

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

MARSHALL

(Last Name)

CHRISTOPHER

(First Name)

D

MI

(DoD ID)

E-3

(Rank)

(Unit/Command Name)

U.S. NAVY

(Branch of Service)

GUAM

(Location)

By

GENERAL

(GCM or SPCM)

COURT-MARTIAL

Convened by

COMMANDING OFFICER

(Title of Convening Authority)

JOINT REGION MARIANAS

(Unit/Command of Convening Authority)

Tried at

On

(Place or Places of Trial)

20 January 2022, 4 August 2022, 28
August 2022, and 11 October 2022

(Date or Dates of Trial)

Companion and other cases

(Rank, Name, DoD ID, (if applicable), or enter "None")

CONVENING ORDER



DEPARTMENT OF THE NAVY
JOINT REGION MARIANAS



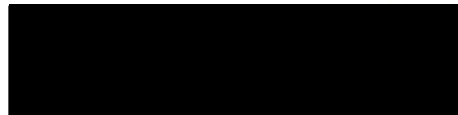
5 Aug 21

GENERAL COURT-MARTIAL CONVENING ORDER 1-21

Pursuant to authority contained in Article 22, UCMJ, and paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7G, of 10 Jan 2021, a general court-martial consisting of a military judge and members is convened with the following members:

Captain [REDACTED] Nurse Corps, U.S. Navy;
Captain [REDACTED] U.S. Navy;
Commander [REDACTED] U.S. Navy;
Commander [REDACTED] U.S. Navy;
Commander [REDACTED] U.S. Navy;
Commander [REDACTED] Civil Engineer Corps, U.S. Navy;
Commander [REDACTED] U.S. Navy;
Lieutenant [REDACTED] U.S. Navy;
Ensign [REDACTED] U.S. Navy;
Chief Warrant Officer Three [REDACTED] U.S. Navy;
Senior Chief Torpedoman's Mate [REDACTED] U.S. Navy;
Chief Yeoman [REDACTED] U.S. Navy;
Chief Electronics Technician [REDACTED] U.S. Navy;
Chief Logistics Specialist [REDACTED] U.S. Navy;
Operations Specialist First Class [REDACTED] U.S. Navy; and
Cryptologic Technician Maintenance First Class [REDACTED] U.S. Navy.

Three alternate members are authorized if excess members remain upon completion of the voire dire process.



B. R. NICHOLSON
Real Admiral, U.S. Navy
Commander, U.S. Joint Region Marianas

CHARGE SHEET

CHARGE SHEET

1 NAME OF ACCUSED (Last, First, MI) MARSHALL, CHRISTOPHER, D.		I. PERSONAL DATA	
2 SSN [REDACTED]		3 RANK/RATE CSSSN	4 PAY GRADE E-3
5 UNIT OR ORGANIZATION [REDACTED]		6 CURRENT SERVICE	
		a INITIAL DATE 15 JAN 20	b TERM 4 YEARS
7 PAY PER MONTH		8 NATURE OF RESTRAINT OF ACCUSED	
a BASIC \$ 2296.50 \$2,103.90	b SEA/FOREIGN DUTY [REDACTED] \$0.00	c TOTAL \$ 2296.50 \$2,103.90	9. DATE(S) IMPOSED N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 134

Specification 1 (Producing Child Pornography): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 8 November 2020, knowingly and wrongfully produce child pornography, to wit: a video of a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

Specification 2 (Possessing Child Pornography): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, knowingly and wrongfully possess child pornography, to wit: a video of a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 92

Specification 1 (Failure to obey other lawful written order): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, Naval Base Guam, to wit: paragraph 37(c) of enclosure (2), NAVBASEGUAMINST 11103.1B, dated 22 May 2017, an order which it was his duty to obey, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 8 November 2020, failed to obey the same by wrongfully allowing a minor into the unaccompanied housing facilities.

SEE CONTINUATION PAGE

III. PREFERRAL	
11a NAME OF ACCUSER (Last, First, MI) [REDACTED]	b GRADE LN1
c ORGANIZATION OF ACCUSER [REDACTED]	e DATE 23 SEP 2021
d SIGNATURE OF ACCUSER [REDACTED]	

AFFIDAVIT Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 23rd day of SEP, 2021, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief

GREGORY A. ESCOBAR

Typed Name of Officer

LT, JAGC, USN

Grade and Service

[REDACTED]

Organization of Officer

TRIAL COUNSEL

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

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13 The sworn charges were received at 1215 hours, 24 September 20 21 at
Submarine Squadron Fifteen Designation of Command or
Officer Exercising Summary Court Martial Jurisdiction (See R C M 403)

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14a. DESIGNATION OF COMMAND OR CONVENING AUTHORITY	b. PLACE	c. DATE
Joint Region Marianas	Asan, Guam	10 JAN 2022

dated 5 August 20 21, subject to the following instructions² None.

B. R. Nicholson

Commander

Typed Name of Officer

Official Capacity of Officer Signing

RDML, USN

GREGORY A. ESCOBAR

Typed Name of Trial Counsel

LT, JAGC, USN

Grade or Rank of Trial Counsel

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

CONTINUATION PAGE ICO US V. CSSSN CHRISTOPHER D. MARSHALL, U.S. NAVY

Specification 2 (Failure to obey other lawful written order): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, Naval Base Guam, to wit: paragraph 37(c) of enclosure (2), NAVBASEGUAMINST 11103.1B, dated 22 May 2017, an order which it was his duty to obey, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 3 December 2020, failed to obey the same by wrongfully allowing a minor into the unaccompanied housing facilities.

Specification 3 (Failure to obey other lawful written order): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, Naval Base Guam, to wit: paragraph 37(c) of enclosure (2), NAVBASEGUAMINST 11103.1B, dated 22 May 2017, an order which it was his duty to obey, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 10 December 2020, failed to obey the same by wrongfully allowing a minor into the unaccompanied housing facilities.

Specification 4 (Failure to obey other lawful written order): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, having knowledge of a lawful order issued by Commanding Officer, Naval Base Guam, to wit: paragraph 37(c) of enclosure (2), NAVBASEGUAMINST 11103.1B, dated 22 May 2017, an order which it was his duty to obey, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 14 December 2020, failed to obey the same by wrongfully allowing a minor into the unaccompanied housing facilities.

Specification 5 (Dereliction of Duty): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, who should have known of his duties, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 8 November 2020, was derelict in the performance of those duties in that he willfully failed to observe base access restrictions, by having [REDACTED] wrongfully hide in a vehicle while entering U.S. Naval Base Guam, as it was his duty to do.

Specification 6 (Dereliction of Duty): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, who should have known of his duties, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 3 December 2020, was derelict in the performance of those duties in that he willfully failed to observe base access restrictions, by having [REDACTED] wrongfully hide in a vehicle while entering U.S. Naval Base Guam, as it was his duty to do.

Specification 7 (Dereliction of Duty): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, who should have known of his duties, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 10 December 2020, was derelict in the performance of those duties in that he willfully failed to observe base access restrictions, by having [REDACTED] wrongfully hide in a vehicle while entering U.S. Naval Base Guam, as it was his duty to do.

Specification 8 (Dereliction of Duty): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, who should have known of his duties, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 14 December 2020, was derelict in the performance of those duties in that he willfully failed to observe base access restrictions, by having [REDACTED] and [REDACTED] wrongfully hide in a vehicle while entering U.S. Naval Base Guam, as it was his duty to do.

SEE CONTINUATION PAGE

CONTINUATION PAGE ICO US V. CSSSN CHRISTOPHER D. MARSHALL, U.S. NAVY

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 131b

Specification 1 (Obstruction of Justice): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, wrongfully do a certain act, to wit: delete messages between himself and Torpedoman's Mate Fireman [REDACTED] U.S. Navy, with the intent to impede the due administration of justice in the case of CSSSN Christopher Marshall, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

Specification 2 (Obstruction of Justice): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, wrongfully do a certain act, to wit: delete messages between himself and [REDACTED] with the intent to impede the due administration of justice in the case of CSSSN Christopher Marshall, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

Specification 3 (Obstruction of Justice): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, wrongfully do a certain act, to wit: instructing Torpedoman's Mate Fireman [REDACTED] U.S. Navy to delete messages between himself and Torpedoman's Mate Fireman [REDACTED] U.S. Navy, with the intent to impede the due administration of justice in the case of CSSSN Christopher Marshall, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

Specification 4 (Obstruction of Justice): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, wrongfully do a certain act, to wit: instructing [REDACTED] to delete messages between himself and [REDACTED] with the intent to impede the due administration of justice in the case of CSSSN Christopher Marshall, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

AND NOTHING FURTHER.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) MARSHALL, CHRISTOPHER, D.	2 SSN [REDACTED]	3. RANK/RATE CSSSN	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]		6. CURRENT SERVICE a. INITIAL DATE 15 JAN 20 b. TERM 4 YEARS	
7. PAY PER MONTH a. BASIC \$2,296.50 \$2,103.90 b. SEA/FOREIGN DUTY [REDACTED] \$0.00 c. TOTAL \$2,296.50 \$2,103.90		8. NATURE OF RESTRAINT OF ACCUSED [REDACTED] N/A	
		9. DATE(S) IMPOSED N/A	

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 92

Additional Specification (Dereliction of Duty): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, who should have known of his duties, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 28 October 2020, was derelict in the performance of those duties in that he willfully failed to observe base access restrictions, by having [REDACTED] wrongfully hide in a vehicle while entering U.S. Naval Base Guam, as it was his duty to do.

CHARGE: VIOLATION OF THE UCMJ, ARTICLE 131b

Additional Specification (Obstruction of Justice): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 15 December 2020, wrongfully do a certain act, to wit: instructing [REDACTED] to delete messages between himself and [REDACTED] with the intent to impede the due administration of justice in the case of CSSSN Christopher Marshall, against whom the accused had reason to believe that there were or would be criminal proceedings pending.

