[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Grijlava	Mark	J	[redacted]	MK3
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

Base Seattle	USCG	Seattle, WA
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commander

(Title of Convening Authority)

U.S. Coast Guard District Thirteen

(Unit/Command of Convening Authority)

Tried at

Base Seattle, WA On 15-19 November 2021

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

Companion and other cases

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

[redacted]

CONVENING ORDER

GENERAL COURT-MARTIAL	)	COMMANDER
	)	COAST GUARD THIRTEENTH DISTRICT
	)	SEATTLE, WA
AMENDMENT 1	)	
CONVENING ORDER NO. 01-21	)	DATE: 21 October 2021

COMMANDER
COAST GUARD THIRTEENTH DISTRICT

1. The General Court-Martial convened by General Court-Martial Convening Order no. 01-21 dated 17 June 2021 is hereby amended for the case of *United States v. MK3 Mark J. Grijalva, USCG*, only, and will be convened in Seattle, Washington.

2. The following members detailed to General Court-Martial convened by order no. 01-21, dated 17 June 2021, are hereby relieved:

CDR [redacted]
LCDR [redacted]
LTJG [redacted]
BOSN2 [redacted]
LT [redacted]
YNC [redacted]
MSTCM [redacted]
LT [redacted]
BOSN2 [redacted]
LCDR [redacted]
BOSN4 [redacted]
LT [redacted]
LT [redacted]
MST1 [redacted]
BM1 [redacted]
MKC [redacted]
CSC [redacted]

3. The following are hereby detailed as <u>primary members</u> of General Court-Martial convened by General Court-Martial Convening Order no. 01-21:

CDR [redacted]
LCDR [redacted]
MLES2 [redacted]
LCDR [redacted]
CDR [redacted]
EM1 [redacted]
BM2 [redacted]
YN2 [redacted]
SK1 [redacted]
ETC [redacted]

MK2 [redacted]
OSC [redacted]
GM1 [redacted]
LT [redacted]
LT [redacted]
WEPS2 [redacted]
LT [redacted]
CDR [redacted]
PA2 [redacted]
OS1 [redacted]

4. Should any officer in paragraph three (3) be properly excused prior to impanelment, that member will be replaced with an officer listed below, in the order listed:

LT [redacted]
LT [redacted]
LCDR [redacted]
LT [redacted]
LT [redacted]
LCDR [redacted]
LT [redacted]
ENG3 [redacted]
LT [redacted]

5. Should any enlisted members in paragraph three (3) be properly excused prior to impanelment, that member will be replaced with an enlisted member below, in the order listed:

SKC [redacted]
MECS [redacted]
YNCM [redacted]
HS1 [redacted]
YN1 [redacted]
MSTC [redacted]
ET1 [redacted]
YN1 [redacted]
ME1 [redacted]
GMC [redacted]
CS1 [redacted]
DCC [redacted]
MST1 [redacted]
MKCM [redacted]
CS1 [redacted]
YN1 [redacted]
MK1 [redacted]
AMTC [redacted]
SK1 [redacted]

ET1 [redacted]
MST1 [redacted]
AMTC [redacted]
EM1 [redacted]
BM1 [redacted]

6. After impanelment, if excess primary members remain, the military judge shall impanel up to one (1) primary member as an alternate pursuant to RCM 912A(a)(4).

[redacted]

Melvin W. Bouboulis
Rear Admiral, U. S. Coast Guard
Commander
Coast Guard Thirteenth District

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED *(Last, First, MI)*	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Grijalva, Mark J.	[redacted]	MK3	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
BASE SEATTLE	26 Sept 2016	6 years

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2,713.50	$0.00	$2,713.50	None	N/A

II. CHARGES AND SPECIFICATIONS

10.

See Continuation Sheet

III. PREFERRAL

11a. NAME OF ACCUSER *(Last, First, Middle Initial)*	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LCDR	USCG District Thirteen

d. SIGNATURE OF ACCUSER	e. DATE *(YYYYMMDD)*
[redacted]	20210716

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this sixteenth day of July 2021, 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.

Katie E. Smith

USCG District Thirteen

Lieutenant Commander

Grade

Commissioned Officer

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

[redacted]

12.

On 16 July, 2021, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

BASE SEATTLE, USCG
Organization of Immediate Commander

E-8 YNCS

[redacted]RT-MARTIAL CONVENING AUTHORITY

13.

The charges were received at 1308 hours, 16 July, 2021, at Thirteenth Coast Guard District
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403).

M. W. Bouboulis
Typed Name of Officer

~~FOR THE~~ [1] ~~XXXXXXXXXXXXXXXX~~

RADM, USCG

Commander, U.S. Coast Guard District Thirteen
Official Capacity of Officer Signing

[redacted]EFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Thirteenth Coast Guard District	Seattle, WA	20210716

Referred for trial to the General court-martial convened by Convening Order No. 01-21 Dated 17 June 2021, subject to the following instructions: [2]

// By // of //
Command or Order

M. W. Bouboulis
Typed Name of Officer

Commander, U.S. Coast Guard District Thirteen
Official Capacity of Officer Signing

RADM, USCG

[redacted]

15.

On 16 JUL, 2021, I caused to be served a copy hereof on the above named accused.

KATIE E SMITH
Typed Name of Trial Counsel

LCDR, USCG
Grade or Rank of Trial Counsel

[redacted]

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

DD FORM 458, (BACK), MAY 2000

DD Form 458 Cont.
United States v. MK3 Mark Grijalva, USCG

CHARGE I: Violation of the UCMJ, Article 107

Specification: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, on board Naval Base Kitsap Bangor, Washington, on or about 12 July 2019, make to a Coast Guard Investigative Service Special Agent an official statement, to wit: that his Apple Watch was located in his duty locker in Port Angeles, Washington, which statement was totally false, and was then known by the MK3 Grijalva to be so false.

CHARGE II: Violation of the UCMJ, Article 131b

[redacted] 10NOV2021

Specification ~~1~~: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, on or about 6 March 2019, wrongfully do a certain act, to wit: made false statements to Anaheim (California) Police Department Detective [redacted] with intent to influence the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

Withdrawn and dismissed without prejudice EC 10NOV2021

~~Specification 2: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, on or about 12 July 2019, wrongfully do a certain act, to wit: wrongfully give multiple locations of his Apple Watch which contained images of [redacted] with intent to impede and obstruct the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.~~

CHARGE III: Violation of the UCMJ, Article 134

Specification 1: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 1 February 2019 and on or about 26 February 2019, unlawfully and without authority or permission of [redacted] access the Snapchat account of [redacted] and obtain digital images of [redacted] an act which is of a nature to bring discredit upon the armed forces.

[redacted] 10NOV2021

Dismissed by order of military judge

~~Specification 2: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create a [redacted] profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces.~~

[redacted] 10NOV2021

Dismissed by order of military judge

~~Specification 3: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted], create an OKCupid dating profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces.~~

2 [redacted] 10NOV2021

Specification ~~4~~: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at Naval Base Kitsap Bangor, Washington, on divers occasion between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstances in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and when he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

[redacted] 10NOV2021

Specification 5: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or ~~near~~ Naval Base Kitsap Bangor, Washington, on divers occasion between ~~on~~ or about ~~1~~ February 2019 to on or about 31 March 2019, violate Title 9A Washington ~~Criminal~~ Code, Chapter 9A.86, Disclosing Intimate Images, by knowingly disclosing ~~an intimate~~ image of [redacted] who is identifiable from the visual image, which ~~was obtained~~ under circumstances in which a reasonable person would know ~~or understand~~ that the image was to remain private, which MK3 Grijalva knew ~~or should have~~ known that the depicted person, [redacted] had not consented to the disclosure, ~~and~~ MK3 Grijalva knew or reasonably should have known that the disclosure would ~~cause~~ harm to the depicted person, [redacted] an offense not capital.

Dismissed by order of Military Judge

3 [redacted] 10NOV2021

Specification ~~6~~: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly access without authorization a computer used in or affecting interstate or foreign commerce or communication, to wit: accessing without authorization the Snapchat application; that MK3 Grijalva did so with the intent to defraud; that access without authorization furthered the intended fraud; and that MK3 Grijalva obtained anything of value, to wit: images of [redacted] from her Snapchat profile, in violation 18 U.S. Code Section 1030(a)(4), a crime or offense not capital.

4 [redacted] 10NOV2021

Specification ~~7~~: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly transfer, possess, or use without legal authority a means of identification of another person, to wit: [redacted] name and image to create a social media dating application profile; that MK3 Grijalva knew that the means of identification belonged to a real person; and that MK3 Grijalva did so during and in relation to violation of 18 U.S. Code Section 1343, in violation of 18 U.S. Code Section 1028A, a crime or offense not capital.

5 [redacted] 10NOV2021

Specification ~~8~~: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly devise a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; to wit: created a dating profile on the Tinder and OKCupid application using [redacted] name and image and offered to have sex with individuals for money; that MK3 Grijalva made material statements that had a natural tendency to influence, or were capable of influencing, a person to part with money or property; that MK3 Grijalva did so with intent to defraud; and that MK3 Grijalva used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme in violation of 18 U.S. Code Section 1343, a crime or offense not capital.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED *(Last, First, MI)*	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Grijalva, Mark, J.	[redacted]	MK3	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
BASE SEATTLE	09/26/2016	6 years

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
2,713.50	0	2,713.50	N/A	N/A

II. CHARGES AND SPECIFICATIONS

10.

See attached continuation page.

W [redacted] WN BY DIRECTION

[redacted], CARISSA 16JUL21

III. PREFERRAL

11a. NAME OF ACCUSER *(Last, First, Middle Initial)*	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LCDR	USCG District Thirteen

d. SIGNATURE OF [redacted]	e. DATE *(YYYYMMDD)*
	20210304

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this fourth day of March, 2021, 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.

Matthew D. Pekoske	USCG District Thirteen
Typed Name of Officer	*Organization of Officer*
Lieutenant Commander / O-4	Commissioned Officer
Grade [redacted]	*Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*
Signature	

12\.
On 16 MAR , 2021, the accused was informed of the charges against him and of the name of the accuser 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

USCG BASE SEATTLE
Organization of Immediate Commander

CWO4

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13\.
The charges were received at 1647 hours, 16 MARCH , 2021 at Thirteenth Coast Guard District
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403).

A. J. Vogt
Typed Name of Officer

~~FOR THE~~ [1] XXXXXXXXXXXXXXX

RADM, USCG
Grade

Commander, U.S. Coast Guard District Thirteen
Official Capacity of Officer Signing

[redacted] RADM, USCG

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Thirteenth Coast Guard District	Seattle, WA	20210617

Referred for trial to the General court-martial conve[redacted]rder No. 01-21 Dated 17 JUN 21 ,

_____, _____[redacted]_____, subject to the following instructions: [2]

_____ By _____
Command or Order

A.J. Vogt
Typed Name of Officer

Commander, U.S. Coast Guard District Thirteen
Official Capacity of Officer Signing

RADM, USCG

[redacted]

WITHDRAWN ... TION SJA COR 16JUL21

15\.
On 22 JUN , ~~2020~~ 2021 I caused to be served a copy hereof on the above named accused.

M. D. Pekoske
Typed Name of Trial Counsel

LCDR, USCG
Grade or Rank of Trial Counsel

[redacted]

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

[redacted] 17JUN21

CHARGE I: Violation of the UCMJ, Article 121

~~Specification 1: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 1 February 2019 and on or about 26 February 2019, steal, digital images, of some value, the property of [redacted]~~

DISMISS W/O PREJUDICE [redacted] 17JUN21

~~Specification 2: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 26 February 2019 and on or about 28 February 2019, steal, money, of a value of $100, the property of [redacted]~~

DISMISS W/O PREJUDICE [redacted] 17JUN21

~~Specification 3: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 1 March 2019 and on or about 3 March 2019, steal, money, of a value of $100, the property of [redacted]~~

DISMISS W/O PREJUDICE [redacted] 17JUN21

CHARGE ~~II~~ I: Violation of the U [redacted] b

Specification 1: In that MK3 Ma [redacted] oast Guard, on active duty, did, at or near Bremerton, Washington, on or ab [redacted] wrongfully do a certain act, to wit: made false statements to Anaheim (California) Police Department Detective [redacted] with intent to influence the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

Specification 2: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Silverdale, Washington, on or about 12 July 2019, wrongfully do a certain act, to wit: wrongfully give multiple locations of his Apple Watch which contained images of [redacted] with intent to impede and obstruct the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

WITH [redacted] ECTION CDR, SJA 16JUL21

[redacted]
17JUN21

CHARGE ~~III:~~ II: Violation of the UCMJ, Article 134

Specification 1: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 1 February 2019 and on or about 26 February 2019, unlawfully and without authority or permission of [redacted] access the Snapchat account of [redacted] and obtained digital images of [redacted] an act which is of a nature to bring discredit upon the armed forces.

Specification 2: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create a [redacted] profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces.

Specification 3: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authori[redacted]n of [redacted] create an [redacted] dating profile using the name and image of [redacted] a[redacted]f a nature to bring discredit upon the armed forces.

Wi[redacted]drawn by direction 16JUN21

Specification 4: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at ~~or near Bremerton, Washington,~~ Naval Base Kitsap-Bremerton on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstances in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and when he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

[redacted]
17JUN21

Specification 5: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Bremerton, Washington, on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, violate Title 9A Washington Criminal Code, Chapter 9A.86, Disclosing Intimate Images, by knowingly disclosing an intimate image of [redacted] who is identifiable from the visual image, which was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private, which MK3 Grijalva knew or should have known that the depicted person, [redacted] had not consented to the disclosure, and MK3 Grijalva knew or reasonably should have known that the disclosure would cause harm to the depicted person, [redacted] an offense not capital.

ADDITIONAL CHARGE I: Violation of the UCMJ, Article 107

Specification: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, on board Naval Base Kitsap Bangor, on or about 12 July 2019, make to a Coast Guard Investigative Service Special Agent an official statement, to wit: that his Apple Watch was located in his duty locker in Port Angeles, Washington, which statement was totally false, and was then known by the MK3 Grijalva to be so false.

ADDITIONAL CHARGE II: Violation of the UCMJ, Article 134 (Clause 3)

Specification 1: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Silverdale, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly accessed without authorization a computer used in or affecting interstate or foreign commerce or communication, to wit: accessing without authorization the Snapchat application; that MK3 [redacted] did so with the intent to defraud; that access without authorization furthered the intended fraud; and that MK3 [redacted] obtained anything of value, to wit: images of [redacted] from her Snapchat profile, in violation 18 U.S. Code Section 1030(a)(4), a crime or offense not capital.

Specification 2: In that MK3 M[redacted]t Guard, on active duty, did, at or near Silverdale, Washington, betwe[redacted]y 2019 and on or about 6 March 2019, knowingly transfer, posses, or [redacted]ity a means of identification of another person, to wit: [redacted] name an[redacted] media dating application profile; that MK3 Grijalva knew that the m[redacted]onged to a real person; and that MK3 Grijalva did so during and in relation to violation of 18 U.S. Code Section 1343, in violation of 18 U.S. Code Section 1028A, a crime or offense not capital.

DIRECTED

SJA

Specification 3: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Silverdale, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly devise a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; to wit: created a dating profile on the Tinder and OKCupid application using [redacted] name and image and offered to have sex with individuals for money; that MK3 M.G. made material statements that had a natural tendency to influence, or were capable of influencing, a person to part with money or property; that MK3 [redacted] did so with intent to defraud; and that MK3 [redacted] used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme in violation of 18 U.S. Code Section 1343, a crime or offense not capital.

16 JUL 21

TRIAL COURT MOTIONS & RESPONSES

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Bill of Particulars)** **28 JUNE 2021**

MOTION

Pursuant to the Fifth Amendment of the Constitution and R.C.M. 906(b)(6), the Defense moves for appropriate relief in the form of a Bill of Particulars as to the two Specifications under Charge II. As the moving party, the Defense bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this matter. R.C.M. 905(c).

FACTS

1. In Specification 1 of Charge I, the Government alleges that MK3 Grijalva obstructed justice in violation of Article 131b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 931b (2019), when he, "on or about 6 March 2019 . . . made false statements to Anaheim (California) Police Department Detective [[redacted]]." (Charge Sheet at 3, Mar. 4, 2021.)

2. The Specification does not identify any statements.

3. In Specification 2 of Charge I, the Government alleges that MK3 Grijalva also obstructed justice in violation of Article 131b, when he, "on or about 12 July 2019 . . . wrongfully [gave] multiple locations of his Apple Watch." (Charge Sheet at 3.)

4. The Specification does not identify to whom MK3 Grijalva gave the "multiple locations" or what those locations were.

LAW

The President provides that, where necessary, a military judge may order a bill of particulars. R.C.M. 906(b). As the Manual provides, a bill may be necessary

> to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense with the specification itself is too vague and indefinite for such purposes.

Id., Discussion, Manual for Courts-Martial, United States (2019 ed.).

ARGUMENT

Here, every reason listed in the Manual supports the need for a Bill. First, Petty Officer Grijalva cannot prepare for a trial on the criminality of his statements when the charges do not even identify what the statements are. Second, a Specification alleging criminal speech that identifies no particular words creates an imminent danger of surprise at trial. Finally, these Specifications provides no protection against double jeopardy; rather, they invite re-prosecution. Regardless of outcome here, the Government could charge MK3 Grijalva at another proceeding with another UCMJ violation based on a separate "statement" not envisioned by these current Specifications.

RELIEF REQUESTED & ARGUMENT

The Defense requests that the Government provide a Bill of Particulars identifying with sufficient precision the statements alleged in Specifications 1 and 2 of Charge I and the person(s) to whom the statements were directed in Specification 2.

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

[redacted]
B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Bill of Particulars 28 JUNE 2021)** 25 August 2021

On 28 June 2021, the Government received a motion directed at this court to compel the Government to provide Defense a bill of particulars. The Government does not oppose the Defense's motion. The Government will provide the Defense a bill of particulars by 30 August 2021.

Respectfully Submitted,

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

APPELLATE EXHIBIT IX
PAGE 1 OF 2 PAGE (S)

CERTIFICATE OF SERVICE

I hereby certify that I electronically served copies of the above document on the military judge and defense counsel on 25 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
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APPELLATE EXHIBIT IX
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Bill of Particulars)** **06 JUL 21**

MOTION

Pursuant to the Fifth Amendment of the Constitution and R.C.M. 906(b)(6), the Defense moves for appropriate relief in the form of a Bill of Particulars as to Specification 3 under Additional Charge II. As the moving party, the Defense bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this matter. R.C.M. 905(c).

FACTS

1. In Specification 3 of Additional Charge II, the Government alleges that MK3 Grijalva committed a violation of 18 USC § 1343, a crime or offense not capital, when he, as part of a "scheme or plan for obtaining money or property . . . made material statements that had a natural tendency to influence, or were capable of influencing, a person to part with money or property." (Charge Sheet at 4, June 22, 2021.)

2 The Specification does not identify what material statements were made or to whom they were made.

LAW

The President provides that, where necessary, a military judge may order a bill of particulars. R.C.M. 906(b). As the Manual provides, a bill may be necessary

> to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense with the specification itself is too vague and indefinite for such purposes.

Id., Discussion, Manual for Courts-Martial, United States (2019 ed.).

ARGUMENT

a. A Bill of Particulars is needed to put the Defense on notice of what material statements were made, and to whom they were made, as part of MK3 Grijalva's alleged scheme to defraud.

A wire fraud charge under the U.S. Code prosecuted in Federal civilian courts would ordinarily be preceded by an indictment or criminal complaint, laying out the scheme and material statements in detail, thus putting defendants on notice of the conduct of which they are accused. *See, e.g., Huff v. United* States, 301 F.2d 760 (5th Cir. 1962) (holding that trial court did not abuse discretion in denying a Bill of Particulars because the "overt acts" contained in the indictment "specified considerable detail about times, places, telephone calls, persons and other actions."); *United States v. Ojeikere*, 299 F. Supp. 2d 254 (S.D.N.Y. 2004) (denying a demand for a Bill of Particulars because the "superseding indictment, the complaint, and the other information disclosed to the defendant explain the specific acts of which the defendant is accused in sufficient detail that he can prepare for trial, avoid surprise, and interpose a plea of double jeopardy if warranted."). Here, however, the Specification does not disclose any of those relevant details. *Cf. United States v. Crisona*, 271 F. Supp. 150, 156 (S.D.N.Y. 1967) (ordering a Bill of Particulars specifying, *inter alia*, "the names of any persons . . . known to the Government as persons to whom false and fraudulent representations and promises were to be made, or were made, as part of the alleged scheme to defraud."). Here, the Government should be required at a minimum to specify which statements were allegedly made, and to whom they were made. This serves all the reasons listed in the Manual as compelling the need for a Bill of Particulars: Petty Officer Grijalva cannot prepare for a trial on the criminality of his allegedly fraudulent and material statements when the Specification does not even identify which statements he made, a Specification alleging material misrepresentations that identifies no particular statements creates an imminent danger of surprise at trial, and this Specification provides no protection against double jeopardy; rather, it invites re-prosecution. Regardless of outcome here, the Government could charge MK3 Grijalva at another proceeding with another UCMJ violation, or in Federal court, with a violation of the U.S. Code, based on a separate set of statements made as part of an alleged scheme to defraud but not envisioned by the current Specification.

RELIEF REQUESTED & ARGUMENT

The Defense requests that the Government provide a Bill of Particulars identifying with sufficient precision the material statements allegedly made by MK3 Grijalva, and the persons wo whom those statements were made. Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS** **(Defective Referral of** **"Additional" Charges)** **23 JUN 21**

MOTION

Pursuant to R.C.M. 905(b) and 907(b)(3)(A), the Defense moves to dismiss what the Government styles as "Additional Charges I and II," which were never sworn as Congress required in Article 30(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 830(a) (2018) and as the President prescribes in R.C.M. 307(b).

BURDEN

The Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. On March 4, 2021, LCDR [redacted] signed Block 11.a. of a DD Form 458 Charge Sheet, signifying that to the best of his knowledge and belief MK2 Grijalva had committed offenses under the UCMJ—three Specifications under Charge I, Article 121; two Specifications under Charge II, Article 131b; and five Specifications under Charge III, Article 134—all of which were listed on two "continuation" pages attached to the Form. (Encl. A.)

2. Less than two weeks later, the Convening Authority directed a Preliminary Hearing under Article 32, UCMJ. (Encl. B.)

3. During and after the Preliminary Hearing, the Defense objected to Trial Counsel's request that the Preliminary Hearing Officer consider what Trial Counsel styled as "Additional Charges" alleging violations of Article 107, UCMJ, and 18 U.S.C. §§ 1028A, 1030(a)(4), and 1343 (2018). (Encl. C.)

4. Over the Defense's objection, the Preliminary Hearing Officer issued a report that addressed each "Additional Charge," noting that each alleged an "uncharged offense." (Encl. D at 11-12, 15-16.)

5. The Convening Authority then referred each Specification of original Charges II and III to this court-martial (renumbered as Charge I and II, respectively), and along with those Charges purported to refer two "Additional" Charges alleging one Specification of a violation under Article 107 and three Specifications of a violation under Article 134, UCMJ—all of which were now listed on a third "continuation" page attached to the same DD Form 458 that LCDR [redacted] signed. (Charge Sheet.)

6. As of this writing, no person subject to the UCMJ has sworn to the Additional Charges before an officer authorized to administer oaths.

LAW

Congress directs that court-martial charges and specifications "may be preferred only by a person subject to the [UCMJ] . . . and *shall be preferred* by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths." Article 30(a), UCMJ (emphasis added).

Implementing this provision, the President also requires that the person preferring the charges and specifications "must sign them under oath" in a writing which "must state the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer." R.C.M. 307(b).

It is settled law that "[n]o accused should be tried on unsworn charges over his objection." *United States v. Miller*, 31 M.J. 798, 801 (A.F.C.M.R. 1990) (citing *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988); *United States v. Goodman*, 31 C.M.R. 397 (N.B.R. 1961); *United States v. Bolton*, 3 C.M.R. 374 (A.B.R. 1951), *pet. denied*, 3 C.M.R. 150 (C.M.A. 1952)); cf. *United States v. Hamilton*, 41 M.J. 32, 36 (C.A.A.F. 1994) ("If a commander is coerced into preferring charges that he does not believe are true, the charges are treated as unsigned and unsworn.").

Objections to this defect must be raised before entry of pleas. R.C.M. 905(b). "Failure to object at trial to defects in the preferral of charges constitutes waiver and permits trial on unsworn charges." *United States v. Beckermann*, 35 M.J. 842, 846 (C.G.C.M.R. 1992) (citing *United States v. May*, 1 C.M.A. 174, 2 C.M.R. 80 (1952); *United States v. Marcy*, 1 C.M.A. 176, 2 C.M.R. 82 (1952)).

ARGUMENT

Here, the Convening Authority here has attempted to refer four unsworn Specifications of two "Additional" Charges to this Court—none of which has been sworn to or preferred by any person subject to the Code. This effort goes against seven decades of law and practice under our Code. And because MK3 Grijalva objects, he may not be tried on these unsworn charges.

RELIEF REQUESTED

This Court must dismiss the unsworn Charges and Specifications.

EVIDENCE & ORAL ARGUMENT

The Defense attaches the following enclosures in support of this Motion:

A. Preferred Charge Sheet dated March 4, 2021

B. Preliminary Hearing Order

C. Defense R.C.M. 405(k) Objection to Consideration of "Additional Charges"

D. Article 32 Preliminary Hearing Report

Unless the Government concedes the Motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (Defective Referral of "Additional" Charges):** 24 August 2021

RELIEF SOUGHT

Pursuant to RCM 907(b)(3)(A), the Government moves for this Court to DENY the defense motion to dismiss.

HEARING

The Government respectfully requests oral argument.

SUMMARY

The Government requested the Preliminary Hearing Officer (PHO) consider additional charges during the Article 32 hearing that were not preferred on the original charge sheet on March 4, 2021. The PHO considered the additional charges and the Convening Authority referred the additional unsworn charges to this court-martial on June 17, 2021. The Defense claims the unsworn charges are defective. After considering the Defense motion, the Convening Authority withdrew all charges and specifications. New charges were properly sworn, preferred, and referred to this court-martial on July 16, 2021. The Defense motion is now moot.

BURDEN OF PROOF

As the moving party, the Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. On March 4, 2021, LCDR [redacted] signed Block 11.a. of a DD Form 458 Charge Sheet [hereinafter "Original Charge Sheet"].

2. A preliminary hearing pursuant to Article 32, UCMJ was held on May 5, 2021.

3. During the preliminary hearing, the Government requested the Preliminary Hearing Officer to consider "Additional Charges" pursuant to R.C.M. 405(e)(2) alleging violations of Article 107, UCMJ, and 18 U.S.C. §§ 1028A, 1030(a)(4), and 1343 (2018).

4. On June 17, 2021, the Convening Authority referred each Specification of Original Charge Sheet charges II and III to this court-martial (renumbered as Charge I and II, respectively), along with the "Additional Charges" alleging one Specification of a violation under Article 107 and three Specifications of a violation under Article 134, UCMJ.

5. The Accused was arraigned on July 7, 2021. The Defense filed a Motion to Dismiss for Defective Referral of the "Additional Charges" on the basis they were unsworn at the arraignment.

6. On July 16, 2021 the Convening Authority withdrew all charges referred on 17 June 2021.

7. Later on July 16, 2021, LCDR [redacted] a person with personal knowledge of the matters set forth in a New Charge Sheet, swore under oath that the matters set forth in the charges and specifications on the New Charge Sheet were true to the best of his knowledge and belief. LCDR [redacted] signed Block 11.a. of a DD Form 458 before LCDR [redacted] a commissioned officer of the armed forces who is authorized to administer oaths. Charges were preferred against

the Accused.

8. The Convening Authority found a new preliminary hearing was not necessary because all charges and specifications preferred on July 16, 2021 were adequately considered at the preliminarily hearing on May 5, 2021 in accordance with R.C.M. 603.

9. The charges were referred by the Convening Authority on July 16, 2021 to this court-martial and the Accused was arraigned on July 22, 2021.

LEGAL AUTHORITY

Court-martial charges and specifications "...shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths." Article 30(a). The person preferring the charges and specifications "must sign them under oath" in a writing which "must state the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer." R.C.M. 307(b).

ARGUMENT

The Defense's Motion to Dismiss for Defective Referral of "Additional Charges" because they were unsworn is moot. Any Defective Referral alleged by the Defense was cured when new charges were referred by the Convening Authority on July 16, 2021. LCDR [redacted] has personal knowledge of all charges and specifications on the DD Form 458 before this court martial. LCDR [redacted] swore an oath that matters set forth in the charges and specifications are true to the best of his knowledge and belief. The oath was administered by LCDR [redacted] a Judge Advocate and commissioned officer authorized to administer oaths. The requirements directed by Congress in Article 30(a) and implemented by the President in R.C.M. 307(b) have been met. All charges and specifications are properly sworn. The Accused is not being tried on any unsworn charges.

CONCLUSION

The Government respectfully requests the Court DENY the Defense Motion to Dismiss because all charges and specifications before this court are properly sworn.

/s/ Matthew D. Pekoske
MATTHEW D. PEKOSKE
LCDR, USCG
Asst. Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the Defense Counsel via electronic mail on 25 August 2021.

/s/ Matthew D. Pekoske
MATTHEW D. PEKOSKE
LCDR, USCG
Asst. Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS** **(Due Process Notice Defect)** **7 JUL 21**

MOTION & SUMMARY

Specifications 1 through 3 of Charge II, each asserting a novel Article 134 violation, allege conduct that MK3 Grijalva had no notice was forbidden. Likewise, each of those Specifications is empty of any standard applicable to the purportedly forbidden conduct. The Defense therefore moves to dismiss those Specifications for failure to satisfy even the barest notice requirements, errors that render the Specifications so defective as to mislead MK3 Grijalva. U.S. Const. amend V; R.C.M. 907(b)(3)(A).

FACTS

1. In Charge II, the Government charges MK2 Grijalva with three novel violations of Article 134, alleging:

a. In Specification 1, that he did "unlawfully and without authority or permission of BC, access the [redacted] account of [redacted] and obtained digital images of [redacted] an act which is of a nature to bring discredit upon the armed forces";

b. In Specification 2, that he did "unlawfully and without authority or permission of [redacted] create a [redacted] profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces"; and

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c. In Specification 3, that he did "unlawfully and without authority or permission of [redacted] create an [redacted] dating profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces." (Charge Sheet at 4, June 17, 2021.)

LAW

a. Constitutional due process requires fair notice both that the alleged conduct is forbidden and the standard applicable to that conduct's criminality.

"Under the Due Process Clause of the Fifth Amendment, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *United States v. Warner*, 73 M.J. 1, 4 (C.A.A.F. 2013) ("It is well settled . . . that a servicemember must have fair notice that an act is criminal before being prosecuted.") (citations omitted).

The Clause thus demands both "fair notice that an act is forbidden and subject to criminal sanction," *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998), as well as "fair notice as to the standard applicable to the forbidden conduct." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting *Parker v. Levy*, 417 U.S. 733, 755 (1974)).[1] Sources of fair notice that one's conduct may be punishable under the UCMJ include federal law, state law, military case law, military custom and usage, and military regulations. *Vaughan*, 58 M.J. at 31.

The Due Process concepts of "fair notice and vagueness are related," but they remain distinct. *Warner*, 73 M.J. at 3 n.2; *see Parker*, 417 M.J. at 752 (vagueness doctrine "incorporates notions of fair notice or warning"). Vagueness concerns the criminal statute at issue. *See United*

[1] *See also United States v. Lanier*, 520 U.S. 259, 265 (1997) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.") (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal citation and quotation marks omitted));

States v. Cochrane, 60 M.J. 632, 634 (N-M. Ct. Crim. App. 2004) ("void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement") (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972) (criminal laws "must provide explicit standards" to avoid potential to "trap the innocent by not providing fair warning"); *United States v. Capital Traction Co.*, 34 App. D.C. 592, 596-598 (1910) ("A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."). But fair notice evaluates the offense charged. *United States v. Escochea-Sanchez*, No. 20100093, 2011 CCA LEXIS 77, at *11-12 (N-M. Ct. Crim. App. Apr. 19, 2011) ("In general, fair notice has two key facets. First, the accused must have fair notice his conduct is subject to criminal sanction. Second, the accused must have fair notice of the elements against which he must defend.") (citing *United States v. Saunders*, 59 M.J. 1, 6, 9 (C.A.A.F. 2003); *United States v. Pope,* 63 M.J. 68 (C.A.A.F. 2006)).

Thus, in *Warner*, the Court of Appeals for the Armed Forces could set aside a conviction under Article 134 for possession of images depicting minors "as sexual objects or in a sexually suggestive way" on notice grounds and decline to evaluate Article 134 itself for vagueness. *Id.*, 73 M.J. at 3-4. There, the court observed that the subject matter in question was already addressed "at length and in considerable detail" in the United States Code. *Id.*

ARGUMENT

a. <u>No source establishes that any action alleged in Charge II, Specifications 1 through 3—whether accessing [redacted] snapchat account or setting up social media profiles using her name and likeness—was subject to criminal sanction and the Specifications contain no applicable standard to evaluate the alleged conduct</u>.

In Specification 1 of Charge II, the Government seeks to criminalize accessing another person's online account without their consent and obtaining digital images of that person. As in *Warner*, however, the U.S. Code already provides a "myriad of potential crimes" related to accessing the online accounts and computers of others without their consent. *See, e.g.*, 18 U.S.C. § 1030 (criminalizing "Fraud and related activity in connection with computers"). Indeed, the Government has simultaneously charged MK3 Grijalva under that statute *for this identical act,* alleging in Additional Charge II, Specification 1 that MK3 Grijalva violated 18 U.S.C. § 1030(a)(4) when he obtained images of [redacted] from her Snapchat profile as part of an alleged scheme to defraud.

The computer offenses pertaining to unauthorized access in § 1030(a)(4) and elsewhere in the U.S. Code, however, require proof of additional elements, e.g., engaging in a scheme to defraud. Thus, MK3 Grijalva would not be on notice that mere nonconsensual access of an online account and downloading of an image would be criminal *without* those additional elements. Nor is he on notice of the standard used to evaluate his conduct—as charged, the Specification criminalizes unauthorized access of a computer without specifying the *mens rea* required, and seemingly reaches the obtaining of *any* image, regardless of its nature.

Similarly, in Specifications 2 and 3, the Government seeks to criminalize, without more, the unauthorized creation of an online account using another person's name and likeness. As with Specification 1, computer crimes already occupy a place in the U.S. Code, and to the extent that there is any military-specific interest at work, Congress has already criminalized the unauthorized distribution of a person's image and identifying information in Article 117a. That offense has strict requirements of proof, specifying that only certain images may not be distributed, and only when such distribution has specified, tangible impact on the individual depicted in the image and on the military mission. Here again, MK3 Grijalva had no way of knowing that his conduct was prohibited, nor any notice as to the standard that would be used to evaluate his conduct.

RELIEF REQUESTED

Because none of Specifications 1, 2, and 3 under Charge I meets the *Vaughn* factors for notice, and because each lacks a standard applicable to evaluate the criminality of the alleged conduct, this Court must dismiss those Specifications.

ORAL ARGUMENT

Unless the Government concedes the Motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. COAST GUARD	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS** **(Due Process Notice Defect)** 25 August 2021

RELIEF SOUGHT

Pursuant to RCM 907(b)(3)(A), the Government moves for this Court to DENY the defense motion to dismiss.

HEARING

The Government respectfully requests oral argument.

SUMMARY

MK3 Grijalva unlawfully gained access to the computer of [redacted] While searching through the files on her computer, he downloaded several private, sexually explicit photographs. He used the intimate photos which he unlawfully obtained to create social media accounts on Tinder and OKCupid. [redacted] was clearly identifiable in the photographs, and they were posted in a manner likely to cause her embarrassment. He then proceeded to use [redacted] identity to steal money from individuals by promising them sex acts in exchange for money. This conduct formed the basis for Charge III, Article 134 (General Article), Specifications 1 thru 3. The Defense claims that MK3 Grijalva had no notice that his criminal and immoral actions would cause discredit upon the Armed Forces, and therefore he did not have adequate notice that his conduct was criminal under Article 134.

BURDEN

As the moving party, the burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

FACTS

1. MK3 Mark Grijalva hacked into [redacted] Snap Chat account and took images from her. He did this by guessing her password. He admitted downloading images from her account without her consent. **Exhibit 1.**
2. MK3 Grijalva concocted a scheme to defraud individuals out of money by assuming [redacted] identity and using the intimate images he stole from [redacted] Using the intimate images he enticed men to send money in exchange for the possibility of certain sex acts.
3. Although he admitted his actions to criminal investigators, he initially deceived them and indicated he had not stolen the images and he had not defrauded individuals out of money.

EVIDENCE

The Government offers the following exhibit:

Exhibit 1: MK3 Grijalva's video recorded interview with CGIS

LEGAL AUTHORITY

It is well settled that conduct that is not specifically listed in the MCM may be prosecuted under Article 134, UCMJ. *United States v. Vaughan*, 58 MJ 29, 31 (C.A.A.F. 2003). Fair notice is all that is required for an act to be punishable under Article 134, UCMJ. *Vaughan*, 58 M.J. at

31. In *Vaughan*, CAAF identified several potential sources of "fair notice' to include "federal law, state law, military case law, military custom and usage, and military regulations. Id at 31-32.

There are several sources of law which put the accused on notice in this case. First, in 2003, CAAF held that an accused had fair notice that he risked prosecution under Article 134, UCMJ, if he knowingly and willfully engaged in a course of conduct that placed the woman in reasonable fear of injury or emotional distress. *United States v. Saunders*, 59 MJ 1, 16 (C.A.A.F. 2003). Federal law prohibits unauthorized access to someone's digital accounts with a fraudulent purpose. 18 U.S.C. 1030(a)(4).

In the state of Washington, the law also prohibits disclosure or intimate images. Revised Code Wash 9A.86.010. The state of Washington also criminalizes computer trespass. Revised Code Wash 9A.90.040 and 9A.90.050.

Additionally, custom and training in the Armed Services emphasize the need to act with integrity and in a forthright manner. Recently, training and custom have focused particularly on the value of privacy and respect when handling intimate digital images. Since the events of Marine's United, the Armed Service has clearly condemned the wrongful acquisition and distribution of intimate images of another.

ARGUMENT

Several factors should be considered when determining if an accused has fair notice that his conduct may be prosecuted under the General Article. *Vaughn*, 58 MJ 51, *Saunders*, 59 M.J. 1. Examples they provided were if conduct were if conduct was in violation of state or Federal laws or if a reasonable person would have known that their conduct was service discrediting. In this case, the conduct of the accused was in violation of Federal Law and state laws regarding online privacy.

Charge III, specification 1 thru 4 alleges that MK3 Grijalva logged onto [redacted] computer and stole images from her, used the pictures to create fake social media accounts, and shared intimate images of [redacted] without her consent. The images he stole were intimate in nature, and he did not have the authority to take them or share them. The claim that he lacked "notice" that such actions is contrary to a reasonable person's understanding of punishable conduct, and shows a lack of awareness regarding the state of the law. As noted above, both Federal and State law prohibit this type of behavior, and the Armed Forces have clearly communicated that service members will be held to a high standard in regards to unauthorized use of intimate images. The Defense asserts that MK3 Grijalva had no "notice" that stealing intimate pictures from [redacted] was service discrediting, but this argument lacks any merit. A reasonable person understands that the customs and traditions of the Coast Guard do not condone this type of behavior, and this behavior is clearly punishable under the General Article.

