATION OF COMPLETION OF APPELLATE REVIEW IN THE GENERAL COURT-MARTIAL OF CORPORAL DANIEL K. CHEGE, USMC - NMCCA 202200079

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

Encl: (1) Post Trial Action of 11 Jan 22 and Entry of Judgment of 20 Mar 21
(2) NMCCA Opinion of 13 Oct 23
(3) CAAF Denial Order of 23 Apr 24
(4) Naval Clemency and Parole Board Waiver of Clemency Review of 22 Jul 22

1. Corporal (Cpl) Daniel K. Chege, USMC – NMCCA 202200079 was arraigned, tried, and convicted at a General Court-Martial convened by the Commanding General, 3d Marine Air Wing. Cpl Chege was sentenced on 8 December 2021, to forfeiture of all pay and allowances, 2 years confinement, reduction to E-1 and to be discharged from the United States Marine Corps with a Dishonorable Discharge. (Encl.1)

2. In an Opinion issued 13 October 2023, the United States Navy-Marine Court of Criminal Appeals (NMCCA), affirmed the findings and the sentence of the General Court-Martial. (Encl. 2)

3. Cpl Chege petitioned the decision of the NMCCA to the United States Court of Appeals for the Armed Forces (CAAF). CAAF denied the petition for review in a CAAF Denial Order issued 23 April 2024. (Encl. 3)

4. The 2 year sentence awarded to Cpl Chege triggered an automatic clemency review by the Naval Clemency and Parole Board (NC&PB). Cpl Chege waived review by the NC&PB on 22 July 2022. (Encl. 4)

5. Accordingly, all appellate review is now complete in the General Court-Martial of Corporal Daniel K. Chege, USMC - NMCCA 202200079. The Dishonorable Discharge awarded to Corporal Chege may now be executed.

6. Point of contact for this matter is Ms. Ebonique Bethea, Deputy Branch Head, Court-Martial Records, Navy and Marine Corps Appellate Review Activity (Code 40) [redacted]

Copy to:
Appellant
SJA,
LSSS West