SEE CONTINUATION PAGE

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]	b. GRADE LN1/E6	c. ORGANIZATION OF ACCUSER SUBMARINE SQUADRON FIFTEEN
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE 13 December 2021	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 13 day of December, 2021, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[REDACTED]

Typed Name of Officer

LT, JAGC, USN

Grade and Service

[REDACTED]

Signature

SUBMARINE SQUADRON FIFTEEN

Organization of Officer

LEGAL OFFICER

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

12. On 13 December, 20 21, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Typed Name of Immediate Commander Legal Officer

LT, JAGC, USN

SUBMARINE SQUADRON FIFTEEN

Organization of Immediate Commander Legal Officer

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1015 hours, 14 December 20 21 at

SUBMARINE SQUADRON FIFTEEN

Designation of Command or

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

FOR THE

Typed Name of Officer

CAPT, USN

COMMANDER

Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

Joint Region Marianas

b. PLACE

Asan, Guam

c. DATE

11 January 2022

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-21

dated 5 August 20 21, subject to the following instructions:² The referred charges will

be joined and tried concurrently with the charges preferred against said Culinary Specialist Submarine Seaman Christopher Marshall, USN on 23 September 2021. By of

Command or Order

B. R. Nicholson

Typed Name of Officer

Commander

Official Capacity of Officer Signing

RDML, USN

Signature

15. On 12 January 2022, 20 21, I (caused to be) served a copy hereof on (each of) the above named accused.

GREGORY A. ESLOBAR

Typed Name of Trial Counsel

LT, JAGC, USN

Grade or Rank of Trial Counsel

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

CONTINUATION PAGE ICO US V. CSSSN CHRISTOPHER D. MARSHALL, U.S. NAVY

ADDITIONAL CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120b

Specification 1 (Sexual Assault of a Child): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 30 October 2020, commit a sexual act upon [REDACTED] a child who ~~had attained the age of 12 years but~~ had not attained the age of 16 years, by penetrating [REDACTED] vulva with Culinary Specialist Submarine Seaman Christopher Marshall's penis.

Specification 2 (Sexual Abuse of a Child): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near U.S. Naval Base Guam, Santa Rita, Guam, on or about 8 November 2020, commit a lewd act upon [REDACTED] a child who had attained the age of 12 but had not attained the age of 16, by intentionally exposing his genitalia to [REDACTED] with the intent to gratify the sexual desire of CSSSN Christopher D. Marshall.

Specification 3 (Sexual Abuse of a Child): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 9 November 2020, commit a lewd act upon [REDACTED] a child who had not attained the age of 16 years, by intentionally exposing his genitalia to [REDACTED] with an intent to gratify the sexual desire of Culinary Specialist Submarine Seaman Christopher Marshall.

ADDITIONAL CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120c

Specification (Indecent Exposure): In that Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, [REDACTED] on active duty, did, at or near Santa Rita, Guam, on or about 9 November 2020, intentionally expose his genitalia, in an indecent manner, to wit: displaying his penis on camera to [REDACTED]

AND NOTHING FURTHER.

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION FOR
APPROPRIATE RELIEF
CONTINUANCE**

1 MAR 22

1. **Nature of Motion.** Pursuant to Article 40, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §840, and RCM 906(b)(1), the Defense moves this Court to continue trial on the merits in this case to a date no earlier than 4 July 2022. A continuance is necessary to allow the Defense to obtain and consult with a private forensic psychologist who is available the week of trial in anticipation of our expert witness request. Additionally, a continuance is necessary to accommodate for CSSSN Marshall's unexpected surgery and allow him to be present at all court hearings.

2. **Facts.**

a. An Article 39(a) session is currently scheduled for 17 March 2022 and trial is currently scheduled to begin on 25 April 2022.

b. CSSSN Marshall is scheduled to have surgery on 3 March 2022 followed by 30 days of convalescent leave.¹

c. On 11 February 2022, the Defense requested an expert consultant in the field of forensic psychology. On 18 February 2022, Trial Counsel emailed Defense Counsel to advise that a Government forensic psychologist was unavailable. Unfortunately, Defense counsel was on travel and did not receive the email. As a result, Defense Counsel did not receive notification of the unavailability of a Government psychologist until 25 November 2022, when the Convening Authority denied the Defense request. However, the Convening Authority indicated it would still entertain a request for a private forensic psychologist. On 1 March 2022, the Defense submitted a funding request for Dr. [REDACTED] a private forensic psychologist.²

d. On 16 February 2022, the Defense requested a Bill of Particulars.³ As of 1 March 2022, Trial Counsel has not responded. The Defense anticipates the Bill of Particulars to materially shape case planning and litigation.

e. The Defense submitted a supplemental discovery request on 17 February 2022,⁴ and as

¹ Enclosure (1): CSSSN Marshall Medical Chit.

² Enclosure (2): Second Request for Funding for A Forensic Psychologist of 1 Mar 22.

³ Enclosure (3): Defense Request for Bill of Particulars of 16 Feb 22.

⁴ Enclosure (4): Defense First Supplemental Discovery Request of 17 Feb 22.

of 1 March 2022, has not received a response. The Defense anticipates responsive, relevant materials in the pending discovery.

f. This request is the Defense's first continuance request.

3. **Burden.**

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

4. **Law.**

Article 40 of the UCMJ provides that the "military judge...may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." 10 U.S.C. §840. Consistent with that authority, the military judge is empowered to set the time for each session of a court-martial, RCM 801(a)(1), and is the only person who may grant a continuance. RCM 906(b)(1); *see United States v. Knudson*, 4 U.S.C.MA. 587 (1954). Reasons for a continuance include, but are not limited to: "insufficient opportunity to prepare for trial; unavailability of an essential witness...and illness of an accused, counsel, military judge, or member." Discussion, RCM 906(b)(1), Manual for Courts-Martial (2019 ed.).

5. **Argument.**

As CSSSN Marshall is pending surgery and will be on convalescent leave, a continuance is necessary, at a minimum, for the pending 39(a). CSSSN Marshall will have limited ability to prepare with Defense Counsel in the weeks prior to the hearing, and would be unable to attend the hearing on 17 March 2022.

Not only would the requested delay accommodate CSSSN Marshall's unexpected surgery, but it would also allow the Defense the opportunity to consult with Dr. [REDACTED] a private forensic psychologist, who is available for trial on 4 July 2022 in anticipation of our witness expert request and in an effort to prevent any further delays.

Further, the requested delay would ensure the Government is able to provide the requested discovery and Bill of Particulars to the Defense with sufficient time to litigate any necessary issues, and to adjust the defense strategy appropriately.

This is the Defense's first continuance request. The requested delay is less than three months and does not prejudice the Government's case.

6. **Evidence and Enclosures.**

The Defense respectfully submits Enclosures A and B in support of this motion.

- A. Enclosure (1): CSSSN Marshall Medical Chit.
- B. Enclosure (2): Second Request for Funding for A Forensic Psychologist of 1 Mar 22.
- C. Enclosure (3): Defense Request for Bill of Particulars of 16 Feb 22.
- D. Enclosure (4): Defense First Supplemental Discovery Request of 17 Feb 22.

7. **Relief Requested.**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. The Defense respectfully moves this Court to continue trial to a date no earlier than 4 July 2022.

BURGOSSOLIS. Digitally signed by
ANA.MARIA BURGOSSOLIS.ANA.MARI
Date: 2022.03.01 01:19:31
-08'00'
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March 2022, a copy of this motion was served on Trial Counsel.

BURGOSSOLIS. Digitally signed by
ANA.MARIA BURGOSSOLIS.ANA.MARI
Date: 2022.03.01 01:20:03
-08'00'
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES v. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF CONTINUANCE 4 MAR 22
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1. **Nature of Motion.** Government has no objection to a continuance in the case of *United States v. CSSSN Marshall* to accommodate CSSSN Marshall's surgery. However, the Government objects to a continuance beyond the week of 27 June – 1 July 2022 for trial.
2. **Facts.** The Government concurs with the Defense summary of the facts and adds the following:
 - a. Defense's 1 March 2022 Expert Request for Dr [REDACTED] is still under review by the convening authority. Based on discussion with Defense Counsel, Dr. [REDACTED] earliest available dates are the week of 5 – 8 July 2022, and 11-15 July 2022.
 - b. Based on discussions with the Convening Authority's Force Judge Advocate, the Convening Authority intends to offer an adequate alternative expert who is available the weeks of 21- 24 June 2022 or the week of 27 June to 1 July 2022 for trial.
3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).
4. **Law.** The military judge should grant a continuance upon a showing of reasonable cause for as long and as often as is just.²
5. **Discussion.**

a. Motions Hearing and Deadlines

Government is prepared to move forward with the Court's 18 January 2022 Trial Management Order. However, the Government has no objection to a continuance for the currently scheduled 17 March 2022 motions hearing to accommodate CSSSN Marshall's surgery. Based on discussion with Defense, Government and Defense propose the following amendments to the Trial Management Order based on Defense's request for a motion to continue:

¹ Defense MFAR Continuance, Enclosure 2.

² R.C.M. 906(b)(1), Discussion.

- | | |
|---------------------------|-----------|
| a. Motion(s) filing | 15 APR 22 |
| b. Responses to motion(s) | 22 APR 22 |
| c. Article 39(a) | 28 APR 22 |

b. Trial Dates


Government objects to the delay of trial until 11 July 2022 as unnecessary. Alternative experts are available for both the weeks of 21- 24 June 2022 or the week of 27 June to 1 July 2022 for trial. Additionally, at this time, Defense has no forensic psychologist appointed as an expert. To reflect the proposed later Article 39(a) motions hearing date, the Government proposes and requests that the Trial Management Order be amended to no later than as follows:

- | | |
|--------------------------------------|---------------------|
| d. Written notice of pleas and forum | 20 MAY 22 |
| e. Notice of expert testimony | 20 MAY 22 |
| f. Final pretrial matters | 3 JUN 22 |
| g. Trial Dates | 21-24 JUN 22 (Guam) |

Government would also not object to the following proposed dates:


- | | |
|--------------------------------------|------------------------|
| a. Written notice of pleas and forum | 26 MAY 22 |
| b. Notice of expert testimony | 26 MAY 22 |
| c. Final pretrial matters | 10 JUN 22 |
| d. Trial Dates | 27 JUN-1 JUL 22 (Guam) |

6. **Relief Requested.** The Government proposes either the week of 21- 24 June 2022 or the week of 27 June to 1 July 2022 for trial. The Government respectfully requests this Court consider a continuance for trial no later than the week of 27 June – 1 July 2022.