Although the subjective believe of MK3 Grijalva is not relevant to the analysis, it is persuasive that he hid his actions from law enforcement. His actions clearly show that he was aware that his conduct fell short of the standards set by the Coast Guard. Not only would a reasonable person understand that breaking into a young females social media accounts and stealing pictures is service discrediting, but MK3 Grijalva also understood the illegal nature of his behavior.

The charged offenses clearly describe service discrediting behavior. The actions fell short of the customs of the Coast Guard, and violated state and Federal law. As such, the charges are consistent with military law, and well within the boundaries of notice required for the General Article.

CONCLUSION

For these reasons the Court should **DENY** the Defense's motion to dismiss because the charges and specifications clearly provide notice of service discrediting behavior.

/S/ Jon T. Taylor
J. T. TAYLOR
LCDR, JAGC, USN
Assistant Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 25 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
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LCDR Terrence Thornburgh, USCG
Special Victims Counsel
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LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS AND FOR OTHER APPROPRIATE RELIEF** **(Multiplicity and Unreasonable Multiplication of Charges)** **23 JUN 21**

MOTION

Pursuant to R.C.M. 906(b)(12) and 907(b)(3)(B), the Defense moves to dismiss Charge I, Specification 2, as it is both multiplicious with and an unreasonable multiplication of the sole Specification under Additional Charge I. The Defense also moves this Court, under R.C.M. 906(b)(12), for appropriate relief from the unreasonable multiplication that exists in three other sets of offenses:

(1) Charge II, Specification 1 and Additional Charge II, Specification 1, alleging two crimes based on the same February 26, 2019, unauthorized access of [redacted] Snapchat account;

(2) Charge II, Specifications 2 and 3 and Additional Charge II, Specification 2, alleging three crimes based on the use of [redacted] name and image to create social media profiles between February 3 and March 6, 2019; and

(3) Charge II, Specifications 4 and 5 alleging two crimes based on the distribution of [redacted] name and image between February 1 and March 31, 2019.

SUMMARY

The Government has serially charged MK3 Grijalva twice for the same acts: stating that his Apple iWatch was in his locker; accessing [redacted] Snapchat account without authorization; creating dating profiles purporting to be [redacted] without her consent; and non-consensually

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distributing her image. Because any offense of false official statement is necessarily a lesser included offense of obstruction, that Specification must be dismissed. And because all of these redundant Specifications are unreasonably multiplied under *Quiroz*, this Court's relief is required. Dismissal of the extraneous Specifications is the appropriate remedy.

BURDEN

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

FACTS

1. Based on the same statement MK3 Grijalva made under interrogation by Coast Guard Investigative Service (CGIS) agents, the Government has charged him with two offenses:

a. First, in Specification 2 of Charge I, alleging that he violated Article 131b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 931b (2018), when he

> did, at or near Silverdale, Washington, on or about 12 July 2019, wrongfully do a certain act, to wit: wrongfully give multiple locations of his Apple Watch which contained images of [redacted] with intent to impede and obstruct the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

(Charge Sheet at 3, June 17, 2021.)

b. Second, in Specification of Additional Charge II,[1] alleging that he violated Article 107, UCMJ, 10 U.S.C. § 907 (2018), when he

> did, on board Naval Base Kitsap Bangor, on or about 12 July 2019, make to a Coast Guard Investigative Service Special Agent an official statement, to wit: that his Apple Watch was located in his duty locker in Port Angeles, Washington, which statement was totally false, and was then known by the MK3 Grijalva to be so false.

[1] The Defense has separately moved to dismiss what purport to be "Additional Charges" as they were never sworn or properly preferred. Here, we refer for the sake of brevity to the Additional Charges as if they were properly before the Court.

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(*Id.* at 5.)

2. Based on the same alleged unauthorized access of BC's Snapchat account, the Government has charged MK3 Grijalva with two offenses:

   a. First, in Specification 1 of Charge II, alleging that he violated clause 2 of Article 134, UCMJ, 10 U.S.C. § 934 (2018), when he

> did, at or near Bremerton, Washington, between on or about 1 February 2019 and on or about 26 February 2019, unlawfully and without authority or permission of [redacted] access the Snapchat account of [redacted] and obtained digital images of [redacted] an act which is of a nature to bring discredit upon the armed forces.

(Charge Sheet at 4.)

   b. Second, in Specification 2 of Additional Charge II, alleging that he violated clause 3 of Article 134, UCMJ when he

> did, at or near Silverdale, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly accessed [sic] without authorization a computer used in or affecting interstate or foreign commerce or communication, to wit: accessing without authorization the Snapchat application; that MK3 [Grijalva] did so with the intent to defraud; that access without authorization furthered the intended fraud; and that MK3 [Griljalva] obtained anything of value, to wit: images of [redacted] from her Snapchat profile, in violation 18 U.S. Code Section 1030(a)(4), a crime or offense not capital.

(Charge Sheet at 5.)

3. Based on the same alleged unauthorized use of [redacted] name and image, the Government has charged MK3 Grijalva with three offenses:

   a. First, in Specification 2 of Charge II, alleging that he violated clause 2 of Article 134, UCMJ, when he

> did, at or near Bremerton, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create a Tinder profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces.

(Charge Sheet at 4.)

b. Second, in Specification 3 of Charge II, alleging that he violated clause 2 of Article 134, UCMJ, when he

> did, at or near Bremerton, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create an OKCupid dating profile using the name and image of [redacted] an act which is of a nature to bring discredit upon the armed forces.

(Charge Sheet at 4.)

c. Third, in Specification 2 of Additional Charge II, alleging that he violated clause 3 of Article 134, UCMJ, when he

> did, at or near Silverdale, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly transfer, posses, or use without legal authority a means of identification of another person, to wit: [redacted] name and image to create a social media dating application profile; that MK3 Grijalva knew that the means of identification belonged to a real person; and that MK3 Grijalva did so during and in relation to violation of 18 U.S. Code Section 1343, in violation of 18 U.S. Code Section 1028A, a crime or offense not capital.

(Charge Sheet at 5.)

4. Based on the same alleged distributions of [redacted] name and image, the Government has charged MK3 Grijalva with two offenses:

a. First, in Specification 4 of Charge II, alleging that he violated clause 3 of Article 134, UCMJ, when he

> did, on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstances in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and when he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

(Charge Sheet at 4.)

b. Second, in Specification 5 of Charge II, alleging that he violated clause 3 of Article 134, UCMJ, when he

> did, at or near Bremerton, Washington, on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, violate Title 9A Washington Criminal Code, Chapter 9A.86, Disclosing Intimate Images, by knowingly disclosing an intimate image of [redacted] who is identifiable from the visual image, which was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private, which MK3 Grijalva knew or should have known that the depicted person, [redacted] had not consented to the disclosure, and MK3 Grijalva knew or reasonably should have known that the disclosure would cause harm to the depicted person, [redacted] an offense not capital.

(Charge Sheet at 4.)

LAW

a. Courts protect against Double Jeopardy violations from multiplicity error by testing whether proof of one charge also proves every element of another—that is, when completing the lesser offense is required to commit the greater offense.

The Fifth Amendment prohibits the Government from obtaining a conviction and punishment "under more than one statute for the same act, if it would be contrary to the intent of Congress." *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997) (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)), *overruled in part on other grounds, United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009); *see also* Article 44, UCMJ, 10 U.S.C. § 844 (2018). Because of this prohibition, the Government may not use multiplicious court-martial charges to punish an accused twice for the same act. R.C.M. 907(b)(3)(B); *see United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012) (Stucky, J., concurring) (noting multiplicity is rooted "in the Constitution's Fifth Amendment Double Jeopardy Clause, which provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb'") (quoting U.S. Const. amend. V).

Where Congressional intent is unclear, this Court's multiplicity test is simple: "A charge is multiplicious if the proof of such charge also proves every element of another charge." R.C.M. 907(b)(3)(B); *see also Teters*, 37 M.J. at 376-77 (adopting this elements test for Double Jeopardy inquiry into whether Congress intended to allow "multiple convictions at a single trial for different statutory violations arising from the same act or transaction") (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *Campbell*, 71 M.J. at 23 ("[T]here is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis.").

(1) <u>Military courts look beyond the statutory elements, into the elements pled, to determine whether a charge is a lesser-included offense and therefore multiplicious</u>.

The multiplicity doctrine demands that "an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments." *Britton*, 47 M.J. at 197 (citations omitted). Although a lesser-included offense "must be determined with reference to the elements defined by Congress for the greater offense," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), the analysis depends neither on exacting statutory language nor the language pled in the specifications. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011) ("The two offenses need not have 'identical statutory language. . . . Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'") (quoting *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (internal citation omitted)).

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

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

In *United States v. Palagar*, 56 M.J. 295 (C.A.A.F. 2006), the court used the same rationale to reach a converse finding, holding that an officer's Article 121 larceny conviction for using a government credit card for personal purchases *was* multiplicious of his Article 133 conduct unbecoming conviction for using that same card for "unauthorized purchases" when the unauthorized purchases were the personal purchases. 56 M.J. at 297; *see also United States v. Pate*, 73 M.J. 352, 353 (C.A.A.F. 2014) (dismissing, based on *Jones*, assault consummated by battery and aggravated assault convictions as necessary lesser included offenses, and therefore multiplicious, of aggravated assault and maiming convictions, respectively).

(2) <u>The multiplicity doctrine forbids the Government even from charging an offense and one of its lesser-included offenses, lest acquittal of the lesser offense bar conviction on the greater. Dismissal is therefore the only appropriate remedy</u>.

Because conviction on a greater offense necessarily includes conviction of all lesser offenses, the Manual directs that a charge and lesser-included offense should not appear on the charge sheet. R.C.M. 307(c)(4), Discussion, Manual for Courts-Martial, United States (2019 ed.) ("In no case should both an offense and a lesser included offense thereof be separately charged."); *see also* Article 79, UCMJ, 10 U.S.C. § 879 (2019).

The Discussion to R.C.M. 907(b)(3)(B) suggests that multiplicious offenses need not be dismissed before findings, but this hortatory guidance derives from the Rule's clause concerning "multiplicious" specifications that are "unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action." Such an untenable scenario renders this language mere surplusage: no multiplicious specification could ever be necessary to meet "exigencies of proof" of *different* elements. Under *Jones*, specifications are *not* multiplicious when they have divergent elements.

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

In *Smith*, the military judge convicted the appellant of obstruction of justice—excepting the language "and convince her to change her testimony at the preliminary hearing scheduled for 21 September 1989," and entering a finding, "Of the excepted words, not guilty." 39 M.J. at 449. The Army Court of Military Review affirmed, but twice cited as a fact Smith's effort to change the testimony of his daughter—the very language excepted by the military judge and for which he entered "not guilty" findings. *Id.* at 450. The Court Military Appeals reversed, finding that the Army Court exceeded the scope of its authority under Article 66(c) by findings facts in "direct conflict" with the findings of the military judge. *Id.* at 449, 451.

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

> [U]nder the unique circumstances of this case, the principles underpinning the Double Jeopardy Clause as recognized in *United States v. Smith* made it impossible

> for the [Court of Criminal Appeals] to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts the members found Stewart not guilty of in Specification 1.

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

b. Unlike multiplicity, which addresses constitutional concerns and involves statutory interpretation, the prohibition on unreasonable multiplication protects against prosecutorial overreach based on a fundamental fairness.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001). This prohibition against unreasonable multiplication of charges "has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *Quiroz*, 55 M.J. at 338 (contrasting multiplicity and unreasonable multiplication doctrines); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (same).

(1) The trial judge is the bulwark against prosecutorial overreach.

A military judge must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster,* 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds*, *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009). In service of this obligation, a trial court considers four-factors in testing whether charges are unreasonably multiplied:

- Is each charge and specification aimed at distinctly separate criminal acts?
- Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?
- Does the number of charges and specifications unfairly increase the accused's punitive exposure?
- Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

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

(2) A military court has wide discretion to remedy unreasonable multiplications of charges, up to and including dismissal.

When charges are unreasonably multiplied, a military judge has wide latitude to craft a remedy, including dismissing offenses, merging them for findings, or merging offenses only for sentencing. *United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014) (citing *Campbell*, 71 M.J. at 25) (concluding military judge had discretion to not dismiss or merge specifications for findings but to merge them for sentencing).

In the *Quiroz* case where the factors originated, the Navy-Marine Corps Court of Criminal Appeals dismissed a conviction for wrongfully disposing of military property by selling C-4, which was the same act that led to a conviction for violating 18 U.S.C. § 842. *United States v. Quiroz*, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999). Later in *United States v. Roderick*, the Court of Appeals for the Armed Forces reiterated that dismissal is an available and appropriate remedy for unreasonable multiplication. 62 M.J. 425, 433-34 (C.A.A.F. 2006). The *Roderick* court dismissed indecent liberties convictions that arose from the same criminal acts—taking photographs of underage girls—as the appellant's child pornography convictions under 18 U.S.C. § 2251(a). *Id.*[2]

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

Our courts are energetic in protecting against unreasonable multiplication—setting aside convictions and dismissing charges even where an accused has entered a guilty plea. *See, e.g.*, *United States v. Simmons*, 70 M.J. 649, 654 (N-M. Ct. Crim. App. 2012) (dismissing convictions for uniform violations that unreasonably multiplied a conviction for Joint Ethics Regulation violation). The Air Force Court of Criminal Appeals went so far as to set aside convictions and dismiss charges after a guilty plea pursuant to a pretrial agreement that required the appellant to "waive all waiveable motions," on the grounds that Article 66(c), UCMJ, authorizes appellate approval only of those findings that "should be approved." *United States v. Chin*, ACM 38452 (recon), 2015 CCA LEXIS 241, at *11-13 (A.F. Ct. Crim. App. June 12, 2015).

Finally, when convictions result from specifications that were charged for exigencies of proof, a military judge must "'consolidate or dismiss [the contingent] specification[s],' not merely merge then for sentencing purposes. *Thomas*, 74 M.J. at 568 (quoting *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014)) (additional citation omitted). Where consolidation is impractical, military judges are encouraged to conditionally dismiss convictions, *id.* at 570, mindful that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation." *Doss*, 15 M.J. at 412 (citing *O'Clair v. United States*, 470 F.2d 1199, 1203 (9th Cir. 1972), *cert. denied*, 412 U.S. 921 (1973).

ARGUMENT

a. <u>Because MK3 Grijalva's July 12, 2019, statement to CGIS could have been wrongful only if it were knowingly false and because he could have had the intent to impede only if he had the intent to deceive, the alleged Article 107 offense is necessarily a lesser-included offense of the Article 131b and must be dismissed</u>.

Here, the elements of obstruction of justice Charge I, Specification 2 are:

(1) That the accused wrongfully did a certain act, to wit: wrongfully give multiple locations of his Apple Watch which contained images of [redacted]

(2) That the accused did so in the case of himself, against whom the accused had reason to believe there were or would be criminal proceedings pending; and

(3) That the act was done with the intent to impede and obstruct the due administration of justice.

(Charge Sheet at 3); 10 U.S.C. § 931b; Manual for Courts-Martial (MCM), United States, Part IV, ¶ 83.b. (2019 ed.).

The elements of false official statement in the Specification under Additional Charge I are:

(1) That the accused made a certain official statement, to wit: that his Apple Watch was located in his duty locker in Port Angeles, Washington;

(2) That the statement was totally false;

(3) That the accused knew it to be false at the time of making it; and

(4) That the false statement was made with the intent to deceive.

(Charge Sheet at 5); 10 U.S.C. § 907; MCM, Part IV, ¶ 41.b.(1).

There is no indication that Congress intended a servicemember to be subject to multiple convictions and punishments under Articles 107 and 131b for a single statement to law enforcement.

Convicting Petty Officer Grijalva of the Specification under Article 131b *requires* finding that he made a false official statement to CGIS. If the Government's proof establishes the elements of the Article 131b offense, then the same proof necessarily meets the elements of the charged false official statement. The Article 107 offense is therefore a lesser-included offense, and is multiplicious, because its elements are entirely contained within Charge I, Specification 2 obstruction. *See Arriaga*, 70 M.J. at 54; *Palagar* 56 M.J. at 297; *Pate*, 73 M.J. at 353.

In contrast, an acquittal on the Additional Charge I Specification forecloses any possible conviction of Charge I, Specification 2. The Government should not be permitted to violate Double Jeopardy by seeking an Obstruction of Justice conviction under Charge I, Specification 2 that, under *Smith* and *Stewart*, would force a review authority conducting a factual sufficiency review to find as fact the same facts resulting in acquittal under Additional Charge I False Official Statement.

b. Because the four trial-level *Quiroz* factors weigh in favor of the Defense, relief from these unreasonably multiplied charges is warranted.

The alleged facts in each specification demonstrate that this charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*.

(1) The Government has charged nine Specifications that target four separate acts: two arising from a single statement to CGIS, two addressing unauthorized access o[redacted] snapchat account, three from the use of [redacted] name and image in social media, and two more based on the same distributions of her image.

Each of these four batches of charges facially addresses the same acts. Moreover, evidence adduced at trial will demonstrate that each batch of charges is proved by the same conduct. The first *Quiroz* factor therefore weighs in favor of the Defense for each tranche of these unreasonably multiplied charges.

(2) The over-exaggeration of any possible criminality arising from these distinct acts also unfairly multiplies MK3 Grijalva's punitive exposure.

The gravamen of the charged offenses here is that in early 2019, MK3 Grijalva took [redacted] private photos without her consent and distributed them online. But the Government's charging scheme—alleging that four acts constitute nine violations of six different provisions in the UCMJ, Title 18 of the United States Code, and Washington State Code—both exaggerates any straightforward accounting of the purported misconduct and grossly multiplies MK3 Grijalva's punitive exposure of fifty-two years of confinement.[3] These factors thus weigh in favor of the Defense.

[3] Five years each for the Article 107 and 131b violations; four months for the Article 134 clause 2 offense in Charge II, Specification 1 and five years for its multiplied Article 134 clause 3 offense of violating 18 U.S.C. § 1030(a)(4); four months each for the Article 134 clause 2 offenses in Charge II, Specifications 2 and 3 and 22 years for their multiplied Article 134 clause 3 offense of violating of 18 U.S.C. §§ 1028A and 1343; and seven years for the Charge II,

(3) <u>There is evidence of prosecutorial overreaching in the drafting of these charges, which originally included Article 121 larceny allegations and which have been multiplied by the addition of unsworn charges</u>.

The final trial-level *Quiroz* factor tends to encompass all the others, as the unreasonable multiplication test itself is designed to cure prosecutorial overreach. *Quiroz*, 55 M.J. at 337, ("[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."). But even this factor weighs in favor of the Defense here, because evidence of prosecutorial overreach exists in three places. First, the Government originally alleged that MK3 Grijalva had "stolen" digital images from [redacted] and money from two men. When those allegations of larceny could not survive even bare probable cause hurdle, the Government added an additional sheet of charges, none of which has ever been sworn. (*See* Def. Mot. to Dismiss for Defective Referral, July 7, 2021.) Second, at least one of these Specifications arrives at this court despite the Preliminary Hearing Officer's finding that it was not supported by probable cause. (*See id.*, encl. C.) Third, and as raised in a separate Defense motion, in the Specifications alleging novel violations of Article 134 under Charge II, the Government has far exceeded the bounds of Due Process notice requirements, "stacking" charges against MK3 Grijalva not with firmly articulated punitive articles, but with novel language that serves only to exaggerate MK3 Grijalva's criminality beyond the bounds enacted by Congress or articulated by the President.

(4) <u>Dismissal is the appropriate remedy</u>.

This Court may remedy unreasonably multiplied charges prior to the findings stage by dismissing the lesser offenses or merging all offenses into one. R.C.M. 906(b)(12); *Roderick.*,

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Specification 4 offense of violating Article 134 in a manner closely related to Article 117a, UCMJ, *see United States v. Page*, 80 M.J. 760 (N-M. Ct. Crim. App. 2021) and 364 days for the Charge II, Specification 5 offense of violating R.C.W. 9A.86. *See* R.C.W. 9.92.020.

62 M.J. at 433. Either remedy works the same effect here, but dismissal is the cleanest approach, both to enforce the unreasonable multiplication doctrine as well as to eliminate the confusion and redundancy at trial caused by unreasonable multiplication.

RELIEF REQUESTED

In the absence of remedies arising from other Defense motions, the Defense requests that the Military Judge dismiss:

(1) Additional Charge I, Specification 1, alleging an Article 107 violation, as a multiplicious lesser-included offense of Charge I, Specification 2, alleging Article 131b obstruction of justice;

(2) Charge II, Specification 1, alleging Article 134 unauthorized access of [redacted] Snapchat account, as an unreasonable multiplication of Additional Charge II, Specification 1, alleging the same to perpetuate a fraud in violation of 18 U.S.C. §§ 1030(a)(4;

(3) Charge II, Specifications 2 and 3, alleging Article 134 unauthorized use of [redacted] name and image to create social media accounts, as unreasonable multiplications of Additional Charge II, Specification 2, alleging the same in violation of 18 U.S.C. §§ 1028A and 1343; and

(4) Charge II, Specification 5, alleging unauthorized distribution of intimate images in violation of Washington State Code, as an unreasonable multiplication of Charge II, Specification 4, alleging the same in violation of Article 134 clause 2.

EVIDENCE & ORAL ARGUMENT

Unless the Government concedes the Motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS AND FOR OTHER APPROPRIATE RELIEF (Multiplicity and Unreasonable Multiplication of Charges): 25 August 2021

RELIEF SOUGHT

The government respectfully requests the military judge deny the defense's requested relief for dismissal of the following charges and specifications:

Original Offenses on the 17 June 2021 Charge Sheet	Corresponding Offenses on the 16 July 2021 Charge Sheet
Charge II, Specification 1	**Charge III, Specification 1**
Charge II, Specification 2	**Charge III, Specification 2**
Charge III, Specification 3	**Charge III, Specification 3**
Charge II, Specification 5	**Charge III, Specification 5**
Additional Charge I, Specification 1	**Charge I, Sole Specification**

HEARING

The government does not concede the defense's motion and requests an opportunity to fully articulate its position orally before the military judge.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The defense bears the burden of demonstrating by a preponderance of the evidence that the charges are multiplicious and the unreasonably multiplied. R.C.M. 905(c). The defense also bears the burden of persuasion. R.C.M. 905(c)(2).

APPELLATE EXHIBIT 22
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LEGAL AUTHORITY AND ARGUMENT

1. Statements Regarding the Whereabouts of Petty Officer Girjalva's Apple iWatch

The offenses do not violate the prohibition against double jeopardy because they are distinctly separate acts. "The Fifth Amendment's Double Jeopardy Clause precludes a court, contrary to the intent of Congress, from imposing multiple convictions and punishments under different statutes for the same act or course of conduct." *U.S. v. Coleman*, 79 M.J. 100, 102-103 (C.A.A.F. 2019) (*citing U.S. v. Teters*, 37 M.J. 370, 377 (1993)). The Court in Teters adopted the separate elements test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). Id. Accordingly, for more than a quarter century we have used the *Blockburger* test to determine whether specifications are multiplicious. Id.

In *Blockburger*, the Supreme Court stated: "The applicable rules is that where the *same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." [emphasis added] *Blockburger,* 284 U.S. at 304.

The Specification of Charge I[1] is not necessarily included in Specification 2 of Charge II[2]. The government does not allege Petty Officer Grijalva's initial false statement to an investigative agent about his Apple iWatch being in his duty locker is part of the act that constitutes obstruction of justice. As the government will provide more fully in a bill of particulars, the "multiple locations" referenced in Specification 2 of Charge II are 1) a bag that existed somewhere other than in his duty locker, and (2) a Gamestop store in Silverdale, Washington. For purposes of Specification 2 of Charge II, the government does not allege that

[1] The defense mistakenly refers to this offense as the Specification of Additional Charge II when originally it was the Specification of Additional Charge I. It has been reordered as the Specification of Charge I.
[2] The defense refers to this offense as Specification 2 of Charge I. It has been reordered as Specification 2 of Charge II.

MK3 Grijalva's duty locker is one of the multiple locations. Therefore, the two offenses are not the same act, and the alleged false official statement is not necessarily included in the obstruction of justice allegation.

2. The Remaining Claims of Unreasonable Multiplication of Charges

The remaining assertions of unreasonable multiplication of charges fail for a similar reason. With the exception of Specifications 4 and 5 of Charge III, all remaining offenses are aimed at separate criminal acts that address "distinct criminal purpose[s]." *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012).

Snapchat

Charge III, Specification 1[3] is about unauthorized access of [redacted] Snapchat account. Charge III, Specification 6[4] is about fraud committed using her Snapchat account. These are plainly separate acts with separate elements. MK3 Grijalva's punitive exposure is not unfairly increased as the maximum punishments correspond to the severity of the offenses as reflected by their separate elements.

Dating/matchmaking sites

Much like the matter with Snapchat, Charge III, Specifications 2 and 3[5] are about the unauthorized use of [redacted] name and image to create profiles on two different online dating services. Charge III, Specification 7[6] is about identity theft, creating unauthorized online profiles with an intent to commit fraud. Again, these are separate acts with separate elements with the more severe punishment for the more severe crime.

[3] The defense refers to this offense as Specification 1 of Charge II.
[4] The defense mistakenly refers to this offense as Specification 2 of Additional Charge II when originally it was Specification 1 of Additional Charge II.
[5] The defense refers to these offenses as Specifications 2 and 3 of Charge II.
[6] The defense refers to this offense as Specification 2 of Additional Charge II.

The wrongful sharing of images

Charge III, Specifications 4 and 5[7] are about the wrongful sharing of a specific type of image belonging to [redacted] However, these offenses are pled for contingencies of law. The government concedes that Specification 5 of Charge III may be dismissed should the military judge find that Specification 4 of Charge III is not preempted by Article 117a, UCMJ; 10 U.S.C. § 917a. If, rather, Specification 4 of Charge III is preempted by Article 117a, UCMJ, then the government would proceed on Specification 5 of Charge III.

CONCLUSION

Because none of the offenses are either multiplicious or unreasonably multiplied with any other, the government respectfully requests the military judge deny the defense's requested relief.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

[7] The defense refers to these offenses as Specifications 4 and 5 of Charge II.

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 25 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
[redacted]

LCDR Terrence Thornburgh, USCG
Special Victims Counsel
[redacted]

LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS OR GRANT OTHER APPROPRIATE RELIEF** **(Speedy Trial)** **11 AUG 21**

MOTION

Pursuant to the Sixth Amendment, R.C.M. 707, and R.C.M. 907(b)(2)(A), the Defense moves to dismiss all Charges and Specifications because the Government has violated MK3 Grijalva's right to a speedy trial. Alternatively, the Defense moves the Court to modify the Trial Management Order to set trial for the earliest available date.

SUMMARY

The conduct underlying the Charges here occurred in February 2019. Under Coast Guard Investigative Service (CGIS) interrogation in July 2019, MK3 Grijalva admitted committing the acts at issue. Since then, he has been serving in duties substantially out of his rate, doing menial tasks first aboard Naval Base Kitsap-Bangor, where he resides, and, beginning in August 2020, 74 miles away in Seattle, where he does not. The Government did not prefer Charges, however, until March 2021, nearly twenty months after his admissions to CGIS. In June 2021, the same day that Charges were referred, MK3 Grijalva made an unambiguous demand for Speedy Trial under the Sixth Amendment and R.C.M. 707. The Government functionally rejected that demand: citing unspecified difficulties with counsel and witness availability, the Government could not be ready for trial any earlier than September, more than two months after the expiration of the R.C.M. 707 120-day clock. When Defense Counsel objected to that proposed week of trial, the Government again claimed it could not be ready for trial any time earlier than November—and the Military Judge ordered that trial begin on November 15, almost four months after the expiration of the 120-day clock and more than two years after MK3 Grijalva resolved nearly any factual dispute as to the issues.

BURDEN

The Government has the burden to establish compliance with R.C.M. 707. R.C.M. 905(c)(2)(B).

FACTS

1. Investigation. On March 20, 2019, CGIS received notice that Anaheim Police Department was investigating MK3 Grijalva for taking and distributing intimate pictures of [redacted] (Encl. A.).

a. On July 12, 2019, CGIS Special Agents interviewed MK3 Grijalva in Bangor, Washington. (Encl. A.)

b. During that interview, MK3 Grijalva admitted to guessing the password to and obtaining images from [redacted] Snapchat account and sharing those images with others in exchange for money. (Encl. B.)

2. Reassignment pending charges. For the next thirteen months after his admissions to CGIS, MK3 Grijalva began working out of his rate, doing groundskeeping and other labor like mowing grass aboard Naval Base Kitsap Bangor. (Encl. C.)

a. In August 2020, MK3 Grijalva was transferred to Coast Guard Base Seattle, where was assigned other basic duties outside the Machinist's Mate rating. (Encl. C.)

b. Despite the transfer, believing his disciplinary proceedings to be nearing an end, thirteen months after his admissions to CGIS, MK3 Grijalva maintained his residence aboard Naval Base Kitsap-Bangor, a 74-mile drive away from Coast Guard Base Seattle. (Encl. C.)

3. Prereferral actions. On March 5, 2020, CGIS marked the investigation as "Cleared," though that did not lead directly to court-martial Charges. (Encl. A.).

a. Almost six months later, on August 28, 2020, the CGIS Report of Investigation was provided to Legal Services Command Alameda. (Encl. D.).

b. The Government did not prefer Charges against MK3 Grijalva until March 4, 2021. (Original Charge Sheet at 1, June 17, 2021.)

c. Despite MK3 Grijalva's waiver of the Article 32 hearing on April 28, 2021 (encl. E), the Convening Authority did not refer Charges to this court-martial until June 17, 2021. (Original Charge Sheet at 2.)

4. Post-referral actions. The same day as referral, aware of the glacial pace of these proceedings, MK3 Grijalva demanded a speedy trial, to no effect. (*See* Def. Demand for Speedy Trial, June 23, 2021.)

a. In his demand, MK3 Grijalva requested that his case be docketed for trial any of the three weeks before the R.C.M. 707 120-day clock ran on July 23, 2021.

b. The Government demurred, claiming that it was not ready or available for trial on those weeks. (Encl. F.)

c. Instead, during an R.C.M. 802 scheduling conference later summarized by the Military Judge on the Record, Trial Counsel sought only to arraign MK3 Grijalva on July 7, 2021, and requested that trial begin almost two months later, in mid-September 2021, despite the Defense's availability on any of at least four weeks for trial between July 23 and September 13.

d. At that scheduling conference, the Military Judge granted Trial Counsel's request to arraign on July 7 and postpone trial proceedings until a later date.

e. The day of arraignment, where the Defense again demanded a speedy trial, the Military Judge signed a Trial Management Order over the Defense's objection, which directed trial to begin November 15, 2021—almost four months after the original 120-day clock ran. (Trial Management Order, July 7, 2021.)

f. As of this pleading, the Government has never provided any evidence or made any other factual showing supporting why trial could not begin before July 23, 2021.

5. Withdrawal and re-referral. Nine days after arraignment, on July 16, 2021, attempting to repair its defective original referral of unsworn "Additional Charges," the Convening Authority withdrew all the Charges.

a. The same day as the withdrawal, the Convening Authority re-referred the original properly-sworn Charges and Specifications to this same court-martial, and joined them with the previously-unsworn and now newly-preferred "Additional Charges." (Second Charge Sheet at 2, July 16, 2021.)

b. On July 22, 2021, the Military Judge re-arraigned MK3 Grijalva on those same original properly-sworn Charges and Specifications and the newly-sworn Charges and Specifications.

c. Neither the Convening Authority nor the Military Judge obtained MK3 Grijalva's waiver to the joinder of the newly-sworn Charges and Specifications.

d. At arraignment Petty Officer Grijalva stood on his previous election of forum, and the Trial Management Order remained unchanged—trial is still scheduled for November 15, 2021.

6. Denial of reassignment. The next week after the second arraignment, MK3 Grijalva's command denied his request to be re-assigned duties at Naval Base Kitsap-Bangor, where he worked while under investigation from July 2019 to August 2020. (Encl. C.)

LAW

a. The President augments the Sixth Amendment's "speedy *trial*" guarantee by requiring the Government to bring a court-martial accused to "*trial*" within 120 days after preferral of charges.

"R.C.M. 707, Article 10, UCMJ, and the Sixth Amendment provide a cohesive and sometimes overlapping framework for the protection of an accused's speedy trial rights." *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016) (citing *United States v. Tippit*, 65 M.J. 69, 72-73 (C.A.A.F. 2007).

1. An accused's constitutional right to a speedy trial, which starts at preferral and extends until trial, is subject to the four-factor analysis established in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

An accused's Sixth Amendment speedy-trial protections are generally triggered at court-martial upon preferral. *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (citing *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992)). "[T]rial stops the speedy trial clock for Article 10, UCMJ, and the Sixth Amendment." *Wilder*, 75 M.J. at 138 (internal citations omitted).

Courts test for Sixth Amendment speedy-trial violations using the four-factor test set forth in *Barker v. Wingo*. *See id*. The four factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Danylo*, 73 M.J. at 186 (citations omitted).

2. Our courts blessed a seven-day lapse between a Day-119 arraignment and trial in *Doty*, but no case stands for the proposition that the Government may hold an arraignment, forestall the merits phase over the accused's speedy trial-demand for months after Day 120, and still satisfy R.C.M. 707.

Under R.C.M. 707(a), there is a bright-line rule: "The accused shall be brought to trial within 120 days after . . . [p]referral of charges." R.C.M. 707(a)(1). Failure to do so requires dismissal of the affected charges. R.C.M. 707. That Rule also provides, "The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904." R.C.M. 707(b)(1).

Thus, in the absence of a "sham," *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999), an arraignment that satisfies R.C.M. 904 "'stops' the speedy trial clock for purposes of R.C.M. 707." *Wilder*, 75 M.J. at 138 (citing *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014)).

In *Doty*, the Government succeeded in arraigning the appellant on Day 119, though it was not ready to begin trial on the merits until seven days later. 51 M.J. at 464. Thereafter, the Court of Appeals for the Armed Forces rejected the appellant's argument that trial did not begin until Day 126, rendering the Day-119 arraignment a "sham." Instead, recognizing week-long gap between arraignment and the merits phase of trial, the *Doty* court adopted the trial judge's reasoning that R.C.M. 707 allows for "a lapse in time between arraignment and trial" and held that the arraignment in that case was "properly conducted and not a 'sham.'" *Id.* at 465.

In the two decades since *Doty*, courts applying its reasoning have continued to bless arraignments occurring just before the 120-day clock followed by short lapses until trial. *See, e.g.*, *United States v. Gammon*, No. NMCCA 200800324, 2009 CCA LEXIS 108, at *6-8 (N-M Ct. Crim. App. Apr. 21, 2009) (arraignment occurring on Day 112 after excludable delay, followed by motions session eighteen days later and merits phase two weeks after that); *United States v. Simmons*, No. ARMY 20070486, 2009 CCA LEXIS 301, at *78 (A. Ct. Crim. App. Aug. 12, 2009) (arraignment occurring on Day 107 and trial four weeks later on Day 135).

No court, however, has held that a "stand-alone" arraignment excuses the Government from its fundamental, constitutional speedy-trial obligations, particularly in the face of an accused's demand for speedy trial—largely due to the military judge's "power and responsibility to force the Government to proceed with its case if justice so requires." *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003). The *Cooper* court, even after noting in dicta that the Government's duty under R.C.M. 707 is "no more and no less" than "to arraign an accused within 120 days of preferral of charges or pretrial confinement, or face dismissal of the charges," still reversed a lower court which had ignored that speedy trial protections must extend "far beyond arraignment." *Id.* (relying on Sixth Amendment for "baseline" standard supported, by 80-day limit in Speedy Trial Act, 18 U.S.C. § 3161, for "period between arraignment and trial").

3. Dismissal is the sole remedy for constitutional or regulatory speedy-violations, though dismissal with prejudice is not necessarily required under an R.C.M. 707.

"The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial." R.C.M. 707(d)(1).

Where the Government exceeds the R.C.M. 707 120-day speedy trial clock, "[d]ismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date." *Id.* The President lists the following factors when evaluating the remedy: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." *Id.*

a. R.C.M. 604(b) authorizes a convening authority to re-refer withdrawn Charges to another court-martial, but not the same court-martial.

The President directs, "Charges that have been withdrawn from a court-martial may be referred to *another* court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b) (emphasis added). Since Congress implemented our Uniform Code, military courts have abided by the statutory interpretation canon of *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). *See United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018); *United States v. Huff*, 19 C.M.R. 603, 608 (C.G.B.R. 1955). Thus, recognizing the President's limited express grant of re-referral powers, the Court of Appeals for the Armed Forces has interpreted the Rule to mean, "Unless the charges are withdrawn for an 'improper reason,' the convening authority may re-refer the withdrawn charges to a *different* court-martial." *United States v. Williams*, 55 M.J. 302, 304 (C.A.A.F. 2001) (emphasis added); *see also United States v. Shakur*, 77 M.J. 758, 762-63 (A. Ct. Crim. App. 2018) ("While the power to withdraw is unfettered, the ability to re-refer those charges is more limited.").

ARGUMENT

a. The Government's dilatory prosecution of this case, especially after referral of Charges, has violated MK3 Grijalva's right to a Speedy Trial under the Sixth Amendment.

The *Barker* factors weigh in favor of the Defense. First, charges were preferred on March 4, 2021, and trial is now set to begin November 15, 2021. Even allowing for twenty days of Defense-attributed delay before the Article 32 hearing, a trial date that reflects eight months to prosecute a relatively simple set of offenses—with minimal dispute as to the facts, in light of MK3 Grijalva's voluntary July 2019 admissions—is unreasonable. The Government can point to no good reason for any period of delay here, and MK3 Grijalva has unambiguously and repeatedly demanded a speedy trial since the June 17 referral. Finally, although it is not yet apparent whether the unreasonable delay has imperiled MK3 Grijalva's ability to any defense, certainly he has suffered due to the Government's slothful pace. He continues to commute to work 74 miles daily from the residence he maintained in August 2020 with the expectation that, a year after his CGIS admissions, it would not take over *another year* to prosecute him.

b. The Government's refusal of MK3 Grijalva's speedy trial demand, and the Military Judge's acquiescence, resulted in a trial date four months after arraignment, rendering that proceeding a "sham" as understood by *Doty* and exceeding R.C.M. 707 clock, which began at the March 4, 2021 preferral date.

The Charges before this Court are the ones preferred on March 4, 2021. The Second Charge Sheet is a nullity, given that the Convening Authority lacked the power to re-refer the original charges this same court-martial after withdrawal, R.C.M. 604(b), and MK3 Grijalva, after arraignment, never consented to the joinder of the "Additional Charges." (*See* Def. Mot. to Dismiss for Improper Joinder, Aug. 4, 2021.)

Nor did the Government treat the July 7, 2021, courtroom evolution as a proper arraignment. Aside from setting a trial date over four months in the future—over the Defense's objection—the Convening Authority withdrew the Charges nine days after the "arraignment" and then re-referred them to this same court-martial. The endless series of missteps continues to plague the Government's attempts to bring charges here: each of the remaining charges continues to suffer serial defects. (*See* Def. Mot. to Dismiss for Failure to State on Offense, Aug. 10, 2021; Def. Mot. for Approp. Relief from Article 32 & 34 Errors, Aug. 10, 2021; Def. Mot. to Dismiss for Multiplicity & Unreasonable Multiplication, July 7, 2021; Def. Mot. to Dismiss for Due Process Defects, July 7, 2021.)