G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**MOTION FOR APPROPRIATE
RELIEF FOR PRELIMINARY RULING
ON ADEQUATECY OF SUBSTITUTE**

15 APRIL 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(a) and (R.C.M.) 703(d), the Government respectfully requests that the Court make a preliminary ruling that Dr. [REDACTED] is an adequate substitute

2. **Facts.**

a. On 11 February 2022, Defense requested funding for an unspecified expert in forensic psychology to consult on the issues of recidivism and false confessions.¹ On 25 February 2022, the Convening Authority denied Defense request.²

b. On 1 March 2022, Defense requested funding for 10 hours of pretrial consultation with Dr. [REDACTED] on the issues of recidivism and false confessions.³ Dr. [REDACTED] is a forensic psychologist with a fee rate for pre-trial consultation at \$375.00 per hour.⁴

c. On 7 March 2022, Commander, Joint Region Marianas denied Defense request for an expert consultant regarding false confessions and denied the appointment of Dr. [REDACTED] for recidivism but offered the appointment of Dr. [REDACTED] as an adequate substitute.⁵ Dr. [REDACTED] is a forensic psychologist with a fee rate for expert consultation at \$300.00 per hour.⁶

d. Dr. [REDACTED] is competent to conduct forensic psychological evaluations with recidivism risk assessments, consult on and testify regarding sex offender recidivism risk, and consult and opine on susceptibility to false confessions.⁷

3. **Burden.** The Government bears the burden of demonstrating that its proffered expert is an adequate substitute.⁸

¹ Gov MFAR Substitute Adequacy, Enclosure 1. Defense Request for Funding for Forensic Psychologist dated 11 Feb 22

² Gov MFAR Substitute Adequacy, Enclosure 2.

³ Def MFAR Continuance, Enclosure 2.

⁴ Gov MFAR Substitute Adequacy, Enclosure 3.

⁵ Gov MFAR Substitute Adequacy, Enclosure 4.

⁶ *Id.*

⁷ Gov MFAR Substitute Adequacy, Enclosure 5.

⁸ *United States v. Guitard*, 28 M.J. 952, 955 (N-M.C.M.R. 1989).

4. **Law.**

As matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense.⁹ The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706 and R.C.M. 703(d). Defense is also required to educate itself to attain a level of competence to defend their client.¹⁰

The right to expert assistance attaches when the defense demonstrates that such assistance is necessary.¹¹ The “mere possibility of assistance from a requested expert” is not sufficient to prevail on the request for expert assistance.¹² In a similar line of reasoning, sufficient evidence must be established that shows a theory of defense would be aided by the requested expert’s consultation and testimony.¹³ The accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.”¹⁴ To satisfy the first prong of this test, the Defense must show, “(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop.”¹⁵

R.C.M. 703(d) authorizes a military judge to determine whether the employment of an expert witness is relevant and necessary; and if so, whether the Government has or will provide an adequate substitute.

If expert assistance is necessary, an accused is only entitled to expert services that are sufficient to permit defense to adequately prepare for trial and the Government meets its burden by providing competent assistance as government expense.¹⁶ Neither the convening authority nor the military judge are required to provide the defense with the particular expert it requests.¹⁷ There is no litmus test standard for determining whether a substitute for a defense-requested expert is adequate; rather, it is a fact-intensive determination that is committed to the military judge's sound discretion.¹⁸

5. **Argument.**

The Defense request for a forensic psychologist comes down to three assertions of necessity: (1) clinically evaluate CSSSN Marshall and assess any genuine risk of recidivism and present such evidence to the court; (2) make a psychological diagnosis and examine CSSSN Marshall for

⁹ *United States v. Garries*, 22 M.J. 288,290 (C.M.A. 1986), cert. denied, 479 U.S. 985 (1986); see also Art 46 UCMJ, 10 U.S.C. § 846 (establishing “equal opportunity to obtain witnesses and other evidence” for the defense); R.C.M. 703(d). *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

¹⁰ *United States v. Short*, 50 M.J. 370, 375 (C.A.A.F. 1999)

¹¹ *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)

¹² *Id.* (quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)).

¹³ *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

¹⁴ *Id.* (quoting *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008)).

¹⁵ *Gonzalez*, 39 M.J. at 461 (C.M.A 1994).

¹⁶ *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).

¹⁷ *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005)

¹⁸ *Warner*, 62 M.J. at 120.

any traits that might make him more susceptible to false confessions, and review the circumstances of the case and nature of the interview for other relevant risk factors; and (3) testify to the probative weight of the admissions in this case and, if convicted, the potential for future criminal behavior.¹⁹

Dr. [REDACTED] is trained at the pre-doctoral and post-doctoral level in psychosexual disorders and in risk assessment and has routinely conducted comprehensive forensic psychological evaluations with recidivism risk assessments since 1985.²⁰ She is able to evaluate and formulate a scientific opinion of CSSSN Marshall's personality structure and psychological functioning.²¹ She is also able to provide an opinion of his psychological characteristics that may tie to the literature on susceptibility and potential for false confessions.²² She has testified as an expert witness on risk assessment in over 100 military and civilian judicial proceedings.²³ Dr. [REDACTED] is competent to provide expert assistance for all the areas which Defense claims are necessary for an adequate defense.

The Convening Authority has agreed to produce Dr. [REDACTED] as an expert consultant on the issues of recidivism and risk assessment. Dr. [REDACTED] qualifications and expertise are sufficient for Defense to adequately prepare for trial.

The Convening Authority denied Dr. [REDACTED] as an expert consultant on the issue of false confessions because Defense has not shown the necessity for such expert assistance. Assuming, arguendo, that a false confession expert were necessary, Dr. [REDACTED] is also capable of providing sufficient expert assistance for Defense to adequately prepare for trial.

6. **Evidence and Enclosures.** Government relies on previously submitted Defense MFAR Continuance, Enclosure 2 and submits the following Government Enclosures:

Enclosure 1: Defense Request for Forensic Psychologist dtd 11 Feb 22
Enclosure 2: Denial of Defense Request for Forensic Psychologist dtd 25 Feb 22
Enclosure 3: C.V. and Fee Schedule of Dr. [REDACTED]
Enclosure 4: Partial Approval of Defense Request for Forensic Psychologist
Enclosure 5: Affidavit of Dr. [REDACTED] dtd 8 Apr 22

7. **Relief Requested.** The Government respectfully requests this Court issue a preliminary ruling that Dr. [REDACTED] is an adequate substitute to provide expert forensic psychologist assistance to Defense.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

¹⁹ Def MFAR Continuance, Enclosure 2.

²⁰ Gov MFAR Substitute Adequacy, Enclosure 5, page 1.

²¹ *Id.*

²² *Id.* page 2.

²³ *Id.* page 1.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION TO DISMISS
(Failure to State an Offense)**

15 APR 22

1. **Nature of Motion.** The Navy-Marine Corps Court of Criminal Appeals has held that Article 120c(c) criminalizes exposures that have “a temporal and physical presence aspect,” where a “victim [may be] present to view the actual body parts listed in the statutes, not images or likenesses of the listed parts.” *United States v. Uriostegui*, 75 M.J. 857, 865 (N-M Ct. Crim. App. 2016). Because the Government has abandoned this binding law by attempting to criminalize a display of a penis “on camera,” the Defense moves to dismiss Specification of Additional Charge II for failure to state an offense. R.C.M. 907(b)(2)(E).

2. **Facts**

a. In the Specification of Additional Charge II the Government alleges that CSSSN Marshall “did, at or near Santa Rita, Guam, on or about 9 November 2020, intentionally expose his genitalia, in an indecent manner, to wit: displaying his penis on camera to [REDACTED] (Charge Sheet, Jan. 10, 2022.)

3. **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. RC.M. 905(c).

4. **Law**

Congress criminalizes indecent exposure in Article 120c(c), UCMJ, defining it as “intentionally expos[ing], in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple.” 10 U.S.C. § 920c(c) (2019). Simultaneously, Congress provides that sexual abuse of a child under Article 120b(c), UCMJ, includes intentionally exposing “one’s genitalia, anus, buttocks [...] including *via any communication technology*.” 10 U.S.C. § 920b(c), (h)(5)(B).

Following the lead of the Army Court of Criminal Appeals, our service court noted, “‘This language that expands what qualifies as an exposure is notably absent from the [Article 120c(c)] offense of indecent exposure.’” *Uriostegui*, 75 M.J. at 864 (quoting *United States v. Williams*,

75 M.J. 663, 664 (A. Ct. Crim. App. 2016)).

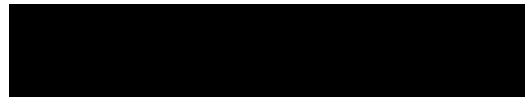
Applying this plain statutory language, the *Uriostegui* court set aside the appellant’s guilty plea to indecent exposure for transmitting a photograph of his penis online, holding that indecent exposure has “a temporal and physical presence aspect . . . [and] violations occur when a victim [may be] present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts.” *Id.* at 666.

5. **Argument**

Here, just like in *Uriostegui*, any exposure “on camera” cannot constitute indecent exposure under the UCMJ, and any specification alleging that act fails to state an offense.

6. **Relief Requested**

Because no trial by court-martial is possible on a specification that states no lawful offense, the Defense moves this Court to dismiss the Specification of Additional Charge II.



A. M. BURGOS SOLIS
LT, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS SOLIS
LT, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES v. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	DEFENSE MOTION TO DISMISS FOR OTHER APPROPRIATE RELIEF (Unreasonable Multiplication) 15 APR 22
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1. Nature of Motion

Pursuant to R.C.M. 906(b)(12), the Defense moves to dismiss Charge II, Specifications 1 through 4 as unreasonable multiplications of Specifications 5 through 8 under that same Charge. Alternatively, the Defense moves to merge Specification 1 through 4 and Specification 5 through 8 of Charge II for findings.

Additionally, if this Court denies the Motion to Dismiss the Specification of Charge II for Failure to State an Offense, the Defense moves to dismiss that Specification as an unreasonable multiplication of Additional Charge I, Specification 3.

2. Summary

In Charge II, the Convening Authority has referred four “sets” of two Specifications (1 and 5, 2 and 6, 3 and 7, and 4 and 8) in which both Specifications arise from substantially the same transaction between the same people: CSSSN Marshall and his girlfriend, [REDACTED]. According to the Charge Sheet and the facts that will be adduced at trial, CSSSN Marshall surreptitiously brought [REDACTED] onto Naval Base Guam base four times—naturally using the gate access to the Base. But the Government has charged each of these actions as both a violation of the Base access instruction and a dereliction of CSSSN Marshall’s duty to observe “base access restrictions.” Such a charging scheme fails each of the four trial-level *Quiroz* factors.

Additionally, based on a single allegation of exposing his penis during a WhatsApp video call with two sisters, [REDACTED] and [REDACTED], the Convening Authority has referred two Specifications—under Article 120b and Article 120c—based on the notion that two different people viewed the exposure. No charging scheme permits separating these offenses *by spectator*, as no court has ever held that the unit of prosecution for such a crime is the observer, rather than the exposure.

3. 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).

4. **Facts.**

a. During its investigation of CSSSN Marshall, Naval Criminal Investigative Service agents discovered evidence that, on four different occasions, he brought ██████ to his barracks room located onboard Naval Base Guam via the Base's main gate.¹

b. Based on those four incidents, the Government now charges CSSSN Marshall with eight separate violations of Article 92—alleging in Charge II that each episode constituted a violation of an order and a dereliction of a duty. (Charge Sheet, Jan. 11, 2022.)

c. Separately, two women, ██████ and ██████ claim that they observed CSSSN masturbating during a WhatsApp video call on 9 November 2020.²

d. Based on this single transaction, the Government has charged CSSSN Marshall twice—once under Article 120b in Charge I, Specification 3 and once under Article 120c in the sole Specification of the Additional Charge. (Charge Sheet, Jan. 11, 2022).

5. **Law**

- a. Unlike multiplicity, which is grounded in Double Jeopardy and involves statutory interpretation, the prohibition on unreasonable multiplication protects against prosecutorial overreach based on fundamental fairness.

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” 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).

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:

1. Is each charge and specification aimed at distinctly separate criminal acts?
2. Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?
3. Does the number of charges and specifications unfairly increase the accused's punitive exposure?

¹ Enclosure (1): Cellebrite Extraction Report of CSSSN Marshall's phone, BS 57-60. Enclosure (2): ROI of ██████ of 15 Dec 20, BS 5-6.

² Enclosure (3): NCIS ROI of ██████ of 27 Oct 21, BS 357-358; Enclosure (4): NCIS ROI of ██████ of 27 Oct 21, BS 359-360; Enclosure (5): NCIS Results of Review of Data from CSSSN Marshall's cellular telephone, BS 383-385.

4. 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).

With respect to the first of these factors, when courts look at continuous-course-of-conduct type offenses, criminal acts that are “united in time, circumstance, and impulse” should not be made the subject of separate findings of guilty. *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989).

- b. A military judge has wide discretion to remedy unreasonable multiplications of charges, up to and including dismissal.

When charges are unreasonably multiplied, the military judge has wide latitude to craft a remedy, including dismissing offenses, merging them for findings, 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.*

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 [them] 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)).

6. Argument.

- a. The first three Quiroz factors are so heavily weighted in favor of the Defense such that relief from the unreasonably multiplied specifications are required.

This is precisely the type of case where the first *Quiroz* factor nearly overwhelms the analysis. Specifications 1-4 and 5-8 of Charge II are aimed at “substantially one transaction” because they are “united in time, circumstance, and impulse.” *Flynn*, 28 M.J. at 221. CSSN

Marshall brought his girlfriend, [REDACTED] onto Naval Base Guam, precisely to bring her to his barracks room on four occasions: 8 November, 3 December, 10 December, and 14 December. Although gate access was a necessary means to arrive at his barracks room, the Government has excessively charged CSSSN Marshall with a “blow by blow” charging scheme for conduct that is one continuous transaction.

The second and third factors, too, favor the defense. These Specifications misrepresent and exaggerate CSSSN Marshall’s criminality by serializing his alleged conduct on paper when in reality the allegations arise from one event. Furthermore, the Specifications unfairly double his potential punitive exposure.

b. Dismissal is the appropriate remedy.

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

c. Should this court not dismiss Additional Charge II for failure to state an offense, it should for the unreasonable multiplication of charges because the first three *Quiroz* factors are so heavily weighted in favor of the Defense, relief is required.

Both Specifications 3 of Additional Charge I, and Additional Charge II are the exact same singular transaction, “united in time, circumstance, and impulse.” *Flynn*, 28 M.J. at 221. Indeed, both [REDACTED] and [REDACTED] are both watching pornography together in the same room while CSSN Marshall appears virtually. Nevertheless, the Government has excessively charged CSSSN Marshall for conduct that is one transaction. The second and third factors also favor the defense. These charges misrepresent and exaggerate CSSSN Marshall’s criminality—charging him twice for the same act serializes his alleged conduct on paper when in reality the allegations arise from one singular event. Furthermore, the Charges unfairly increase his potential punitive exposure.

7. **Evidence and Enclosures.**


The Defense respectfully submits the following enclosures in support of this motion.

- Enclosure (1): Cellebrite Extraction Report of CSSSN Marshall’s phone, BS 57-60.
- Enclosure (2): ROI of [REDACTED] of 15 Dec 20, BS 5-6.
- Enclosure (3): NCIS ROI of [REDACTED] of 27 Oct 21, BS 357-358.
- Enclosure (4): NCIS ROI of [REDACTED] of 27 Oct 21, BS 359-360.
- Enclosure (5): NCIS Results of Review of Data from CSSSN Marshall’s cellular telephone, BS 383-385.

8. **Relief Requested.**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant

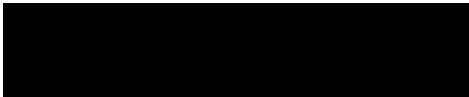
to RCM 905(h), an Article 39(a) session to present oral argument and evidence. The Defense respectfully moves this Court to dismiss Charge II, Specifications 1 through 4, as unreasonably multiplied charges of Specifications 5 through 8 under Charge II.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION TO SUPPRESS
UNWARNED STATEMENTS AND
EVIDENCE OUTSIDE THE SCOPE
OF THE PASS**

15 APR 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rules of Evidence (M.R.E.) 304, 305, 311, 314, and the Fourth Amendment to the United States Constitution, the Defense moves to suppress CSSSN Marshall's unwarned statements pertaining to the deletion of text messages that are the basis for the obstruction of justice charges, in Specifications 1-4 and the Additional Specification of Charge III, and all evidence searched and seized outside the scope of CSSSN Marshall's permissive authorization to include WhatsApp messages pertaining to the deletion of messages.

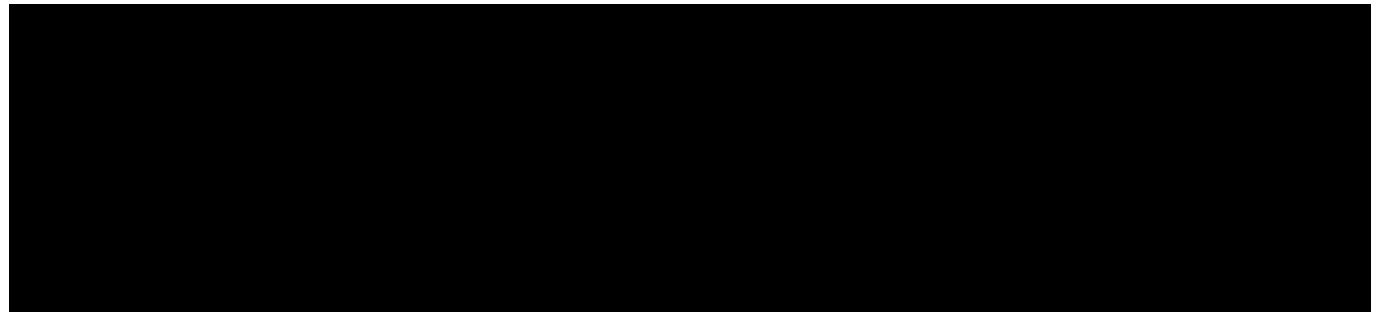
2. **Facts.**

a. The Government has charged CSSSN Marshall with: unlawfully binging [REDACTED] on base on 8 November, 3 December, 10 December and 14 December, production of child pornography on 8 December, and five specifications of Obstruction of Justice. (Charge Sheet, 10 Jan. 2022.)

i. In Charge III, the Government alleges that on or about 15 December 2020: CSSSN Marshall wrongfully delet[ed] messages between himself and TMFN [REDACTED] and himself and [REDACTED]

ii. That he wrongfully instruct[ed] TMFN [REDACTED] and [REDACTED] to delete messages between himself and them.