As *Doty* envisioned the possibility of a "sham" arraignment in which no upcoming trial proceedings were contemplated, this case provides the exemplar: trial on the merits remains only a mirage, some distance in a hazy future. And the *Cooper* backstop that ensures R.C.M. 707 is not a mere administrative nicety—the trial judge's power to direct compliance with an accused's speedy trial demands—is absent here, as the Government has never made the barest showing for why it could not try MK3 Grijalva in July 2021.

c. Dismissal with prejudice is required for the Sixth Amendment violation and appropriate for the R.C.M. 707 violation given the penalty that MK3 Grijalva has already paid for discrete misconduct that is now over two-and-a-half years old.

Because the Government violated MK3 Grijalva's Sixth Amendment right to a speedy trial, the sole remedy is dismissal with prejudice. R.C.M. 707(d)(1).

As to the remedy for the R.C.M. 707 violation, dismissal with prejudice is also the correct relief. Without minimizing the impact upon [redacted] whose private images are at issue in this case, the offenses at issue here are relatively minor, non-contact matters that resulted in small financial value. The reasons for the violation are pure administrative oversight and lack of diligence: this investigation ended two years ago and very few facts remain in dispute. A re-prosecution of MK3 Grijalva only allows the Government another opportunity to bring the same additional overblown Title 18 charges it sought to shoehorn into the Article 32 hearing and then referred despite being unsworn. And the denial of speedy trial will continue to adversely impact MK3 Grijalva, who was transferred to Coast Guard Base Seattle in August 2020, and still must finance his own travel there from Bangor every work day.

RELIEF REQUESTED

This Court should bring a termination to these trial proceedings, needlessly-prolonged by a Government delay and multiple errors, and dismiss the Charges. Alternatively if this Court finds no speedy trial violation, it should direct trial to commence immediately.

EVIDENCE & ARGUMENT

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

A. CGIS report of Investigation, August 25, 2020
B. CGIS Interview of MK3 Grijalva, July 12, 2019
C. Declaration of MK3 Grijalva, August 11, 2021
D. Transmittal of CGIS Report of Investigation dtd August 28, 2020
E. Article 32 Waiver, April 28, 2021
F. Email thread regarding trial dates, June 2021

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

[redacted]
J. C. HENDERSON
CDR, JAGC, USN
Asst. Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

<table>
<tr><td>UNITED STATES

v.

MARK J. GRIJALVA
Machinery Technician Third Class
U.S. Coast Guard</td><td>GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS OR GRANT OTHER APPROPRIATE RELIEF
(SPEEDY TRIAL)

24 August 2021</td></tr>
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RELIEF SOUGHT

The government moves this Court to DENY the defense motion to dismiss for denial of speedy trial because: (1) the accused was brought to trial within the 120 day Speedy Trial Clock when he was arraigned on 16 July, in accordance with R.C.M. 707; and (2) the accused's Sixth Amendment rights have not been violated.

HEARING

The government respectfully requests oral argument.

BURDEN OF PERSUASION AND PROOF

According to R.C.M. 905(c)(2)(B), the government bears the burden of persuasion for this motion.

STATEMENT OF FACTS

1. Preferral of charges. 04 March 2021 the government preferred multiple charge for violations of the UCMJ against MK3 Mark J. Grijalva.
    a. On 17 March 2021, the convening authority designated a preliminary hearing officer and scheduled the preliminary hearing to take place on 15 April 2021 in Seattle, WA. **Exhibit 1.**

APPELLATE EXHIBIT 27
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b. On 19 March 2021, the parties and preliminary hearing officer held a scheduling phone call. During this call, the defense stated they would request a continuance.

2. Defense submits continuance of Article 32 preliminary hearing. On 29 March 2021, the defense submitted a request for delay of the preliminary hearing until 5 May 2021. In the request the defense stated: "The Defense accepts all delay against relevant speedy trial clocks arising from this request." The preliminary hearing officer granted the request and scheduled the preliminary hearing for 5 May 2021 in Seattle, WA. **Exhibits 2 and 3.**

   a. On 28 April 2021, MK3 Grijalva submitted an unconditional waiver of preliminary hearing to the convening authority. **Exhibit 4.**

   b. On 29 April 2021, the convening authority directed the preliminary hearing be conducted notwithstanding MK3 Grijalva's unconditional waiver. **Exhibit 5.**

3. Article 32 preliminary hearing. On 05 May 2021, the preliminary hearing officer conducted a preliminary hearing under Article 32, UCMJ.

   a. On 19 May 2021, the preliminary hearing officer completed his report and submitted it to the convening authority and all parties via email correspondence. **Exhibit 6.**

   b. On 14 June 2021, D13 Staff Judge Advocate provided advice under Article 34, UCMJ to RADM A. J. Vogt, Commander, USCG D13.

4. Referral of charges. On 17 June 2021, RADM A. J. Vogt referred charges.

   a. On 22 June 2021, trial counsel submitted a docketing request. **Exhibit 7.**

5. Speedy trial demand. On the afternoon of 23 June 2021, the defense filed a speedy trial demand, requesting trial for 6, 12, or 19 July. **Exhibit 8.**

a. On 24 June 2021, the Chief Trial Judge, CAPT Ted Fowles, responded to the defense filing by notifying all parties that CDR Paul Casey had been detailed as military judge and was prepared for trial to commence on 19 July. **Exhibit 9.**

6. R.C.M. 802. On 25 June 2021, the military judge, CDR Paul Casey, and the parties conducted an RCM 802. **Exhibits 10-11**. During that call, trial counsel confirmed that witnesses and trial counsel were unavailable for jury trial during the month of July. Trial counsel also noted that the parties expected there would be several issues to be litigated prior to trial given the complexity of the charges, and it would be prudent to allow time for the Court to issue rulings that would affect the evidence at trial. The military judge scheduled an arraignment for 7 July and directed the parties to work on a draft Trial Management Order.

    a. The court did not ask for specifics during the R.C.M. 802, however, prior to the scheduling call, trial counsel confirmed that government witness, Detective [redacted] of the Anaheim Police Department, was unavailable for the week of 12 July, specifically 13-16 July, because of his duties. In addition, government witness, [redacted] was unavailable on 16 July due to the funeral of an extended family member to take place on 17 July.

    b. Trial Counsel and Assistant Trial Counsel LCDR Taylor were unavailable during week of 19 July due to other trials scheduled to begin that week.

7. Drafting the Trial Management Order. On the morning of 29 June 2021, trial counsel sent a draft Trial Management Order (TMO) to Defense via email correspondence proposing

trial begin on 13 September 2021, in Seattle, with an Article 39(a) hearing for motions to occur on 11 August 2021. **Exhibit 12.**

a. Defense responded via email with a draft TMO setting trial for 23 July 2021, which had already been rejected by the military judge during the R.C.M. 802 call on 25 June. **Exhibit 13**. Defense counsel also informed that they were unavailable for both motions on 11 August and Trial during the week of 13 September, and then provided additional dates of unavailability for the months of August and September.

b. On Friday 2 July, 2021, after consulting with witnesses and special victims counsel, Trial counsel emailed the military judge proposing that trial commence on 27 September and attached another draft TMO. **Exhibit 14**. Subsequent to this email, defense counsel emailed trial counsel informing that the defense was unavailable during the week of 27 September. **Exhibit 15**. The parties exchanged emails and calls over the holiday weekend to determine another trial date.

c. On Tuesday 6 July, Trial counsel emailed the military judge and proposed another TMO based on weekend discussions with defense counsel, witness availability, SVCs' schedules, the Court's schedule, and all trial counsels' schedule. **Exhibit 16**. This resulted in the current TMO dates, with a trial date set for 15 November 2021.

d. Defense counsel objected and requested the earliest possible trial date, subject only to the weeks they were unavailable from August through November.

Notwithstanding defense counsel's objection, the court signed the TMO on 6 July 2021. **Exhibit 17.**

8. First Arraignment. On 7 July 2021, an arraignment took place with all parties participating remotely. During the arraignment, defense counsel filed multiple motions, including a motion for defective referral of the added charges.

9. Withdrawal and re-referral. On 16 July 2021, all charges were withdrawn by direction of RADM M. W. Bouboulis, Commander, USCG D13 to correct the alleged defective referral of additional charges that was noted by the defense. All charges, including the additional charges contemplated at the Article 32 hearing, were then preferred, re-referred, then served on the accused. RADM Bouboulis also granted excludable delay for the period between 7 July and 16 July. **Exhibit 18.**

    a. That same day, trial counsel emailed the military judge and defense counsel informing them of the re-referral. **Exhibit 19.**

    b. Additionally, trial counsel emailed defense counsel requesting if defense was available on Monday 19 July 2021 for an arraignment. **Exhibit 20.**

10. Accused asserts Article 35 rights. On 19 July, Defense counsel emailed trial counsel informing that the defense was not available for arraignment and that they would not be waiving the 5 day statutory waiting period. **Exhibit 20.**

    a. In the same email, Defense counsel informed that they were available to participate in an arraignment on Thursday 22 July.

    b. Trial counsel emailed defense counsel the same day requesting their availability for the same dates of trial, motions, etc., previously set out in the TMO signed by the military judge on 6 July. Defense counsel responded via email they were available, but maintained the same objections.

11. Court issues operative TMO. On 21 July 2021 the Court signed the operative TMO. **Exhibit 21**.

12. Second arraignment. On 22 July 2021, the accused was arraigned.

EVIDENCE

The Government offers the following exhibits:

Exhibit 1: Coast Guard District 13 memo appointing Article 32 Preliminary Hearing Officer

Exhibit 2: Defense request for delay of Article 32 hearing

Exhibit 3: Preliminary Hearing Officer memo scheduling Article 32

Exhibit 4: Accused's unconditional waiver of Preliminary Hearing

Exhibit 5: 28 April 2021 email correspondence between all parties and PHO

Exhibit 6: 19 May 2021 email correspondence from PHO to D13 Staff Judge Advocate

Exhibit 7: Docketing request

Exhibit 8: Defense speedy trial demand

Exhibit 9: 24 June 2021 email correspondence from Chief Trial Judge

Exhibit 10: 24 June 2021 email correspondence from Trial Counsel to Trial Judge

Exhibit 11: 25 June 2021 email correspondence from Trial Judge regarding R.C.M. 802

Exhibit 12: Draft Trial Management Order

Exhibit 13: 30 June 2021 email correspondence from Defense counsel to Trial Counsel

Exhibit 14: 2 July 2021 email correspondence from Trial Counsel to Trial Judge

Exhibit 15: 2-6 July 2021 email correspondence between Trial and Defense Counsel

Exhibit 16: 6 July 2021 email correspondence from Trial Counsel to Trial Judge

Exhibit 17: 6 July 2021 Trial Management Order

Exhibit 18: CGD13 first endorsement of Article 34 Advice dated 16 July 2021

Exhibit 19: 16 – 19 July 2021 email correspondence between Trial Counsel, Trial Judge and all parties

Exhibit 20: 16 – 19 July 2021 email correspondence between Trial and Defense Counsel

Exhibit 21: 21 July 2021 Trial Management Order

Exhibit 22: Subpoena for Detective [redacted]

LEGAL AUTHORITY

There are several sources of speedy trial protections that may apply in the course of a court-martial, and each of these sources have their own triggers. See *United States v. Wilder*, 75 M.J. 135 (C.A.A.F. 2016). "R.C.M. 707, Article 10, UCMJ and the Sixth Amendment provide a cohesive and sometimes overlapping framework for the protection of an accused's speedy trial rights." *Id.* (citing *United States v. Tippit*, 65 M.J. 69, 72-73 (C.A.A.F. 2007). In this case, the defense brought its motion pursuant to R.C.M. 707 and the Sixth Amendment.

R.C.M. 707(a) states that "[t]he accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry on active duty under R.C.M. 204." *Wilder*, 75 M.J. at 138. For the purposes of RCM 707, the accused is brought to trial when he is arraigned; the date of the triggering event does not count towards the 120 days, but the date of arraignment does count. R.C.M. 707(b)(1). Accordingly, "[a]rraignment 'stops' the speedy trial clock for purposes of R.C.M 707. *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014). If an accused is arraigned within 120 days of preferral, then R.C.M. 707 is not violated. *Wilder*, 75 M.J. at 138.

An analysis under the Sixth Amendment focuses on the date of preferral or the imposition of restraint or confinement, and analyzes an alleged violation based on the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Wilder*, 75 M.J. at 138. The four *Barker* factors are: "(1) the length of delay; (2) the reasons for the delay; (3) whether the appellant made a demand for speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker v. Wingo, supra*). The "length of delay is to some extent a triggering mechanism," and unless there is a period of delay that appears on its face to be unreasonable under the circumstances, "there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. Conversely, if the delay is unreasonable, then it must be balanced with the other three factors.

ARGUMENT

1. **There can be no R.C.M. 707 violation because the accused was arraigned before the 120 day clock expired.**

MK3 Grijalva was arraigned prior to the expiration of the 120 day Speedy Trial Clock. Charges were preferred on 4 March 2021 (120 days later would have been 2 July 2021). The defense requested a delay of twenty days before the Article 32 preliminary hearing, and the preliminary hearing officer granted the request and attributed the delay to the defense (2 July 2021 plus twenty days extended the Speedy Trial Clock to 22 July 2021). The government withdrew, re-preferred and referred, and served charges on the accused on 16 July. Prior to re-preferral/referral, the convening authority granted excludable delay from 7 July 2021 to 16 July 2021. R.C.M. 707(c)(1). This added nine more days, making the new Speedy Trial Clock expiration date 31 July 2021. The accused was arraigned on 22 July 2021—prior to expiration.

Even if the convening authority had not granted excludable delay from 7 to 16 July, there still would be no R.C.M. 707 violation. The government was prepared to arraign the accused on 19 July 2021, however, MK3 Grjilava asserted his Article 35, U.C.M.J. right to a five day statutory waiting period between service of charges and commencement of trial. This tolled the Speedy Trial Clock. "The purpose of Article 35 is to protect an accused from receiving such a speedy trial that the defense has inadequate opportunity to prepare . . . Thus, Article 35 provides a shield with which an accused may prevent too speedy a trial, not a sword with which an accused may attack the government for failing to bring him to trial sooner." *United States v. Lazukas*, 62 M.J. 39 (C.A.A.F. 2005) (citing *United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986)). Therefore, the time period between service of charges on 16 July and arraignment on 22 July 2021 should not be attributable to the government.

The defense motion ignores the fact that the government complied with the requirements of R.C.M. 707. Instead, the defense makes the obsolete argument that an arraignment completed before the expiration of the R.C.M. 707 Speedy Trial clock can somehow be a "sham" arraignment. See Defense Motion 8-9. This argument was explicitly rejected by the U.S. Court of Appeals for the Armed Forces over twenty years ago. *United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999).

Despite this fact, the defense attempts to resurrect this notion of a "sham" arraignment in in their motion by citing to three inapplicable cases that analyze Speedy Trial issues under Article 10, UCMJ, when the accused has been confined and is awaiting trial. See *United States v. Gammons*, No. NMCCA 200800324, 2009 CCA Lexis 108 (N-M Ct. Crim. App. Apr. 21, 2009); *United States v. Simmons*, No. ARMY 20070486, 2009 CCA LEXIS (A. Ct. Crim. App. Aug.

12, 2009); *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003). The defense fails to explain how these cases support their argument in this case as the accused has never been confined.

The evidence in this case is clear that the "bright line rule" was followed. The accused was arraigned before the expiration of the 120 day Speedy Trial Clock and therefore R.C.M. 707 was not violated. *U.S. v. Leahr*, 73 M.J. at 367.

2. **Applying the *Barker* factors, the Accused's Sixth Amendment rights have not been violated.**

Applying the *Barker* factors to this case, the record shows that the length of delay was not unreasonable; the delay was for a legitimate purpose (and at least in part due to defense counsels' schedule) and that any prejudice to the accused is minimal. *United States v. Grom*, 21 M.J. 53, 58 (C.M.R. 1985).

a. **The length of delay.**

The first factor in the *Barker* test is to review the length of delay. For pretrial delay, there is no bright-line rule for the amount of delay that is considered reasonable. The "[l]ength of delay that will provoke [a constitutional] inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker,* 407 U.S. at 530. It is noteworthy that the accused in *Barker* experienced a delay of over five years, ten months of which involved confinement, and this was not an impermissible abrogation of his constitutional right to a speedy trial. In any event, and as explained below, any delays to which MK3 Grijalva has been subjected certainly do not rise to the level of Constitutional import.

Again, similar to the analysis under R.C.M. 707, the triggering event in this case is the preferral on 4 March. The accused will go to trial on 15 November. Eight months from preferral to trial in a general court martial involving complex charges that require civilians and both state and federal investigators as witnesses is not, on its face, unreasonable. Recognizing that delays of a lesser amount of time have caused federal courts to inquire into the remaining *Barker* factors, an inquiry into the other factors in this case only supports the conclusion that the delay was reasonable. *Grom*, 21 M.J. at 56.

b. **Reasons for delay**.

A review of the record in this case reveals that any delay in bringing the accused to trial was not due to "intentional dilatory conduct" by the government. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995) (overturned on other grounds). The accused was lawfully arraigned according the requirements of R.C.M. 707. Trial could not take place in July because the Court, witnesses, and trial counsel were not available to participate in trial. So long as motions were filed and litigated with enough time for the Court to issue rulings and the parties to prepare their cases accordingly, the government was prepared to schedule trial for as early as 13 September. However, defense counsel were unavailable during this time. Additional attempts by the government to schedule trial before November were similarly rebuffed. Accordingly, this factor should not weigh in the accused's favor. "An accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for the same delay." *United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990).

c. **Demand for Speedy Trial**

The accused demanded speedy trial on 23 June 2021.

d. **Prejudice to the accused**

Courts consider three "similar interests" relevant to the prejudice analysis: (1) prevention of oppressive incarceration; (2) minimization of anxiety and concern of the accused awaiting the outcome of their case; and (3) limitation of the possibility that the accused's defenses might be impaired." *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (citing *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006). "Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 654 (1992).

As noted in the defense motion, they are unable to cite any evidence that a delay in this case has impaired MK3 Grijalva's defense. See Def. Motion at 8. Moreover, MK3 Grijalva is not, nor has he ever been, subject to pre-trial confinement; nor is he even restrained to a specific location.

Instead, the prejudice that he claims warrants dismissal of the charges is that he must commute from his residence in Bangor to Coast Guard Base Seattle for work. Any stress, anxiety, or financial hardship associated with this commute does not rise to the level of actionable prejudice contemplated by the Sixth Amendment. Especially since there is a Mass Transit Benefits Program available to MK3 Grijalva to help defray the costs of travel to and from work. *See* (https://www.dcms.uscg.mil/Our-Organization/Director-of-Operational-Logistics-DOL/Bases/Base-Seattle/Mass-Transit/). Therefore, this factor is neither strong nor conclusive and should be weighed only slightly, if at all, in MK3 Grijalva's favor.

3. Trial should begin on the date set by the Court: 15 November.

There has been no violation of R.C.M. 707 or MK3 Grijalva's Sixth Amendment right to a speedy trial in this case. The defense motion may be styled as a speedy trial motion, however, it is really a scheduling motion requesting that trial be moved from the date set by the Court to a date of the defense's choosing. The Court should not move the trial date. All parties are available on

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15 November. The government's witnesses have already been notified of the trial date and have been relying on the date since the Court issued its 7 July TMO. At least one witness has already been issued a subpoena to testify in order to hold the date open from their other duties. **Exhibit 22**. Keeping the current trial date in place will allow this Court to issue thoughtful rulings regarding the fifteen motions to be litigated with enough time for each party to prepare for trial. The defense has presented no reason, supported by law or fact, that the trial date should be changed.

CONCLUSION

The government respectfully requests the Court DENY the defense motion.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 24 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
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LCDR Terrence Thornburgh, USCG
Special Victims Counsel
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LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Objection to Joinder)** **4 AUG 21**

MOTION

Pursuant to R.C.M. 905(b)(1) and 906(b), the Defense objects to the joinder of the sole Specification under what the Government now styles as "Charge I" and Specifications 6 through 8 of "Charge III." R.C.M. 601(e)(2). The Military Judge arraigned MK3 Grijalva at this court-martial on July 7, 2021. Now, upon timely objection, this Court must rule that it has no authority to hear Charges and Specifications that were preferred only on July 16 and were thus not properly before the Court at the time of arraignment.

BURDEN

The Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. The Military Judge arraigned Petty Officer Grijalva at this court-martial on July 7, 2021.

a. Although MK3 Grijalva had demanded speedy trial, no trial began on that day, Day 104 of the Government's R.C.M. 707 120-day speedy trial clock.

b. Before the Court at arraignment were what the Convening Authority had purported to refer as "Additional Charges" under Article 107, Uniform Code of Military Justice (UCMJ), 10

U.S.C. § 907 (2018), supported by a sole Specification, and Article 134, UCMJ, 10 U.S.C. § 934 (2018), supported by three Specifications. (Charge Sheet at 2, 5, June 17, 2021.)

c. The only Charges that had been properly sworn by the time of that July 7 arraignment were what was then Charge I, alleging two specified violations of Article 131b, UCMJ, and what was then Charge II, alleging five specified violations of Article 134, UCMJ.[1] (*Id.* at 3, 4.)

2. Prior to entering his Not Guilty pleas and electing a forum of members with enlisted representation, the Defense timely filed several motions.

a. One of the Defense motions was a motion to dismiss the unsworn "Additional" Charges and Specifications. (Def. Mot. to Dismiss for Defective Referral, July 7, 2021.)

b. In response, the Convening Authority "withdrew" all the Charges, but did not dismiss them. (Encl. A.)

c. On July 16, 2021, the same officer who preferred the seven previously-sworn Specifications—the ones this Court had arraigned MK3 Grijalva upon—again swore to those Specifications, now along with the four previously-defective Specifications. (Charge Sheet at 1, July 16, 2021.)

d. That same day, the Convening Authority referred the four previously-defective Specifications to this same court-martial, to be tried alongside the seven Specifications this Court had already arraigned MK3 Grijalva upon.

3. Neither the Convening Authority nor the Military Judge obtained MK3 Grijalva's consent to be tried on additional charges after arraignment.

[1] Aside from changes to location data in the jurisdictional data, these Charges and Specifications are identical to the Charges that were referred to this Court styled as Charge II, Specifications 1 and 2, and Charge III, Specifications 1-5, respectively.

LAW

The Rule on the joinder of charges at court-martial is clear:

> In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. *After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.*

R.C.M. 601(e)(2) (emphasis added). Reviewing the history and purpose of this Rule thirty years ago, the Navy-Marine Corps service court explained that the President's limit on joinder works in conjunction with other referral rules, including the R.C.M. 604 limits on withdrawal of charges:

> As to joinder of new charges, R.C.M. 601(e)(2), 603 and 604 logically complement each other. Read in tandem they each have life. R.C.M. 102(b). Arraignment cuts off the addition of new charges over the accused's objection (*Davis*), absent good cause, e.g., the arising of a significant new charge coupled with a referral of all offenses to a higher level of court-martial (*Wells*). R.C.M. 604 should not permit by indirection that which is directly prohibited under R.C.M. 601(e)(2) or 603. Consequently, a higher standard than mere adherence to a permissive joinder policy is required to justify withdrawal after arraignment with a view toward rereferral.

United States v. Koke, 32 M.J. 876, 881 (N-M.C.M.R. 1991), *aff'd*, 34 M.J. 313 (C.M.A. 1992).

In *Koke*, the convening authority withdrew unrelated involuntary manslaughter and aggravated assault charges after arraignment and re-opened the Article 32 investigation to obtain sworn testimony in support of the aggravated assault charge. On appeal, the service court held that this post-arraignment withdrawal was improper, as it was a functional end-run around joinder limits: "When measured in best light for the convening authority, the withdrawal in this case was error. The convening authority, in effect, merely added a charge after arraignment." 32 M.J. at 882 (citing *United States v. Fleming*, 18 C.M.A. 524, 529 (1960)). Finding no prejudice because the trial judge had dismissed the improperly-joined aggravated assault charges anyway, the court explained that its error finding was rooted in the principle underlying the good-cause requirement for withdrawal of charges: "once the convening authority commits a case to a court-martial, he should not thereafter interfere with the judicial process until the case is properly returned to him for review." *Id.* at 880 (citations omitted).

ARGUMENT

The Government has recreated the *Koke* withdrawal-and-joinder blunder of three decades ago. There is no daylight between that case and this one—indeed, the facts here are even more limiting on convening authority discretion. The four Specifications that were unsworn at that the time of the original arraignment do not arise from new or different events, unlike the aggravated assault allegations in *Koke*. Indeed, in that case, those allegations were so distinct they had been subject to a defense motion to sever. *Koke*, 32 M.J. at 878 (noting also that trial judge dismissed later dismissed those allegations before trial on involuntary manslaughter charge). Here, unlike *Koke*, every one of the new, joined Specifications alleges a crime that arises from the same set of events covered by the seven previously-sworn Specifications.

Thus, the same-day withdrawal, "preferral," and immediate re-referral of all the Charges is a transparent attempt to circumvent joinder limits. If permitted, R.C.M. 601(e)(2) would in effect become a dead letter. Just like in *Koke*, the Convening Authority here "merely added [two] charge[s] after arraignment." Despite the Convening Authority's otherwise broad authority with respect to withdrawal, "R.C.M. 604 should not permit by indirection that which is directly prohibited under R.C.M. 601(e)(2)." *Id.* at 881. Because MK3 Grijalva never consented to joinder of these new Specifications, this Court must reject this obvious error.

RELIEF REQUESTED

Recognizing MK3 Grijalva's objection, this Court should declare that the new Charges and Specifications may not be joined to the originally-sworn Charges and Specifications upon which MK3 Grijalva was already arraigned.

EVIDENCE & ORAL ARGUMENT

The Defense attaches the following enclosures in support of this Motion:

A. Trial Counsel email of 16 Jul 21

Unless the Government concedes the Motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE REPLY TO GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Objection to Joinder)** **25 AUG 21**

Confronted with a Defense objection to post-arraignment joinder of previously-unsworn "Additional Charges" to the sworn charges at the same court-martial, the Government opens its Response by proposing that perhaps these charges are not "new." This long-shot argument ignores the undisputed fact that the "Additional Charges" were never properly before this court-martial when they were unsworn. The Convening Authority's action upon the Defense's timely objection—based on his own Staff Judge Advocate's concession that it was error to refer unsworn charges—answers that issue.

After this failed introductory argument, the Government's Response rests entirely on pleading a benign purpose for attempting to skirt joinder limits with a same-day withdrawal, preferral, and re-referral: *the defective original referral needed repair.* "If curing this potential error makes the charges new or different, and subject to the joinder rules, it is only error if there is material prejudice to the Accused." (Gov. Resp. at 5.)

By seeking this Article 59(a)-style prejudice evaluation at the trial level, the Government invites the same gaffes that resulted in *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017). There, the Court of Appeals for the Armed Forces reversed the Coast Guard Court of Criminal Appeals and set aside a conviction and sentence for misapplication of the rule limiting post-arraignment amendments to charges. Rejecting the incorrect analyses of the trial court and lower court, each of which tested for prejudicial "surprise" to the defense, our highest military court held:

> The plain language of R.C.M. 603(d) does not discuss prejudice. Rather, if a change is "major," it provides that such change cannot be made over defense objection unless the charge is "preferred anew." . . . To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled: absent "preferr[al] anew" and a second referral there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012), is not, in fact, implicated.

Reese, 76 M.J. at 301-02 (citations omitted).

Now, four years after *Reese* settled the law, the Government badly misses the mark by citing to *Howard*, *Koke*, and *Rose*—all appellate cases that turn on Article 59(a) prejudice. (*See* Gov. Resp. at 3-4.) Just like R.C.M. 603(d), the binding Rule here "does not discuss prejudice," and no "separate showing of prejudice" is required. *Reese*, 76 M.J. at 301, 302. Rather, this Court need only apply the plain language of R.C.M. 601(d): "After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused."

Because this Court may not walk headlong into trial error, regardless of how much the Government asks it to, this Court may not permit the joinder of these "Additional Charges."

[redacted]
B. D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Objection to Joinder):** 24 August 2021

RELIEF SOUGHT

Pursuant to RCM 907(b)(3)(A), the Government moves for this Court to DENY the Defense's Motion for Appropriate Relief (Objection to Joinder).

SUMMARY

The Convening Authority referred charges against the Accused on June 17, 2021. The Accused was arraigned on those charges and specifications. Upon a Defense Motion, and to cure a potential error in preferral, the Convening Authority withdrew all charges and specifications on July 16, 2021. The same day, the Convening Authority re-referred the same charges and specifications after correcting the potential error in prefferal, and the accused was arraigned six days later. The Defense claims the re-referral of the same charges and specifications is impermissible joinder. However, no new or additional charges were joined to this court martial after arraignment. There is no joinder.

HEARING

The government respectfully request oral argument.

BURDEN OF PROOF

As the moving party, the Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. The Convening Authority referred charges to this court-martial on June 17, 2021. The charges and specifications in the original DD Form 458 [hereinafter "Original Charge Sheet"] contained "Additional Charges" consisting of one specification of a violation of Article 107, UCMJ, and three specifications of a violation of Article 134, UCMJ. These "Additional Charges" were first considered by a Preliminary Hearing Officer at the Article 32 Hearing on May 5, 2021.

2. The Accused was arraigned on July 7, 2021. The Defense filed a Motion to Dismiss for Defective Referral of the "Additional Charges" on the basis they were unsworn at the arraignment.

3. After considering the Defense Motion to Dismiss for Defective Referral of the "Additional Charges" on the basis that they were unsworn, and upon receiving advice from his Staff Judge Advocate, the Convening Authority withdrew all charges and specification referred to this court-martial.

4. On July 16, 2021, Trial Counsel presented a clean charge sheet containing the same charges and specifications at the Accused's first arraignment, and presented it to an accuser to be properly sworn and re-referred.

5. Later on July 16, 2021, LCDR [redacted] a person with personal knowledge of the matters set forth in the charge sheet of July 16, 2021, swore under oath that the matters set forth in the

charges and specifications on the charge sheet were true to the best of his knowledge and belief. LCDR [redacted] signed Block 11.a. of a DD Form 458 before LCDR [redacted] a commissioned officer of the armed forces who is authorized to administer oaths. Charges were preferred against the Accused.

6. The Convening Authority found a new preliminary hearing was not necessary because all charges and specifications preferred on July 16, 2021 were adequately considered at the preliminarily hearing on May 5, 2021 in accordance with R.C.M. 603.

7. The charges were referred by the Convening Authority on July 16, 2021 to this court-martial and the Accused was re-arraigned on July 22, 2021.

8. No new or additional charges were added after the Accused's first arraignment on July 7, 2021 or the Accused's second arraignment on July 22, 2021.

LEGAL AUTHORITY

The Rule on the joinder of charges at court-martial states, "two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offense or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused." R.C.M. 601(e)(2).

The protection in R.C.M. 601(e)(2) against post-arraignment referral of additional charges without consent of an accused, although important, is not a statutory or constitutional right. Defects in applying the rule, which have been tested for prejudice under Article 59(a), UCMJ, have not been treated as jurisdictional error. *United States v. Howard*, 47 M.J. 381, 383 (C.A.A.F. 1998). The purpose of R.C.M. 601(e)(2) is simply to "create[ ] a certain stability to the trial process and firm[ ] the matters against which an accused must defend. *United States v. Koke*, 32 M.J. 876, 881 (N.M.C.M.R. 1991), *aff'd* 35 M.J. 313 (C.M.A. 1992).

Additional charges only create a joinder issue if they are new. In *United States v. Rose*, 20014 WL 843495 (A.F. Ct. Crim. App. 2014), the Accused was arraigned and later the government corrected the charges and specifications by adding the Article 134 terminal element, which they had omitted in the first arraignment. The court found that while the Charges were not different, they were "new". The court ultimately found that the addition of these "new" charges was error but tested for material prejudice to the appellant's substantive rights. The court followed *Koke*, which stated the purpose of R.C.M. 601(e)(2) is to provide stability and allow the accused adequate preparation, and found the Accused was aware of the matters he had to defend himself against. While it was error for the Government to try the appellant for the "new" charge without his consent, there was no material prejudice. *Rose*, 2014 WL 843495, at *3-4. Similarly, in *Howard*, the Accused was arraigned on one charge of wrongful use of methamphetamine. One month later, a second charge of wrongful use of methamphetamine was referred to the same court-martial. The Court found that the addition of the second charge was not prejudicial to the Accused in part because the Accused was aware of the second positive urinalysis result even before he was arraigned on the original wrongful use charge. *Howard*, 47 M.J. at 383.

Finally, when withdrawal of charges is for a proper purpose, as it was in this case, and additional charges are added, dismissal of the withdrawn charges eliminates a joinder error. *See*

United States v. Leahr, 73 M.J. 364, 370 (C.A.A.F. 2014). Severance of the offenses may also be ordered, "but only to prevent manifest injustice." R.C.M. 906(b)(10).

ARGUMENT

The Rule on Joinder only applies if new charges are added after arraignment. No new charges were added to this court-martial after the arraignment of the Accused. The Accused has been arraigned on the same changes and specifications twice. The court in *Rose* found the addition of the terminal element to an Article 134 offense after arraignment made the charges "new" but not different. This created a joinder issue. That is not the case here. The only difference between the charges at issue from first arraignment to the second arraignment is the curing of a potential procedural error. This does not make those charges new. It does not make those charges different. There is no joinder.

The Defense argues that the same day withdrawal, preferral, and re-referral of all Charges and Specifications is a, "transparent attempt to circumvent joinder limits." This was not the Convening Authority's intent. In fact the withdrawal, preferral, and re-referral was to cure a potential error in the first preferral. If curing this potential error makes the charges new or different, and subject to the joinder rules, it is only error if there is material prejudice to the Accused. The purpose of the rule is to ensure the Accused is aware of the matters to defend himself against. Similar to *Howard* and *Rose,* where the Accused was aware of the evidence and general nature of the charges prior to arraignment, but a new charge was added post arraignment, the same is true here if curing a procedural error makes the charges new. There is no material prejudice to the Accused when these charges have been part of this court-martial from the start. No new evidence has been introduced and the same Charges and Specifications remain. The Accused has been on notice and aware of the Charges to defend himself against prior to the first arraignment. With no material prejudice to the Accused the error is harmless.

CONCLUSION

The Government respectfully requests the Court DENY the Defense Motion to prohibit properly referred Charges and Specifications at this court-martial. If however, this court finds there was joinder without consent of the Accused, the error did not unfairly prejudice the Accused and is harmless error. Out of an abundance of caution and should the court wish to perfect the record, dismissal of the previously withdrawn charges following the model set forth in *Leahr,* and re-arraignment of the Accused may serve as an option.

/s/ Matthew D. Pekoske
MATTHEW D. PEKOSKE
LCDR, USCG
Asst. Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the Defense Counsel via electronic mail on 24 August 2021.

/s/ Matthew D. Pekoske
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. COAST GUARD	**GOVERNMENT RESPONSE TO DEFENSE NOTICE AND MOTION IN LIMINE (Marital Privilege)** 25 August 2021

RELIEF SOUGHT

Pursuant to MRE 504(b), the Defense provided notice of MK3 Grijalva's claim of privilege as to any confidential communications he made to his [redacted] The Government does not oppose the motion, and does not plan to introduce any confidential communications between them. In an abundance of caution, the Government request a ruling of admissibility regarding [redacted] testimony in regards to her observations and conversations with other witnesses.

HEARING

The Government respectfully requests oral argument.

BURDEN

As the proponent of the evidence, the Government bears the burden of proof and persuasion by a preponderance of the evidence. R.C.M. 905(c).

STATEMENT OF FACTS

1. On March 5, 2019, [redacted] contacted Mr. [redacted] regarding messages found on KM3 Grijalva's Apple iWatch. She indicated she found messages to three different phone numbers depicting nude photos of [redacted] At the time [redacted] was Mr. [redacted]

2. [redacted] provided information regarding the internet service provider and confirmed the cell phone of MK3 Grijalva.

3. [redacted] provided a statement to Special Agent [redacted] In the statement she stated that intimate images of [redacted] were on MK3 Grijalva's watch. She provided 12 videos she had taken to show the contents of the watch. She confirmed that MK3 Grijalva had a USAA and paypal account. **Exhibit 1**.

EVIDENCE

Exhibit 1: CGIS ROI summary of interview of [redacted]

LEGAL AUTHORITY

Military Rules of Evidence 504(b) states that "A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were married and not separated." In *United States v. Durbin*, 68 M.J. 271 (C.A.A.F. 2010), the Court held that testimony from a wife regarding her observation of child pornography on her husband's computer was not a privileged communication.

ARGUMENT

The Government does not oppose the defense motion, and does not plan to introduce statements between [redacted] and MK3 Grijalva. In their motion, the Defense only references one incident, when [redacted] confronts MK3 Grijalva, that qualifies as marital privilege. While the Government does into to call [redacted] as a witness to testify to her observations and to provide some foundation testimony for certain evidence, there is no intention to illicit testimony regarding her confrontation of MK3 Grijalva. Based on the limited nature of the defense motion, the Government does not oppose, but request that any further objections to her testimony based on marital privilege be addressed during the next motions hearing.

CONCLUSION

The Government does not oppose the Defense motion. The Government request that the Court's ruling apply narrowly to the single interaction described in the Defense's motion.

/S/ Jon T. Taylor
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LCDR, JAGC, USN
Assistant Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 25 August 2021.

/s/ Case A. Colaw
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. MARK J. GRIJALVA MK3/E-4 U.S. COAST GUARD	DEFENSE MOTION TO DISMISS (Failure to State Offenses) 10 AUG 21

MOTION

Pursuant to R.C.M. 307(c)(3) and 907(b)(2)(E), the Defense moves to dismiss Specifications 4 and 5 under Charge II for failure to state an offense.

SUMMARY

The Government alleges that MK3 Grijalva broadcast a visual image of [redacted] charging him in a specification that lists nearly every element of Article 117a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 917a (2018). But in Specifications 4 and 5 of Charge II, the Government relieves itself of the final Article 117a element, substituting instead the terminal clause 2 element of Article 134, UCMJ, in Specification 4 and Washington State Law's proof elements in Specification 5. Because Congress has made this conduct punishable exclusively under Article 117a, the preemption doctrine forecloses prosecution under Article 134, UCMJ, and these Specifications allege no lawful offense—along with other defects in Specification 5.

FACTS

1. In Specification 4 of Charge II, MK3 Grijavla is charged with violating Article 134, UCMJ, in that he:

> . . . on active duty, did, at Naval Base Kitsap Bremerton, on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual

image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that visual image was made under circumstances in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and when he knew ore reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

(Charge Sheet at 4, June 17, 2021).

2. In Specification 5 of Charge II, MK3 Grijalva is charged with violating Article 134, UCMJ, in that he:

> on active duty, did, at or near Bremerton, Washington, on one or more occasions, between on or about 1 February 2019 to on or about 31 March 2019, violate Title 9A Washington Criminal Code, Chapter 9A.86, Disclosing Intimate Images, by knowingly disclosing an intimate image of [redacted] who is identifiable from the visual image, which was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private, which MK3 Grijalva knew or should have known that the depicted person, [redacted] had not consented to the disclosure, and MK3 Grijalva knew or reasonably should have known that the disclosure would cause harm to the depicted person, [redacted] an offense not capital.