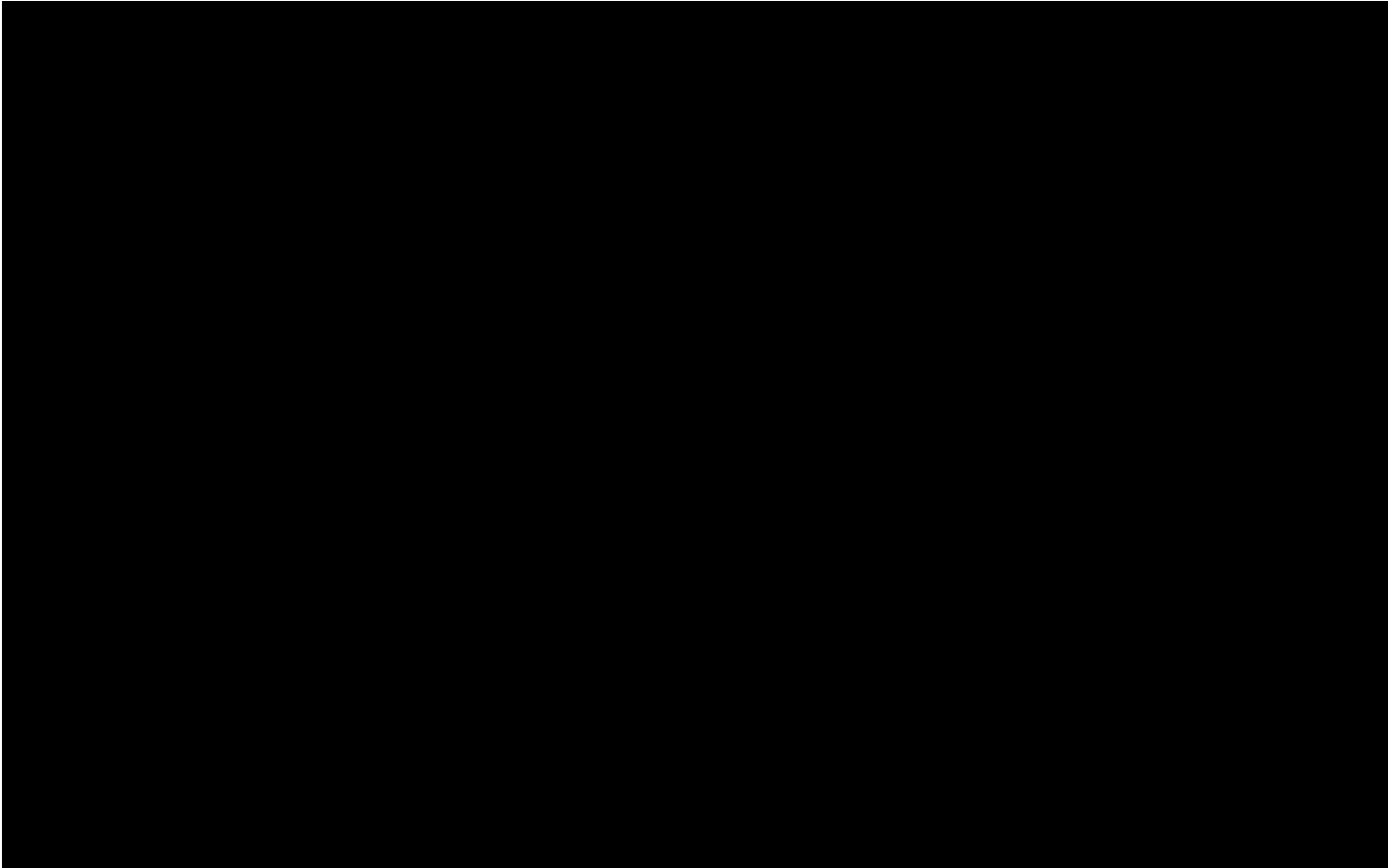
b. NCIS interrogated CSSSN Marshall on 15 Dec 20.¹



¹ Enclosure (1): ROI of CSSSN Marshall interrogation on 15 Dec 2020, BS 11-12.

² Enclosure (2): Art 31b Right's Advisement of 15 Dec 20, BS 13.

³ Enclosure (3): CSSSN Marshall's interrogation of 15 Dec 20 (Video 1).



i. NCIS searched and seized CSSSN Marshall's phone, discovering WhatsApp messages, which formed the basis for the obstruction of justice charges.⁷

j. The Government provided evidentiary notice, under M.R.E. 304(d), with its intent to offer CSSSN Marshall's interrogation and evidence obtained from search of his barracks room and cell phone at trial.⁸

3. **Burden.**

Upon motion by the Defense to suppress statements of the Accused under Mil. R. Evid. 304, the prosecution has the burden of establishing the admissibility of the statement. Mil. R. Evid. 304(f)(6). The military judge must find by a preponderance of the evidence that the Accused's statement was made voluntarily before the statement may be admitted into evidence. Mil. R. Evid. 304(f)(7).

Pursuant to M.R.E. 311(d)(5) the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some valid exception applies. Pursuant to M.R.E. 314(e)(5), the prosecution must prove consent for a search by clear and convincing evidence.

⁴ Enclosure (4): CSSSN Marshall's interrogation of 15 Dec 20 (Video 2).

⁵ Enclosure (5): PASS of Barracks Room of 15 Dec 20, BS 19.

⁶ Enclosure (6): PASS of Phone of 15 Dec 20, BS 18.

⁷ Enclosure (7): Results of DC3 Report 24 Jun 21 and DC3 Report, BS 40-101.

⁸ Enclosure (8): Government Evidentiary Notices of 27 Jan 22.

4. Law.

A statement is obtained in violation of Article 31 and is inadmissible at court-martial if it fails to inform the suspect of the nature of the allegation against him or her.

An adequate rights advisement under Article 31(b) must include “informing the accused or suspect of the nature of the accusation,” the purpose of which “is to orient him to the transaction or incident in which he is allegedly involved.” Mil. R. Evid. 305(c)(1)(A). *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960)(internal citations omitted). In *United States v. Simpson*, the court held that rights advisement of “indecent acts related to AP” were sufficiently related to sodomy to inform the suspect of the “general nature” of the allegations against him. *United States v. Simpson*, 54 M.J. 281, 284.

Statements obtained when the rights advisement fail to orient the suspect of the nature of the allegation against him or her are inadmissible against the accused at court-martial. Mil. R. Evid. 305(c)(1).

Evidence obtained outside the scope of consent constitutes an unlawful search, which per the exclusionary rule of the Fourth Amendment, must be suppressed.

Even when a search and seizure is conducted pursuant to a permissive authorization, consent “may be limited in any way by the person granting consent, including limitations in terms of time, place, or property, and may be withdrawn at any time.” MIL. R. EVID. 314. Consent must be voluntarily given, which is a determination from all circumstances. *Id.* The scope of consent is determined by “objective reasonableness,” asking “what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). Neither the subjective intentions of the suspect nor the “boilerplate language of the PASS solely control the scope of consent.” *United States v. Crocker*, 2020 CCA Lexis 80, No.201900226 *22 (N-MCCA 2020).

“Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible” if there is a timely motion to suppress, the accused had a reasonable expectation of privacy in the property searched, and “exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.” MIL. R. EVID. 311(a).

5. Argument.

- a. CSSN Marshall’s statement pertaining to deleting messages is inadmissible at court-martial because his rights advisement failed to inform him that he was suspected of obstruction of justice.

On its face CSSN Marshall’s right’s advisement failed to inform him that he was suspected of obstruction of justice. Further, “unlawful access to a naval installation and child pornography” are not sufficient “to orient him” to the charged obstruction of justice. Unlike in *Simpson*, where a generalized “indecent acts” warning encompassed the more specific indecent act of sodomy, unlawful base access and child porn are entirely unrelated to deleting, or instructing others to delete messages. Further, there is no temporal proximity that links these acts, thus CSSN Marshall was not sufficiently informed and his statement pertaining to the deletion of messages is inadmissible at court-martial.

- b. NCIS exceeded the scope of CSSSN Marshall's consent, and any evidence obtained as a result of the unlawful search and seizure, should be suppressed to include What'sApp messages.

Even after CSSSN Marshall tells NCIS about deleting, or instructing others to delete messages, CSSSN Marshall still only signed a PASS for "all electronic media and data files" related to "assisting in unlawful access to a naval installation and child pornography." Although the scope of his consent was narrowly tailored, the Government searched the entirety of his phone looking for additional criminality, exactly what the Fourth Amendment was designed to prevent. When looking at the "objective reasonableness" of CSSSN Marshall's consent, and taking into consideration Special Agent [REDACTED] two statements reiterating the search his for child porn, NCIS exceeded the scope of his consent and infringed on his reasonable expectation of privacy. The only cure is suppression.

6. **Evidence and Enclosures.**

The Defense respectfully submits Enclosures A through H in support of this motion.

- A. Enclosure (1): ROI of CSSSN Marshall interrogation on 15 Dec 2020, BS 11-12, 2 pages;
- B. Enclosure (2): Art 31b Right's Advisement of 15 Dec 20, BS 13, 1 page;
- C. Enclosure (3): CSSSN Marshall's interrogation of 15 Dec 20 (Video 1);
- D. Enclosure (4): CSSSN Marshall's interrogation of 15 Dec 20 (Video 2);
- E. Enclosure (5): PASS of Barracks Room of 15 Dec 20, BS 19, 1 page;
- F. Enclosure (6): PASS of Phone of 15 Dec 20, BS 18, 1 page;
- G. Enclosure (7): Results of DC3 Report 24 Jun 21 and DC3 Report, BS 40-101, 62 pages; and
- H. Enclosure (8): Government Evidentiary Notices of 27 Jan 22.

7. **Relief Requested.**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rules of Evidence (M.R.E.) 304, 305, 311, 314, and the Fourth Amendment to the United States Constitution, the Defense moves to suppress CSSSN Marshall's unwarned statements pertaining to the deletion of messages that form the basis for the obstruction of justice charges in Specifications 1-4 and the Additional Specification of Charge III, and all evidence searched and seized outside the scope of CSSSN Marshall's permissive authorization to include What'sApp messages.

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION TO COMPEL
EXPERT CONSULTANT**

15 APR 22

1. **Nature of Motion**. Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 703(c) and 906(b)(7), as well as the Sixth Amendment to the U.S. Constitution, the Defense moves this Court to compel the production of Dr. [REDACTED] and set trial for 11 July 2022.