2. In December 2017, Congress enacted and the President later signed into law, Article 117a, UCMJ, criminalizing the wrongful broadcast or distribution of visual images in a statute reading:

> (a) Any person subject to this chapter [10 USCS §§ 801 et seq.]—
>
> (1) who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who—
>
> (A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created;
>
> (B) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself, or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and
>
> (C) does not explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;
>
> (2) who knows or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in

which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(3) who knows or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely—

(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or

(B) to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(4) whose conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment,

is guilty of wrongful distribution of intimate visual images or visual images of sexually explicit conduct and shall be punished as a court-martial may direct.

10 U.S.C. § 917a (2018).

LAW

a. The President explicitly denies Convening Authorities the ability to refer charges under Article 134 when Congress has already addressed the same conduct under a different provision of the Code.

The preemption doctrine prohibits the Government from using Article 134 to prosecute conduct already covered under Articles 80 through 132 of the Code. *United States v. Guardado*, 77 M.J. 90, 95 (C.A.A.F. 2017) (citing Manual for Courts-Martial (MCM), United States, Part IV, ¶ 60.c.(5)(a) (2012 ed.)).[1] This doctrine codifies a longstanding principle of military justice: "Where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." *United States v. McGuinness*, 35 M.J.

[1] The doctrine now appears in ¶ 91.c.(5)(a) of the 2019 edition of the Manual.

149, 152 (C.M.A. 1992) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). "Congress has 'occupied the field' if it 'intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way.'" *Id.* (quoting *United States v. Maze*, 21 C.M.A. 260, 262 (C.M.A. 1972)).

This Court applies a two-part test to determine whether the preemption applies. First, Congress must have "intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code," and, second, the specification must be "composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles." *Id.* at 151-52 (quoting *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978)).

Under this analysis, the Army lacked authority to charge reckless driving under Article 134 because Congress preempted that offense through Article 111. *United States v. Brooks*, 64 M.J. 587, 593 (A. Ct. Crim. App. 2006). Likewise, because Congress had, "in Article 121, covered the entire field of criminal conversion for military law," an Article 134 "wrongful taking" conviction with no specific-intent element was preempted. *United States v. Norris*, 8 C.M.R. 36, 39-40 (C.M.A. 1953); *but see United States v. Tenney*, 60 M.J. 838, 842 (N-M. Ct. Crim. App. (2005) ("We have found no indication, and the appellant has cited us to no authority, that Congress intended by the creation of Article 121, UCMJ, to cover the entire field of larceny.").

b. Because a preempted specification fails to allege a necessary element, it fails to state an offense and must be dismissed.

The *Guardado* court reiterated the dangers of preempted Article 134 specifications, albeit in a case involving novel Article 134 specifications that alleged sexually explicit conversations with minors that did not contain all the elements of another Article 134 offense, Indecent Language. *Guardado*, 77 M.J. at 95 (citing MCM, pt. IV, ¶ 89.b (2012 ed.)). That court observed:

> By "using 'novel' specifications, the Government relieved itself of the responsibility of proving the second, and arguably most important, element of indecent language—that Appellant's language rose to the level of indecency. In deleting a vital element, the Government, in effect, improperly reduced its burden of proof. Such an outcome illustrates the reason for the limits of pt. IV, ¶ 60.c.(6)(c), and cannot be countenanced.

Id. at 96.[2]

"Failure to allege an essential fact renders a specification a legal nullity." *United States v. Longmire*, 39 M.J. 536, 538 (A.C.M.R. 1994) (citing *United States v. Jones*, 50 C.M.R. 724, 726 (A.C.M.R. 1975)).

c. In Article 134, Congress criminalizes commission of "crimes and offenses not capital," proof of which has two elements.

For the purpose of Clause 3 Article 134 offenses, the Government must prove

> (a) That the accused did or failed to do certain acts that satisfy each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law); and
>
> (b) That the offense charged was a crime or offense not capital.

10 U.S.C. § 834 (2019); Manual for Courts Martial, United States (2019 ed.), part IV, ¶ 91.b.(3).

ARGUMENT

a. Because Congress "occupied the field" of wrongful broadcast of digital images in the military when it enacted Article 117a, UCMJ, the Government is preempted from charging a wrongful-broadcast-like offense under Article 134, with a residuum of elements that reduces the burden to prove "a reasonably direct and palpable connection to a military mission or military environment."

Both parts of the preemption test are met here with respect to Charge II, Specification 4.

First, that novel Article 134 offense is composed of a "residuum of elements" of Article 117a,

[2] This provision was moved to ¶ 60.c.(6)(a) of the 2016 edition, and now appears in ¶ 91.c.(6)(a) in the 2019 edition of the Manual.

with the fourth and final element—"a reasonably direct and palpable connection to a military mission or military environment"—replaced with the terminal element of Article 134, clause 2.

A side by side comparison of the elements of 117a and the Charged offense makes this clear:

Elements of Article 117a	Charged Offense
(1) who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who—	"knowingly, wrongfully . . . broadcast an intimate visual image of [redacted]
(A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created;	(Omitted)
(B) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself, or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and	"who is identifiable from the visual image or from information displayed in connection with the visual image"
(C) does not explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;	"without the explicit consent of [redacted]
(2) who knows or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;	"when he knew or reasonable should have known that the visual image was made under circumstances in which [redacted] retained a reasonable expectation of privacy regarding any broadcast"
(3) who knows or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely—	"when he knew or reasonably should have known that the broadcast was likely"
(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or	"the cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships"

(B) to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and	
(4) whose conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment	*Replaced with "an act which is of a nature to bring discredit upon the armed forces."*

Second, given the specificity of the statutory elements, there is little doubt that Congress intended to limit prosecution for wrongful broadcast or distribution of intimate visual images to Article 117a. Indeed, the legislative history shows that Congress had a particular interest in limiting such prosecutions to situations involving a "reasonably direct and palpable connection to a military mission or military environment." Article 117a was added to the Code as part of the National Defense Authorization Act for Fiscal Year 2018, 132 Stat. 1283 § 533. In the original drafts of that bill, as introduced in the House and Senate, the proposed addition to the Code omitted this element. *See* H.R. 2810 § 523 (proposing a version of Article 117a that omitted the "reasonably direct and palpable connection" element); S.R. § 1519 § 532 (same). While the bill was in Conference, however, the Department of Justice weighed in with a letter to the Chairmen of the House and Senate Committees on the Armed Services. The Justice Department argued that to "avoid First Amendment concerns, we recommend limiting section 532 to the distribution of visual images 'with a reasonably direct and palbable connection' to 'the military or military environment.'" Letter from the Office of the Assistant Attorney General (November 8, 2017), https://www.justice.gov/ ola/ page/file /1010611/download (quoting *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008)). Following that letter, Congress added "reasonably direct and palpable connection" element to the final version of the bill. H.R. Rep. 115-404 at 810 (2017).

Because this Specification is composed of a residuum of elements of Article 117a, and because Congress intended to occupy the field, this charging decision falls squarely under the preemption doctrine. *See* MCM, Pt. IV, ¶ 91.c.(5)(a). Indeed, it is the very reason the doctrine exists. *See McGuinness*, 35 M.J. at 152.

b. Charge II, Specification 5 fails is preempted because it attempts to incorporate a Washington State law to again attempt what the Government may not do in Specification 4.

For essentially the same reasons, the Government is preempted from charging a version of Article 117a by citing to Washington State law, as they have done in Specification 5. The Court of Appeals for the Armed Forces has observed that State law offenses charged under Article 134 are preempted when applying "the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy the field." *United States v. Robbins*, 52 M.J. 159, 161-62 (C.A.A.F. 1999) (quoting *Lewis v. United States*, 523 U.S. 155, 164 (1999)).

Congress has spoken: unauthorized distribution of a private intimate image violates the UCMJ *only* when there is a "reasonably direct and palpable connection to a military mission or military environment." The Government, in attempting to punish MK3 Grijalva for distribution of intimate images without having to establish Congress's elements, has reduced its burden of proof in a way that raises Constitutional concerns Congress specifically intended to avoid.

c. In its naked allegation of a violation of Washington State law, Specification 5 also fails each of its Article 134, clause 3 "offense not capital" requirements.

Here, in charging MK3 Grijalva with violating the Washington Criminal Code, the Government has not even alleged that MK3 Grijalva violated a "federal statute." To the extent that such a violation is implied, its absence here robs the Members panel of the ability to make findings on whether any alleged conduct violated a specific federal statute, as required in the first element of the Article 134 offense. Even if the Government could somehow argue that the Specification implicated the Assimilative Crimes Act, 18 U.S.C. § 13, the specification omits the first element of such an offense—that the conduct occurred on exclusive federal jurisdiction. Finally, the Specification fails to allege that any violation was a "crime or offense not capital."

RELIEF REQUESTED

Because no trial by court-martial is possible on a specification that states no lawful offense, this Court has no discretion other than to dismiss Specifications 4 and 5 of Charge II.

ORAL ARGUMENT

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

[redacted]
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Asst. Detailed Defense Counsel

APPELLATE EXHIBIT 35
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (FAILURE TO STATE OFFENSES)** 25 August 2021

RELIEF SOUGHT

The government requests this Court to deny the defense motion because Charge III, Specifications 4 and 5 each state an offense under the Uniform Code of Military Justice and are not preempted.[1]

HEARING

The government respectfully requests oral argument.

BURDEN OF PERSUASION AND PROOF

As the moving party, the defense bears the burden of proof and of persuasion. R.C.M. 905(c).

STATEMENT OF FACTS

1. On the night of 1 February, 2019, MK3 Mark Grijalva of the Marine Force Protection Unit in Bangor, Washington, hacked into the Snapchat social media account of his civilian friend, [redacted] MK3 Grijalva was searching for nude or explicit photographs [redacted] took of herself for her boyfriend, civilian [redacted] (also MK3 Grijalva's friend).

1 The defense refers to these specifications as 4 and 5 of Charge II, however that is incorrect. According to the operative charge sheet, the specifications at issue in the motion / response are in Charge III.

2. MK3 Grijalva gained access to [redacted] Snapchat account by successfully guessing her password after nearly 50 attempts. MK3 Grijalva did not have permission to access [redacted] Snapchat account when he guessed her password. **Exhibit 1.**

3. After gaining access to [redacted] Snapchat account on 1 February, MK3 Grijalva continued to access [redacted] account throughout February 2019. During this time he downloaded at least 10 images [redacted] had taken of herself, including five explicit images she took of herself posing nude or in her underwear. [redacted] had taken these pictures to send only to her boyfriend, [redacted] and she saved these images on her Snapchat account. **Exhibit 2.** She did not send the images to anyone else. MK3 Grijalva did not have permission to download [redacted] images when he saved them to his iPhone and Apple Watch.

4. From 26 February to 5 March, MK3 Grijalva created dating profiles on several social media dating applications, including Tinder and OKCupid, using [redacted] name and the images of [redacted] he previously downloaded from [redacted] Snapchat account. During this time, MK3 Grijalva used the fake [redacted] dating application profiles to contact dozens of young men in the greater Seattle area pretending to be [redacted] Records show that during these conversations, MK3 Grijalva offered to sell [redacted] explicit images to the contacted young men, and/or, offered to meet up with the young men for sex in exchange for money sent to the fake [redacted] Paypal account.

5. Interviews conducted by CGIS Special Agents and records retrieved via subpoena revealed that during this time period, MK3 Grijalva sent [redacted] intimate images to at least three young men via cell phone text messages: GMSN [redacted] USN; [redacted] and [redacted] **Exhibits 3, 4, 5.**

6. MK3 Grijalva admitted to this conduct during his CGIS interview on 19 July 2021. It is still unknown exactly how many people he sent [redacted] images to. **Exhibit 1.**

7. Records and interview statements also show that during this time MK3 Grijalva texted the images to the three identified individuals late at night, during times that he was at his residence onboard Naval Base Kitsap – Bangor. Navy records show that Naval Base Kitsap is subject to Concurrent Legislative Jurisdiction. **Exhibit 6.**

EVIDENCE

The Government offers the following exhibits:

Exhibit 1: MK3 Grijalva's video recorded interview with CGIS

Exhibit 2: CGIS ROI summary of interview with [redacted]

Exhibit 3: CGIS ROI summary of interview with GMSN [redacted] USN

Exhibit 4: CGIS ROI summary of interview with [redacted]

Exhibit 5: CGIS ROI summary of interview with [redacted]

Exhibit 6: Department of the Navy: COMNAVREG NORTHWEST INSTRUCTION 11011.1

LEGAL AUTHORITY

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. MCM, Pt. IV, ¶ 91(c)(1). These are referred to as "clauses 1, 2, and 3" of Article 134. Id. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate federal civilian law including law made applicable through the Federal Assimilated Crimes Act. Id. In this case, the government charged the accused with violation of 134 under clause (2) and clause (3).

1. Prosecuting offenses under clause (2).

When prosecuting a case under clause (2), the term "discredit" means to injure the reputation of. MCM, Pt. IV, ¶ 91(c)(3). This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. Id. Novel offenses may be charged under clause (2) as long as not prosecutable elsewhere. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). This is known as the preemption doctrine.

The preemption doctrine prohibits application of Article 134 to conduct already prohibited by Congress in the UCMJ by Articles 80 through 132. MCM, Pt. IV, ¶91c(5)(a). According to the *Wright* test, conduct is already covered if: (1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ, and (2) the offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ. Wright, 5 M.J. at 111.

A year after Wright, the United States Court of Military Appeals expounded on the test for preemption in *United States v. Kick*. "Simply stated, preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. [] In addition, it must be shown that

Congress intended the other punitive article to cover a class of offenses in a complete way." [citations omitted] *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979)(citing *United States v. Maze*, 21 U.S.C.M.A. 260, 262-63, 45 C.M.R. 34, 36-7 (1972) and *United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968)).

2. Prosecuting Crimes under clause (3).

Under clause (3), an accused may be charged with un-preempted state offenses as the local federal law of application. This is through the Federal Assimilative Crimes Act (FACA) (18 U.S.C. § 13). Application of FACA is explained in MCM, Pt. IV, ¶91c(4)(a)(iii):

> The Federal Assimilative Crimes Act (18 U.S.C. section 13) is an adoption by Congress of state criminal laws for areas of exclusive jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after the passage of the act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the State wherein the military installation is located and applies it as though it were federal law.

The purpose of FACA is to fill the gaps left by the patchwork of federal statutes. *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999). "When alleging a clause 3 violation, each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. section 13, each element of the assimilated State, Territory, Possession, or District law) must be expressly or by necessary implication, and the specification must expressly allege that the conduct was 'an offense not capital.' In addition, any applicable statutes should be identified in the specification." MCM, Pt. IV, ¶91c(6)(b).

There are limits on the use and application of FACA. State law may not be assimilated if the act or omission is punishable by any enactment of Congress. The discussion section to ¶91c(5)(a) states: "Although the preemption doctrine generally does not preclude charging Article 134, clause 3 offenses (crimes or offense, not capital), the preemption doctrine does preclude charging a federal "crime or offense, not capital" under Article 134 clause 3 where either direct legislative language or direct legislative history demonstrate that Congress intended a factually similar UCMJ punitive article to cover a class of offenses in a complete way."

The test for assimilating a state statute under FACA comes from the United States Supreme Court's opinion in *Lewis v. United States*, 523 U,S, 155, (1998). *Lewis* established a two-part test: (1) Is the accused's "act or omission . . . made punishable by any enactment of Congress?" If not, then assimilate. If so, ask: (2) Do the relevant federal statutes preclude application of the state law? Specifically, would the application of the state law interfere with the achievement of a federal policy, effectively rewrite an offense definition that Congress carefully considered, or run counter to Congressional intent to occupy the entire field under consideration? *Lewis*, 523 U.S. at 164.

ARGUMENT

1. **Defense has not proved their burden that Congress intended for Article 117a to cover the broadcast of a civilian's intimate images by a military accused.**

Under the preemption doctrine, the defense must prove that Congress intended to limit prosecutions for all broadcasts of intimate visual images that were created under a reasonable expectation of privacy by an accused to only Article 117a. However, the background as to why Article 117a was drafted, and its development from drafting to final enactment does not support such a finding.

First, Article 117a was drafted with the idea of providing a tool to military commanders to punish the conduct uncovered in the Marines United scandal in 2017. The scandal involved "hundreds of Marines who were part of a Facebook page used to solicit and share hundreds, maybe even thousands, of naked photographs of female servicemembers and veterans." *From Veteran to Victim: An In Depth Analysis of the Military's New Revenge Porn Statute*, Alicia Ferguson, 46 U. Dayton L. Rev. 79, 82 (2020) **(Enclosure 1)**. Through criminal investigations and reporting, it was determined that servicemembers used Google Drive folders linked to the Marines United Facebook page to share files of women's' names, their military branches, their intimate images, screenshots of their social media accounts, and images of sexual acts." Id. at 83.

Congress sought a solution to this problem in various ways, however, the end product was 533 of the National Defense Authorization Act for Fiscal Year 2018, which added a punitive article to the UCMJ – Article 117a. The defense cites to the November 8, 2017 letter from the Office of the Assistant Attorney General to the Chairmen of the House and Senate Committees on the Armed Services in its motion. The defense argues that the letter and subsequent changes to the bill is all the proof necessary to conclude Congress intended to limit all prosecution of wrongful broadcasts of privately held intimate images "in a complete way" via Article 117a. However, reading the applicable section of the letter in its entirety provides context to Congress' intent.

The letter addresses two sections of the proposed bill at that time: Sections 521 and 532. Section 521 was a proposal to amend the Manual for Courts-Martial to include a specific enumerated offense under article 134 of the UCMJ that dealt with the distribution of a visual depiction of the private area of a person or of sexually explicit conduct involving a person.

Section 532 was the proposal to add what is now Article 117a. It is true the letter suggests, and Congress ended up adopting for Section 532, the suggested limiting language from the First Amendment case *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008): "with a reasonably direct and palpable connection to the military or military environment." However, Congress did not end up passing section 521 to add an enumerated offense under Article 134. Instead, Section 521 did not end up in the final text of the bill; it was discarded.

Rather than create a set of statutes to cover a broader base of conduct, Congress chose to address specific conduct when it passed Article 117a – the sharing of private intimate images of military members within the military environment by a military accused. This choice should not be construed as Congressional intent to occupy "the field" for the purpose of preemption analysis. See *United States v. McGuiness*, 35 M.J. 149, 152 (C.M.A. 1992). The evidence cited to by the defense does not suggest that Congress intended to limit any prosecution of a military accused who, as in this case, steals private intimate images from a civilian victim and then broadcasts those images to other civilians. Accordingly, because Congress did not intend to prohibit the conduct in this case by enacting Article 117a, Charge III, Specification 4 and 5 are not preempted.

2. **Even if Article 117a is meant to "cover" the conduct at issue in this case for the preemption analysis, Article 117a does not preclude application of the applicable Washington State law under *Lewis*.**

If the Court finds that Charge III, Specification 4 is preempted by Article 117a, the government may still proceed on Specification 5. The issue of assimilation of the Washington State statute, RCW 9A.86.010 (**Enclosure 2**), Disclosing Intimate Images is a different matter than determining if Article 117a preempts the government from charging the conduct in this case under clause 2 of Article 134. Indeed, it involves a different test with distinct considerations. As the Supreme Court stated in *Lewis*: "[T]he ACA's language and its gap-filling purpose taken together indicate that a court must first ask the question that the ACA's language requires: Is the defendant's 'act or omission . . . made punishable by any enactment of Congress. 18 U.S.C. section 13(a). If the answer to this question is 'no,' that will normally end the matter. The ACA presumably would assimilate the statute." *Lewis*, 523 at 164.

Here, and similar to that discussed above, the accused's disclosure of a civilian's intimate images via text message to other people he believes are civilians is not made punishable by Article 117a because of the limiting language of the final element. It is clear from the history of Article 117a that is was passed to address a specific wrong brought to the forefront by the Marines United scandal. It was not meant to address the situation in this case, a case where the misconduct has no palpable connection to a military mission or the military environment. This should end the matter, as described in *Lewis*, and the Washington State law should be assimilated in this case.

Assuming, *arguendo*, this Court finds that Article 117a does (or was intended) to punish the type of crime the accused committed in this case, there is another step in the analysis. "If the answer to this question is 'yes,' however, the court must ask the further question whether the federal statutes that apply to the 'act or omission' preclude application of the state law in question, say, because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue." *Lewis*, 523 at 164-165. There are several factors that demonstrate that Congress did not want to punish the accused's conduct in this case with only Article 117a to the exclusion of the Washington State law in this case.

First, and again, as discussed above, Congress did not seek to preempt all other disclosure / broadcast of intimate image laws when it amended the UCMJ to include Article 117a. It did not choose to enact a similar Article 134 act, which, taken with Article 117a, would have constituted a "set of federal enactments" to "make criminal a single form of wrongful behavior." *Lewis*, 523 U.S. at 165. In passing only Article 117a, Congress left open a gape for state statutes like RCW 9A.86.010.

Indeed, several state revenge porn statutes were in place, including the Washington State law at issue in this case, at the time Article 117a was enacted as part of the National Defense Authorization Act for Fiscal Year 2018 in December 2017. The defense offers no statements of legislative intent – no statements from the drafters – that this statute was meant to preclude application of state laws through clause (3) when a military accused targets a civilian by releasing the civilian victim's intimate images in a completely civilian setting. The statements by the Assistant Attorney General to Congress do not reflect statements by Congress on its intent. Moreover, the statements in the Assistant Attorney General's letter regarding the First Amendment analysis discussed in *Wilcox* are inapposite to the issue involved in this case. The accused is not being charged with the Washington State law for his speech, but for the nonconsensual broadcast of intimate visual images of [redacted] a civilian, who did not consent to the broadcast of her intimate visual images that she never intended the accused to see.

Finally, the different levels of punishment between Article 117a and the Washington State law further show that assimilating the Washington State law under FACA does not conflict with the policy reasons for enacting Article 117a. Congress meant to punish more severely those situations where an accused shared intimate images of a fellow service member, hence the stronger terminal element. While the President has not yet established any limits on the punishment which a court martial may direct for Article 117a, according to R.C.M.1003(c)(1)(B), the offense most similar is Article 120c(a)(3) ("knowingly broadcasts or distributes any recording that the person knew or reasonably should have known was made [under circumstances in which the other person has a reasonable expectation of privacy]), which carries a maximum sentence of dishonorable discharge, seven years confinement, and total forfeitures.

In contrast, a first offense of RCW 9A.86.010 is a "gross misdemeanor" punishable by confinement up to 364 days, and a fine fixed by the court of not more than $5000. RCW 9.92.020 (**Enclosure 3**). Assimilating the applicable state law in this case achieves the complimentary policy of prosecuting an accused for broadcasting intimate visual images of a civilian in a civilian setting under less punitive laws.

3. **Charge III, Specification 5 includes all the requirements of an assimilated crime under clause 3**

The defense claim that Charge III, Specification 5 fails to allege all the necessary elements is without merit. When alleging an assimilated state statute under clause (3) of Article 134, the government must plead each element of the federal or assimilated State law expressly or by necessary implication and it must expressly allege that the conduct was an offense not capital. Here, the specification lists where the offense occurred (Naval Base Kitsap Bangor), the state law, and the elements of the law that the accused violated. The necessary implication of this language is that it is a violation of federal law through the FACA. Furthermore, the government will prove at trial that the accused committed the crime while at a location under concurrent jurisdiction, thus establishing the jurisdictional hook for assimilating the state law. Finally, the specification specifically states that it is an offense not capital. As such, the specification meets the requirements of stating an offense listed in the Manual for Courts Martial. See MCM, pt. IV, ¶91c(6)(b).

CONCLUSION

The government respectfully requests the Court DENY the defense motion.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

Enclosures for the convenience of the Court:

Enclosure 1: *From Veteran to Victim: An In Depth Analysis of the Military's New Revenge Porn Statute,* [redacted] 46 U. Dayton L. Rev. 79 (2020)

Enclosure 2: RCW 9A.86.010

Enclosure 3: RCW 9.92.020

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 25 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
[redacted]

LCDR Terrence Thornburgh, USCG
Special Victims Counsel
[redacted]

LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Second Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **WAVE BROADBAND RECORDS** 11 August 2021

RELIEF SOUGHT

The government moves under R.C.M. 906(b)(13) and M.R.E. 104 for a preliminary determination of admissibility of Prosecution Exhibit 1, which consists of records produced by WaveDivision Holdings, LLC dba ("Wave Broadband"), in response to a search warrant issued by the State of California.

HEARING

The government respectfully requests oral argument if this motion is opposed.

BURDEN OF PERSUASION AND PROOF

As the moving party, the government bears the burden to prove that the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

On 5 March 2019, [redacted] of the accused, MK3 Mark Grijalva, discovered nude (explicit) images of [redacted] on the accused's Apple Watch. After discovering [redacted] explicit images on [redacted] Apple Watch, Rosa Grijalva sent videos and screenshots of the images on the watch to [redacted] boyfriend (and MK3 Grijalva's friend), [redacted] showed [redacted] the videos and screenshots sent by [redacted] never shared nude

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photos of herself with the accused, nor anyone else besides [redacted]

[redacted] made a report to the Anaheim, California Police Department. **See Exhibit 1.** B.C. recalled that the only place she stored the explicit images of herself was on her Snapchat account which is protected by a password. [redacted] forwarded Anaheim Police Detective [redacted] an email she received containing a logon notification from Team Snapchat to the email address associated with her Snapchat account notifying her of a logon to her Snapchat account that took place "somewhere near Bremerton, WA, United States ([redacted])." [redacted] was located in Anaheim, CA when the logon occurred and has never been to Bremerton, WA.

Detective [redacted] used an internet based geographical IP search to discover that the IP address was located in Silverdale, Washington where the accused resides, and that the IP address was provided by Wave Broadband. In addition, Detective [redacted] confirmed that the Grijalva's used Wave Broadband as their internet provider during a phone call with [redacted] on 20 March 2019. **See Exhibit 1.**

On 21 March 2019, Detective [redacted] applied to the Superior Court of California, County of Orange, North Justice Center Department 3, for a search warrant seeking records related to the IP address [redacted] associated with the Snapchat logon notification received by Ms. [redacted] The same day, Judge Roger Robbins of the Superior Court of the State of California issued a search warrant to Wave Broadband for records held by Wave Broadband for the IP address [redacted] **See Exhibit 2.** This warrant was directed to "Wave Broadband, [redacted] and identified the evidence to be seized as:

> "Subscriber information including name, address, telephone phone numbers, date of birth, date of registration, billing information and

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email addresses associated with the account holder for the following IP address:

[redacted]

2019-02-01 22:57:48 MST"

Detective [redacted] sent this warrant to Wave Broadband the same day.

On 9 May 2019, the Custodian of Records at Wave Broadband complied with the search warrant. **See Exhibit 3.** Ms. [redacted] Custodian of Records, included a Certificate of Authenticity along as part of that response. She also included a cover letter, and a responsive file containing subscriber information for the IP address.

The government now seeks to admit that cover letter, Certificate of Authenticity, and responsive file, which contains subscriber and billing information of IP address [redacted] as Prosecution Exhibit 1 (**Exhibit 3** to this motion).

EVIDENCE

1. **Exhibit 1:** Anaheim Police Department Report by Cadet [redacted]
2. **Exhibit 2:** State of California search warrant signed by Judge [redacted].
3. **Exhibit 3:** Response to State of California search warrant from Wave Broadband.

LEGAL AUTHORITY AND ARGUMENT

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The files contained in Prosecution Exhibit 1 are relevant to all charges because they link MK3 Grijalva's Wave Broadban account with the IP address that accessed [redacted] Snapchat

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account without her knowledge or consent, thereby making it more probable the accused committed the charged crimes.

Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore is not barred by M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission." The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Records of a Regularly Conducted Activity are admissible notwithstanding the rule against hearsay. M.R.E. 803(6). The records contained in Prosecution Exhibit 1 qualify under this exception, as they were made contemporaneously with the underlying events and they were kept in the normal course of regularly conducted business activity.

Finally, M.R.E. 901(a)'s authentication threshold is met by "evidence sufficient to support a finding that the item is what the proponent claims it is." Under M.R.E. 901, evidence authenticity serves a condition to admission. M.R.E. 901(a). The records in Prosecution Exhibit 1 are admissible pursuant to M.R.E. 902(11) as certified records of regularly conducted activity as demonstrated by the sworn Certificate of Authenticity submitted by the Custodian of records of Wave Broadband.

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CONCLUSION

The government respectfully requests the Court determine that Prosecution Exhibit 1 is relevant to all charges, meets the hearsay exception for Records of a Regularly Conducted Activity, and that this foundation is properly demonstrated by the Certificate of Authenticity, which is a self-authenticating document. The government further requests that Prosecution Exhibit 1 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

APPELLATE EXHIBIT 38
PAGE 5 OF 20 PAGE (S)

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 11 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
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LCDR Terrence Thornburgh, USCG
Special Victims Counsel
[redacted]

LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

APPELLATE EXHIBIT 38
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **AUDIO RECORDING OF ACCUSED'S PHONE CALL TO DETECTIVE [redacted]** 11 August 2021

RELIEF SOUGHT

The Government moves under R.C.M. 906(b)(13) and M.R.E. 104 for a preliminary determination of admissibility of Prosecution Exhibit 3, which consists of an audio recording of a phone call by the accused to Anaheim Police Detective [redacted] on 6 March 2020.

HEARING

The Government respectfully requests oral argument if this motion is opposed.

BURDEN OF PROOF

As the moving party, the Government bears the burden of proof and of persuasion that the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

MK3 Grjialva accesses [redacted] Snapchat account and obtains her images

On the night of 1 February, 2019, MK3 Mark Grijalva of the Marine Force Protection Unit in Bangor, Washington, hacked into the Snapchat social media account of his civilian friend, [redacted] MK3 Grijalva was searching for nude or explicit photographs [redacted] took of herself for her boyfriend, civilian [redacted] (also MK3 Grijalva's friend). MK3 Grijalva did so

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while at his residence located onboard Naval Base Kitsap located at [redacted], and unbeknownst to [redacted] MK3 Grijalva gained access to [redacted] Snapchat Account by successfully guessing her password after nearly 50 attempts. MK3 Grijalva did not have permission to access [redacted] Snapchat account when he guessed her password.

After gaining access to [redacted] Snapchat account on 1 February, MK3 Grijalva continued to access [redacted] account throughout February 2019. During this time he downloaded at least 10 images [redacted] had taken of herself, including five explicit images she took of herself posing nude or in her underwear. [redacted] had taken these pictures to send only to her boyfriend, [redacted] and she saved these images on her Snapchat account. She did not send the images to anyone else. MK3 Grijalva did not have permission to download [redacted] images when he saved them to his iPhone and Apple Watch.

MK3 Grijalva uses [redacted] name and photos to create a Yahoo! email account, a Paypal account and social media dating application profiles

On 26 February, 2019, MK3 Grijalva created a Yahoo! email address in [redacted] name. According to records received from Yahoo!, MK3 Grijalva listed his personal cell phone and his birthday on the Yahoo! profile for fake [redacted] Shortly thereafter, MK3 Grijalva created a Paypal account in [redacted] name using the fake [redacted] Yahoo! email address. According to records received from Paypal, MK3 Grijalva listed his personal cell phone on the fake [redacted] Paypal account information and linked his USAA personal checking account to receive money from the fake [redacted] Paypal account.

From 26 February to 5 March, MK3 Grijalva created dating profiles on several social media dating applications, including Tinder and OKCupid, using [redacted] name and the images of

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[redacted] he previously downloaded from [redacted] Snapchat account. During this time, MK3 Grijalva used the fake [redacted] dating application profiles to contact dozens of young men in the greater Seattle area pretending to be [redacted] Records show that during these conversations, MK3 Grijalva offered to sell [redacted] explicit images to the contacted young men, and/or, offered to meet up with the young men for sex in exchange for money sent to the fake [redacted] Paypal account. Records also show that during this time period MK3 Grijalva sent [redacted] explicit images to at least three young men: GMSN [redacted] USN, [redacted] and [redacted]

Rosa Grijalva discovers [redacted] explicit images on MK3 Grijalva's Apple Watch

On 5 March 2019, MK3 Grijalva went to work at the MFPU in Bangor, Washington. He took his personal cell phone, but left his Apple Watch at home. MK3 Grijalva's [redacted] was at home and noticed the Watch received several incoming messages. She scrolled through the messages on the Apple Watch and saw the explicit images of [redacted] whom she recognized. [redacted] made a phone call to [redacted] who was in [redacted] where he lived and worked, to discuss what she found. Throughout the day, [redacted] and [redacted] exchanged phone calls and text messages as they attempted to figure out why [redacted] explicit images were on MK3 Grijalva's Apple Watch and why MK3 Grijalva appeared to be sending the images to unknown phone numbers. During this time [redacted] used her cell phone to take photos and videos of the text message conversations on MK3 Grijalva's Apple Watch that contained the explicit images of [redacted] and she sent them to [redacted]

After speaking to [redacted] called and texted MK3 Grijalva. [redacted] demanded to speak with MK3 Grijalva about why [redacted] images were on MK3 Grijalva's Apple Watch. MK3 Grijalva did not respond until the evening (1805) and claimed he could not return

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[redacted] call because he had an important meeting.

For the rest of the evening of 5 March, [redacted] continued to exchange text messages about what they were going to do now that [redacted] found the images of [redacted] MK3 Grijalva and [redacted] exchanged text messages into the night about whether MK3 Grijalva was responsible for the images being on the Apple Watch.

[redacted] *report the incident to Anaheim Police Department*

On 6 March 2019, [redacted] visited the Main station of the Anaheim Police Department in Orange County, California. They spoke to Anaheim Police Department Cadet [redacted] reported the incident to Cadet [redacted] who wrote up a report. See **Exhibit 1.** Cadet [redacted] also contacted Anaheim Police Detective [redacted] who assisted Cadet [redacted] in extracting data from [redacted] cell phone.

The Grijalvas call Detective Cunah

At approximately 1030, while Detective [redacted] was extracting messages from [redacted] cell phone, [redacted] called [redacted] and Detective [redacted] answered the call. Detective [redacted] introduced himself as an Anaheim Police detective and confirmed that [redacted] was MK3 Grijalva. They spoke about what [redacted] had found on MK3 Grijalva's Apple Watch; how she had documented what she found with pictures and videos; that she sent those pictures and videos to [redacted] and what she thought were possible explanations for why the images were on MK3 Grijalva's phone. Detective [redacted] provided [redacted] with his work phone number [redacted] The call lasted approximately 5-10 minutes. **See Exhibit 2**.

At 1347, [redacted] and MK3 Grijalva called Detective [redacted] at the phone number Detective [redacted] had provided to [redacted] three hours before. [redacted] informed Detective

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[redacted] that MK3 Grijalva wanted to speak with him and then handed off the phone to MK3 Grjialva. The ensuing conversation with MK3 Grijalva lasted 8 minutes and 30 seconds. Detective [redacted] recorded the conversation, as was his custom and practice. During the conversation, Detective [redacted] told MK3 Grijalva that he was just getting started investigating the case and asked to verify some background information (full name, date of birth, rate and rank). Detective [redacted] then informed MK3 Grijalva that he knew [redacted] were involved, and then asked MK3 Grijalva what he wanted to speak about. MK3 Grijalva explained that he would be "on mission" for the next few days and would not be able to speak to the detective. MK3 Grijalva also explained that he had been receiving fake phone calls about his bank account and IRS activity; and that he used special procedures to file his taxes as a result. Detective [redacted] asked MK3 Grijalva if he had ever had any photos of [redacted] or if she had sent him any photos of herself; MK3 Grijalva denied both. MK3 Grijalva then asked if he should file a police report of his own, to which Detective [redacted] advised it was his choice. **See Exhibit 2.**

EVIDENCE

1. **Exhibit 1**: Anaheim Police Department Report by Cadet [redacted]
2. **Exhibit 2**: Affidavit of Detective [redacted]

LEGAL AUTHORITY AND ARGUMENT

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The audio file of Detective [redacted] phone call with MK3 Grijalva, contained in Prosecution Exhibit 3 (Exhibit B attached to **Exhibit 2**) is relevant to Charge II and Charge III.

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Prosecution Exhibit 3 is relevant to Charge II because MK3 Grijalva's statements concerning strange activity on his bank account; special procedures for filing his taxes; never having possession of [redacted] explicit images; and his interest in filing his own police report amount to affirmative falsehoods intended to mislead and misdirect Detective [redacted] investigation. *See United States v. Rogers*, 78 M.J. 813 (C.G.C.C.A. Feb. 19, 2019) (citing *United States v. Jenkins*, 48 M.J. 594, 601-02 (A. Ct. Crim. App. 1998).

Prosecution Exhibit 3 is relevant to Charge III because the above referenced statements by MK3 Grijalva constitute false exculpatory statements concerning the conduct alleged in Charge III and they tend to suggest MK3 Grijalva's consciousness of guilt. *See United States v. Williams*, No. ACM 39746, 2021 WL 955908, *14 (A.F. Ct. Crim. App. Mar 12, 2021)(citing *Wilson v. United States*, 162 U.S. 613, 621 (1896)).

The statements of MK3 Grijalva, when offered by the government, are not hearsay. M.R.E. 801(d)(2). The statements were made voluntarily: while MK3 Grijalva and [redacted] were in Silverdale, Washington, they called Detective [redacted] in Anaheim, California, at Detective [redacted] work phone number, because MK3 Grijalva desired to speak with Detective [redacted] about the investigation.

Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore is not barred by M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission." The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United*

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PAGE 6 OF 25 PAGE (S)

States v. Leiker, 37 M.J. 418 (C.M.A. 1993).

CONCLUSION

The Government respectfully requests the Court determine that Prosecution Exhibit 3 is relevant to Charge II and Charge III and that it is not hearsay. The Government further requests that Prosecution Exhibit 3 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

APPELLATE EXHIBIT 40
PAGE 7 OF 25 PAGE (S)

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 11 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
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LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
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CDR Justin Henderson, USN, JAGC
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LCDR Terrence Thornburgh, USCG
Special Victims Counsel
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LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

APPELLATE EXHIBIT 40
PAGE 8 OF 25 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **CGIS INTERVIEW OF ACCUSED** 11 August 2021

RELIEF SOUGHT

The government moves under R.C.M. 906(b)(13) and M.R.E. 104 for a preliminary determination of admissibility of Prosecution Exhibit 4, which consists of a video recording of the CGIS interview of the accused, MK3 Mark Grijalva.

HEARING

The government respectfully requests oral argument if this motion is opposed.

BURDEN OF PERSUASION AND PROOF

As the moving party, the government bears the burden of proof and of persuasion that the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

On Friday, 12 July 2019, CGIS Special Agents [redacted] interviewed MK3 Mark Grijalva at the NCIS Northwest Field Office onboard Naval Base Kitsap Bangor, in Silverdale, Washington. The purpose of the interview was to gather factual information regarding allegations that MK3 Grijalva had illegally obtained explicit images of his civilian friend, [redacted] that he had broadcasted those images without [redacted] consent; and that he had stolen [redacted] identity when he created a Yahoo! email account, a Paypal account, and

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several social media dating application accounts using [redacted] name and image. **See Exhibit 1.**

At the outset of the interview, S/A [redacted] provided MK3 Grijalva the Article 31(b) rights, both verbally and in writing, before asking any substantive questions. MK3 Grijalva indicated he understood those rights and elected to talk with S/A [redacted] and S/A [redacted] without the presence of an attorney. **See Exhibit 1.**

During the interview, MK3 Grjialva initially denied the allegations and lied to the Special Agents before he eventually made numerous admissions, confessions, and corroborated the factual allegations developed in the case.

The recording was made with the NCIS Northwest Filed Office video system. S/A [redacted] retrieved the video file from the NCIS system and subsequently stored the file at CGIS Northwest Region Office. See **Exhibit 1.**

EVIDENCE

The Government offers the following exhibits:

Exhibit 1: Affidavit of Special Agent [redacted] and attachments.

LEGAL AUTHORITY & ARGUMENT

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The file contained in Prosecution Exhibit 4 (Exhibit B attached to **Exhibit 1** of this motion) is relevant to all charges because, during the interview with S/A [redacted] and S/A [redacted] the accused admitted: that he obtained [redacted] explicit images from her Snapchat account; that he did not have her permission to do so; that he used her name and photos to create an email and various social

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media dating application accounts in [redacted] name; that he posed as [redacted] on the social media dating applications in order to sell [redacted] images and offer sexual favors for money; that he was not being truthful to the Special Agents about where his Apple Watch was (or was not) located on the date of the interview.

MK3 Grijalva's statements, when offered by the government, are not hearsay. M.R.E. 801(d)(2). The statements were made voluntarily and following a knowing and voluntary waiver of MK3 Grijalva's rights. M.R.E. 305(e).

CONCLUSION

The Government respectfully requests the Court determine that Prosecution Exhibit 4 is relevant to all charges, is not hearsay, and its probative value is not substantially outweighed by any potential danger to the accused. The Government further requests that Prosecution Exhibit 4 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the below listed individuals via electronic mail on 11 August 2021.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
[redacted]

CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
[redacted]

LCDR Terrence Thornburgh, USCG
Special Victims Counsel
[redacted]

LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. MARK J. GRIJALVA MK3/E-4 U.S. NAVY	**DEFENSE RESPONSE TO GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISIBILITY OF EVIDENCE (CGIS Interview of the Accused)** **25 AUG 21**

MOTION & BURDEN

Pursuant to R.C.M. 906 and Mil. R. Evid. 401, 403 and 404(b), the Defense objects to the portion of Prosecution Exhibit 4 in which MK3 Grijalva mentions the possibility that he may have engaged in an extramarital affair. As the moving party, the Government bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this matter. R.C.M. 905(c).

FACTS

For the purposes of this motion, the Defense adopts the "Summary of Facts" offered by the Government in support of their motion for a preliminary ruling on the admissibility of the Coast Guard Investigative Service (CGIS) interrogation of MK3 Grijalva, with the following addition:

1. During the course of MK3 Grijalva's interrogation by CGIS, the following exchange occurred:

[redacted]

[redacted]

(Enclosure A. at 35:22-36:5).

LAW & ARGUMENT

Any reference, however slight, to MK3 Grijlava having been unfaithful to [redacted] during the course of their [redacted] would not be relevant under Mil. R. Evid. 401, as it has no bearing on any of the charges at issue in this case. Even if that portion of the interview could pass a test for bare relevance, the possibility for unfair prejudice to MK3 Grijalva far outweighs whatever minimal relevance it might have, and should be excluded under Mil. R. Evid. 403. Finally, such evidence would constitute a "crime, wrong, or other act" that is inadmissible under Mil. R. Evid. 404(b).

RELIEF REQUESTED

The Defense objects to the admission of that portion of MK3 Grijalva's interview with CGIS in which he makes reference to a relationship outside [redacted]

EVIDENCE & ARGUMENT

The Defense offers the following enclosure in support of this Response:

A. Excerpt from transcript of CGIS interview of the Accused dtd 14 Jul 19

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

[redacted]

B.D. ADAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **YAHOO! RECORDS** 11 August 2021

RELIEF SOUGHT

The government moves under R.C.M. 906(b)(13) and M.R.E. 104 for a preliminary determination of admissibility of Prosecution Exhibit 2, which consists of records produced by Oath Holdings, Inc. ("Yahoo!"), in response to a search warrant issued by the United States Coast Guard.

HEARING

The government respectfully requests oral argument if this motion is opposed.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the government bears the burden of proof and of persuasion the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

On the night of 1 February, 2019, MK3 Mark Grijalva of the Marine Force Protection Unit in Bangor, Washington, hacked into the Snapchat social media account of his civilian friend, [redacted] looking for nude or explicit images [redacted] took of herself for her boyfriend [redacted] (also MK3 Grijalva's friend). MK3 Grijalva did so while at his residence located onboard Naval Base Kitsap located on [redacted] in [redacted] and

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unbeknownst to his [redacted] MK3 Grijalva gained access to [redacted] Account by successfully guessing her password after at least 50 attempts. MK3 Grijalva did not have permission to access [redacted] Snapchat account when he guessed her password.

After gaining access to [redacted] Snapchat account on 1 February, MK3 Grijalva continued to access [redacted] account without her consent throughout February 2019. During this time he downloaded at least 10 images [redacted] had taken of herself, including five explicit images [redacted] took of herself posing nude or in various state of undress. [redacted] had taken these pictures to send only to her boyfriend, [redacted], and she saved these images on her Snapchat account. She did not send the images to anyone else. MK3 Grijalva did not have permission to download [redacted] images when he saved them to his iPhone and Apple Watch.

On 26 February, 2019, MK3 Grijalva created a Yahoo! email address in [redacted] name: [redacted] According to records received from Yahoo!, MK3 Grijalva listed his personal cell phone and his birthday on the Yahoo! profile for [redacted] MK3 Grijalva then created a Paypal account in [redacted] name using [redacted] According to records received from Paypal, MK3 Grijalva listed his personal cell phone on the fake [redacted] account information and linked his USAA personal checking account to receive money from the fake [redacted] account.

From 26 February to 5 March, MK3 Grijalva used [redacted] along with [redacted] name and images he downloaded from her Snapchat account, to create dating profiles on several social media dating applications, including Tinder and OKCupid.

The accused later admitted to Coast Guard Investigative Service (CGIS) Special Agents that he created a Yahoo! email account and used that Yahoo! email account to create a PayPal account to receive money from young men he contacted via the social media dating applications by either selling nude images of [redacted] or posing as [redacted] and promising the young men sexual favors in exchange for money. Subsequent investigation corroborated that the young men MK3 Grijalva contacted while posing as [redacted] used the [redacted] email account to send money to the MK3 Grijalva through [redacted]

CGIS Special Agent [redacted] applied for a search warrant to Yahoo! seeking records associated with the MK3 Grijalva's phone number or the email address [redacted] On 12 August 2019, military judge Commander Tamara S. Wallen of the U.S. Coast Guard issued a search warrant to Oath Holdings Inc., ("Yahoo!") for records held by Yahoo! for MK3 Grijalva's phone number or the email address [redacted] **See Exhibit 1.** This warrant was directed to "Oath Holdings Inc, ("Yahoo!"), a company headquartered at [redacted] and identified the evidence to be seized as:

> "The contents of all emails, text messages, data messages, and photos data associated with the phone number belonging to MK3 Mark J. Grijalva, the phone number [redacted] or the email [redacted] including stored or preserved copies of messages sent to and from the account, draft messages, the source and destination addresses associated with each message, the date and time at which each message was sent, and the size and length of each message; and all records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the IP address used to register the account, log-in IP addresses associated with the session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number)."

Special Agent [redacted] sent this warrant to Yahoo! the same day.

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On 23 September 2019, the Custodian of Records at Yahoo! complied with the search warrant. **See Exhibit 2.** Ms. [redacted] Custodian of Records, included a Certificate of Authenticity as part of that response. She also included a cover letter, and a responsive file containing subscriber details and logon information associated with MK3 Grijalva's phone number and the email address [redacted] Special Agent [redacted] documented the results in his Report of Investigation. **See Exhibit 3.**

The government now seeks to admit the contents of **Exhibit 2** attached to this motion as Prosecution Exhibit 2: (1) Ms. [redacted] cover letter, (2) the Certificate of Authenticity, and (3) the responsive file (containing subscriber details; the dates, times, and Internet protocol addresses for logins and authentication events; content of the email account; a list of accounts linked by cookies; and mail contacts).

EVIDENCE

The government offers the following exhibits:

Exhibit 1: 12 August 2019 search warrant to Oath Holdings Inc.

Exhibit 2: Oath Holdings Inc. response to the 12 August 2019 search warrant.

Exhibit 3: CGIS Report of Investigation Supplement [redacted] from 29 October 2019.

LEGAL AUTHORITY AND DISCUSSION

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The files contained in Prosecution Exhibit 2 are relevant to Charge II and Charge III

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because they link MK3 Grijalva's phone number and his birthday to the email address used to defraud victims, thereby making more probable the conclusion that MK3 Grijalva committed these crimes.

Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore is not barred by M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission." The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Records of a Regularly Conducted Activity are admissible notwithstanding the rule against hearsay. M.R.E. 803(6). The records contained in Prosecution Exhibit 2 qualify under this exception, as they were made contemporaneously with the underlying events, and they were kept in the normal course of regularly conducted business activity.

Finally, M.R.E. 901(a)'s authentication threshold is met by "evidence sufficient to support a finding that the item is what the proponent claims it is." Under M.R.E. 901, evidence authenticity serves a condition to admission. M.R.E. 901(a). The records in Prosecution Exhibit 2 are admissible pursuant to M.R.E. 902(11) as certified records of regularly conducted activity as demonstrated by the sworn Certificate of Authenticity submitted by the Custodian of records of Yahoo!.

CONCLUSION

The government respectfully requests the Court determine that Prosecution Exhibit 2 is

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relevant to Charge II and Charge III, meets the hearsay exception for Records of a Regularly Conducted Activity, and that this foundation is properly demonstrated by the Certificate of Authenticity, which is a self-authenticating document. The government further requests that Prosecution Exhibit 2 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

APPELLATE EXHIBIT 45
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UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	
	)	
v.	)	SVC MOTION IN LIMINE
	)	TO LIMIT USE OF IMAGES AND FOR
	)	PROTECTIVE/SEALING ORDER
MARK GRIJALVA	)	
MK3 / E-4	)	
U.S. Coast Guard	)	11 August 2021

1. **Nature of Motion.**

B. C. by and through her counsel moves this Court (1) to limit the use of intimate visual images of [redacted] and questioning about the surrounding circumstances of the images at trial; and (2) to place a protective/sealing order on the images to safeguard her privacy and dignity.

2. **Hearing.**

[redacted] requests oral argument.

3. **Burden of Proof.**

The moving party bears the burden of proof and persuasion. RCM 905(c); 906(b)(10)(A).

4. **Summary of Facts.**

In March 2019, Mr. [redacted] and lived in California. They knew the accused, MK3 Mark Grijlava, and [redacted] MK3 Grijalva and [redacted] lived in [redacted]. At all times relevant, MK3 Grijlava was assigned to USCG Maritime Forces Protection Unit at Naval Base Kitsap Bangor near Silverdale, Washington.

On 5 March 2019, [redacted] contacted Mr. [redacted] because she found explicit images of [redacted] on MK3 Grijlava's Apple iWatch. Enclosure (Encl.) (1). In messages to third parties, MK3 Grijlava impersonated [redacted] and sent explicit images of her to solicit money for sexual favors. *Id.* [redacted] ook videos and screen shots of the messages and sent them to Mr. [redacted] *Id.* [redacted] face was visible in the images. *Id.*

After [redacted] made a report to law enforcement, investigators copied the videos and screen shots from Mr. [redacted] cell phone. *Id.* Investigators also found messages on Mr [redacted] cell phone in which he accused MK3 Grijalva of distributing explicit photos of [redacted] – an accusation which MK3 Grijlava denied. *Id.*

[redacted] identified the images from MK3 Grijalva's iWatch to law enforcement. Encl. (2). During her communications with law enforcement, [redacted] stated she took the images on her phone and sent them only to her boyfriend, Mr. [redacted] *Id.* Moreover, she stated that she did not know how MK3 Grijlava got the images but that she did not share them with him. *Id.* At all times relevant, the images were stored in her SnapChat account. *Id.* On or about 1 February 2019, she received an email notification from SnapChat that someone had logged into her account from an IP address near Bremerton, Washington. *Id.*

[redacted] expressed to law enforcement that the incident has affected her in a negative way, and she constantly worried about third parties seeing her images. Encl. (1).

5. **Evidence.**

[redacted] relies on the following enclosures:

(a) APD Report

(b) CGIS interview summary with [redacted]

6. **Argument.**

A. This Court Should Limit the Use of the Intimate Visual Images of [redacted] at Trial to protect her Privacy and Dignity.

To date, no party has filed a motion to pre-admit intimate visual images of [redacted] or filed an MRE 412 notice regarding the images or the circumstances surrounding the images. The further display and distribution of these images – in discovery and in court – impacts [redacted] right to privacy and dignity under Article 6b, UCMJ. Article 6b(a)(8). As such, SVC seeks the Court's intervention to impose reasonable and necessary limits on use of the images at this trial.

While SVC understands the basic relevance of the images, the central question is whether the images are actually necessary at trial given the impact to [redacted] privacy and dignity. Alternatives exist to admitting and publishing the images. The government may elicit descriptions of the images from witnesses to demonstrate that the images are intimate visual images of [redacted] that she retained a reasonable expectation of privacy in them; and that she did not consent to their broadcast or disclosure. Additionally, the parties may stipulate to the contents of the photos. Again, the central question is whether the images are necessary at trial.

Further, courts have wide discretion to exclude evidence, including shocking or gruesome images, for unfair prejudice or if cumulative. *See Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926, 930-31 (1st Cir. 1999) (trial court properly excluded images of stillborn fetus under FRE 403 balancing test for prejudice and alternative evidence was presented by witness testimony); *United States v. Katz*, 178 F.3d 368, 372-74 (5th Cir. 1999) (trial court properly excluded potential child pornography images under FRE 403 balancing test because the prejudicial effect outweighed the probative value and alternative evidence was admitted to meet the elements of the charged offenses). Similarly, this Court has discretion under MRE 403 and 611 to exclude the intimate visual images of [redacted] for unfair prejudice, or if cumulative, or to protect [redacted] "from harassment or undue embarrassment." MRE 611(a)(3).

Assuming necessity of the images at trial, SVC seeks reasonable controls on the use of the images in court. If admitted into evidence and published to the members, the images should be appropriately redacted to obscure breasts or genitalia and should not be displayed in open court, i.e., published to the members only. These constraints are within the Court's discretion under MRE 611 which includes reasonable controls to "protect witnesses from harassment or undue embarrassment." MRE 611(a)(3).

B. **This Court Should Limit Questioning about the Surrounding Circumstances of the Images to Preclude Irrelevant, Inadmissible, and/or Prejudicial Testimony**.

SVC anticipates that [redacted] will testify at this trial about the images. Moreover, SVC understands that some line(s) of questioning are relevant for purposes of establishing the elements of the charged offenses. Relevant areas of examination include whether [redacted] retained a reasonable expectation of privacy in the images; whether she consented to the broadcast and disclosure of the images; and whether the broadcast or disclosure caused her harm. Expanded examination about the surrounding circumstances – for example, why she took the images – would not be relevant and may elicit evidence of other sexual behavior or sexual predisposition, prohibited under MRE 412. Further, certain lines of questioning of [redacted] habits or lifestyle may violate MRE 303. Additionally, some lines of questions may place her morality before the members, which may raise concerns about confusing the issues, misleading the members, and wasting time under MRE 403. The touchstone for line(s) of questioning should always be relevance. SVC therefore seeks the Court's intervention to limit questioning about the surrounding circumstances of the images to protect [redacted] privacy and dignity and preclude otherwise irrelevant, inadmissible, and/or prejudicial matters.

C. SVC Requests a Protective/Sealing Order for the Images in Discovery and at Trial.

SVC requests a protective order to safeguard the intimate visual images of [redacted] in discovery. RCM 701(g). The defense should only be permitted to inspect the images. If the defense received a physical or electronic copy of the images, they should only be used for the trial and destroyed afterwards, and the accused should not have his own copies. Further, if the images are used at this trial (admitted into evidence or made an appellate exhibit), SVC requests that they be sealed in accordance with RCM 1113.

7. **<u>Relief Requested</u>.**

SVC moves this Court to limit the use of intimate visual of images of [redacted] and questioning about the surrounding circumstances of the images in court, and to place a protective/sealing order on the images to safeguard [redacted] privacy and dignity.

[redacted]
Terrence M. Thornburgh
LCDR, USCG
Special Victim's Counsel

--CERTIFICATE OF SERVICE------------------------------

I hereby certify that an electronic copy of the foregoing was served on the Military Judge, and trial and defense counsel this 11th day of August 2021.

[redacted]
Adam J. Jaffe
LT, USCG
Special Victim's Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. MARK J. GRIJALVA MK3/E-4 U.S. NAVY	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Referral upon Defective Article 32 and Erroneous Article 34 Advice)** **10 AUG 21**

MOTION

Pursuant to R.C.M. 905(b)(1) and 906(b)(3) the Defense renews its objections to the defective preliminary hearing under Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832 (2019), and requests this Court's relief from that error and the erroneous supplemental Article 34, UCMJ, advice which misled the Convening Authority as to the appropriate disposition of these Charges.

BURDEN

The Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

SUMMARY

After the Convening Authority ordered a preliminary hearing on the Charges and Specifications preferred on March 4, 2021, he directed the hearing to be held over MK3 Grijalva's waiver. Prior to that hearing, Trial Counsel sought the Preliminary Hearing Officer's consideration of four unsworn, uncharged offenses. The Defense objected before, during and after the hearing to the Government's improper expansion of the Article 32 hearing process beyond the narrow permissions of R.C.M. 405(a) and (e)(2). The Government persisted anyway, to the point that the Convening Authority referred those uncharged offenses to general court-martial—even though they were still unsworn. Realizing the error upon Defense trial motion, the Convening Authority withdrew the Charges. He allowed the unsworn offenses to be sworn, but then referred them to this same court-martial still without proper Article 32 hearing—after receiving misleading Article 34 advice that misstated the Preliminary Hearing Officer's finding of "no probable cause" to multiple offenses, including one of the unsworn charges.

FACTS

1. On March 4, 2021, LCDR [redacted] signed Block 11.a. of a DD Form 458 Charge Sheet, signifying that to the best of his knowledge and belief MK2 Grijalva had committed multiple offenses under the UCMJ in early 2019—three Specifications under Charge I, Article 121; two Specifications under Charge II, Article 131b; and five Specifications under Charge III, Article 134—all of which were listed on two "continuation" pages attached to the Form. (Original Charge Sheet, June 17, 2021.)

   a. Less than two weeks later, the Convening Authority directed a Preliminary Hearing under Article 32, UCMJ. (Encl. A.)

   b. Petty Officer Grijalva waived his right to that hearing on April 28, 2021. (Encl. B.)

   c. Despite the waiver, the Government proceeded with the Preliminary Hearing.

2. Before, during, and after the Preliminary Hearing, the Defense objected to Trial Counsel's request that the Preliminary Hearing Officer consider what Trial Counsel styled as "Additional Charges," alleging unsworn offenses under Article 107, UCMJ, and 18 U.S.C. §§ 1028A, 1030(a)(4), and 1343 (2018). (Encl. C.)

   a. Over the Defense's objection, the Preliminary Hearing Officer issued a report that addressed each "Additional Charge," noting that each alleged an "uncharged offense." (Encl. D at 11-12, 15-16.)

b. The Preliminary Hearing Officer found probable cause to believe MK3 Grijalva committed the offenses charged, with the exception of "Charge III, Specification 5," about which he wrote "Based on my review of the evidence, tthere [sic] is not probable cause to believe the accused committed the offense charged." (Encl. D at 10)

c. The Preliminary Hearing Officer found probable cause to believe MK3 Grijalva committed the "uncharged offenses," with the exception of the allegation of a violation of 10 U.S.C. § 1030(a)(4), about which he wrote, "There is not probable cause, however, that the accused used a computer in the fraud scheme." (Encl. D. at 13.)

3. In June, the Convening Authority referred each Specification of original Charges II and III to this court-martial (renumbered as Charge I and II, respectively), along with the "Additional Charges" the Government had asked the Preliminary Hearing Officer to consider, but which were never sworn. (Original Charge Sheet at 2.)

4. Before entering MK3 Grijalva's Not Guilty pleas and electing a forum at arraignment on those original charges, the Defense timely moved to dismiss the "Additional Charges" as defectively referred without being previously sworn. (Def. Mot. to Dismiss for Defective Referral, July 7, 2021.)

a. In response, the Convening Authority "withdrew" all the Charges, but did not dismiss them. (Encl. E.)

b. Nine days later, on a new charge sheet, LCDR [redacted] again swore to seven of the original Specifications and preferred along with them the four Specifications of the "Additional Charges" the Government had asked the Preliminary Hearing Officer to consider. (Second Charge Sheet at 1, July 16, 2021.)

c. The same day as the re-referral, CDR [redacted] signed "Supplemental" Article 34, UCMJ, advice asserting:

> 6. In his report, the PHO determined there was **probable cause to believe the Accused committed all the charges and specifications now in the current charge sheet preferred on 16 July 2021.** I likewise find that the charges and specifications allege offenses under Chapter 47 of Title 10, United States Code; that all charges and specifications are supported by probable cause; and that a court-martial would have jurisdiction over the accused and the offenses.

(Encl. F.)

d. Also that same day, the Convening Authority re-referred all eleven Specifications to this same court-martial. (Second Charge Sheet at 2.)

LAW

a. <u>The plain language of both Article 32 and R.C.M. 405(a) direct a preliminary hearing officer to opine on "specifications" and "offenses charged"; the R.C.M. 405(e)(2) exception for inquiry into uncharged offenses cannot swallow the rule</u>.

Congress requires specified court-martial charges to be sworn under oath. Article 30, UCMJ, 10 U.S.C. § 830 (2018). In R.C.M. 405(a), the President directs that "no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this Rule." Preliminary hearings are not fact-finding enterprises; instead, the President limits their scope to the determination of required matters under Article 32(a) and R.C.M. 405(a), including whether "each *specification* states an offense" and whether probable cause exists to believe the accused committed the "offense or offenses *charged*." R.C.M. 405(e)(1) (emphasis added).

When evidence is adduced *during* an Article 32 hearing that indicates an accused committed an uncharged offense, the hearing officer *may* expand the scope of the hearing to cover that uncharged offense. R.C.M. 405(e)(2). But no statute or other Manual provision authorizes the Government to organize a preliminary hearing on uncharged matters.

b. <u>The Article 34, UCMJ, advice a convening authority must receive before referring charges to a general court-martial may not be so incorrect as to mislead him</u>.

"Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing." Article 34(a)(1), UCMJ, 10 U.S.C. § 834(a)(1) (2019); *see also* R.C.M. 406(a) ("Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.") Whatever its contents, pretrial advice must be accurate:

> If the staff judge advocate, intentionally or negligently, misrepresents the contents of the investigative record in, or omits material information from, the Article 34 advice, the principal purpose of the investigation and advice can be defeated. Consequently, a well-developed body of law exists to provide judicial review of the Article 34 advice to ensure that the evidence developed at the Article 32 investigation and any other matters, including matters in mitigation, which may have some bearing on the type of court-martial to which the charges are referred, if presented at all, will be fairly and accurately presented to the convening authority by the staff judge advocate. A judicial remedy is provided if they are not.

United States v. Klawuhn, 33 M.J. 941, 943 (N-M.C.M.R. 1991). As the Manual currently provides, "Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief." R.C.M. 406(b), Discussion (citing R.C.M. 905(b)(1); 906(b)(3)).

ARGUMENT

a. <u>This Court must not permit the Government to skirt the Code's basic Article 30, UCMJ, swearing requirements</u>.

While expansion of preliminary hearings is available where necessary, R.C.M. 405(e)(2) does not permit the Government to skirt *all* preferral and Article 32 convening requirements. If it did, Article 32 and the President's Rules as to preliminary hearings would be superfluous—an Accuser could swear and prefer just a single charge (or, indeed, no charges at all), and Trial

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Counsel would be still free to request that the Hearing Officer opine on any "additional charges" the prosecutor wished, based on whatever evidence they choose to present.

This cannot be the law. Instead, for the Rule to make any sense in the structure of the Code and Manual, Rule 405(e)(2) must refer only to evidence which neither the Convening Authority nor any swearing agent could have reviewed *before* the hearing.

Here, in March 2021, LCDR [redacted] swore to some Charges under Article 30(a), UCMJ, and R.C.M. 307. The Convening Authority directed those "charged offenses" to an Article 32 hearing—then he mandated that hearing occur over MK3 Grijalva's waiver. Still, by the time of the preliminary hearing in May, nobody had preferred any other Charges or Specifications against MK3 Grijalva. Instead, despite over *two years* of opportunity to investigate the matters concerning MK3 Grijalva and swear charges against him, Trial Counsel advised the Preliminary Hearing Officer of the Government's explicit request for him to consider, review, and opine on *uncharged* allegations. In short, Trial Counsel sought to use the Article 32 hearing as a vehicle to investigate known, unsworn charges.

The Defense timely objected at the hearing to this abuse of the Article 32 process and the narrow R.C.M. 405(e)(2) permission to expand hearings. The Defense now objects to the Government's seemingly interminable end-run around the requirements of Article 32(a) and R.C.M. 405(a), which demand that review of whether a "specification" states an offense and whether evidence supports a "charged offense."

b. <u>The latest in a long line of pretrial errors in this case is "supplemental" Article 34 advice, about already-befouled charges, that contradicts the Preliminary Hearing Officer's express findings of "no probable cause</u>."

Whatever is in the Article 34 advice, it must be accurate. But here, where the propriety of the charging scheme and the referral of charges is in doubt but the Preliminary Hearing Officer's Article 32 findings are not, the staff judge advocate's advice fails its sole obligation. Rather than advising the Convening Authority of the Article 32 findings that not all charges were supported by probable cause, the advice mangles them, claiming instead that the Hearing Officer *did* find probable cause for all offenses. Particularly where the re-referral (and joinder) of erroneously-referred charges is already in doubt, this Article 34 error was so incorrect as to mislead the Convening Authority. It demands this Court's relief.

RELIEF REQUESTED

Unless it has already granted the Defense Motion for Appropriate Relief regarding improper joinder, this Court should rule that the Additional Charges have not been properly referred to this court-martial due to the above Article 32 and Article 34 defects.

EVIDENCE & ORAL ARGUMENT

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

A. Preliminary Hearing Order

B. MK3 Grijalva Article 32 Waiver

C. Defense R.C.M. 405(k) Objection to Consideration of "Additional Charges"

D. Article 32 Report

E. Trial Counsel email of July 16, 2021

F. Supplemental Article 34 Advice

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

[redacted]
[redacted]. C. HENDERSON
CDR, JAGC, USN
Asst. Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Referral Upon Defective Article 32 and Erroneous Article 34 Advice):** 24 August 2021

RELIEF SOUGHT

The Government moves for this Court to DENY the Defense's Motion for Appropriate Relief (Referral Upon Defective Article 32 and Erroneous Article 34 Advice).

HEARING

The Government respectfully requests oral argument.

BURDEN OF PROOF

As the moving party, the Defense bears the burden of proof as to any factual issue necessary to resolve this motion, by a preponderance of the evidence. R.C.M. 905(c)(1).

SUMMARY

Two issues are discussed in this motion:

(1) A preliminary hearing pursuant to Article 32 was held on May 5, 2021. The Government requested the Preliminary Hearing Officer (PHO) consider four additional uncharged offenses based on the same facts and evidence being presented for the charged offenses. The Defense argues that the PHO must turn a blind eye to uncharged offenses and disregard the permissible scope of their inquiry. The PHO properly considered additional charges based on evidence brought forth during the hearing.

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(2) The Staff Judge Advocate (SJA) for the Convening Authority provided supplemental Article 34 advice for withdrawal and re-referral of charges on July 16, 2021. The SJA's advice contained all required information per Article 34(a)(1). However, a one sentence scrivener's error in the SJA's summarization of the PHO's findings was contained in the supplemental advice. The defense argues that this error misled the Convening Authority and seeks appropriate relief from the Court. However, the Convening Authority had already reviewed the PHO report and referred the exact same charges one month prior to receiving the supplemental advice. Accordingly, the SJA's scrivener's error was minor, had no material effect on the Convening Authority's decision to refer these charges, and should be considered a de minimis error.

STATEMENT OF FACTS

Issue 1:

1. Trial counsel notified the PHO and Defense counsel of our intent to ask the PHO to consider four uncharged offenses at the Article 32 preliminary hearing during a conference call on or about April 28, 2021.

2. The Accused was present at the Article 32 Preliminary Hearing, was informed of the nature of each uncharged offense considered by the PHO, and was afforded the same opportunities for representation, cross-examination, and presentation consistent with Article 32(d).

3. The PHO considered the uncharged offenses pursuant to RCM 405(e) and sought comment from Trial and Defense Counsel before issuing his report.

4. Trial and Defense Counsel provided comments to the PHO. The PHO concurred with Trial Counsel that consideration of uncharged offenses was permitted by R.C.M. 405(e).

5. The PHO included his findings on the uncharged offenses in his report.

Issue 2:

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5. On June 14, 2021, the SJA provided Article 34 advice to the Convening Authority. The SJA's advice contained whether each specification alleged an offense under the Code, whether there was probable cause to believe the accused committed the offense charged, and whether a court-martial would have jurisdiction over the accused and the offense. This advice complied with the requirements in Article 34(a)(1), UCMJ. While not required, the SJA's advice also contained an accurate summarization of the PHO findings on each offense, and specifically articulated conclusions to certain charges and specifications in which the SJA disagreed with PHO recommendations and instead recommend they be referred to Court-Martial. .

6. The SJA Article 34 advice and the PHO report were provided to the Convening Authority. The Convening Authority concurred with the SJA's advice and referred charges to this court-martial on June 17, 2021.

5. On July 16, 2021, following the Defense Motion for Defective Referral due to unsworn charges, the Convening Authority withdrew all charges and specifications.

6. A second Article 32 hearing was not held because the Convening Authority found all charges and specifications were adequately considered at the Preliminary Hearing on May 5, 2021 in accordance with R.C.M. 603.

7. The SJA provided supplemental Article 34 advice to the Convening Authority before referral, again containing all required information per Article 34(a)(1), that all charges and specifications are supported by probable cause, and that a court-martial would have jurisdiction over the offenses and the accused. The primary purpose of this advice was to re-refer the same charges and specifications that the Convening Authority had already referred on June 17, 2021, thereby curing a potential error in the previous preferral.

8. While not required by Article 34(a)(1), the SJA supplemental Article 34 advice also contained

a summarization of the PHO report from May 5, 2021 and a reference to her original Article 34 advice of June 14, 2021, which also contained a full summarization of the PHO findings. However, the supplemental SJA Article 34 advice contained a one sentence scrivener's error which incorrectly stated the PHO found probable cause for all charges and specifications. **Exhibit 1**.

9. The original PHO report and original Article 34 advice of June 14, 2021 were included and attached to the supplemental Article 34 advice and provided to the Convening Authority at the same time. The Convening Authority re-referred the same charges and specifications to this court-martial that he already referred on June 17, 2021, where there was no error regarding the PHO findings in the original SJA Article 34 advice.

EVIDENCE

The Government offers the following exhibit as evidence in support of this motion:

Exhibit 1: SJA Statement on de minimis Scrivener's error.

LEGAL AUTHORITY

a. The plain language of both Article 32 and R.C.M. 405 direct a preliminary hearing officer to opine on offenses charged AND uncharged.

The function of a preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the hearing. R.C.M. 405(a). The plain language of R.C.M. 405(e) defines the limited scope of the hearing and permits the PHO to consider uncharged offenses. The permissible scope of an Article 32 hearing includes uncharged offenses "if evidence *adduced* during the preliminary hearing indicates that the accused committed any uncharged offense." R.C.M. 405(e)(2). Black's law dictionary defines *adduce* to mean, "to offer or put forward for consideration (something) as evidence or authority." *Black's*

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Law Dictionary (11th ed.2019).

If evidence at the preliminary hearing indicates that the accused committed an uncharged offense, the hearing officer may consider that offense without the accused having first been charged with it if the accused: "(1) is present at the preliminary hearing; (2) is informed of the nature of each uncharged offense considered; and (3) is afforded the opportunities for representation, cross examination, and presentation consistent with [Article 32(d)]." Article 32(f) and R.C.M. 405(e).

b. The Staff Judge Advocate's Advice that specifications are supported by sufficient evidence to refer a matter to general court-martial is not a de minimis error occurs.

Article 34 of the UCMJ states in pertinent part that, "the Convening Authority may not refer a specification under a charge to a general court-marital for trial unless the staff judge advocate advises the Convening Authority in writing that:

1. the specification alleges an offense under this chapter;
2. there is probable cause to believe that the accused committed the offense charged; and
3. a court-martial would have jurisdiction over the accused and the offense."

The SJA must also provide a recommendation as to the disposition of each specification. While recommendations of the Article 32 preliminary hearing officer may be included, "...there is no legal requirement to include such information, and failure to do so is not error. *See* R.C.M. 406(b), Discussion.

Additionally, a PHO's recommendation is not dispositive. There is no reason to believe a PHO's determination that probable cause does not exist as to a specification precludes the SJA from making a different determination from the PHO in order for a Convening Authority to refer

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a charge to trial after the requirements of Articles 32 and 34 have been met. *United States v. Meador*, 75 M.J. 682, 683-84 (C.G. Ct. Crim. App. 2016).

The SJA's advice cannot be intentionally or negligently misleading. "Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective. R.C.M. 406(b), Discussion. Courts have found that SJA's failing to make a conclusion as to the legal sufficiency of each charge (*United States v. Harrison*, 23 M.J. 907, 910 (N-M. Ct. Crim App. 1987)), lack of evidence presented at an Article 32 (*United States v. Mercier*, 75 M.J. 643, 646 (C.G. Ct. Crim. App. 2016)), or failing to distinguish between PHO findings and SJA recommendations regarding probable cause (*Meador*, 75 M.J. at 684), may make Article 34 advice incorrect or incomplete. In the case cited in the Defense's motion, the court acknowledges that "...there must undoubtedly be errors so insignificant as to be classifiable as de minimis ..." that are within the unfettered discretion of the Convening Authority and there must "... be limits on the degree to which a military judge ... may substitute his, her or its judgment for that of the Convening Authority." *United States v. Klawuhn*, 33 M.J. 941, 945 (N-M.C.M.R. 1991). There, the Court found that because the incorrect advice resulted in a disparity in consequences between a special and general court martial, then the appellant was entitled to relief.

Even if an error occurs in the Article 34 advice that is so misleading as to alter the Convening Authority's decision, the remedy is ordinarily a continuance so the Government may correct the defect. *Mercier*, 75 M.J. at 646-47. *See also* R.C.M. 906(b)(3).

ARGUMENT

a. Uncharged offenses were properly considered by the Preliminary Hearing Officer during the Article 32 hearing.

The PHO is explicitly charged by R.C.M. 405(e) to exercise impartiality and examine evidence which may indicate the Accused committed an uncharged offense. The Rule cannot be read to permit the PHO to only look at new evidence which neither the Convening Authority or the swearing agent could have reviewed before the hearing. This would require the PHO to turn a blind eye to clear misconduct.

The Government provided adequate notice to Defense Counsel and the PHO of the exact uncharged offenses that Trial Counsel requested to be considered on April 28, 2021. All evidence considered by the PHO was properly disclosed to Defense Counsel in accordance with R.C.M. 404A. No new or additional evidence was introduced specific to the uncharged offenses. In sum, the evidence adduced, or brought forward during the Article 32 hearing for the charged offenses indicated the Accused committed uncharged offenses.

The rule itself provides for the rights of the Accused when uncharged offenses are considered by the PHO. The Accused must be present at the hearing. Here, the Accused was present. The accused must be informed of the nature of each uncharged offense considered. Here, the Accused was provided notice seven days prior to the hearing of each uncharged offense being considered. Further, the uncharged offenses were presented and read at the hearing. Finally, the Accused must be afforded the same opportunities for representation, cross examination, and presentation. Here, all of those requirements were met.

The Rule itself does not put a limitation on when evidence must be discovered or known to the Convening Authority, but it does explicitly provide for uncharged offenses to be considered and the procedural rights for the Accused when they are. The PHO properly considered uncharged offenses when the evidence brought forward as part of the Article 32 indicated the Accused committed the uncharged offenses and the Accused was afforded all required procedural rights.

b. The SJA Article 34 Advice met all requirements required by the Code. A one sentence scrivener's error in summarizing the PHO's findings was de minimis and did not affect the Convening Authority's decision to refer this case to General Court-Martial.

The SJA advice to the Convening Authority on June 14, 2021 contained all the required information per Article 34(a)(1) and a correct summarization of the PHO findings regarding probable cause for each offense. The SJA then clearly articulated the specific offenses in which she disagreed with the PHO findings and made conclusions of law and recommendations to the Convening Authority. In *Meador*, the SJA advice did not specify evidence contained in the PHO report, but it did discuss the evidence, contained SJA conclusions that each specification was warranted by the evidence, and clearly stated the PHO recommendation to dismiss a charge and that the SJA instead recommended referring to a General Court-Martial. The Court found this advice to not be misleading or defective. Similarly, the SJA Article 34 advice of June 14, 2021 clearly articulated where the SJA made conclusions different from the PHO recommendation. In accordance with *Meador*, the PHO recommendation is not dispositive and these conclusions by the SJA were permissible. The Convening Authority referred charges and specifications to court-martial consistent with the SJA advice on June 17, 2021.

On July 16, 2021, to correct a procedural error in the previous preferral, the SJA provided supplemental Article 34 advice to re-refer the same charges and specifications the Convening Authority originally referred on June 17, 2021. This advice incorporated by reference and enclosure the June 14, 2021 Article 34 advice, which accurately and in great detail, stated PHO findings and clearly articulated where the SJA disagreed and recommended alternative action. The supplemental Article 34 advice also included the full PHO report. The SJA met all requirements for Article 34 advice in her supplement, and while not required, included a one

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sentence summarization of the PHO findings that contained an error. This scrivener's error stated the PHO found probable cause for all charges and specifications. That one sentence statement was incorrect. However, the package presented to the Convening Authority on that day, contained the full PHO report and the original Article 34 advice of June 14, 2021 which correctly stated the PHO findings. Furthermore, the SJA was not recommending any changes to the charges or forum. The primary purpose of the re-referral was to correct a procedural error. Unlike *Harrison*, where conclusions of legal sufficiency were at issue, or *Mercier*, where a lack of sufficient evidence was at issue, the SJA's scrivener's error was a de minimis statement that did not materially alter the Convening Authority's decision. The Convening Authority had already weighed the evidence, PHO findings, and SJA recommendations in the prior referral on June 17, 2021. A once sentence error, where a determination of probable cause was not at issue to the Convening Authority, was not so incorrect or incomplete as to be misleading and affecting the Convening Authorities actions.

However, should this court find that this statement was so incorrect as to be misleading, out of an abundance of caution, the Government respectfully requests a continuance so that the SJA may correct the de minimis scrivener's error and provide a second supplemental Article 34 Advice to the Convening Authority. This would be consistent with the appropriate relief found in *Mercier*.

CONCLUSION

The Government respectfully requests the Court DENY the Defense Motion for Appropriate Relief and find that all Charges and Specifications have been properly referred to this court-martial.

Alternatively, if this Court finds the Article 34 advice contained an error that misled the

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Convening Authority, the Government respectfully requests a continuance pursuant to R.C.M. 906(b)(3) to correct the defect.

/s/ Matthew D. Pekoske
MATTHEW D. PEKOSKE
LCDR, USCG
Asst. Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the Defense Counsel via electronic mail on 24 August 2021.