2. **Facts**.

a. On 1 March 2022, the Defense submitted a second funding request for Dr. [REDACTED] a private forensic psychologist.¹ This request was timely because the Defense had previously requested a Government forensic psychologist in accordance with this Court's Trial Management Order, which was denied by the Convening Authority.

b. On 7 March 2022, the Convening Authority denied the Defense's request for Dr. [REDACTED] but granted Dr. [REDACTED]² stating that an expert in false confessions is unnecessary, despite the Government's notice to introduce CSSSN Marshall's recorded interrogation at trial.³

c. On 10 March 2022, the Defense team called Dr. [REDACTED] at which time she expressed disgust for any charges related to child porn and stated that she had no training or expertise in false confessions.⁴

d. Both Dr. [REDACTED] and Dr. [REDACTED] are private forensic psychologists, but Dr. [REDACTED] has no training or expertise with false confessions, while Dr. [REDACTED] has extensive training and expertise.⁵

e. Dr. [REDACTED] and Mr. [REDACTED] the Defense's digital forensic expert consultant are available for trial on 11 July 2022.⁶

¹ Enclosure (1): Second Request for Funding for A Forensic Psychologist of 1 Mar 22.

² Enclosure (2): The Convening Authority's Response of 7 Mar 22.

³ Enclosure (3): Government Evidentiary Notices of 27 Jan 22.

⁴ Enclosure (4): LN1 [REDACTED] Affidavit of 10 Mar 22.

⁵ Enclosure (5): Dr. [REDACTED] CV.

⁶ Enclosure (6): E-mail string of 11 Apr 22.

3. **Burden.**

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

4. **Law.**

The Sixth Amendment guarantees the right to the effective assistance of counsel and the right to present a defense. And the Due Process clause demands a fundamentally fair trial. It is settled law that the advocacy skills of an attorney alone do not satisfy these constitutional requirements. *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (finding that, “without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense,” including presentation of testimony, “the risk of an inaccurate resolution of sanity issues is extremely high”). Congress also demands that the Government and the defense at court-martial “shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.” Article 46, UCMJ. Implementing this mandate, R.C.M. 703(d) authorizes employment of an expert whose testimony would be “relevant and necessary.” *See also United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999).

This “relevant and necessary” test results in a blunt outcome. “When the testimony of an expert is both relevant and necessary to an accused’s defense, the government is *required* to provide either the expert requested, or an ‘adequate substitute.’” *United States v. Axe*, 80 M.J. 578, 583 (N-M Ct. Crim. App. 2020) (emphasis added) (citing R.C.M. 703(d)(2)(i); *United States v. Pomarleau*, 57 M.J. 351, 359 (C.A.A.F. 2002)).

An adequate substitute is an expert “who can provide ‘competent assistance’ to counsel in exploring those issues requiring expertise.” *Axe*, 80 M.J. at 583. Specifically, assisting the defense in “evaluating, identifying, and developing evidence.” *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005)). For competent assistance, the adequate substitute will generally have “reasonably comparable” qualifications in the same subject area as the requested expert—the determination of which is a fact-intensive inquiry within the military judge’s sound discretion. *Id.* at 120. Article 46 is a clear statement of congressional intent against Government exploitation when denying a defense requested expert. *Id.*

5. **Argument.**

The Convening Authority’s willingness to fund a private forensic, just one with lesser qualifications, is exactly the exploitation Article 46 was designed to prevent.

Given the severity of the child sex offenses charged, and in light of the Convening Authority’s funding approval for Dr. [REDACTED] the Government has presumably conceded that a forensic psychologist is relevant and necessary for the preparation of the Defense’s case, at minimum, to examine CSSSN Marshall and assess his recidivism risk. However, the Government denied the Defense’s request for, Dr. [REDACTED] a forensic psychologist with training and expertise in susceptibility and coerced confessions—which is not only relevant and necessary to CSSSN Marshall’s defense, but critical as the Government intends to introduce CSSSN Marshall’s interrogation at trial. With no training or expertise in susceptibility or coerced confessions, Dr. [REDACTED] does not have “reasonably comparable” qualifications as Dr. [REDACTED] and could not provide competent assistance in exploring issues related to false confessions, such as evaluating whether CSSSN Marshall has any abnormalities, personality traits or disorders that could render him more likely to make a false confession.

More egregious that the inadequacy of Dr. [REDACTED] qualifications is Exhibit X of 3

conduct related to child pornography. Before explaining the very unique facts that are the basis for the child pornography charges in this case, she expressed a bias against CSSSN Marshall, despite being the very person who is supposed to conduct a neutral evaluation of him and consult as a member of the Defense team. Therefore, she is unable to perform even the tasks the Convening Authority has deemed permissible.

6. **Evidence and Enclosures.**

The Defense respectfully submits the following enclosures in support of this motion.

- Enclosure (1): Second Request for Funding for A Forensic Psychologist of 1 Mar 22.
- Enclosure (2): The Convening Authority's Response of 7 Mar 22.
- Enclosure (3): Government's Evidentiary Notices of 27 Jan 22.
- Enclosure (4): LN1 [REDACTED] Affidavit of 10 Mar 22.
- Enclosure (5): Dr. [REDACTED] CV.
- Enclosure (6): E-mail string of 11 Apr 22.

7. **Relief Requested.**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence, to include an affidavit from Dr. [REDACTED]. The Defense respectfully moves this Court to compel the production of Dr. [REDACTED] and set trial for 11 July 2022.

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Trial Counsel.

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN

DEFENSE MOTION TO COMPEL
DISCOVERY

15 APR 22

1. **Nature of Motion.** Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 701, the Defense moves this Court to compel discovery.

2. **Summary.** The Defense's theory is that out of revenge, and in an effort to protect her boyfriend, TMFN [REDACTED] CSSSN Marshall's co-accused [REDACTED] made frivolous allegations against CSSSN Marshall, while all other charges against him are NJP level offenses, to include nine specifications arising from bringing [REDACTED] and [REDACTED] onto base without authorization. In order to prepare its case, the Defense must understand the frequency of unlawful base access onboard Naval Base Guam (NBG).

3. **Facts**

- a. CSSSN Marshall faces over 100 years of confinement for a multitude of charges to include nine specifications of orders violation and "dereliction" for bringing [REDACTED] and [REDACTED] onto base. (Charge Sheet, Jan. 10, 2022.)
- b. CSSSN Marshall and TMFN [REDACTED] were friends who had unlawfully brought their respective girlfriends, [REDACTED] and [REDACTED] onto NBG on several occasions.¹
- c. [REDACTED] and her friend [REDACTED] were both was caught for "sneaking onto base."²
- d. In its Response to the Defense's First Supplemental Discovery Request, the Government denied:³
 - i. The total number of NBG and CID quarterly reports of persons unlawfully onboard NBG from 15 September 2011 to 15 September 2021.

4. **Burden.**

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

¹ Enclosure (1): ROI of TMFN [REDACTED] of 21 Dec 20, BS 219.

² Enclosure (2): ROI of [REDACTED] of 15 Dec 20, BS 5-6.

³ Enclosure (3): The Government's Response to the Defense's First Supplemental Discovery Request of 5 Mar 22.

5. **Law.**

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

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

R.C.M. 701(a)(2)(A)(i)(emphasis added).

As a threshold matter, discoverable material is “in the possession, custody or control of military authorities. *Id.* Generally speaking, items held by an entity outside of the Federal Government does not satisfy this requirement. *Stellato*, 74 M.J. at 484.

Evidence is material if it is of “such a nature that knowledge of [it] would affect a person’s decision-making process.” Black’s Law Dictionary 1066 (9th ed. 2009). Evidence may be relevant and even material despite its inadmissibility at trial. *See United States v. Luke*, 69 M.J. 309, 320 (CA.A.F. 2011)(internal citations omitted). Material evidence includes inadmissible materials “that would assist the defense in formulating a defense strategy.” *Id.* The standard for determining “relevance” to defense preparation is still broader than that. Evidence is relevant when it has “any tendency to make the existence of any fact more probable or less probable than it would be without the evidence; and the fact is of consequence to the determination of the action.” Mil. R. Evid. 401.

6. **Argument.**

This Court should compel the quarterly reports of persons unlawfully onboard NBG because it is highly relevant to the Defense’s theory that unlawful base access onboard NBG is an NJP level offense, and it is within the possession of military authorities. Further, without this evidence, the Defense cannot prepare its case in extenuation, which the court must consider to determine the appropriate sentence.

7. **Evidence and Enclosures.**

The Defense respectfully submits the following enclosures in support of this motion.

- Enclosure (1): ROI of TMFN [REDACTED] of 21 Dec 20, BS 219.
- Enclosure (2): ROI of [REDACTED] of 15 Dec 20, BS 5-6.
- Enclosure (3): The Government’s Response to the Defense’s First Supplemental Discovery Request of 5 Mar 22.

8. **Relief Requested.**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. The Defense moves this Court to compel the discovery listed above.

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION TO COMPEL
WITNESS PRODUCTION**

15 APR 22

1. **Nature of Motion.** Pursuant to R.C.M. 703(c) and 906(b)(7), as well as the Sixth Amendment to the U.S. Constitution and Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846 (2019), the Defense moves this Court to compel the production of Mr. [REDACTED] for live, in-person testimony at the sentencing phase of trial.

2. **Facts.**

a. CSSSN Marshall faces a maximum punishment that includes 100 years of confinement for a multitude of Charges that include allegations of child sexual abuse and possession of child pornography. (Charge Sheet, Jan.10, 2022.)

b. On February 25, 2022, denying the Defense's request¹ for the production of Mr. [REDACTED] for live, in-person testimony at the sentencing phase regarding CSSSN Marshall's traumatic upbringing, hardships, ailments, losses, and his excellent capacity for rehabilitation, Trial Counsel instead indicated that the Government would facilitate Mr. [REDACTED] testimony via video-conference (VTC).²

c. As of April 15, 2022, the courtroom onboard Naval Base Guam does not have any internet connectivity and the Surface Hub is inoperable.³

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

4. **Law.** The Sixth Amendment to the U.S Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI, cl. 7. This right is "well established in military law and has been guarded by [our highest Court]." *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986) (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976; *United States v.*

¹ Enclosure (1): The Defense's Request for the Production of Witness of 11 Feb 22.

² Enclosure (2): The Government's Response of 25 Feb 22.

³ Enclosure (3): Affidavit of LN1 [REDACTED] of 15 Apr 22.

Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial “shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process,” R.C.M. 703(a), and “[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.C.M. 703(b)(1).