/s/ Matthew D. Pekoske
MATTHEW D. PEKOSKE
LCDR, USCG
Asst. Trial Counsel

CAPT Diane M. Croff, USCG
Military Judge
[redacted]

LCDR Benjamin Adams, USN, JAGC
Detailed Defense Counsel
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CDR Justin Henderson, USN, JAGC
Detailed Defense Counsel
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LCDR Terrence Thornburgh, USCG
Special Victims Counsel
[redacted]

LT Adam Jaffe, USCG
Special Victims Counsel
[redacted]

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Second Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON THE ADMISSION OF EVIDENCE:** **PAYPAL RECORDS** 08 November 2021

RELIEF SOUGHT

Under R.C.M. 906(b)(13) and M.R.E. 803(6) , the Government moves Prosecution Exhibit 7 for identification into evidence. Prosecution Exhibit 7 for identification consists of records produced by PayPal in response to a search warrant issued by the Superior Court of California as part of Anaheim Police Detective [redacted] investigation of the accused, MK3 Grijalva.

HEARING

The government respectfully requests oral argument if this motion is opposed.

BURDEN OF PERSUASION AND PROOF

As the moving party, the government bears the burden to prove that the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

On the night of 1 February, 2019, MK3 Mark Grijalva of the Marine Force Protection Unit in Bangor, Washington, hacked into the Snapchat social media account of his civilian friend, [redacted] looking for nude or explicit images [redacted] took of herself for her boyfriend [redacted] (also MK3 Grijalva's friend). MK3 Grijalva did so while at his residence located onboard Naval Base Kitsap located at [redacted] Silverdale, Washington, and unbeknownst to [redacted] MK3 Grijalva gained access to [redacted] Snapchat Account by successfully guessing her password after at least 50 attempts. MK3 Grijalva did not have permission to access [redacted] Snapchat account when he guessed her password.

After gaining access to [redacted] Snapchat account on 1 February, MK3 Grijalva continued to access [redacted] account without her consent throughout February 2019. During this time he downloaded at least 10 images [redacted] had taken of herself, including five explicit images [redacted] took of herself posing nude or in various state of undress. [redacted] had taken these pictures to send only to her boyfriend, [redacted], and she saved these images on her Snapchat account. She did not send the images to anyone else. MK3 Grijalva did not have permission to download [redacted] images when he saved them to his iPhone and Apple Watch.

On 26 February, 2019, MK3 Grijalva created a Yahoo! email address in [redacted] name.

From 26 February to 5 March, MK3 Grijalva used the Yahoo! email address, along with [redacted] name and images he downloaded from her Snapchat account, to create dating profiles on several social media dating applications. The accused later admitted to Coast Guard Investigative Service (CGIS) Special Agents that he created the fraudulent dating profiles pretending to be [redacted] and sent illicit photos to several individuals in March 2019 by using the email account he created on the Yahoo!

On 27 February 2019, MK3 Grijalva also created an account on the electronic payment system, PayPal. The accused created a PayPal account to receive money from men he contacted via these social media dating applications by either selling nude images of [redacted] or posing as [redacted] and promising the young men sexual favors in exchange for money. The accused used his phone number [redacted] and the Yahoo! email address he created in [redacted] name to create the PayPal account.

On 5 July 2019, Anaheim Police Detective [redacted] applied for a search warrant to PayPal Holdings, Inc., seeking records associated with the PayPal account the accused created using the [redacted] email address he created in [redacted] name. That same day, Judge Jeffrey Ferguson of the Superior Court of California, County of Orange, issued a search warrant. **See Exhibit 1**. The search warrant identified the following evidence to be seized: Registration and use information; transaction and experience information; participant information; send or request money; pay or request someone else to pay a ball; add value to subscriber accounts; information about subscriber friends and contacts; information that subscriber chose to provide to obtain additional Services or specific online Services; information about subscriber if they transact as a guest; information about subscriber from third-party sources; and other information collected related to subscriber use of PayPal or Services.

On 18 July 2019, Detective [redacted] received a response from PayPal with the records requested. **See Exhibit 2**. The records requested did not include a Certificate of Authenticity. The Government reengaged with PayPal through PayPal employee [redacted] of the [redacted] Global Law Enforcement Fulfillment department to request the records but with a Certificate of Authenticity. On 1 November 2021, Mr. [redacted] sent a signed Affidavit for Business Records Certification via email correspondence certifying the records originally provided by PayPal on 18 July 2019 in response to the search warrant served by Detective [redacted] **See Exhibit 3**.

The Government now seeks to admit the contents of **Exhibit 2 and 3** and attached to this motion as <u>Prosecution Exhibit 7</u>.

EVIDENCE

1. **Exhibit 1:** 5 July 2019 search warrant to PayPal Holdings, Inc.
2. **Exhibit 2:** PayPal's response to the 5 July 2019 search warrant.
3. **Exhibit 3:** 1 November 2021 Affidavit for Business Records Certification signed by Mr. [redacted]

LEGAL AUTHORITY AND ARGUMENT

Prosecution Exhibit 7 is admissible because it is relevant and not excluded by the hearsay rule. M.R.E. 402, 803(6), and 902(11). Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The records contained in Prosecution Exhibit 7 are relevant to Charge III, all specifications, because the records link the dating profile accounts, the Yahoo! email account, and the PayPal electronic payment account to MK3 Grijalva's phone number. In addition, the PayPal records corroborate MK3 Grijalva's admission that he used [redacted] photos, to create fraudulent dating profiles to communicate with others and offered to have sex and exchange explicit photos with individuals for money without the knowledge or consent of [redacted] thereby making it more probable the accused committed the charged crimes.

Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore is not barred by M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission." The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Records of a Regularly Conducted Activity are admissible because they are excluded from the rule against hearsay. M.R.E. 803(6). Under M.R.E. 803(6), records of a regularly conducted activity, if a record of an act, event, condition, opinion, or diagnosis if:

> "(A) the record was made at or near the time by or from information transmitted by someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a uniformed service, business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11) or with a statute permitting certification in a criminal proceeding in a court of the United States; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. Records of regularly conducted activities include, but are not limited to, enlistment papers, physical examination papers, fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

The records contained in Prosecution Exhibit 7 qualify as records of a regularly conducted activity. The PayPal account Registration Information, Contact Information, and linked Bank Account Information were created and preserved by PayPal at the same time the accused created the account in [redacted] name and used the account to receive money from the individuals he met on the social media dating applications. Generating these records is a regular practice of PayPal's business activity. All of these conditions are attested to by a sworn certification provided by PayPal. There is no indicia of a lack of trustworthiness regarding these records. M.R.E. 803(6)(A-E).

Finally, the exhibits are self-authenticating. M.R.E. 901(a)'s authentication threshold is met by "evidence sufficient to support a finding that the item is what the proponent claims it is." Under M.R.E. 901, evidence authenticity serves a condition to admission. M.R.E. 901(a). The records in Prosecution Exhibit 7 is admissible pursuant to M.R.E. 902(11) as certified records of regularly conducted activity under the definition provided by M.R.E. 803(6).

CONCLUSION

The Government respectfully requests the Court determine that Prosecution Exhibit 7 is relevant to all charges, meets the hearsay exception for Records of a Regularly Conducted Activity, and that this foundation is properly demonstrated by the Certificate of Authenticity, which is a self-authenticating document. The Government further requests that Prosecution Exhibit 7 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Second Class U.S. Coast Guard	**GOVERNMENT MOTION FOR PRELIMINARY RULING ON THE ADMISSION OF EVIDENCE:** **OKCUPID AND TINDER RECORDS** 08 November 2021

RELIEF SOUGHT

Under R.C.M. 906(b)(13) and M.R.E. 803(6) , the Government moves Prosecution Exhibits 5 and 6 for identification into evidence. Prosecution Exhibits 5 and 6 for identification consists of records produced by Match Group LLC ("OkCupid") and ("Tinder") in response to search warrants issued by the United States Coast Guard.

HEARING

The government respectfully requests oral argument if this motion is opposed.

BURDEN OF PERSUASION AND PROOF

As the moving party, the government bears the burden to prove that the evidence is admissible by a preponderance of the evidence. R.C.M. 905(c).

SUMMARY OF FACTS

On the night of 1 February, 2019, MK3 Mark Grijalva of the Marine Force Protection Unit in Bangor, Washington, hacked into the Snapchat social media account of his civilian friend, [redacted] looking for nude or explicit images [redacted] took of herself for her boyfriend, [redacted] (also MK3 Grijalva's friend). MK3 Grijalva did so while at his residence located onboard Naval Base Kitsap located at [redacted] Silverdale, Washington, and unbeknownst to [redacted] MK3 Grijalva gained access to [redacted] Snapchat Account by successfully guessing her password after at least 50 attempts. MK3 Grijalva did not have permission to access [redacted] Snapchat account when he guessed her password.

After gaining access to [redacted] Snapchat account on 1 February, MK3 Grijalva continued to access [redacted] account without her consent throughout February 2019. During this time he downloaded at least 10 images [redacted] had taken of herself, including five explicit images [redacted] took of herself posing nude or in various state of undress. [redacted] had taken these pictures to send only to her boyfriend, [redacted], and she saved these images on her Snapchat account. She did not send the images to anyone else. MK3 Grijalva did not have permission to download [redacted] images when he saved them to his iPhone and Apple Watch.

On 26 February, 2019, MK3 Grijalva created a Yahoo! email address in [redacted] name: [redacted] According to records received from Yahoo!, MK3 Grijalva listed his personal cell phone and his birthday on the Yahoo! profile for [redacted]

From 26 February to 5 March, MK3 Grijalva used [redacted] along with [redacted] name and images he downloaded from her Snapchat account, to create dating profiles on several social media dating applications, including Tinder and OkCupid. The accused later admitted to Coast Guard Investigative Service (CGIS) Special Agents that he created a fraudulent account on the dating site, Tinder, pretending to be [redacted] and sent illicit photos to several individuals in March 2019 by using the email account he created on the Yahoo!. MK3 Grijalva also created an account on OkCupid under the name [redacted] with the same Yahoo! email account. MK3 Grijalva would inform the individuals he met on Tinder and OkCupid that he would have sex with them in exchange for money sent via electronic payment system, PayPal. The accused created a PayPal account to receive money from men he contacted via these social media dating applications by either selling nude images of [redacted] or posing as [redacted] and promising the young men sexual favors in exchange for money.

On 10 July 2019, CGIS interviewed an individual named [redacted] stated that he received illicit photos of [redacted] after speaking with "her" on Tinder. After conversing via text message, Mr. [redacted] agreed to send $100.00 via [redacted] in exchange for sex. The payment was sent on 02 March 2019. Mr. [redacted] took a screenshot of the Tinder page and PayPal transaction. The Tinder page used the name [redacted] and featured a picture of [redacted] in underwear. MK3 Grijalva registered the [redacted] account to the Yahoo! email account he created in [redacted] name: [redacted]

CGIS Special Agent [redacted] applied for search warrants to Match Group LLC ("Tinder"), Inc., seeking records associated with MK3 Grijalva's phone number; and Match Group LLC, ("OkCupid"), seeking records associated with MK3 Grijalva's phone number or the email address [redacted] On 04 December 2019, Commander [redacted] of the U.S. Coast Guard issued search warrants to Match Group LLC, ("OkCupid"). **See Exhibit 1.** On 18 July 2019, Commander [redacted] of the U.S. Coast Guard issued search warrants to Match Group LLC, ("Tinder"). **See Exhibit 3.** Both warrants were directed to Match Group LLC, a company headquartered at [redacted] and identified the evidence to be seized as:

<u>OkCupid.</u>

> "All records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was

> created, the length of service, the IP address used to register the account, log-in IP addresses associated with the session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number); [t]he types of service utilized; [a]ll records or other information stored at any time by an individual using the account including address books, contact and buddy lists, calendar data, pictures, and files; [a]ll records pertaining to communications between Provider and any person regarding the account, including contacts with support services and records of actions taken."

<u>Tinder</u>.

> "The contents of all calls, text messages, and data messages associated with the phone number belonging to MK3 Grijalva, [redacted] including stored or preserved copies of messages sent to and from the account, draft messages, the source and destination addresses associated with each message, the date and time at which each message was sent, and the size and length of each message; [a]ll records or other information regarding the identification of the account, to include full name, physical address, telephone numbers and other identifiers, records of session times and durations, the date on which the account was created, the length of service, the IP address used to register the account, log-in IP addresses associated with the session times and dates, account status, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number); [t]he types of service utilized; [a]ll records or other information stored at any time by an individual using the account including address books, contact and buddy lists, calendar data, pictures, and files; [a]ll records pertaining to communications between Provider and any person regarding the account, including contacts with support services and records of actions taken."

On 25 July 2019, CGIS received a response from "Tinder" with the records requested; and on 11 December 2019 received a response from "OkCupid" with the records requested, however, neither included a Certificate of Authenticity. The Government reengaged with Match

Group, LLC to again request the records but with a Certificate of Authenticity. On 13 August 2021, Senior Director, Legal Affairs at Match group, LLC complied with both search warrants and provided a Certificate of Authenticity as part of the most recent response. **See Exhibit 2** and **Exhibit 4.**

The Government now seeks to admit the contents of **Exhibit 2** and attached to this motion as Prosecution Exhibit 5: (1) the Certificate of Authenticity and (2) the responsive file (containing account details; photos; dates; times; messages; and contacts).

The Government now seeks to admit the contents of **Exhibit 4** attached to this motion as Prosecution Exhibit 6 : (1) the Certificate of Authenticity and (2) the responsive file (containing account details; photos; dates; times; messages, and Internet protocol addresses for logins and authentications events; login history; search filters; and contacts).

EVIDENCE

1. **Exhibit 1:** 18 December 2019 search warrant to Match Group, LLC ("OkCupid").
2. **Exhibit 2:** Response to search warrant by Match Group, LLC. Senior Director, Legal Affairs.
3. **Exhibit 3:** 01 August 2019 search warrant to Match Group, LLC ("Tinder").
4. **Exhibit 4:** Response to search warrant by Match Group, LLC. Senior Director, Legal Affairs.

LEGAL AUTHORITY AND ARGUMENT

Prosecution exhibits 5 and 6 are admissible because they are relevant and not excluded by the hearsay rule. M.R.E. 402, 803(6), and 902(11). Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. M.R.E. 401. The files contained in Prosecution Exhibits 5 and 6 are relevant to Charge III, all specifications, because records link the dating profile accounts with the Yahoo! email account that MK3 Grijalva created, using [redacted] photos, and using the fraudulent dating profiles to communicate with others and offered to have sex and exchange explicit photos with individuals for money without the knowledge or consent of [redacted] thereby making it more probable the accused committed the charged crimes.

Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore is not barred by M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission"). The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Records of a Regularly Conducted Activity are admissible because they are excluded from the rule against hearsay. M.R.E. 803(6). Under M.R.E. 803(6), records of a regularly conducted activity, if a record of an act, event, condition, opinion, or diagnosis if:

> "(A) the record was made at or near the time by or from information transmitted by someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a uniformed service, business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11) or with a statute permitting certification in a

> criminal proceeding in a court of the United States; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. Records of regularly conducted activities include, but are not limited to, enlistment papers, physical examination papers, fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

The records contained in Prosecution Exhibits 5 and 6 qualify as records of a regularly conducted activity. The records of communication within the OkCupid and Tinder accounts, Exhibit 5 and 6 respectively, were created and preserved by OkCupid and Tinder at the same time the messages were sent and received. OkCupid and Tinder preserve their members' direct messages and other communications, including images sent back and forth for a period of time. Generating records of communications is a regular practice of OkCupid and Tinder's business activity. All of these conditions are attested by a sworn certification provided by Match Group, LLC, the parent company of OkCupid and Tinder. There is no indicia of a lack of trustworthiness regarding these records. M.R.E. 803(6)(A-E).

Finally, the exhibits are self-authenticating. M.R.E. 901(a)'s authentication threshold is met by "evidence sufficient to support a finding that the item is what the proponent claims it is." Under M.R.E. 901, evidence authenticity serves a condition to admission. M.R.E. 901(a). The records in Prosecution Exhibits 5 and 6 are admissible pursuant to M.R.E. 902(11) as certified records of regularly conducted activity under the definition provided by M.R.E. 803(6).

CONCLUSION

The Government respectfully requests the Court determine that Prosecution Exhibits 5 and 6 are relevant to all charges, meets the hearsay exception for Records of a Regularly

Conducted Activity, and that this foundation is properly demonstrated by the Certificate of Authenticity, which is a self-authenticating document. The Government further requests that Prosecution Exhibits 5 and 6 be admitted into evidence.

/s/ Case A. Colaw
CASE A. COLAW
Lieutenant, USCG
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	GOVERNMENT RESPONSE TO REQUEST FOR BILL OF PARTICULARS 30 August 2021

1. Pursuant to the Rules for Courts-Martial 906(b)(6) the Government hereby responds to the Defense Request for a Bill of Particulars dated 28 June 2021.

2. Specifically, the Defense requests that the government identify "with sufficient precision the statements alleged in Specifications 1 and 2 of Charge I and the person(s) to whom the statements were directed in Specification 2" of the 4 March 2021 Charge Sheet.

3. These Charges and Specifications are renumbered in the operative charge sheet, preferred and referred on 16 July 2021. They are now Specifications 1 and 2 of Charge II.

4. CHARGE II: Specification 1.

   a. On or about March 6, 2019, at or near Naval Base Kitsap Bangor, Washington, MK3 Grijalva made a phone call to Anaheim (California) Police Department Detective [redacted] During the phone call, MK3 Grijalva stated to Detective [redacted] "Also, I just want to inform you, also on my behalf, this isn't the first time I've had stuff going on with my accounts," or words to

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effect. After making this statement, MK3 Grijalva then provided examples of how his account information had allegedly been compromised.

b. Then when directly asked by Detective [redacted] if he ever had pictures of [redacted] MK3 Grijalva stated, "No, I did not," or words to that effect.

c. Then when directly asked by Detective [redacted] if he ever had access to [redacted] photos, or if he ever accessed [redacted] photos anywhere, MK3 Grijalva stated, "Nope, that's correct, never."

d. These statement were totally false and were then known by MK3 Grijalva to be so false in that MK3 Grijalva had not been hacked; MK3 Grjialva had pictures of [redacted] on his cell phone and/or Apple Watch; and that he had accessed [redacted] photos via [redacted] Snapchat account. These statements were made with the intent to influence the due administration of justice in the case of himself, where he had reasons to believe that there were or would be criminal proceedings pending.

5. CHARGE II: Specification 2.

a. On or about July 12, 2019, at or near Naval Base Kitsap Bangor, Washington, MK3 Grijalva waived his Article 31(b) rights and agreed to be interviewed by Coast Guard Investigative Service Special Agents [redacted] and [redacted]

b. During the interview, MK3 Grijalva told Special Agents that his Apple Watch was in his locker in Port Angeles, MK3 Grijalva.

c. After Special Agent [redacted] asked MK3 Grijalva if his locker had a lock on it, MK3 Grijalva told Special Agents that it actually was not in his locker but was in a bag he owned somewhere. Then MK3 Grijalva told Special Agents that he did not know where his Watch was. Then MK3 Grijalva told Special Agents that he sold the watch as a "trade-in" to the Gamestop in Silverdale, Washington.

d. The statements described in the above paragraph (c) were made with the intent to influence the due administration of justice in the case of himself, where he had reasons to believe that there were or would be criminal proceedings pending.

/s/ Case A. Colaw

CASE A. COLAW
Lieutenant, USCG
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	GOVERNMENT RESPONSE TO REQUEST FOR BILL OF PARTICULARS 30 August 2021

1. Pursuant to the Rules for Courts-Martial 906(b)(6) the Government hereby responds to the Defense Request for a Bill of Particulars dated 06 July 2021.

2. The Defense requests, concerning Specification 8 of Charge III in the operative Charge Sheet dated 16 July 2021 (referred to as Specification 3 of Additional Charge II in Defense's Motion), the government identify "with sufficient precision the material statements allegedly made by MK3 Grijalva, and the person wo [sic] whom those statements were made."

3. Specification 8 of Charge III states: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about and on or about 6 March 2019, knowingly devise a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; to wit: created a dating profile on the Tinder and OKCupid application using [redacted] name and image and offered to have sex with individuals for money; that MK3 Grijalva made material statements that had a natural tendency to influence, or were capable of influencing, a person to

part with money or property; that MK3 Grijalva did so with intent to defraud; and that MK3 Grijalva used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme in violation of 18 U.S. Code Section 1343, a crime or offense not capital.

4. The Government alleges that MK3 Grijalva pretended to be [redacted] and offered to send [redacted] intimate images to, and/or meet up for sex with, the following people in exchange for money:

   a. [redacted] on or about 26 February 2019 (Bates Nos. 184-185, and 823);

   b. [redacted] on or about 2 March 2019 (Bates Nos. 177, 811)

   c. [redacted] on or about 2 March 2019 (Bates Nos. 178, 824)

   d. Multiple dating application profiles on Tinder from on or about 26 February to 6 March 2019 (Bates Nos. 315 -329);

   e. Multiple dating application profiles on OKCupid on or about 3 March to 6 March 2019 (Bates Nos. 429 – 557, 751 - 805);

   f. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172);

   g. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172);

   h. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172).

/s/ Case A. Colaw

CASE A. COLAW
Lieutenant, USCG
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	GOVERNMENT AMENDED RESPONSE TO REQUEST FOR BILL OF PARTICULARS 08 September 2021

1. Pursuant to the Rules for Courts-Martial 906(b)(6) the Government hereby responds to the Defense Request for a Bill of Particulars dated 06 July 2021.

2. The Defense requests, concerning Specification 8 of Charge III in the operative Charge Sheet dated 16 July 2021 (referred to as Specification 3 of Additional Charge II in Defense's Motion), the government identify "with sufficient precision the material statements allegedly made by MK3 Grijalva, and the person wo [sic] whom those statements were made."

3. Specification 8 of Charge III states: In that MK3 Mark Grijalva, U.S. Coast Guard, on active duty, did, at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about and on or about 6 March 2019, knowingly devise a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; to wit: created a dating profile on the Tinder and OKCupid application using [redacted] name and image and offered to have sex with individuals for money; that MK3 Grijalva made material statements that had a natural tendency to influence, or were capable of influencing, a person to

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part with money or property; that MK3 Grijalva did so with intent to defraud; and that MK3 Grijalva used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme in violation of 18 U.S. Code Section 1343, a crime or offense not capital.

4. The Government alleges that MK3 Grijalva pretended to be [redacted] and offered to meet up for sex with, the following people in exchange for money:

    a. [redacted] on or about 26 February 2019 (Bates Nos. 184-185, and 823);

    b. [redacted] on or about 2 March 2019 (Bates Nos. 177, 811)

    c. [redacted] on or about 2 March 2019 (Bates Nos. 178, 824)

    d. Multiple dating application profiles on Tinder from on or about 26 February to 6 March 2019 (Bates Nos. 315 -329);

    e. Multiple dating application profiles on OKCupid on or about 3 March to 6 March 2019 (Bates Nos. 429 – 557, 751 - 805);

    f. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172);

    g. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172);

    h. Cell user at phone number [redacted] on or about 5 March 2019 (Bates No. 172).

/s/ Case A. Colaw

CASE A. COLAW
Lieutenant, USCG
Trial Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA **v.** **MK3 MARK J. GRIJALVA** **U.S. COAST GUARD**	**NOTICE OF APPEARANCE** **SPECIAL VICTIMS' COUNSEL** **14 July 2021**

NOW COMES LCDR Terrence Thornburgh, Special Victims' Counsel for [redacted] a victim specified in the charges, and respectfully submits the following notice of appearance.

1. I am a Special Victims' Counsel for [redacted] with whom I have entered into an attorney-client relationship. I am admitted to practice in the State of Hawaii.

2. I am certified under 27(b) of the Uniform Code of Military Justice (UCMJ) and sworn under 42(a) of the UCMJ. I have also been certified by The Judge Advocate General of the United States Coast Guard to serve as a Special Victims' Counsel, and I have not acted in any manner that would tend to disqualify me from representing [redacted] in the instant case.

3. [redacted] is a victim in this case as defined under Art. 6b, UCMJ. I respectfully request the parties provide me with informational copies of any motions or accompanying notices filed or submitted by either the government or the defense pertaining to evidentiary matters surrounding the rights, interests, or privileges of [redacted] including but not limited to those arising under M.R.E. 412, 513, 514, and 615.

4. My client, through counsel, reserves all of her rights provided under Art. 6b, UCMJ, particularly her right to be present throughout the military justice proceedings, with the exception of closed proceedings that do not involve her, and to exercise her limited standing in any hearing

related to this court-martial in order to make factual statements and legal arguments, including argument through her counsel.

5. I respectfully request timely notice of the pertinent dates related to the scheduling of all hearings pending before this court and to attend any Art. 39(a) sessions to represent [redacted] interests regarding admission of evidence pursuant to M.R.E. 412, 513, and 514.

6. My contact information is as follows: [redacted]

Respectfully submitted,

[redacted]
Terrence M. Thornburgh
LCDR, USCG
Special Victims' Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing was served on the Court and counsel for the government and for defense via email on 14 July 2021.

[redacted]
Terrence M. Thornburgh
LCDR, USCG
Special Victims' Counsel

APPELLATE EXHIBIT V
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA **v.** **MK3 MARK J. GRIJALVA** **U.S. COAST GUARD**	**NOTICE OF APPEARANCE** **SPECIAL VICTIMS' COUNSEL** **14 July 2021**

NOW COMES LT Adam Jaffe, Special Victims' Counsel for [redacted] a victim specified in the charges, and respectfully submits the following notice of appearance.

1. I am a Special Victims' Counsel for [redacted] with whom I have entered into an attorney-client relationship. I am admitted to practice in the State of California.

2. I am certified under 27(b) of the Uniform Code of Military Justice (UCMJ) and sworn under 42(a) of the UCMJ. I have also been certified by The Judge Advocate General of the United States Coast Guard to serve as a Special Victims' Counsel, and I have not acted in any manner that would tend to disqualify me from representing [redacted] in the instant case.

3. [redacted] is a victim in this case as defined under Art. 6b, UCMJ. I respectfully request the parties provide me with informational copies of any motions or accompanying notices filed or submitted by either the government or the defense pertaining to evidentiary matters surrounding the rights, interests, or privileges of [redacted] including but not limited to those arising under M.R.E. 412, 513, 514, and 615.

4. My client, through counsel, reserves all of her rights provided under Art. 6b, UCMJ, particularly her right to be present throughout the military justice proceedings, with the exception of closed proceedings that do not involve her, and to exercise her limited standing in any hearing

related to this court-martial in order to make factual statements and legal arguments, including argument through her counsel.

5. I respectfully request timely notice of the pertinent dates related to the scheduling of all hearings pending before this court and to attend any Art. 39(a) sessions to represent [redacted] interests regarding admission of evidence pursuant to M.R.E. 412, 513, and 514.

6. My contact information is as follows: Coast Guard Island, [redacted]

Respectfully submitted,

[redacted]

Adam J. Jaffe
LT, USCG
Special Victims' Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing was served on the Court and counsel for the government and for defense via email on 14 July 2021.

[redacted]

Adam J. Jaffe
LT, USCG
Special Victims' Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. NAVY**	**DEFENSE NOTICE AND MOTION IN LIMINE** **(Marital Privilege)** **5 AUG 21**

MOTION

Pursuant to Mil. R. Evid. 504(b), the Defense provides this Notice of MK3 Grijalva's claim of privilege as to any confidential communications he made to his spouse, Mrs. [redacted] The Defense accordingly requests, pursuant to R.C.M. 906(b)(13), that this Court rule *in limine* that the Government may not inquire, and [redacted] should be prevented from disclosing, any such communications at trial.

SUMMARY

The Government has indicated an intent to call as a trial witness [redacted] who has given Coast Guard investigators information about statements MK3 Grijalva made to her during [redacted] These statements are privileged under Mil. R. Evid. 504(b) and not subject to any exception. Consequently, this Court should rule that the Government may not ask [redacted] at trial about any statements MK3 Grijalva made to her during the course of [redacted]

BURDEN

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

FACTS

1. MK3 Grijalv[redacted] (Encl. A.)

2. Coast Guard Investigative Service agents interviewed [redacted] on July 12, 2019. (Encl. B.)

3. In that interview, [redacted] provided an account of statements allegedly made by MK3 Grijalva to her when she "confronted" him about images she found on his smart watch. (*Id.*)

4. On August 4, 2021, the Government provided notice of its intent to call [redacted] as a witness a trial. (Encl. C.)

LAW

"A person has a privilege during and after the marital relationship to . . . prevent another from disclosing, any confidential communication made to the spouse of the person while they were married and not separated as provided by law." Mil. R. Evid. 504(b)(1). The only exceptions to this Rule apply when both spouses "have been substantial participants in illegal activity," when "one spouse is charged with a crime against the person or property of the other spouse or a child of either," when the marital relationship was a sham, or when one spouse is charged with importing the other as an alien for an improper purpose. Mil. R. Evid. 504(c).

ARGUMENT

With respect to confidential communications made within the confines of [redacted] MK3 Grijalva holds the privilege. No exception negates it: [redacted] was certainly not a participant in any of the activity of which MK3 Grijalva is accused—indeed, she was the one who initiated the investigation against him; she is not a named victim of the any of the alleged offenses; and there is no evidence that their marriage is a sham or otherwise entered into for an improper purpose. Consequently, the privilege applies, and any communications between MK3 Grijalva and [redacted] that occurred since the date of [redacted] should be ruled privileged and inadmissible at trial.

RELIEF REQUESTED

The Defense respectfully requests a ruling *in limine* that bars the Government from inquiring, and prevents [redacted] from disclosing, the contents of any confidential communications made by the Accused to [redacted]

EVIDENCE & ARGUMENT

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

A. CG-2020 Dependency Worksheet ICO MK3 Grijalva dtd 5 Dec 2016
B. CGIS Interview Summary of [redacted]
C. Government Witness Notifications dtd 4 Aug 2021

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

[redacted]
J. C. HENDERSON
CDR, JAGC, USN
Asst. Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MARK J. GRIJALVA Machinery Technician Third Class U.S. Coast Guard	GOVERNMENT NOTICE PURSUANT TO M.R.E. 804(b)(3) and 807 1 October 2021

1. The Government was notified on September 27, 2021, that [redacted] is declining to testify pursuant to the [redacted] in Mil. R. Evid. 504 because she does not want to testify against [redacted] because their interest are aligned. Pursuant to Mil. R. Evid. 807 and Mil. R. Evid 804(b)(3), the Government intends to seek the hearsay evidence at trial:

1. Statements made by [redacted] made to law enforcement and to [redacted] about the following testimony:

   a. Her description of finding the watch on 5 March. On the morning of Tuesday, March 5, MK3 Grijalva went to work at the MFPU. He took his personal cell phone, but left his Apple iWatch at home. [redacted] was at home and noticed the iWatch received several incoming messages. She scrolled through the messages on the iWatch and saw the nude photos of [redacted] in text message threads with phone numbers she did not recognize. [redacted] used her cell phone to take pictures and videos of the text message conversations she found on the iWatch. One of these videos captured a text message MK3 Grijalva had with a phone number associated with a Washington man, [redacted] She observed that MK3 Grijalva sent [redacted] at least one of the explicit photos he took from [redacted] Snapchat to [redacted] She also provided a video of MK3 Grijalva's watch while scrolling through the messages.

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b. [redacted] stated she kept MK3 Grijalva's watch on 5 March. At 2152, [redacted] texted [redacted] "[MK3 Grijalva] is up in the room instead of down here telling me he didn't do it." [redacted] responds, "Probably hiding his [shit]." At 2204, [redacted] texted [redacted] "Can't hide much since I kept his watch." Although these statements are not hearsay, the Government provides notice in an abundance of caution.

[redacted]

Jon T. Taylor
LCDR, JAGC, USN
Trial Counsel

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COURT RULINGS & ORDERS

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON** **DEFENSE MOTION TO DISMISS** **(DUE PROCESS NOTICE DEFECT)** **31 October 2021**

NATURE OF THE MOTION: Defense filed a Motion to Dismiss Specifications 1 through 3 of Charge III arguing they fail to satisfy due process notice requirements in accordance with Amendment V of the U.S. Constitution and RCM § 907(b)(3)(A).

BURDEN: The Defense bears the burden of demonstrating by a preponderance of the evidence that Specifications 1 through 3 of Charge III fail to state an offense. *RCM §905(c).*

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. In doing so, I make the following findings and conclusions:

FINDINGS OF FACT:

1. The accused admitted to Coast Guard Investigative Service (CGIS) agents that he unlawfully gained access to [redacted] Snapchat account by guessing her password after trying unsuccessfully more than 50 times. He admitted to downloading from her account approximately 5 sexually explicit images of [redacted] Thereafter, the accused created accounts/profiles on "Tinder" and "OKCupid" using [redacted] names and images without her permission. Using those accounts and posing as [redacted] the accused communicated with several individuals offering [redacted] photos and sex in exchange for money. The accused estimated he sent photos of [redacted] to approximately 8 individuals and in exchange, received approximately $200 through use of a PayPal account.

2. [redacted] is the girlfriend of the accused's friend at the time of the offenses. Both the former friend and [redacted] are civilians.

3. The accused texted the images to at least three individuals, all civilians, from his residence located onboard Naval Base Kitsap Bangor, Washington.

4. Of significance to this motion, the accused was charged with 3 specifications of service discrediting conduct under Article 134 – one for accessing [redacted] Snapchat account and obtaining her images; one for using her name and photo to create a Tinder profile; and 1 for using her name and photos to create an OKCupid dating profile; the conduct in all 3 specifications was done without the authority or permission of [redacted]

PRINCIPLES OF LAW AND ANALYSIS:

"The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)(citing *United States v. Sell*, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953).

A specification shall be a plain, concise, and definite statement of the essential facts constituting the offense charged. RCM § 307(c)(3). The specification is sufficient when it alleges "every element" of the charged offense "either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); RCM 307(c)(3); See also *Hamling v. United States*, 418 U.S. 87 (1974). *Dear* established a three-prong test requiring: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy.

The Fifth Amendment's Due Process Clause requires "fair notice that an act is forbidden and subject to criminal sanction." *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998). It also requires "fair notice as to the standard applicable to the forbidden conduct." *United States v. Vaughn*, 58 M.J. 29, 31 (C.A.A.F. 2003)(quoting *Parker v. Levy*, 417 U.S. 733, 755 (1974). "Citing *Parker v. Levy*, this Court has held that as a matter of due process, a service member must have 'fair notice' that his conduct [is] punishable' before he can be charged under Article 134 with a service discrediting office." *Vaughn*, 58 M.J. 32 (quoting *Bivens*, 49 M.J. at 330). Sources of notice for 134 offenses include federal law, state law, military case law, military custom and usage and military regulations. "An Article 134 offense that is not specifically listed in the MCM must have words of criminality and provide an accused with notice as to the elements against which he or she must defend." *Vaughn*, 58 M.J. at 35 (quoting *United States v. Davis*, 26 M.J. 445, 447-48 (C.M.A. 1988).

The Defense challenges Specification 1 through 3 of Charge III on due process grounds, claiming all three specifications charged under Article 134 fail to provide him with fair notice that the conduct is forbidden as well as the standard applicable to that forbidden conduct.

Turning first to Specification 1 of Charge III, the accused is charged there with violation of Article 134 of the UCMJ, the elements of which are:

1) that at or near Naval Base Kitsap Bangor, Washington, between on or about 1 February 2019 and on or about 26 February 2019, the accused unlawfully and without authority or permission of [redacted] accessed the Snapchat account of [redacted] and obtained digital images of [redacted] and
2) that under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

The Defense claims he had no notice his conduct of accessing [redacted] Snapchat account and obtaining her digital images unlawful and without her authority or permission was forbidden. He likewise claims he had no notice as to the standard that would be used to evaluate his conduct. This Court disagrees and finds his arguments without merit.

The federal government and all fifty states have enacted criminal laws that prohibit computer related crimes. Laws which prohibit computer trespass closely resemble property trespass crimes. At its core, a password protected computer, email, or account is no different than a locked door of a property. Of course, one key difference is the need to regularly change one's password to thwart the efforts of computer hackers who may successfully guess or otherwise obtain a password and access computers or accounts online without the owner's knowledge. Like property owners, computer users also have Fourth Amendment protections that require the government to obtain a lawful warrant in order to access the contents of computers or any online accounts, further reinforcing the privacy expectations held by computer users.

One such state law is Washington's Cybercrime Act is Revised Code of Washington (R.C.M.) 9A.90.050 Computer Trespass, which prohibits a person, without authorization, from intentionally gaining access to a computer system or electronic database of another. The statute also supplies the following definitions:

"Access" means to gain entry to, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of electronic data, data network, or data system, including via electronic means.

"Without authorization" means to knowingly circumvent technological access barriers to a data system, in order to obtain information without the express or implied permission of the owner, where such technological access measures are specifically designed to exclude or prevent unauthorized individual from obtaining such information[]. RCW 9A.90.030.

Additionally, aside from the Coast Guard's Cyber Command, whose primary mission involves cyber security, all Coast Guard members are required to undergo numerous annual mandated training programs geared toward cyber security, the protection of computers, accounts and the importance of password protection/security. This is the "less formalized custom and image" within the military community which the Supreme Court addressed in *Parker* that provides further notice to the accused of the conduct proscribed by Article 134.

In *Vaughan,* the Court explained, "[w]e need not decide whether custom and regulation, state law, or military case law alone would meet the requirements for due process notice enunciated in *Parker.* We conclude when addressed together, appellant should reasonably have understood that her [] conduct was subject to criminal sanction." *Vaughan* 58 M.J. at 33. This Court reaches the same conclusion – that the accused should have reasonably understood his conduct was criminal. Analysis and application of the facts to Specification 1 of Charge III lead this Court to conclude that the charge states an offense that is sufficiently pled under the RCMs and cognizable under the UCMJ. Specification 1 of Charge III states the essential elements of a computer trespass that is service discrediting as proscribed by Article 134. Specification 1 also provides notice to the accused of the nature of the offense which he is charged as well as the time, date, and location of the alleged offense, which provides him with protection against double jeopardy. The Defense's due process claim with regard to specification 1 of Charge III is without merit and his motion to dismiss is denied.

Turning next to the conduct alleged in Specifications 2 and 3 of Charge III, the Defense raises the same due process claims. The elements of Specification 2 of Charge III charging violation of Article 134 of the UCMJ are:

1) that at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, the accused unlawfully and without authority or permission of [redacted] created a Tinder profile using the name and image of [redacted] and
2) that under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

The elements of Specification 3 of Charge III are identical to Specification 2 except to substitute "OKCupid dating profile" in place of "Tinder profile.

Unlike Specification 1, the Court is unaware of any federal or state crime that prohibits the conduct in Specification 2 and 3, *as alleged*. At first glance, the Identity Theft Statute at RCW 9.35.020 appears it could apply to the defendant's conduct. The statute makes it a crime to "knowingly obtain, possess, use, or transfer a means of identification [] with the intent to commit, or to aid or abet, any crime. RCW 9.35.020. "Means of identification" includes the name of a person, as well as "other information that could be used to identify the person." A photo of the person whose name is being used would certainly seem to identify that person. However, what is missing in the Government's allegations is language of any intent to commit a crime when [redacted] name and photo were used by the accused to open Tinder and OKCupid profiles. The accused's admissions and the facts make clear his intentions were to commit crimes by opening these accounts; crimes which he in fact did do. But the language in the specifications make no mention of that criminal intention, thus Washington's identity theft statute cannot apply.