Additionally, under R.C.M. 703(b)(2) “each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f).” Testimony may be required if enables the Defense to present matters in extenuation and mitigation and aid the court in determining punishment that is “sufficient, but not greater than necessary.” R.C.M. 1001(f)(1); R.C.M. 1002(f). Although there is greater latitude than on the merits to receive testimony by means other than in-person testimony, it is still a matter within the military judge’s discretion. R.C.M. 1001(f)(1).

5. **Argument.** The court is required to consider Mr. [REDACTED] evidence in mitigation to determine any appropriate sentence in this case. The Government’s proposed alternative means for testimony via VTC are overly ambitious given that the courtroom does not currently have internet connectivity or an operable Surface Hub, and even if the Government were able to fix these deficiencies, the internet connectivity on Guam is notoriously poor. Unreliable connectivity, resulting in dropped calls, would interfere with CSSSN Marshall’s right to present a complete defense in extenuation and mitigation. The prejudice from this denial will be especially pronounced given that the putative victims in this matter will be present for live, in-person presentation of their testimony or R.C.M. 1001(c) impact statements. Further, given the severity of the Charges, which carry a possible sentence of confinement for life, this Court is well within its wide discretion to compel the Government to produce the Defense’s sole sentencing witness.

6. **Evidence and Enclosures**

The Defense respectfully submits the following enclosures in support of this motion.

- Enclosure (1): The Defense’s Request for the Production of Witness of 11 Feb 22.
- Enclosure (2): The Government’s Response of 25 Feb 22.
- Enclosure (3): Affidavit of LN1 [REDACTED] of 15 Apr 22.

7. **Relief Requested**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. The Defense respectfully moves this Court to compel the production of Mr. [REDACTED]

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES v. CHRISTOPHER MARSHALL CSSSN/E-3, USN	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR OTHER APPROPRIATE RELIEF (Unreasonable Multiplication) 22 APRIL 22
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1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(12) the Government respectfully requests that the Court deny the Defense's 15 April 2022 *Motion to Dismiss for Other Appropriate Relief (Unreasonable Multiplication)*.

2. **Facts.** For the purposes of this motion, the Government concurs with the defense's recitation of facts (a) through (c), and adds the following:

a. On multiple occasions, CSSSN Marshall brought [REDACTED] on base in a vehicle by having her hide in the trunk of the car.¹

b. Minors are not permitted in Unaccompanied Housing facilities on Naval Base Guam.²

3. **Burden.** As the moving party, Defense bears the burden of proof by a preponderance of the evidence.³

4. **Law.** The Government concurs with the Defense recitation of the law.

5. **Argument.**

a. Specifications 1-4 and 5-8 of Charge II are distinctly separate criminal acts that accurately reflect CSSSN Marshall's criminality.

CSSSN Marshall is charged with failure to obey a lawful written order on four occasions by allowing a minor into unaccompanied housing facilities (Charge II, Specifications 1-4) and for dereliction of duty on four occasions for having [REDACTED] wrongfully hide in a vehicle while entering Naval Base Guam (Charge II, Specifications 5-8). These are separate and distinct criminal acts.

Defense's citation to *Flynn* is instructive in this case. In *Flynn*, the Court found that attempted vaginal penetration followed by attempted anal penetration was not substantially once transaction because there were separate acts involved, there was a lapse of time (which the Court noted was of a short duration), and the criminal intent for each act was different and did not

¹ Def MFAR UMC, Encl. 2, page 2.

² Gov MFAR UMC, Encl. 1, page 25.

³ RCM 905(c).

include the other as a matter of fact.⁴ Here CSSSN Marshall made separate choices to hide ██████ in a vehicle and to bring her to his Unaccompanied Housing room. Bringing ██████ on base by hiding her in the trunk of the car does not include bringing ██████ to his barracks room as a matter of fact. CSSSN Marshall could have simply brought her to the base Commissary and hiding her in the car would still have been wrongful. Similarly, CSSSN Marshall bringing ██████ to his barracks room does not include having her sneak on base as a matter of fact. He could have sponsored her for a gate pass and bringing her to his barracks would still have been wrongful. There is a lapse in time between CSSSN Marshall bringing ██████ on base in the trunk of the car and bringing her into his barracks room. Finally, there is separate criminal intent between sneaking ██████ on base and bringing her to his barracks room. There is no unreasonable multiplication of charges.

b. Additional Charge I, Specification 3 and Additional Charge II, Sole Specification are distinct criminal acts because they involve different victims and address separate crimes

In *United States v. Davis*, the Court found that two specifications involving the same, single act were not an unreasonable multiplication of charges because there were separate victims and separate crimes.⁵ Here, there are two separate victims, ██████ and ██████ and CSSSN Marshall's actions violation both Congress's prohibition to protect public against indecent exposure as well as Congress's statutory protections of children from sexual abuse.

c. Dismissal is an inappropriate remedy

Even if Charge II Specifications 1-4 constituted the same transaction or occurrence as Specifications 5-8 or if Additional Charge I, Specification 3 constituted the same transaction or occurrence as Additional Charge II, Sole Specification, it would be premature to determine whether any of these specifications constitutes an unreasonable multiplication of charges prior to the creation of a factual record and determination by the finder of fact as to the full scope of the accused's misconduct. While the Government believes there is sufficient evidence of each of the above-referenced specifications, the Government must still admit that evidence into the record and satisfy its high evidentiary burden in order for each specification to survive a trial on the merits. A factfinder may find that CSSSN Marshall did in-fact place bring ██████ to his barracks room but that he did not have her wrongfully hide in a vehicle to get onto base. The military judge maintains wide latitude to addressing claims of unreasonable multiplication of charges. The Government should be afforded the opportunity to present evidence under an exigencies of proof theory.

6. **Evidence and Enclosures.** Government relies on previously submitted Defense MFAR UMC, Enclosure 2 and submits the following Government Enclosure:

Enclosure 1: Naval Base Guam Unaccompanied Housing Handbook

⁴ *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989)

⁵ *United States v. Davis*, Docket No. NMCCA 200600163, 2007 CCA LEXIS 50, at 6-7 (N-M Crim. App. Feb. 27, 2007).

7. **Relief Requested.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(12) the Government respectfully requests that the Court deny the Defense's 15 April 2022 *Motion to Dismiss for Other Appropriate Relief (Unreasonable Multiplication)*.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
EXPERT CONSULTANT**

22 APRIL 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(7) and (R.C.M.) 703(d), the Government respectfully requests that the Court deny the Defense 15 April 2022 *Motion to Compel Expert Consultant*.

2. **Facts.**

a. On 15 December 2020, NCIS Special Agent [REDACTED] and Naval Base Guam CID Investigator [REDACTED] interviewed CSSSN Christopher Marshall on Naval Base Guam.¹

b. Prior to questioning CSSSN Marshall, Special Agent [REDACTED] reviewed with CSSSN Marshall his Article 31(b) rights.² Special Agent [REDACTED] informed CSSSN Marshall that he was suspected of “assisting in unlawful access to a naval installation and child pornography.”³ CSSSN Marshall acknowledged and waived his rights and elected to provide a statement.⁴

c. Special Agent [REDACTED] interviewed CSSSN Marshall for approximately 3 hours and 30 minutes.⁵ This included an 8 minute break where CSSSN Marshall was offered water.⁶ After the interview, CSSSN Marshall was offered food,⁷ and after an approximately 14 minute break,⁸ Special Agent [REDACTED] returned and reviewed with CSSSN Marshall two Permissive Authorization for Search and Seizure forms for CSSSN Marshall’s barracks and cell phone respectively.⁹

d. On 11 February 2022, Defense requested funding for an unspecified expert in forensic psychology to consult on the issues of recidivism and false confessions.¹⁰ On 25 February 2022,

¹ Def MTS, Enclosure 1, page 1.

² Def MTS, Enclosure 3, timestamp 10:05-13:25

³ Def MTS, Enclosure 2; Def MTS, Enclosure 3, timestamp 10:23-10:35.

⁴ Def MTS, Enclosure 2; Def MTS, Enclosure 3, timestamp 10:05-13:25.

⁵ Def MTS, Enclosure 3, timestamp 00:00-2:46:50 and Def MTS, Enclosure 4, timestamp 02:41-46:40.

⁶ Def MTS, Enclosure 3, timestamp 53:55-1:01:25.

⁷ Def MTS, Enclosure 4, timestamp 46:40-46:55.

⁸ Def MTS, Enclosure 4, timestamp 46:55-1:00:55

⁹ Def MTS, Enclosure 4, timestamp 1:00:55 – 1:04:02, 1:05:10-1:08:29; *See also* Def MTS, Enclosures 5 and 6.

¹⁰ Gov MFAR Substitute Adequacy, Enclosure 1. Defense Request for Funding for Forensic Psychologist dated 11 Feb 22

the Convening Authority denied Defense request.¹¹

e. On 1 March 2022, Defense requested funding for 10 hours of pretrial consultation with Dr. [REDACTED] on the issues of recidivism and false confessions.¹² Dr. [REDACTED] is a forensic psychologist with a fee rate for pre-trial consultation at \$375.00 per hour.¹³

f. On 7 March 2022, Commander, Joint Region Marianas denied Defense request for an expert consultant regarding false confessions and denied the appointment of Dr. [REDACTED] for recidivism but offered the appointment of Dr. [REDACTED] as an adequate substitute.¹⁴ Dr. [REDACTED] is a forensic psychologist with a fee rate for expert consultation at \$300.00 per hour.¹⁵

g. Dr. [REDACTED] is competent to conduct forensic psychological evaluations with recidivism risk assessments, consult on and testify regarding sex offender recidivism risk, and consult and opine on susceptibility to false confessions.¹⁶

3. **Burden.** As the moving party, Defense bears the burden of proof by a preponderance of the evidence.¹⁷ The Government bears the burden of demonstrating that its proffered expert is an adequate substitute.¹⁸

4. **Law.**

R.C.M. 703(d) authorizes a military judge to determine whether the employment of an expert witness is relevant and necessary; and if so, whether the Government has or will provide an adequate substitute.

a. Right to an Expert Consultant

As matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense.¹⁹ The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706 and R.C.M. 703(d). Defense is also required to educate itself to attain a level of competence to defend their client.²⁰

The right to expert assistance attaches when the defense demonstrates that such assistance is necessary.²¹ The “mere possibility of assistance from a requested expert” is not sufficient to

¹¹ Gov MFAR Substitute Adequacy, Enclosure 2.