The Government points the Court to RCW 9A.86.010 which prohibits disclosure of intimate images, however they fail to allege in either specification 2 or 3 that the image(s) of [redacted] used to create the profiles were *intimate* images. They also point to conduct found to be criminal under Article 134 when an accused's conduct placed a woman in reasonable fear of injury or emotional distress. While this Court can speculate that the accused's conduct in creating these two profiles using [redacted] name and photo placed [redacted] in reasonable fear of injury or emotional distress, there is no mention of that in specifications 2 or 3. The Government's remaining arguments of generality offer no specificity or authority for the Court to find that due process requirements have been met with the conduct they have alleged in Specifications 2 and 3.

Because Specifications 2 and 3 under Charge III do not provide the accused "fair notice that an act is forbidden and subject to criminal sanction," nor "fair notice as to the standard applicable to the forbidden conduct," both specifications must be dismissed.

RULING:
The Defense's Motion to Dismiss Specification 1 of Charge III for Due Process Notice Defects is DENIED.
The Defense's Motion to Dismiss Specifications 2 and 3 of Charge III for Due Process Notice Defects is GRANTED.

So ordered this 31st day of October 2021 [redacted]

D. M. Croff
CAPTAIN, USCGR
Military Judge

APPELLATE EXHIBIT XX
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UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON DEFENSE MOTION TO DISMISS MULTIPLICIOUS SPECIFICATIONS OR MERGE FOR UNREASONABLE MULTIPLICATION OF CHARGES** **31 October 2021**

NATURE OF THE MOTION: Defense filed a motion to dismiss 23 June 2021. Following that filing, the charges and specifications were withdrawn. On 16 July 2021, charges were preferred and referred resulting in the reordering of offenses. For clarity, the Court will list the offenses the Defense refers to in their 23 June pleading according to how they are now listed in the current charge sheet.

The Defense seeks to dismiss Specification 2 of Charge II as multiplicious and an unreasonable multiplication of the sole Specification of Charge I.

Additionally, the Defense seeks to dismiss the following charges as unreasonably multiplied:

Specification 1 of Charge III as unreasonably multiplied with Specification 6 of Charge III;

Specifications 2 and 3 of Charge III as unreasonably multiplied with Specification 7 of Charge III; and

Specification 5 of Charge III as unreasonably multiplied with Specification 4 of Charge III.

The Defense requests that if the charges are found to be unreasonably multiplied, that they either be dismissed, merged for findings, or merged for sentencing.

BURDEN: The Defense bears the burden of demonstrating by a preponderance of the evidence that the charged offenses are multiplicious or constitute an unreasonable multiplication of charges. *RCM §905(c).*

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. In doing so, I make the following findings and conclusions:

FINDINGS OF FACT:

1. The accused admitted to Coast Guard Investigative Service (CGIS) agents that he unlawfully gained access to [redacted] Snapchat account by guessing her password after trying unsuccessfully

more than 50 times. He admitted to downloading from her account approximately 5 sexually explicit images of [redacted] Thereafter, the accused created accounts/profiles on "Tinder" and "OKCupid" using [redacted] names and images without her permission. Using those accounts and posing as [redacted] the accused communicated with several individuals offering [redacted] photos and sex in exchange for money. The accused estimated he sent photos of [redacted] to approximately 8 individuals and in exchange, received approximately $200 through use of a PayPal account.

2. [redacted] is the girlfriend of the accused's friend at the time of the offenses. Both the former friend and [redacted] are civilians.

3. The accused was first interviewed by the Anaheim California Police Department on 06 March 2019 and later by CGIS agents 12 July 2019. During both interviews, the accused made numerous false statements which included denying any involvement in accessing [redacted] Snapchat account or obtaining her photographs. Instead, the accused claimed the accounts of both he and [redacted] must have been hacked to explain how [redacted] photographs wound up on his Apple Watch. Approximately 1 hour and 5 minutes into his 2 hour and 10 minute interview with CGIS on 12 July, the accused made admissions. Toward the end of the interview, the accused made some statements which were untrue.

4. Under Charge I, the accused is charged with a sole specification of false official statement, in violation of Article 107 of the Uniform Code of Military Justice (UCMJ) in that he did:

> … on board Naval Base Kitsap Bangor, Washington, on or about 12 July 2019, make to a Coast Guard Investigative Service Special Agent an official statement, to wit: that his Apple Watch was located in his duty locker in Port Angles, Washington, which statement was totally false, and was then known by the [sic] MK3 Grijalva to be so false.

5. Specification 2 of Charge II charges the accused with obstruction of justice, in violation of Article 131b of the UCMJ in that he did:

> …at or near Naval Base Kitsap Bangor, Washington, on or about 12 July 2019, wrongfully do a certain act, to wit: wrongfully give multiple locations of his Apple Watch which contained images of [redacted] with intent to impede and obstruct the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

6. In response to Defense's Motion for Bill of Particulars (unopposed by the Government) for Specification 2 of Charge II, the Government specified the "multiple locations of his Apple Watch" made by the accused with the intent to obstruct justice. Upon being asked by CGIS Agents "if his locker had a lock on it, MK3 Grijalva told Special Agents that it actually was not in his locker but was in a bag he owned somewhere. Then MK3 Grijalva told Special Agents that he did not know where his Watch was. Then MK3 Grijalva told Special Agents that he sold the watch as a "trade-in" to the "Gamestop" in Silverdale, Washington" (Government's Response to Request for Bill of Particulars, filed 30 August 2021).

7. The accused's statements which the Government alleges were false under the sole Specification of Charge I, and were made with the intent to obstruct justice under Specification 2 of Charge II, stem from the interview conducted by CGIS on 12 July 2019. The accused's statements about the watch being located in his locker occurred around the 2-hour mark, approximately 3 minutes before his statements about the watch being in a bag, not knowing where the watch was located and trading it in to "Gamestop."

8. Specification 1 of Charge III charges the accused with conduct of a nature to bring discredit to the service, in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, between on or about 1 February 2019 and on or about 26 February 2019, unlawfully and without authority or permission of [redacted] access the Snapchat account of [redacted] and obtain digital images of [redacted]

9. Specification 2 of Charge III charges the accused with conduct of a nature to bring discredit to the service, in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create a Tinder profile using the name and image of [redacted]

10. Specification 3 of Charge III charges the accused with conduct of a nature to bring discredit to the service, in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, unlawfully and without authority or permission of [redacted] create a OKCupid dating profile using the name and image of [redacted]

11. Specification 4 of Charge III charges the accused with conduct of a nature to bring discredit to the service, in violation of Article 134 of the UCMJ in that he did:

> ...at Naval Base Kitsap Bangor, Washington, on divers occasions between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstance in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships.

12. Specification 5 of Charge III charges the accused with violation of Washington State law under the Assimilated Crimes Act, in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, on divers occasions between on or

about 1 February 2019 to on or about 31 March 2019, violate Title 9A Washington Criminal Code, Chapter 9A.86, Disclosing Intimate Images, by knowingly disclosing an intimate image of [redacted] who is identifiable from the visual image, which was obtained under circumstance in which a reasonable person would know or understand that the image was to remain private, which MK3 Grijalva knew or should have known that the depicted person, [redacted] had not consented to the disclosure, and MK3 Grijalva knew or reasonable should have known that the disclosure would cause harm to the Depicted person, [redacted]

13. Specification 6 of Charge III charges the accused with computer fraud under 18 U.S.C 1030(a)(4), in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly access without authorization a computer used in or affecting interstate or foreign commerce or communication, to wit: accessing without authorization the Snapchat application; that MK3 Grijalva did so with the intent to defraud; that access without authorization furthered the intended fraud; and that MK3 Grijalva obtained anything of value, to wit: images of [redacted] from her Snapchat profile.

14. Specification 7 of Charge III charges the accused with identity theft under 18 U.S.C 1028A, in violation of Article 134 of the UCMJ in that he did:

> ...at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, knowingly transfer, possess, or use without legal authority a means of identification of another person, to wit: [redacted] name and image to create a social media dating application profile; that MK3 Grijalva knew that the means of identification belonged to a real person; and that MK3 Grijalva did so during and in relation to violation of 18 U.S. Code Section 1343, in violation of 18 U.S. Code 1028A.

PRINCIPLES OF LAW AND ANALYSIS:

Multiplicity

The prohibition against an accused being found guilty of multiplicous offenses is grounded in the concept of double jeopardy. The Fifth Amendment's Double Jeopardy Clause "precludes a court from imposing multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Teeters,* 37 M.J. 370, 373 (C.M.A. 1993). The *Teters* Court applies the test established by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). That rule is as follows:

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. At 304. The Court in *United States v. Colemen*, articulated a three-step inquiry to determine if two charges were multiplicious. 79 M.J. 100, 103 (C.A.A.F. 2019). "First, we determine whether the charges are based on separate acts. If so, the charges are not multiplicious because separate acts may be charged and punished separately." *Id. See United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996). "Second, because the charges are based upon a single act, we next must determine whether Congress made an overt expression of legislative intent regarding whether the charges should be viewed as multiplicious." *Id.* (citing *Teters*, 37 M.J. at 376.) "Third and finally, because there is no overt expression of congressional intent, we must seek to infer Congress's intent based on the elements of the violated statutes and their relationship to each other." *Id.* (citing *Teters* at 376–77.) Specifically, if each statute requires proof of an element not contained in the other, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute. *Id.* (internal citations omitted.)

R.C.M. 907(b)(3)(B) Discussion cautions against dismissing a specification for multiplicity prior to trial "unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification."

Unreasonable Multiplication of Charges

R.C.M. § 307(c)(4) directs that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Unreasonable multiplication of charges (UCMJ) is a policy pronouncement by the courts to address the abuse of prosecutorial discretion in instances where multiplicity does not exist. *United States v. Quiroz*, 57 M.J. 583,596 at 587 (N-M Ct. Crim. App. 2002). The longstanding principle prohibiting unreasonable multiplication of charges promotes fairness and addresses those unique features of the military justice system that increase the potential for prosecutorial overreaching. *Id.*

By its very nature, the proper exercise of prosecutorial discretion cannot be reduced to a formula.[1] Absent direct evidence of abuse, however, a number of non-exclusive factors may circumstantially show that the Government abused its discretion and is "piling on." *See Quiroz*, 57 M.J. at 585. Is each charge and specification aimed at a distinctly separate act? *Id.* Do the charges misrepresent or exaggerate the accused's misconduct? *Id.* Do the charges unfairly increase the punitive exposure? *Id.* Do the charges involve a unique feature of military law that increases the potential for abuse? *Id.* Did the Government face some unreasonable contingencies of proof or law that justifies the multiple charges? *See id.* at 586. Did the Government charging strategy, although aggressive, reflect a reasoned approach? *See United States v. Campbell*, 66 M.J. 578 at 583 (N-M Ct. Crim. App. 2008).

Any abuse of prosecutorial discretion, like multiplicity itself, may be remedied by dismissal of the appropriate charges or consolidation with others. *United States v. Roderick*, 62 M.J. 425, 434 at 433 (C.A.A.F. 2006). Another possible remedy is to limit the punitive exposure of the accused. *RCM §1003(c)(1)(C)* Discussion, *United States v. Balcarczyk*, 52 M.J. 809, 813 (N-M. Ct. Crim. App. 2000).

[1] ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, CRIMINAL JUSTICE SECTION STANDARDS commentary to standard 3-3.9 (1992), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html (discretion in the charging decision).

Defendant's claim that Specification 2 of Charge II is multiplicious and an unreasonable multiplication of the Specification of Charge I.

A review of the facts in this case, and statements made by MK3 Grijalva to CGIS during the 12 July 2019 interview link each charged crime to a separate and distinct act/statement. MK3 Grijalva first told CGIS agents the watch was located in his locker. Approximately 3 minutes later, when asked if his locker was locked, MK3 Grijalva's story changed; he stated he believed the watch was located in one of his bags, which evolved into not knowing where the watch was located, and eventually ended with him stating he no longer had the watch because he sold it to Gamestop after deleting everything on it. The first statement forms the basis for the false official statement. The second series of statements, as specified in the Bill of Particulars, form the basis for the obstruction of justice. Additionally, each statute requires proof of an element not contained in the other. The elements for False Official Statement charged under the Specification of Charge I are:

1) that on or about 12 July 2019, on board Naval Base Kitsap Bangor, Washington, the accused made to a Coast Guard Investigative Service Agent a certain official statement, that is: that his Apple Watch was located in his duty locker in Port Angeles, Washington;
2) that the statement was totally false;
3) that the accused knew it to be false at the time he made it; and
4) that the false statement was made with the intent to deceive.

The elements for Obstruction of Justice charged under Specification 2 of Charge II are:

1) that on or about 12 July 2019 at or near Naval Base Kitsap Bangor, Washington, the accused wrongfully did a certain act, that is, wrongfully give multiple locations of his Apple Watch which contained images of [redacted]
2) that the accused did so in the case of himself against whom the accused has reason to believe there were or would be criminal or disciplinary proceedings pending; and
3) that the acts were done with the intent to influence, impede, or otherwise obstruct the due administration of justice.

Accordingly, the separate statements made by the accused may be charged separately, and the charges are not multiplicious. The next question concerns whether the charges are unreasonably multiplied and for the reasons explained below, this Court finds they are not.

Analysis of the facts and events as alleged in this case lead this Court to conclude that the charges do not misrepresent or exaggerate the accused's criminality. MK3 Grijalva made a number of false official statements to CGIS agents during the interview. The first hour consisted of mostly false statements by the accused, denying any involvement and instead claiming he had been hacked. Only one of the false statements – that his Apple Watch was located in his duty locker – was charged by the Government as a false official statement. The second series of statements, offering multiple locations of his watch, which CGIS Agents investigated but were unable to validate, were charged as obstruction of justice. Although the two charges increase the punitive exposure, there is no evidence it was done so *unfairly*. The charge of false official statement and obstruction of justice, supported by the evidence, reflect a reasoned approach to the government's charging strategy. Moreover, there is no evidence of prosecutorial overreaching or abuse.

<u>Defendant's Claims of Unreasonable Multiplication of Specification 1 of Charge III and Specification 6 of Charge III</u>

The conduct charged under Specifications 1 and 6 of Charge III address similar conduct by the accused in accessing [redacted] Snapchat account and obtaining her images without authority.

The elements of Specification 1 of Charge III charging the accused with violation of Article 134 of the UCMJ are:

1) that at or near Naval Base Kitsap Bangor, Washington, between on or about 1 February 2019 and on or about 26 February 2019, the accused unlawfully and without authority or permission of [redacted] accessed the Snapchat account of [redacted] and obtained digital images of [redacted] and
2) that under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

The elements of Specification 6 of Charge III charging the accused with computer fraud under 18 U.S. Code 1030(a)(4), in violation of Article 134 of the UCMJ are:

1) that at or near Naval Base Kitsap Bangor, Washington, between on or about 3 February 2019 and on or about 6 March 2019, the accused knowingly accessed without authorization a computer used in or affecting interstate or foreign commerce or communication, to wit: accessing without authorization the Snapchat application; that MK3 Grijalva did so with the intent to defraud; that access without authorization furthered the intended fraud; and that MK3 Grijalva obtained anything of value, to wit: images of [redacted] from her Snapchat profile, in violation of 18 U.S. Code Section 1030 (a)(4); and
2) that the defendant knowingly accessed without authorization a computer used in or affecting interstate commerce or communication;
3) that the defendant did so with the intent to defraud;
4) that by accessing the computer without authorization the defendant furthered the intended fraud;
5) that the defendant by accessing the computer without authorization obtained anything of value; and
6) that the offense charged was an offense not capital.

A comparison between the specifications shows the timeframes charged under each are slightly different. Specification 1 includes the terminal element of service discrediting conduct. Specification 6 has heightened proof requirements, adding elements involving computer access, interstate commerce, an intent to fraud, and obtaining items of value.

Analyzing the *Quiroz* factors, and starting with the question of whether each specification is aimed at distinctly separate acts, the answer appears to be no. Instead, both specifications address the act of the accused accessing [redacted] Snapchat account and accessing her photos.

While the Government claims in their 25 August response that these two specifications are aimed at separate criminal acts, they argued during the 01 September motions hearing that the two were pled to cover contingencies of proof. Not knowing whether they will be able to elicit the proof required to meet the additional elements of Specification 6 at trial, Specification 1 is the alternative charging theory. Thus, there may be slight variances between the specifications, but they are not distinctly separate acts.

Turning to whether the charges misrepresent or exaggerate the accused's criminality or unfairly increase the accused's punitive exposure, they do not; nor is there evidence of prosecutorial overreaching or abuse. The government is not prevented from charging in the alternative to meet contingencies of proof. Alternative theories of liability for the same act may be charged because of the uncertainties with the proof that may be adduced at trial, as well as which elements of which charges the members believe have been proven at trial. Here the Government acknowledges it may not be able to meet the higher burden it has placed on itself by charging specification 6, and if unable to do so, specification 6 will be dismissed. Under no circumstances will the accused be sentenced on both specifications 1 and 6.

In arguing the two offenses are unreasonably multiplied, the Defense requests relief in the form of dismissing Speciation 1, presumably because they recognize the added burdens of proof required in Specification 6. Their request is denied at this stage of the proceeding. However, the concept of unreasonable multiplication of these two specifications will be re-addressed at two later stages of the trial: 1) After the evidence is in and before deliberation on findings (the instructions phase); and 2) After findings are announced but prior to sentencing.

Defendant's Claims of Unreasonable Multiplication of Specifications 2 and 3 of Charge III and Specification 7 of Charge III

The conduct charged under Specifications 2, 3 of Charge III address conduct by the accused in using [redacted] identify and images without authority to create online dating profiles at two different sites – Tinder and OKCupid. Specification 7 of Charge III charges identity theft in creating the two online dating profiles with an intent to commit wire fraud. In arguing the offenses are unreasonably multiplied, the Defense requests relief in the form of dismissing Specifications 2 and 3.

In a separate pleading filed 07 July 2021, the Defense moved to dismiss Specification 2 and 3 of Charge III for failure to comply with due process. In its ruling addressing that motion, this Court agreed with Defense that Specifications 2 and 3 of Charge III fail to satisfy due process notice requirements and both specifications were dismissed. Accordingly, there is not need to address the merits of the Defense's argument with respect to their claim her that Specifications 2 and 3 of Charge III are multiplicious with Specification 7 of Charge III.

Defendant's Claims of Unreasonable Multiplication of Specification 4 of Charge III and Specification 5 of Charge III

The conduct charged under Specifications 4 and 5 of Charge III is aimed at the wrongful broadcast/sharing of intimate images of [redacted] without her consent. The Government argues the two specifications are pled for contingencies and law, and concedes that if this Court were to find Specification 4 is *not* preempted by Article 117a, UCMJ, Specification 5 should be dismissed because it is multiplicious with Specification 4. In a separate pleading filed 10 August 2021, the Defense moved to dismiss Specifications 4 and 5 for Failure to State an Offense. In its ruling addressing that motion, this Court denied the Motion to Dismiss Specification 4, and for purposes relevant to the instant motion, concluded that Specification 4 is not preempted by Article 117a, UCMJ. In accordance with that ruling, and the Government's concession, this Court finds that Specification 5 of Charge III must be dismissed.

RULING:

The Defense's Motion to Dismiss Specification 2 of Charge II as multiplicious and unreasonably multiplied with the Specification of Charge I is DENIED.

The Defense's Motion to Dismiss Specification 1 of Charge III as an unreasonable multiplication of Specification 6 of Charge III is DENIED.

The defense may revisit these issues at two later stages of the trial: 1) After the evidence is in and before deliberation on findings (the instructions phase); and 2) After findings are announced but prior to sentencing.

The Defense's Motion to Dismiss Specifications 2 and 3 of Charge III as an unreasonable multiplication of Specification 7 of Charge III is MOOT, as Specifications 2 and 3 of Charge III were dismissed on other grounds.

The Defense's Motion to Dismiss Specification 5 of Charge III as an unreasonable multiplication of Specification 4 of Charge III is GRANTED. Specification 5 of Charge III is DISMISSED.

So ordered this 31st day of October 2021

[redacted]

D. M. Croff
CAPTAIN, USCGR
Military Judge

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON** **DEFENSE MOTION TO DISMISS** **(SPEEDY TRIAL)** **14 November 2021**

NATURE OF THE MOTION: Defense filed a Motion to Dismiss on 11 August 2021 pursuant to 907(b)(2)(A) arguing the Government violated the accused's right to a speedy trial under Amendment VI of the U.S. Constitution and R.C.M. 707.

BURDEN: Pursuant to R.C.M. 905(c)(2)(B), the Government bears the burden of persuasion for a speedy trial motion filed under R.C.M. 707.

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. I also considered the Government's Response filed 24 August 2021, as well as Supplements filed by the Defense and Government on 8 September 2021 coupled with the corresponding exhibits. In doing so, I make the following findings and conclusions:

FINDINGS OF FACT:

1. The underlying crimes alleged to have been committed by the accused – generally involving hacking into a victim's social media account, creating 2 dating profiles using the victim's identify and selling the victim's intimate photographs to men in exchange for money funneled through a Paypal account – occurred between February and March 2019.

2. The accused was first interviewed by the Anaheim California Police Department on 06 March 2019 and later by Coast Guard Investigative Service Agents on 12 July 2019. Additional charges of obstruction of justice and false official statements resulted from those two interviews.

3. On 04 March 2021, a total of 3 charges and 10 specifications were sworn and preferred against the accused. On 17 March 2021, the Convening Authority ordered a preliminary hearing into those charges and specifications be conducted on 15 April 2021

4. During a 19 March 2021 phone call, the Defense indicated they would request a

continuance of the preliminary hearing. On 29 March 2021, the Defense requested the preliminary hearing be continued from 15 April until 5 May 2021. The Defense's request to continue was granted by the preliminary hearing officer (PHO) who attributed 20 days of excludable delay to the defense.

5. On 28 April 2021, the Government disclosed to the Defense 4 additional specifications that were included on a continuation page attached to the already sworn and preferred charges. The additional 4 specifications were not sworn to or preferred. On the same date, the Defense filed a waiver of the Article 32 hearing into the charges and specifications preferred on 04 March 2021. On 29 April 2021, the Convening Authority ordered the preliminary hearing be conducted despite the accused's waiver.

6. On 05 May 2021, an Article 32 preliminary hearing was conducted to consider all charges and specifications, including the additional 4 unsworn specifications pursuant to R.C.M. 405(e)(2), despite the Defense's objection to the PHO's consideration of those 4 additional specifications. Those 4 additional specifications were based upon the same facts and evidence being presented for the 10 original preferred specifications.

7. On 19 May 2021, after requesting a week's extension, the PHO issued his report. He found probable cause existed and recommended charging 6 of the 10 original specifications. He also found probable cause existed for 3 of the 4 additional specifications.

8. On 14 June 2021, the SJA provided pretrial advice pursuant to Article 34, UCMJ to the Convening Authority agreeing in part with the PHO's report. The SJA recommended referring 7 of the 10 original specifications and all 4 additional specifications to a general court-martial.

9. The Convening Authority concurred with the SJA's pretrial advice, and on 17 June 2021 referred all charges and specifications which appear in the current charge sheet to this General Court-Martial, including those 4 unsworn specifications objected to by the Defense.

10. On 23 June 2021, the Defense filed a speedy trial demand requesting trial to commence on 6, 12 or 19 July 2021 prior to the expiration of R.C.M 707's 120-day speedy trial clock on 23 July 2021, taking into account 20 days of excludable delay attributed to the Defense.

11. Although a military judge (CDR Paul Casey) was made available for trial to commence 19 July, the Government and key witnesses were unavailable.

12. CDR Casey conducted a telephonic 802 conference with all parties on 25 June 2021 during which it was confirmed that trial counsel and key witnesses, to include Detective [redacted] were unavailable for trial during the month of July 2021. During that call, the arraignment was scheduled for 7 July 2021 and CDR Casey directed the parties to work together on a draft Trial Management Order (TMO) with the understanding that a July trial date was not possible.

13. Between 29 June and 6 July 2021, the Government and Defense exchanged a series of

emails and schedules in an attempt to select dates for a motion hearing and trial. The Government initially proposed a motions hearing date of 11 August with trial commencing 13 September 2021. Both dates were rejected by the Defense due to their unavailability. A second trial date proposed by the Government of 27 September was also rejected by the Defense due to their unavailability. The Defense again requested the same July trial dates that had already been established during the 802 conference held 25 June 2021 as dates where the Government and some of their key witnesses were unavailable.

14. On 06 July 2021, after several days spent conferring and reviewing the schedules of witnesses, defense counsel, special victims counsel and the military judge's docket, the Government proposed a draft TMO. The trial date proposed within the draft TMO of 15 November 2021 was objected to by the Defense. Ultimately, the TMO was signed and issued by the military judge, CDR Casey, on 6 July 2021, setting a motions hearing date on 01 September with trial commencing 15 November 2021.

15. The accused was arraigned on the charges and specifications on 07 July 2021. CDR Casey also summarized the 802 conference on the record.

16. On the morning of arraignment, the Defense filed a Motion to Dismiss for Defective Referral of "Additional" Charges,[1] formalizing his prior objections that the 4 additional specifications were unsworn and never properly preferred.

17. Upon consideration of the Defense's Motion, the Government agreed that the 4 additional specifications were not properly sworn. On 16 July 2021, the Convening Authority withdrew all charges and specifications but did not dismiss them. On the same day, all charges and specifications were preferred and re-referred to this General Court-Martial, including the 4 specifications previously unsworn. The Convening Authority also authorized excludable delay for the period of 7 to 16 July 2021.

18. The Government and military judge were available to conduct a second arraignment on 19 July. However, the Defense stated they were unwilling the waive the 5-day statutory waiting period and unavailable until 22 July 2021.

19. A second TMO was signed by the military judge on 21 July 2021, adhering to the same dates set forth in the 6 July 2021 TMO, with trial commencing 15 November 2021.

20. On 22 July 2021, the accused was arraigned for a second time on all charges referred 16 July 2021. This second arraignment occurred within 120 days of when the initial charges were preferred (04 March 2021) accounting for the 20 days of excludable delay attributed to the Defense's request to continue to the preliminary hearing.

21. The accused has not been subjected to any form of pretrial restraint. His security

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[1] Although the Motion is dated 23 June 2021, it was filed by the Defense on 07 July 2021, the morning of the 1st arraignment.

clearance was pulled in July 2019 and he was assigned to work in a support billet aboard Naval Base Kitsap-Bangor from July 2019 – August 2020. On 21 August 2020, the accused was transferred to Coast Guard Base, Seattle and assigned to work in a support billet. He requested a transfer back to Naval Base Kitsap-Bangor in July 2021 and that request was denied.

PRINCIPLES OF LAW AND ANALYSIS:

R.C.M. 707(a) demands the accused be brought to trial within 120 days after either preferral of charges, imposition of pretrial restraint, or entry onto active duty. Under the facts of this case, preferral of charges is the operative date for purposes of 707 calculations. When multiple charges are preferred at different times, as they were in this case, "accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge." R.C.M. 707(b)(2). The date when charges are preferred does not count in the calculations, but the date the accused is brought to trial does count. "The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904." R.C.M. 707(b)(1).

The original charges were preferred on 4 March 2021. An additional 4 specifications were referred (though not properly preferred) along with the original charges to this General Court-Marital on 17 June 2021. The accused was first arraigned on all charges and specifications on 7 July 2021. On 16 July 2021 all charges and specifications were withdrawn by the Convening Authority to correct an error brought to the Government's attention by the Defense regarding the 4 additional specifications which were never properly sworn or preferred against the accused.[2] All charges were preferred and re-referred to this General Court-Martial on 16 July 2021. The R.C.M. 707 clock began on 04 March 2021 when the original charges were preferred. However, for the 4 additional charges, R.C.M. 707(b)(2) tells us the clock began ticking when those charges were *properly* preferred on 16 July 2021. A second arraignment occurred on 22 July 2021. The arraignment on 22 July 2021 was conducted prior to the expiration of the 120-day clock (23 July 2021) for the original charges, accounting for the 20-day continuance requested by the defense for the preliminary hearing which was granted as excludable delay by the PHO. Factoring in an additional 10 days (7-16 July 2021) for which the Convening Authority granted excludable delay would extend the expiration of speedy trial until 2 August 2021. Factoring in an additional 3 days (19-22 July) requested by the defense before the second arraignment would extend the expiration of speedy trial date until 5 August 2021. However, there is no need to address how those additional calculations toll speedy trial since based upon the 20 days of excludable delay alone, the accused was brought to trial within the meaning of R.C.M. 707 when he was arraigned on 22 July 2021 (for a second time). For the additional 4 specifications, the accused was brought to trial when he was arraigned a mere 6 days after the speedy trial clock began ticking for those specifications. Thus, the accused's speedy trial rights under R.C.M. 707 were not violated. Furthermore, the Court finds no merit – legally or factually – in the Defense's claims of a "sham" arraignment.

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[2] That issue was addressed separately in the Court's 01 November 2021 Ruling on Defense's Motion Objecting to Joinder as well as the Court's 8 November 2021 Ruling on Defense's Motion for Defective Article 32 Advice and Erroneous Article 34 Advice and won't be rehashed again here.

The right to a speedy trial under the Sixth Amendment is not a bright-line rule quantified by a set period of time, but instead requires application of a 4-factor balancing test. *Barker v. Wingo*, 407 U.S. 514 (1972). The four factors to be considered in determining whether a particular defendant has been deprived of his right to a speedy trial are: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the speedy trial demand; and 4) prejudice to the accused.

Looking at the first factor, the Defense complains of the length of time between when the accused's conduct was first brought to the Government's attention in 2019 until the time of trial. However, the appropriate focus of the inquiry for purposes of the instant motion begins no earlier than when the original charges were preferred against the accused. Any complaints about delay between the time an offense is committed and the preferral of charges is irrelevant for MK3 Grijalva's speedy trial purposes. Having defined the length of delay for this analysis as beginning 04 March 2021 until trial on 15 November 2021 (8 months and 11 days), it is not simply the length of the delay, but the circumstances of a particular case that must be considered. As the *Barker* Court observed, "...the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531. The Defense argues these charges involve a "relatively simple set of offenses" and because of MK3 Grijalva's admissions, there is "minimal dispute as to the facts." Given the extensive motion practice in the case to date, which includes 10 motions filed by the Defense alone, not including their supplements, this Court would not describe this case as being simple or minimal. The charges against MK3 Grijalva more closely resemble a serious, complex conspiracy charge than they do an ordinary street crime. The crimes alleged against MK3 Grijalva did not occur on the street, or anywhere in plain sight for an eyewitness to observe on one particular occasion. Instead, MK3 Grijalva is charged with committing crimes made complex through his use of the internet – hacking and creating online accounts, impersonating a female victim, committing wire fraud and identify theft – all from the privacy of a computer or phone over a period of months. Moreover, the accused's "admissions" to investigators generated the need to conduct additional investigation and as a result, additional charges were filed based upon the accused's false statements and his obstruction of the government's investigation. Even the preliminary hearing officer required additional time to complete his report given the charges at issue. In consideration of the facts and circumstances of this complex case, the length of the delay between preferral of charges and trial is not unreasonable.

We next consider the second factor under *Barker* – the reason for the delay. Despite the Defense's claims that the Government was acting in a manner that was "dilatory" and "slothful," the Court finds no support for these claims. The Government's actions after preferral of the charges, however the Defense chooses to characterize or criticize them, played no role in the case being scheduled for trial on 15 November 2021. Trial could not have occurred any sooner, and the dismissal and re-referral of charges had nothing to do with the selection of the November trial date set prior to the first arraignment. Instead, the 15 November 2021 trial date was selected after consideration of all parties' schedules and availability, to include the Government's witnesses, trial and defense counsel, special victim's counsel, as well as the military judge. The Government was prepared to proceed to trial as early as 13 September 2021, yet neither that date nor the next proposed trial date of 27 September worked for the Defense. The Government's written response to this motion, as well as its supplemental response, and corresponding exhibits detail the challenges associated with identifying dates that allowed for trial to be scheduled. 15 November 2021 was the earliest date trial could be conducted based upon the collective availability of the parties and witnesses. This second factor weighs in the Government's favor.

The third factor weighs in the accused's favor since he has demanded speedy trial.

The fourth factor to be considered is the prejudice to the accused as a result of the delay. The Defense asserts that "it is not yet apparent whether the unreasonable delay has imperiled MK3 Grijalva's ability to any defense." However, the Defense does claim MK3 Grijalava has suffered in the form of a lengthy commute he makes each day from Naval Base Kitsap-Bangor to Coast Guard Base Seattle. While a lengthy driving commute to work may be inconvenient, it does not amount to prejudice, and this Court finds no prejudice has been suffered by the accused as a result of the delay.

Three of the four factors considered under *Barker* weigh in favor of the Government. There has been no violation of MK3 Grijalva's Sixth Amendment right to a speedy trial, nor a violation under R.C.M. 707.

RULING:

The Defense's Motion to Dismiss on speedy trial grounds is DENIED.

So ordered this 14th day of November 2021.

[redacted]

D. M. Croff
CAPTAIN, USCGR
Military Judge

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF (OBJECTION TO JOINDER)** **01 November 2021**

<u>NATURE OF THE MOTION:</u> Defense filed a Motion objecting to what they describe as the joinder of what were previously titled as additional offenses in an earlier charge sheet, but now appear in the current charge sheet as the sole Specification under Charge I, and Specifications 6 through 8 of Charge III RCM § 907(b)(3)(A).

<u>BURDEN:</u> The Defense bears the burden of demonstrating by a preponderance of the evidence that the sole Specification of Charge I and Specification 6 through 8 of Charge III are improperly joined with all other charges and specifications. *RCM §905(c).*

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. In doing so, I make the following findings and conclusions:

<u>FINDINGS OF FACT:</u>

1. On 04 March 2021, charges were properly sworn and preferred against the accused and a Preliminary Hearing under Article 32 was ordered.

2. On 28 April 2021, the Government disclosed to the Defense 4 additional specifications that were included on a continuation page attached to the already sworn and preferred charges. The additional 4 specifications were not sworn to.

3. On 05 May 2021, an Article 32 preliminary hearing was conducted to consider all charges and specifications, including the additional 4 unsworn specifications, despite the Defense's objection to the preliminary hearing officer's consideration of those 4 additional specifications.

4. On 17 June 2021, the Convening Authority referred all charges and specifications which appear in the current charge sheet, to this General Court-Martial including those 4 unsworn specifications objected to by the Defense.

5. The accused was first arraigned on 07 July 2021.

6. On the morning of arraignment, the Defense filed a Motion to Dismiss for Defective

Referral of "Additional" Charges,[1] formalizing his prior objections that the 4 additional specifications were unsworn and never properly preferred.

7. Upon consideration of the Defense's Motion, the Government agreed that the 4 additional specifications were not properly sworn. On 16 July 2021, the Convening Authority withdrew all charges and specifications but did not dismiss them. On the same day, all charges and specifications were sworn to, preferred and re-referred to this General Court-Martial, including the 4 specifications previously unsworn.

8. On 22 July 2021, the accused was arraigned for a second time on all charges referred 16 July 2021. This second arraignment occurred within 120 days of when the initial charges were preferred (04 March 2021) accounting for excludable delay.

9. The 4 specifications at issue for purposes of this motion are now included on the charge sheet as the sole Specification under Charge I, and Specifications 6 through 8 of Charge III.

PRINCIPLES OF LAW AND ANALYSIS:

The Defense argues these 4 specifications are "new" and may not be joined with the original properly sworn specifications upon which the accused was already arraigned on 07 July 2021. The Defense cites to R.C.M. 601(e)(2) and argues these 4 specifications were improperly joined because the accused never consented to be tried on these new charges after he was already arraigned. Relying on *United States v. Koke*, 32 M.J. 877, 881 (N-M.C.M.R. 1991) *aff'd* 35 M.J. 313 (C.M.A. 1992), the Defense argues the Convening Authority's "same-day withdrawal, 'preferral,' and immediate re-referral of all of the Charges is a transparent attempt to circumvent joinder limits" (Defendant's Motion, p. 4). The Defense's reliance on *Koke* is misplaced. There, the convening authority was found to have erred when after arraignment, the two original charges were withdrawn and then re-referred along with *an additional charge*. The additional charge was a completely new and different charge, previously unknown to the accused, and was added after arraignment. Such is not the case here.

The Convening Authority has broad authority to withdraw charges from a court-martial under R.C.M. 604(a). It may be done at any time before findings are announced. R.C.M. 604(b) permits the referral of withdrawn charges to another court-martial as long as the withdrawal was not done for an improper reason. The issue here is whether the Convening Authority's withdrawal and re-referral of charges, done to cure an error in not properly swearing to 4 of the specifications, was a proper purpose, and secondly whether there was unfair prejudice to the accused in doing so.

In *Koke,* the Navy-Marine Corps Court addressed the operation in tandem of R.C.M. 601 and 604, and laid out several factors to consider in determining whether withdrawal and referral after arraignment is proper:

(1) is undertaken for an articulable reason that genuinely serves a public interest, or the interests of justice or is reactive to an operational exigency;
(2) arises because of, or relates to, some event occurring after arraignment that actually

[1] Although the Motion is dated 23 June 2021, it was filed by the Defense on 07 July 2021, the morning of the 1st arraignment.

raises a substantial question concerning the appropriateness of the original referral decision;

(3) is not based on retribution for the assertion of a right by the accused;
(4) does not involve harassment of the accused;
(5) is not arbitrary or unfair to an accused, considering all of the facts and circumstances of a case and bearing in mind that the mere exposure to potential additional punishment if not controlling; and
(6) is invoked in response to an operational exigency.

Koke, 32 M.J. at 881. "If there is bright line rule in this area of military procedure, it is that a convening authority may not withdraw charges from one court-martial and refer them to another in a way which is unfair or arbitrary to the accused." *United States v. Underwood*, 47 M.J. 805 (1997)(citing *United States v. Blaylock*, 15 M.J. 190(C.M.A 1983)). Improper withdrawal includes any interference with the free exercise of a constitutional or codal right or with the impartiality of a court-martial. *Koke*, 32 M.J. at 881 (citing *United States v. Williams*, 11 U.S.C.M.A 459, 29 C.M.R. 275 (1960)).

In consideration of the above factors, this Court finds that the Convening Authority's decision to withdraw and re-refer charges after arraignment was not improper. The charges were withdrawn to correct the preferral error raised by the Defense. The *same charges* (as distinguished from the additional charge in *Koke*) were properly sworn, preferred and re-referred, and the accused was arraigned on those same charges 6 days later. This was not done in a way that was unfair or arbitrary to the accused and it did not interfere with the exercise of his constitutional rights. Instead, this Court finds it was done for a proper purpose.

The Court next finds that the withdrawal and re-referral of properly sworn charges did not unfairly prejudice the accused. There were no "new" charges as the Defense claims. The only difference was the reordering and numbering of those same charges. Defense counsel made no mention of any prejudice to their client in their motion and they were unable to articulate during the motion hearing any such prejudice suffered by their client, despite being asked multiple times by this Court. Upon being pressed by the Court to articulate prejudice, Defense ultimately claimed they were prejudiced by a delay in the trial proceedings. However, the 15 November 2021 trial date was set by the Court by way of a 06 July 2021 Trial Management Order, before the first arraignment, and after taking schedules into account. Trial could not have occurred any sooner with or without the 4 specifications on the charge sheet, and no such prejudice in the form of delay exists.

The second ground for prejudice claimed by the defense, again when pressed, was the fact that the 4 additional specifications were not properly considered by the preliminary hearing officer. Again, the Court sees no prejudice to the accused. The Defense was placed on notice of these additional specifications on 28 April, prior to the Article 32 hearing, was provided all evidence relevant to those additional specifications, and did not request any additional witnesses or evidence concerning those additional specifications. The PHO's report, dated 13 May, indicates his proper consideration of those additional specifications pursuant to R.C.M. 405(e). For one of the additional specifications, the PHO even found no probable cause existed (the Convening Authority chose to refer despite that recommendation). Thus, it is difficult to conceive what prejudice the accused suffered from the PHO's consideration of the 4 specifications. This Court concludes there was no prejudice suffered by the defendant.

RULING:
The Defense's Motion for Appropriate Relief upon claims of improper joinder is DENIED.

So ordered this 1st day of November 2021.

[redacted]

D. M. Croff
CAPTAIN, USCGR
Military Judge

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON** **DEFENSE MOTION TO DISMISS** **FAILURE TO STATE AN OFFENSE** **31 October 2021**

NATURE OF THE MOTION: Defense filed a Motion to Dismiss Specifications 4 and 5 of Charge III arguing they fail to state an offense in accordance with RCM § 307(c)(3) and 907(b)(2)(E).

BURDEN: The Defense bears the burden of demonstrating by a preponderance of the evidence that Specifications 4 and 5 of Charge III fails to state an offense. *RCM §905(c).*

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. In doing so, I make the following findings and conclusions:

FINDINGS OF FACT:

1. The accused admitted to Coast Guard Investigative Service (CGIS) agents that he unlawfully gained access to [redacted] Snapchat account by guessing her password after trying unsuccessfully more than 50 times. He admitted to downloading from her account approximately 5 sexually explicit images of [redacted] Thereafter, the accused created accounts/profiles on "Tinder" and "OKCupid" using [redacted] names and images without her permission. Using those accounts and posing as [redacted] the accused communicated with several individuals offering [redacted] photos and sex in exchange for money. The accused estimated he sent photos of [redacted] to approximately 8 individuals and in exchange, received approximately $200 through use of a PayPal account.

2. [redacted] is the girlfriend of the accused's friend at the time of the offenses. Both the former friend and [redacted] are civilians.

3. The accused texted the images to at least three individuals, all civilians, from his residence located onboard Naval Base Kitsap Bangor, Washington.

4. Specification 4 of Charge III charges the accused with violation of Article 134 of the UCMJ in that he did:

> ...at Naval Base Kitsap Bangor, Washington, on divers occasions between on or about 1 February 2019 to on or about 31 March 2019, knowingly, wrongfully, and without the

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explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstance in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships, an act which is of a nature to bring discredit upon the armed forces.

PRINCIPLES OF LAW AND ANALYSIS:

The gist of the Defense's argument is that Specifications 4 and 5 of Charge III fail to allege a lawful offense is because the preemption doctrine prohibits prosecution of the accused's conduct under Article 134, UCMJ, where the conduct – wrongful broadcast of intimate images without consent – is exclusively punishable under Article 117a.

Article 134, UCMJ criminalizes offenses not specifically covered under other articles of the UCMJ. Clause (2) offenses under Article 134, as Specification 4 of Charge III is, involve conduct of a nature to bring discredit upon the armed forces, i.e. conduct which injures the reputation of the armed forces and tends to bring the service in disrepute or which tends to lower it in public esteem. MCM, Pt. IV ¶ 91(c)(3). The elements of Specification 4 of Charge III are:

1) that at Naval Base Kitsap Bangor, Washington, on divers occasions between on or about 1 February 2019 to on or about 31 March 2019, the accused knowingly, wrongfully, and without the explicit consent of [redacted] broadcast an intimate visual image of [redacted] who is identifiable from the visual image or from information displayed in connection with the visual image, when he knew or reasonably should have known that the visual image was made under circumstance in which [redacted] retained a reasonable expectation of privacy regarding any broadcast and he knew or reasonably should have known that the broadcast of the visual image was likely to cause harm, harassment, or emotional distress for [redacted] or to harm substantially [redacted] with respect to her safety, business, calling, career, reputation, or personal relationships; and
2) that, under the circumstance, that accused's conduct was of a nature to bring discredit upon the armed forces.

Article 117a, UCMJ was enacted by the National Defense Authorization Act for Fiscal Year 2018 in the wake of the "Marines United" scandal of 2017 which involved service members who shared intimate photographs of other service members through social media. The elements of Article 117a, wrongful broadcast or distribution of intimate digital images, are:

1) that the accused knowingly and wrongfully broadcast or distributed an intimate visual image or a visual image of sexually explicit conduct involving an individual;
2) that the individual was at least 18 years of age when the visual image was created;
3) that the individual is identifiable from the visual image or from information displayed

in connection with the visual image;

4) that the individual did not explicitly consent to the broadcast or distribution of the visual image;
5) that the accused knew or reasonably should have known that the visual image was made under circumstances in which the individual retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image;
6) that the accused knew or reasonably should have known that the broadcast or distribution of the visual image was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for the individual or to harm substantially individual with respect to her health, safety, business, calling, career, financial condition, reputation, or personal relationships; and
7) that the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

Preemption prohibits charging conduct under Article 134 when the conduct is already covered by an offense under Articles 80-132.

"Simply stated, preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. See *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A.1978). However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. *United States v. Maze*, 21 U.S.C.M.A. 260, 262-63, 45 C.M.R. 34, 36-7 (1972). In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *United States v. Maze, supra*; *United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968). See also *United States v. Wright*, supra." *United States v. Kick*, 7 M.J. 82, 85 (U.S.C.M.A. 1979). In *U.S. v. Anderson,* C.A.A.F. affirmed that preemption "require[s] Congress to indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of the enumerated article, and may not be charged under Article 134, UCMJ." *U.S. v. Anderson,* 68 M.J. 378, 387 (C.A.A.F. 2010).

The Defense encourages a review of the legislative history of Article 117a and points to earlier drafts of the bill that were not passed, as well as letters sent and arguments made during the review process. By relying on such extraneous considerations, the Defense surmises the intent of Congress was to limit all prosecution of wrongful broadcast or distribution or images to Article 117a. The inclusion of the final element which requires the conduct to have "reasonably direct and palpable connection to the military mission of military environment" (missing from an earlier draft but included is the final version) is proof, the Defense argues, that Congress intended to "occupy the field" for preemption purposes.

This Court does not agree with Defense's bare inference that the enactment of Article 117a indicates a clear intent by Congress to cover the *entire* field of wrongful distribution of intimate images and eliminate it as an offense chargeable under Article 134, UCMJ, particularly in situations where the images depict a civilian and are distributed to civilians. The plain language of Article 117a's final element – that the conduct have a reasonably direct and palpable connection to a military mission or military environment – plainly limits that charge to the type of conduct committed in the Marines United scandal, where the images depict service members and/or are distributed among service members. Moreover, it cannot be disputed that the enactment of Article 117 was in direct response to the Marines United scandal and was intended to address that specific conduct with a direct military connection.

Recently, in *United States v. Griffin*, the providency inquiry of an accused's guilty plea to Article 117a was reviewed to determine whether his conduct had a reasonably direct and palpable connection to a military mission or military environment. *Griffin*, 81 M.J. 646 (N-M Ct. Crim. App. 2021). In an act of revenge following a breakup, the accused posted to a pornography website intimate videos of his former girlfriend, also a servicemember, having sex with him in the barracks. *Id.* at 648. During providency, the accused testified that his conduct damaged the victim's career, reputation and relationships; that his conduct affected the mission environment; and that other servicemembers who worked with the victim were aware of the videos which detracted from the victim's military duties. *Id.* at 650. At issue for the court was whether the plea was provident despite the accused and victim not working in the same workplace. In the end, the court upheld the conviction finding that one fact did not matter in light of the other facts showing the conduct had a direct and palpable connection to the military mission or environment. Noteworthy about *Griffin* is how many boxes were required to be checked, factually, to satisfy the terminal element which is not easily met, and demonstrates the very narrow scope of conduct envisioned under Article 117a.

In the absence of clear intent which the Defense has failed to demonstrate, this Court is unable to infer that Congress intended to restrict the charging of the "entire field" of this criminal conduct when it enacted Article 117a. Without clear intent that Congress "intended to cover a class of offenses in a complete way" the preemption doctrine does not apply. See *United States v. Maze* at 263. That a military member could broadcast intimate visual images of a civilian without their consent to other civilians, and because the conduct has no connection to a military mission or military environment prevents it from being charged under Article 134 as service discrediting, cannot stand to reasonably reflect Congress' intent when it enacted Article 117a. Not being permitted to charge such a crime committed by a service member simply because the victim is a civilian *would be* service discrediting and necessarily lower the reputation of the armed forces in public esteem. Thus, it cannot be reasonably inferred that Congress intended Article 117a to "occupy the field" of what is a massive field made infinitely larger through the internet's reach. Just the opposite, it appears that Congress intended Article 117a to occupy only a limited portion of that field when it comes to the prosecution of wrongful broadcasting of visual images offenses. In this case, the accused's conduct falls outside of that narrow field covered by Article 117a, which does not preempt his prosecution as service discrediting conduct under Article 134.

Analysis and application of the facts to Specification 4 of Charge III leads this Court to conclude that the charge states an offense that is sufficiently pled under the RCMs and cognizable under the UCMJ and is not preempted by Article 117a. In reaching the conclusion that Specification 4 of Charge III is not preempted, Specification 5 of Charge III is dismissed on other grounds, pursuant to a separate Defense Motion to Dismiss for Unreasonable Multiplication of Charges and the Government's concession to the dismissal of Specification 5. Accordingly, there is no need to address the merits of the Defense's argument with respect to their claim here that Specification 5 fails to state an offense.

RULING:
The Defense's Motion to Dismiss Specification 4 of Charge III for failing to state an offense is DENIED.
The Defense's Motion to Dismiss Specification 5 of Charge III for failing to state an offense is MOOT, as the Specification was dismissed on other grounds.

So ordered this 31st day of October 2021

[redacted]

D. M. Croff
CAPTAIN, USCGR
Military Judge

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Defective Article 32 and Erroneous Article 34 Advice)** **8 November 2021**

NATURE OF THE MOTION: Defense filed a Motion objecting to what they claim was a defective preliminary hearing under Article 32, UCMJ and erroneous Article 34 advice which misled the Convening Authority.

BURDEN: The Defense bears the burden of demonstrating by a preponderance of the evidence that the preliminary hearing was defective and the Article 34 advice was erroneous and misled the Convening Authority, and thus the charges were not properly referred to this court-martial. *RCM §905(c).*

In reaching my findings and conclusions, I considered all legal and competent evidence presented by the government and defense during a motions hearing held 01 September 2021. In doing so, I make the following findings and conclusions:

FINDINGS OF FACT:

1. On 04 March 2021, a total of 3 charges and 10 specifications were properly sworn and preferred against the accused. On 17 March 2021, the Convening Authority ordered a preliminary hearing into those charges and specifications be conducted under Article 32.

2. On 28 April 2021, the Government disclosed to the Defense 4 additional specifications that were included on a continuation page attached to the already sworn and preferred charges. The 4 additional specifications were not sworn to or preferred. On the same day, the Defense filed a waiver of the Article 32 hearing into the charges and specifications preferred on 04 March 2021.

3. On 05 May 2021, an Article 32 preliminary hearing was conducted to consider all charges and specifications, including the 4 additional unsworn specifications pursuant to R.C.M. 405(e)(2), despite the Defense's objection to the preliminary hearing officer's (PHO's) consideration of those 4 additional specifications. Those 4 additional specifications were based upon the same facts and evidence being presented for the 10 original preferred specifications.

4. On 13 May 2021, the PHO issued his report. He found probable cause existed and

recommended charging 6 of the 10 original specifications. As it relates to his consideration of the 4 unsworn specifications titled then as "additional offenses," he found probable cause existed to support 3 of those 4 specifications. Those additional specifications now appear in the current charge sheet as the sole specification under Charge I, and specifications 7 and 8 under Charge III. The one additional specification the PHO found was *not* supported by probable cause is what now appears in the current charge sheet as specification 6 under Charge III.

5. Additionally, the PHO found the defense was provided notice of the additional specifications, all evidence relevant to those additional specifications had been provided to the defense, and the defense did not request any additional witnesses or evidence relevant to those additional specifications.

6. On 14 June 2021, the staff judge advocate (SJA) (CDR [redacted] provided the Convening Authority (RADM A. J. Vogt) pretrial advice under Article 34, UCMJ, and enclosed a copy of the PHO's report. In her advice, the SJA agreed with the PHO in part and recommended dismissing 3 of the original specifications. However, contrary to the PHO's recommendations, the SJA concluded probable cause did exist and recommended that specification 5 under Charge III (one of the original specifications) be referred to a general court-martial, as well as one additional charge now found under Charge III as specification 6. Finally, the SJA agreed with the remainder of the PHO's determinations, concluding that probable cause existed and recommended referring to general court-martial 6 of the original specifications and the 3 additional specifications.

7. The SJA's 14 June 2021 pretrial advice complied with all requirements under Article 34, UCMJ and R.C.M. 406. Though not required, the SJA took the additional steps in her advice to summarize the PHO's findings as to each specification, as well as explain in detail why her recommendations differed from the PHO with regard to 2 of the specifications.

8. The Convening Authority concurred with the SJA's advice and on 17 June 2021 referred all charges and specifications which appear in the current charge sheet to this General Court-Martial, including those 4 unsworn specifications objected to by the Defense.

9. The accused was arraigned on those charges and specifications on 07 July 2021.

10. On the morning of arraignment, the Defense filed a Motion to Dismiss for Defective Referral of "Additional" Charges[1], formalizing his prior objections that the 4 additional specifications were unsworn and never properly preferred.

11. Upon consideration of the Defense's Motion, the Government agreed that the 4 additional specifications were not properly sworn. On 16 July 2021, the Convening Authority withdrew all charges and specifications but did not dismiss them. On the same day, the same charges and specifications were sworn to and preferred against the Accused, including the 4 specifications previously unsworn.

12. On 16 July 2021, the SJA provided the new Convening Authority (RADM M. W.

[1] Although the Motion is dated 23 June 2021, it was filed by the Defense on 07 July 2021, the morning of the 1st arraignment.

Bouboulis) with supplemental pretrial advice under Article 34, UCMJ, and enclosed a copy of the PHO's report as well as her 14 June 2021 pretrial advice. That supplemental advice complied with all requirements under Article 34, UCMJ and R.C.M. 406. The SJA stated that her pretrial advice of 14 June 2021 had not changed. Though not required, the SJA referenced the PHO's report and erred in her description of his findings with the following sentence: "[i]n his report, the PHO determined there was **probable cause to believe the Accused committed all the charges and specifications now in the current charged sheet preferred on 16 July 2021.**"

13. The PHO had *not* made such a determination with regard to all the charges and specifications in the 16 July 2021 charge sheet. As detailed in the PHO report and by the SJA in her earlier Article 34 pretrial advice (both enclosed with her supplemental advice), the PHO determined there was *not* probable cause as to Specifications 5 and 6 of Charge III.

14. On 16 July 2021, the Convening Authority re-referred all charges and specifications, finding in accordance with R.C.M. 603 that all charges and specifications had been adequately considered at the 05 May 2021 preliminary hearing.

15. On 22 July 2021, the Accused was arraigned for a second time on all charges and specifications referred 16 July 2021. This second arraignment occurred within 120 days of when the initial charges were preferred (04 March 2021) accounting for excludable delay.

16. On 10 August 2021, the Defense filed the instant motion and a hearing was conducted on 01 September 2021. In their written response, the Government acknowledged the error made by the SJA in her 16 July 2021 supplemental pretrial advice, but argued that error did not mislead or affect the Convening Authority's referral decision. However, if the Court were to reach such a conclusion, the Government requested an opportunity to correct the error and provide corrected advice to the Convening Authority. Without reaching any findings as to whether the Convening Authority was misled or his actions were affected, the Court felt it appropriate for the Convening Authority to be informed of the SJA's error. The Government agreed and requested until 08 September 2021 to do so.

17. On 07 September 2021, the SJA provided the Convening Authority (RADM M. W. Bouboulis) a correction to her 16 July 2021 pretrial advice and enclosed a copy of the PHO's report, along with her 14 June 2021 pretrial advice and 16 July 2021 pretrial advice.

18. Upon being informed of the error made by the SJA in her 16 July 2021 advice, and after reviewing all enclosures, the Convening Authority made no change to his 16 July 2021 referral of all charges and specifications to this General Court-Martial.

PRINCIPLES OF LAW AND ANALYSIS:

The Defense advances two separate arguments in their motion. The first takes issue with the PHO's consideration of 4 "additional" charges (sole specification of Charge I and specifications 6 through 8 of Charge III) at the Article 32 hearing because they were unsworn and not properly preferred against the accused. The second argument takes issue with the error made by the SJA in her Article 34 pretrial advice to the Convening Authority, which concerns specifications 5[2] and 6 of Charge III.

Article 32 Issue
A preliminary hearing is required to be held under Article 32, UCMJ before referral of charges and specifications to a general court-martial. R.C.M. 405(e)(2) permits the PHO to consider uncharged offenses "if evidence adduced during the primary hearing indicates the accused committed any uncharged offense." The accused's rights and the procedure for production of witnesses and evidence as set forth in R.C.M. 405 are the same for charged and uncharged offenses. The PHO may consider uncharged offenses if the accused: (1) is present at the preliminary hearing; (2) is informed of the nature of each uncharged offense considered; and (3) is afforded the opportunities for representation, cross-examination, and presentation consistent with Article 32(d). *See* Article 32(f).

The plain language of R.C.M.405(e) permits the PHO to consider evidence of uncharged offenses at a preliminary hearing conducted under Article 32, UCMJ. In this case, the PHO properly considered evidence of the 4 uncharged offenses in compliance with the rules. The Defense was provided notice of the 4 uncharged offenses one week prior to the primary hearing scheduled to be conducted on the 10 specifications preferred against him. Those 4 uncharged offenses were based upon the same facts and evidence as the 10 specifications. The PHO found the Defense was provided notice of the additional specifications, all evidence relevant to those additional specifications had been provided to the defense, and the defense did not request any additional witnesses or evidence relevant to those additional specifications.

The Court is unpersuaded by the Defense's argument that because they were uncharged offenses, the PHO could not consider the additional 4 specifications. R.C.M. 405 and Article 32 dictate otherwise. The Court finds the PHO's consideration of these charges was proper and done in compliance with R.C.M. 405 and Article 32, UCMJ.

Article 34 Issue
The SJA's written pretrial advice to the convening authority is required under Article 34, UCMJ, prior to the referral of charges to a general court-martial. R.C.M. 406 sets forth certain requirements be contained in the written pretrial advice to include the SJA's:
(1) conclusion with respect to whether each specification alleges an offense under the UCMJ;
(2) conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;
(3) conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and
(4) recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline. See R.C.M. 406(b).
"Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief." R.C.M. 406 Discussion.

[2] Specification 5 of Charge III was dismissed on unreasonable multiplication grounds.

The focus of the Article 34 process is to ensure the convening authority is properly informed regarding his referral decision. "To the extent that his advice is incomplete, ill-considered, or misleading as to any material matter, he has failed to comply with the statutory obligation imposed by Article 34, Uniform Code of Military Justice, 10 U.S.C. s 834. *United States v. Riege*, 5 M.J. 938, 943 (N.C.M.R. 1978) (citing *United States v. Greenwalt*, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955)). "The test for materiality is whether there is a risk the omission of fact would mislead the convening authority in his prosecutorial decision to determine the appropriate level of court-martial or what charges should be referred." *United States v. Clements*, 12 M.J. 842, 845 (A.C.M.R. 1982) (citing *United States v. Foti*, 12 U.S.C.M.A 303 (1961)).

In this case, the SJA provided the Convening Authority with her initial pretrial advice on 17 June 2021. In that advice, the SJA complied with all requirements under Article 34 and additionally summarized the PHO's findings as to each specification, as well as explained in detail why her recommendations differed from the PHO with regard to 2 of the specifications for which the PHO found no probable cause. Enclosed with her advice was the PHO's report. The Defense does not dispute, nor is there a basis to dispute the sufficiency of the SJA's 17 June 2021 Article 34 advice. At issue is the 16 July 2021 advice which contains an error. While the advice complies with R.C.M. 406 in all other respects, the SJA erred when she stated, "[i]n his report, the PHO determined there was **probable cause to believe the Accused committed all the charges and specifications now in the current charged sheet preferred on 16 July 2021**."

The Defense claims the SJA's Article 34 advice "mangle[d]" the PHO's findings, whereas the Government describes it as a "scrivener's error." The Court disagrees with both characterizations and sees the error for what it was – an error. The SJA herself concedes in her corrected pretrial advice of 07 September 2021 that she incorrectly summarized the PHO's findings and that her statement was made in error. That Article 34 pretrial advice containing an error was accompanied by the earlier Article 34 pretrial advice which was error-free, as well as the PHO's report. While unlikely the Convening Authority was misled by that error given the documentation provided for his review, we need not speculate whether his referral decision was impacted by the error. The Convening Authority himself has informed us it had no bearing on his decision. Upon being informed of the error made by the SJA in her 16 July 2021 advice, and after reviewing all enclosures, the Convening Authority made no change to his 16 July 2021 referral of all charges and specifications to this General Court-Martial. Thus, the Convening Authority was not misled in his decision.

RULING:
The Defense's Motion for Appropriate Relief is DENIED.

So ordered this 8th day of November 2021.

[redacted]
D. M. Croff
CAPTAIN, USCGR
Military Judge

APPELLATE EXHIBIT 51
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**COURT ORDER ON DEFENSE MOTION FOR BILL OF PARTICULARS** **17 OCTOBER 2021**

1. The Defense motion, filed 28 June 2021, seeks a bill of particulars as to Specifications 1 and 2 of Charge II of the current charge sheet, preferred and referred on 16 July 2021.

2. The Government did not oppose the Defendant's Motion and responded with a bill of particulars, filed on 30 August 2021.

3. A hearing was conducted 01 September 2021 and the Defense indicated the Government's response was sufficient.

4. The Defense Motion for Bill of Particulars is therefore MOOT.

So ordered this 17th day of October, 2021.

[redacted]

D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT X
PAGE 1 OF 1 PAGE (S)

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**COURT ORDER ON DEFENSE MOTION FOR BILL OF PARTICULARS** **18 OCTOBER 2021**

NATURE OF THE MOTION:

The Defense motion, filed 06 July 2021, seeks a bill of particulars as to Specification 8 of Charge III of the current charge sheet, preferred and referred on 16 July 2021. Specifically, the Defense requests the Government to identify what material statements were made by MK3 Grijalva and to whom they were made.

BURDEN:

The Defense bears the burden of proof by a preponderance of the evidence.

SUMMARY OF LAW:

Pursuant to R.C.M. 307(c)(3), a specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Regardless, under R.C.M. 906(b)(6), the defense may request a Bill of Particulars "to inform the accused of the nature of the charge with sufficient precision to enable to accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable to accused to plead the acquittal or conviction in bar of another prosecution." *Discussion*. However, a Bill of Particulars "should not be used to conduct discovery of the Government's theory of the case, to force a detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial." *Id.* The decision to order a Bill of Particulars is within the discretion of the military judge. *United States v. Williams*, 40 MJ 379, fn 4 (C.A.A.F. 1994).

FINDINGS OF FACT:

1. The Government did not oppose the Defendant's Motion and responded with their first bill of particulars, filed on 30 August 2021.

2. A hearing was conducted 01 September 2021 where the Defense argued the Government's 30 August 2021 response was insufficient for two reasons. The first was that the Government's response expanded the statements alleged in the Specification by including MK3 Grijalva's offers to send [redacted] images to various individuals. On that point, the Government agreed that MK3 Grijalva's offers to send [redacted] images are not alleged in the Specification and therefore should not have been included in the bill of particulars. The Defense's second objection concerned the Government's lack of specificity with regard to which of MK3 Grijalva's statements would be used to prove the Specification.

3. The Government filed a Supplemental Response 08 September 2021 and attached an amended bill of particulars which removed reference to MK3 Grijalva's offers to send [redacted] images to various individuals, but remained the same in all other respects.

4. In Specification 8 of Charge III, MK3 Grijalva is alleged to have violated the UCMJ Article 134 between 03 February 2019 and 06 March 2019 by "knowingly devis[ing] a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; to wit: created a dating profile of the Tinder and OKCupid applications using [redacted] name and image and offered to have sex with individuals for money; that MK3 Grijalva made material statements that had a natural tendency to influence, or were capable of influencing, a person to part with money or property; that MK3 Grijalva did so with intent to defraud; and that

MK3 Grijalva used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme in violation of 18 U.S. Code Section 1343, a crime or offense not capital."

5. In both the original and amended bill of particulars, the Government itemized the individuals to whom MK3 Grijalva, pretending to be [redacted] made material statements concerning offers of sex in exchange for money, the dates on which the statements were made, as well as the particular statements identified by the discovery bates numbers where the statements are located.

6. The Amended Bill of Particulars, in conjunction with the Bates stamped discovery provided to the Defense, sufficiently identifies the statements made by MK3 Grijalva, as alleged in Specification 8 of Charge III.

7. The court concludes that Specification 8 of Charge III expressly alleges every element of the charged offense as required by R.C.M. 307. Additionally, the bill of particulars adequately informs the accused of the nature of the charge with sufficient precision to enable to accused to prepare for trial, to avoid surprise at the time of trial, and to enable him to plead the acquittal or conviction in bar of jeopardy. Requiring additional notice regarding the materiality of the statements would impose the type of inappropriate discovery and proof limitations the Discussion to R.C.M. 906(b)(6) warns against.

RULING:

For the reasons stated above, the Defense's Motion for *supplemental* Bill of Particulars is DENIED.

So ordered this 18th day of October, 2021.

/S/
D.M. Croff
Captain, USCGR
Military Judge

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**COURT ORDER ON** **DEFENSE MOTION TO DISMISS** **(Defective Referral of Additional Charges)** **18 OCTOBER 2021**

1. The Defense motion, dated 23 June but filed on 07 July 2021, seeks to dismiss "Additional Charges I and II, referred for court-martial but never sworn to.

2. On 16 July 2021, the convening authority withdrew all charges and specifications, including Additional Charges I and II. New charges sworn to, preferred and referred to this court-martial on 16 July 2021.

3. The Government filed a response on 24 August 2021. A hearing was conducted 01 September 2021 and the Defense conceded the instant motion was made moot by the convening authority's withdrawal of charges.

4. The Defense Motion to Dismiss is therefore MOOT.

So ordered this 18th day of October, 2021.

/S/
D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT XVII
PAGE 1 OF 1 PAGE(S)

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **MK3/E-4** **U.S. COAST GUARD**	**COURT ORDER GRANTING DEFENSE MOTION IN LIMINE (Marital Privilege)** **16 OCTOBER 2021**

1. The Defense motion, filed 5 August 2021, seeks an *in limine* ruling pursuant to R.C.M. 906(b)(13), prohibiting the Government from inquiring, and preventing [redacted] from disclosing, the contents of any confidential communications made by the Accused to [redacted]

2. A hearing was conducted 01 September 2021 and the government did not oppose the motion.

   a. The Court finds that the Accused and [redacted] have been married since November 22, 2016, that the marriage was not entered into for the purpose of using the martial relationship as a sham, and that the Accused is not charged with any crimes against the person or property of [redacted] or with any other crime subject to exception under Mil. R. Evid. 504(c).

   b. Therefore, Mil. R. Evid. 504(b) applies, and the Accused may assert a privilege over the contents of any confidential communications between himself and [redacted] during the course of their marriage.

3. The Defense Motion in Limine is GRANTED.

So ordered this 16th day of October, 2021.

[redacted]

D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT 34
PAGE 1 OF 1 PAGE (S)

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT ORDER GRANTING GOVERNMENT'S MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **WAVE BROADBAND RECORDS** **13 October 2021**

1. The government's motion, filed 11 August 2021, seeks a preliminary ruling pursuant to R.C.M. 906(b)(13) and M.R.E. 104 on the admissibility of Prosecution Exhibit 1 for identification which consists of "WAVE Broadband" records accompanied by a certificate of authenticity from the records custodian.

2. Following a hearing conducted 01 September 2021, and without objection by the Defense, the court finds Prosecution Exhibit 1 is relevant to Charges II and III; meets the hearsay exception for Records of a Regularly Conducted Activity under M.R.E. 803(6); and its authenticity has been properly demonstrated according to M.R.E. 902(11).

3. The motion is therefore GRANTED and Prosecution Exhibit 1 for identification is preadmitted into evidence.

So ordered this 13 day of October 2021

[redacted]

D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT 39
PAGE 1 OF 1 PAGE (S)

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT ORDER GRANTING GOVERNMENT'S MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **AUDIO RECORDING OF ACCUSED'S PHONE CALL TO DETECTIVE [redacted]** 13 October 2021

1. The government's motion, filed 11 August 2021, seeks a preliminary ruling pursuant to R.C.M. 906(b)(13) and M.R.E. 104 on the admissibility of Prosecution Exhibit 3 for identification which consists of a March 6, 2019 audio recording of the Accused's phone call to Anaheim Police Detective [redacted]

2. Following a hearing conducted 01 September 2021, and without objection by the Defense, the court finds Prosecution Exhibit 3 is relevant to Charges II and III; it is not hearsay pursuant to M.R.E. 801(d)(2); and its authenticity has been properly demonstrated by the Affidavit of Detective [redacted] and the supporting attachments thereto.

3. The motion is therefore GRANTED and Prosecution Exhibit 3 for identification is preadmitted into evidence.

So ordered this 13th day of October 2021

[redacted]
D.M. Croff
Captain, USCGR
Military Judge

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT ORDER GRANTING IN PART GOVERNMENT'S MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **CGIS INTERVIEW OF ACCUSED** **13 October 2021**

1. The government's motion, filed 11 August 2021, seeks a preliminary ruling pursuant to R.C.M. 906(b)(13) and M.R.E. 104 on the admissibility of Prosecution Exhibit 4 for identification, which consists of video recording of MK3 Grijalva's 12 July 2019 interview with Coast Guard Investigative Service (CGIS) Special Agents.

2. Following a hearing conducted 01 September 2021, and without objection by the Defense, except for the portion in which the Accused makes reference to a relationship outside his marriage, the court finds the Prosecution Exhibit 4 is relevant to all charges; it is not hearsay according to M.R.E. 801(d)(2); and its authenticity has been properly demonstrated by the Affidavit of CGIS Special Agent [redacted] and the supporting attachments thereto.

3. The government's motion is therefore GRANTED IN PART. Prosecution Exhibit 4 for identification is preadmitted into evidence, except for the portion of the interview (as cited in Defense's Response filed 25 August 2021) in which MK3 Grijalva makes reference to a relationship outside his marriage, which shall be redacted.

So ordered this 13th day of October 2021

[redacted]

D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT 44
PAGE 1 OF 1 PAGE (S)

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT ORDER GRANTING GOVERNMENT'S MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE:** **YAHOO! RECORDS** **13 October 2021**

1. The government's motion, filed 11 August 2021, seeks a preliminary ruling pursuant to R.C.M. 906(b)(13) and M.R.E. 104 on the admissibility of Prosecution Exhibit 2 for identification which consists of 286 pages of YAHOO! records accompanied by a certificate of authenticity from the records custodian.

2. Following a hearing conducted 01 September 2021, and without objection by the Defense, the court finds Prosecution Exhibit 2 is relevant to Charges II and III; meets the hearsay exception for Records of a Regularly Conducted Activity under M.R.E. 803(6); and its authenticity has been properly demonstrated according to M.R.E. 902(11).

3. The motion is therefore GRANTED and Prosecution Exhibit 2 for identification is preadmitted into evidence.

So ordered this 13th day of October 2021

[redacted]
D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT 46
PAGE 1 OF 1 PAGE(S)

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MARK J. GRIJALVA** **Machinery Technician Third Class** **U.S. Coast Guard**	**COURT ORDER GRANTING IN PART SVC'S MOTION IN LIMINE TO LIMIT USE OF IMAGES AND FOR PROTECTIVE / SEALING ORDER** **15 October 2021**

1. In their 11 August 2021 motion, Special Victim's Counsel for [redacted] seeks a preliminary ruling to (1) limit the use of intimate visual images of [redacted] and questioning about the surrounding circumstances of the images at trial; and (2) place a protective/sealing order on the images to safeguard [redacted] privacy and dignity.

2. A hearing was conducted 01 September 2021. Neither the government nor defense objected to the sealing of the images due to their sensitive nature and to protect [redacted] privacy rights.

3. The intimate visual images of [redacted] are alleged to have been wrongfully broadcast by MK3 Grijalva without the consent of [redacted] In order for the government to meet the elements of its charged offenses, the images must be viewed by the factfinders, without redaction. However, upon their admission into the evidence, the images are to be published ONLY to the members, by handing each image to the member who will then pass it to the next member. The images are NOT otherwise to be published within the courtroom.

4. SVC counsel next argued that the questioning of [redacted] regarding the images be limited, and requested this Court find that M.R.E 412 applies based upon the offenses charged in this case. SVC for [redacted] was provided an additional opportunity following the hearing to supplement his brief with legal authority for the Court to make such a finding.

5. In that supplemental filing on 8 September 2021, SVC for [redacted] argued that the offenses charged in this case, specifically Specifications 4 and 5 of Charge III, are closely analogous to Article 120c offenses (other sexual misconduct) so as to trigger M.R.E. 412. However, Article 120c nor any other sexual offense has been charged in this case. The Court has not been provided and is not aware of any legal authority to conclude that M.R.E. 412 applies in this case. Accordingly, that portion of the motion is DENIED.

6. SVC's concerns regarding irrelevant and prejudicial questioning of his client about the intimate images themselves, other instances when such images may have been taken, as well as his client's romantic relationships, are well taken. Despite the fact that M.R.E. 412 does not apply in this case, there are other rules in place (e.g. M.R.E.'s 303, 401, 403, 611(a)(3)) that serve to appropriately limit the questioning of [redacted] and will be enforced.

7. SVC's motion is therefore GRANTED IN PART with the visual images to be published ONLY to the members as described herein, and will be SEALED upon the conclusion of the case.

So ordered this 15th day of October 2021

[redacted]

D.M. Croff
Captain, USCGR
Military Judge

APPELLATE EXHIBIT 48
PAGE 2 OF 2 PAGE (S)

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
Grijalva, Mark J.	Coast Guard	E-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
U.S. Coast Guard District Thirteen	General	Enlisted Members	Nov 19, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Bad conduct discharge	3 months	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-3	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
Casey, Paul R.	Coast Guard	O-5	Nov 19, 2021	[redacted]

37. NOTES

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I:	107	Specification:	**Not Guilty**	Guilty			107-B-
		Offense description	False official statement				
Charge II:	131b	Specification:	**Not Guilty**	Guilty			134-U2
		Offense description	Obstructing justice				
Charge III:	134	Specification 1:	**Not Guilty**	Not Guilty			Empty
		Offense description	General article: clause 1 or 2 offense				
		Specification 2:	**Not Guilty**	Guilty			Empty
		Offense description	General article: clause 1 or 2 offense				
		Specification 3:	**Not Guilty**	Guilty			134-J9
		Offense description	General article: violation of federal law				
		Specification 4:	**Not Guilty**	Guilty			134-J9
		Offense description	General article: violation of federal law				
		Specification 5:	**Not Guilty**	Guilty			134-J9
		Offense description	General article: violation of federal law				

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
GRIJALVA, MARK J.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
Base Seattle Temporary Duty Division	09/26/2016	6 (4 years + 24m extension)

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
USCG District Thirteen	General	Enlisted Members	19-Nov-2021

Post-Trial Matters to Consider

Question	Yes	No
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.

RCM 1106A: Victim requested you take no action on the sentence in her written submission of RCM 1106A matters dtd 29NOV21.

RCM 1106: Accused (GRIJALVA) requested in his RCM 1106 matters submitted 19DEC21*:
1- Suspension of the remaining confinement and the reduction to E-3.
2- Alternately, deferment of automatic forfeitures until the entry of judgment and waiver of remaining automatic forfeitures if GRIJAVLA remains in confinement.
* GRIJALVA was granted a 20-day extension allowing GRIJALVA to view RCM 1106A prior to his written submission of RCM 1106 matters.

GRIJALVA requested deferral of automatic forfeitures and adjudged reduction in grade prior to RCM 1106 and it was denied.

24. Convening Authority Name/Title	25. SJA Name
Melvin W. Bouboulis Rear Admiral, U.S. Coast Guard Commander, Thirteenth Coast Guard District	[redacted] Commander, U.S. Coast Guard Staff Judge Advocate, Thirteenth Coast Guard District

26. SJA signature	27. Date
[redacted]	Dec 21, 2021

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

No Action.

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

[redacted]	31. Date
	Dec 21, 2021

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

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

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

Charge I: Violation of the UCMJ, Article 107
Offense Description: False Official Statement
Sole Specification Plea: Not Guilty
Sole Specification Finding: Guilty

Charge II: Violation of the UCMJ, Article 131b
Offense Description: Obstructing Justice
Sole Specification Plea: Not Guilty
Sole Specification Finding: Guilty

Charge III: Violation of the UCMJ, Article 134
Offense Description: General Article: Clause 1 or 2 Offense (Specification 1 & 2)
Offense Description: General Article: Violation of Federal Law (Specification 3, 4, & 5)
Pleas:
Specification 1 Plea: Not Guilty
Specification 2 Plea: Not Guilty
Specification 3 Plea: Not Guilty
Specification 4 Plea: Not Guilty
Specification 5 Plea: Not Guilty
Findings:
Specification 1 Finding: Not Guilty
Specification 2 Finding: Guilty
Specification 3 Finding: Guilty
Specification 4 Finding: Guilty
Specification 5 Finding: Guilty

34. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

Confinement for 3 months;

Reduction to pay grade E-3;

Bad Conduct Discharge

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

On 21 November 2021, GRIJALVA requested deferral of automatic forfeitures and adjudged reduction in grade.
On 29 November 2021, the CA denied the request for deferral.

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

N/A

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

34. Sentenced (Continued)

33. Findings (Continued)

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

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

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

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Offense Description: Obstructing Justice
Sole Specification Plea: Not Guilty
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Charge III: Violation of the UCMJ, Article 134
Offense Description: General Article: Clause 1 or 2 Offense (Specification 1 & 2)
Offense Description: General Article: Violation of Federal Law (Specification 3, 4, & 5)
Pleas:
Specification 1 Plea: Not Guilty
Specification 2 Plea: Not Guilty
Specification 3 Plea: Not Guilty
Specification 4 Plea: Not Guilty
Specification 5 Plea: Not Guilty
Findings:
Specification 1 Finding: Not Guilty
Specification 2 Finding: Guilty
Specification 3 Finding: Guilty
Specification 4 Finding: Guilty
Specification 5 Finding: Guilty

34. **Sentence to be Entered.** Accou... for any modifications made by reason o... 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.

Confinement for 3 months;

Reduction to pay grade E-3;

Bad Conduct Discharge

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

On 21 November 2021, GRIJALVA requested deferral of automatic forfeitures and adjudged reduction in grade.
On 29 November 2021, the CA denied the request for deferral.

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

N/A

37. Judge's signature:	38. Date judgment entered:
CASEY.PAUL.R.[redacted] Digitally signed by CASEY.PAUL.R.[redacted] Date: 2021.12.28 09:57:32 -05'00'	28-Dec-2021

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

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

34. Sentenced (Continued)

33. Findings (Continued)

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)