¹² Def MFAR Continuance, Enclosure 2.

¹³ Gov MFAR Substitute Adequacy, Enclosure 3.

¹⁴ Gov MFAR Substitute Adequacy, Enclosure 4.

¹⁵ *Id.*

¹⁶ Gov MFAR Substitute Adequacy, Enclosure 5.

¹⁷ RCM 905(c).

¹⁸ *United States v. Guitard*, 28 M.J. 952, 955 (N-M.C.M.R. 1989).

¹⁹ *United States v. Garries*, 22 M.J. 288,290 (C.M.A. 1986), cert. denied, 479 U.S. 985 (1986); see also Art 46 UCMJ, 10 U.S.C. § 846 (establishing “equal opportunity to obtain witnesses and other evidence” for the defense); R.C.M. 703(d). *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

²⁰ *United States v. Short*, 50 M.J. 370, 375 (C.A.A.F. 1999)

²¹ *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)

prevail on the request for expert assistance.²² In a similar line of reasoning, sufficient evidence must be established that shows a theory of defense would be aided by the requested expert's consultation and testimony.²³ The accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial."²⁴ To satisfy the first prong of this test, the Defense must show, "(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop."²⁵

b. Experts on False Confessions

In *United States v. Freeman*, the Court has ruled that a simple claim by Defense that it "does not possess the academic or practical experience to perform the necessary analysis that an expert consultant would be able to perform" is not sufficient to establish that Defense cannot gather and present evidence themselves.²⁶ A case decided by the Army Court of Criminal Appeals found that Defense fails to meet the third prong of the *Gonzalez* test where it provides no evidence of what efforts they made and why they were unable to understand, gather, develop, or present evidence in the area of false confession.²⁷ Similarly, the Air Force Court of Criminal Appeals found that generalized requests for expert assistance to "review case material," assess "psychological issues," help the defense "develop our case theory" and explore "possible defenses" fail to show necessity.²⁸

Specific to the question of an expert consultant for false confessions, the Court has found an expert is not necessary where scant evidence is found that the confession is false or coerced.²⁹ In determining this, the Court considered factors such as 1) the lack of evidence that the accused suffered from abnormal emotional or psychological problem or had a submissive personality, 2) the videotaped interview showing a lack of coercive techniques, 3) the interview did not continue for an unreasonable amount of time, 4) the accused provided details that the NCIS agents did not have, and 5) failure of the accused to disavow his statements.³⁰

c. Adequate Substitutes

If expert assistance is necessary, an accused is only entitled to expert services that are sufficient to permit defense to adequately prepare for trial and the Government meets its burden by providing competent assistance as government expense.³¹ Neither the convening authority nor the military judge are required to provide the defense with the particular expert it requests.³² An

²² *Id.* (quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)).

²³ *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

²⁴ *Id.* (quoting *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008)).

²⁵ *Gonzalez*, 39 M.J. at 461 (C.M.A 1994).

²⁶ *United States v. Freeman*, 65 M.J. 451, 458-59 (C.A.A.F. 2008).

²⁷ *United States v. Leyba*, Docket No. ARMY 20160159, 2018 CCA LEXIS 394, at 6 (A. Crim. App. Aug. 13, 2018).

²⁸ *United States v. Price*, Docket No. ACM 38045 (rem), 2014 CCA LEXIS 256, at 5-6 (A.F. Crim. App. Apr. 22, 2014).

²⁹ *United States v. Evans*, Docket No. 201600111, 2017 CCA LEXIS 616, at 5 (N-M Crim. App. Sep. 21, 2017)

³⁰ *Id.* at 5-6.

³¹ *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).

³² *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005)

alternative expert to assist with the preparation of the defense case is distinguished from an alternative expert witness.³³ There is no litmus test standard for determining whether a substitute for a defense-requested expert is adequate; rather, it is a fact-intensive determination that is committed to the military judge's sound discretion.³⁴

5. Argument.

a. Defense has failed to show the necessity for production of a false confession expert

There is no error in denying a Defense request for an expert consultant where the defense fails to present evidence that a confession is actually false.³⁵ Here, Defense has made no *claim* that there is a false confession and has provided no *evidence* that CSSSN Marshall made a false confession. Instead, in their motion, Defense states that Dr [REDACTED] is needed to provide competent assistance “in exploring issues related to false confessions, such as evaluating whether CSSSN Marshall has any abnormalities, personality traits, or disorders...”³⁶ However, a member of the military, CSSSN Marshall has access to mental health treatment and diagnoses and Defense has presented no evidence that CSSSN Marshall suffers from abnormal emotional or psychological problems or had a submissive personality. In other words, as in *Lloyd* the Defense has only presented the “mere possibility of assistance from a requested expert” is not sufficient to prevail on the request for expert assistance.³⁷

Even if Defense had made a claim that CSSSN Marshall’s confession was false, the facts of his confession are similar to the facts of *United States v. Evans* where the Court found scant evidence of a false confession.³⁸ As in *Evans*, the videotape of the NCIS interview does not show the use of coercive techniques.³⁹ As in *Evans*, the interview did not continue for an unreasonable amount of time.⁴⁰ Finally, as in *Evans*, the CSSSN Marshall has not disavowed his statement. While none of these factors are dispositive in alone, they all contribute to a totality of the circumstances analysis required for false confessions.⁴¹

Additionally, the Defense has not shown that it is unable to gather and present evidence without the assistance of an expert. In their request to the convening authority, the Defense makes the generic claim that they lack the “training and experience in the areas of recidivism and false confessions.”⁴² This is nearly identical to the Defense claim in *Freeman* where the Court

³³ *United States v. True*, 28 M.J. 1057, 1062 (N-M.C.M.R. 1989); See also, *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986).

³⁴ *Warner*, 62 M.J. at 120.

³⁵ *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); see also *United States v. Evans*, Docket No. 201600111, 2017 CCA LEXIS 616, at 5 (N-M Crim. App. Sep. 21, 2017).

³⁶ Defense Motion to Compel Expert Consultant dtd 15 Apr 22

³⁷ *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)).

³⁸ *United States v. Evans*, Docket No. 201600111, 2017 CCA LEXIS 616, at 5-6 (N-M Crim. App. Sep. 21, 2017).

³⁹ Def MTS, Enclosures 3 & 4.

⁴⁰ Compare Def MTS, Enclosures 3 & 4 (interview takes 3 hours, 30 minutes), with *United States v. Scholz*, Docket No. NMCCA 200800512, 2009 CCA LEXIS 43, at 6 (N-M Crim. App. Feb. 10, 2009) (finding that an interrogation of 10 hours on one occasion and less than four on another were not inordinately long interrogations).

⁴¹ See *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1993).

⁴² Gov MFAR Substitute Adequacy, Encl 1, page 2.

found this claim was insufficient to meet the third prong of the Gonzalez test.⁴³ As in *Leyba*, the Defense has made no showing of what efforts they have made and why those efforts are insufficient.⁴⁴

b. Government has provided an adequate substitute to the Defense's requested expert

Preliminarily, Defense's first argument of Dr. [REDACTED] alleged bias is not supported by evidence. Defense's sole evidence is that Dr. [REDACTED] made "a sound" that the Defense Lealman interpreted as disgust and speculated that it was in regards to child porn. No follow up or clarifying questions are recorded. Defense has failed to provide any evidence of bias.

Second, in regards to Dr. [REDACTED] competence to assist the Defense, the Defense request for a forensic psychologist comes down to three assertions of necessity: (1) clinically evaluate CSSSN Marshall and assess any genuine risk of recidivism and present such evidence to the court; (2) make a psychological diagnosis and examine CSSSN Marshall for any traits that might make him more susceptible to false confessions, and review the circumstances of the case and nature of the interview for other relevant risk factors; and (3) testify to the probative weight of the admissions in this case and, if convicted, the potential for future criminal behavior.⁴⁵

Dr. [REDACTED] is trained at the pre-doctoral and post-doctoral level in psychosexual disorders and in risk assessment and has routinely conducted comprehensive forensic psychological evaluations with recidivism risk assessments since 1985.⁴⁶ She is able to evaluate and formulate a scientific opinion of CSSSN Marshall's personality structure and psychological functioning.⁴⁷ She is also able to provide an opinion of his psychological characteristics that may tie to the literature on susceptibility and potential for false confessions.⁴⁸ She has testified as an expert witness on risk assessment in over 100 military and civilian judicial proceedings.⁴⁹ Dr. [REDACTED] is competent to provide expert assistance for all the areas which Defense claims are necessary for an adequate defense.

The Convening Authority has agreed to produce Dr. [REDACTED] as an expert consultant on the issues of recidivism and risk assessment. Dr. [REDACTED] qualifications and expertise are sufficient for Defense to adequately prepare for trial.

The Convening Authority denied Dr. [REDACTED] as an expert consultant on the issue of false confessions because Defense has not shown the necessity for such expert assistance. Assuming, arguendo, that a false confession expert were necessary, Dr. [REDACTED] is also capable of providing sufficient expert assistance for Defense to adequately prepare for trial.

6. Evidence and Enclosures. Government relies on previously submitted Defense MFAR

⁴³ *United States v. Freeman*, 65 M.J. 451, 458-59 (C.A.A.F. 2008).

⁴⁴ *United States v. Leyba*, Docket No. ARMY 20160159, 2018 CCA LEXIS 394, at 6 (A. Crim. App. Aug. 13, 2018).

⁴⁵ Def MFAR Continuance, Enclosure 2.

⁴⁶ Gov MFAR Substitute Adequacy, Enclosure 5, page 1.

⁴⁷ *Id.*

⁴⁸ *Id.* page 2.

⁴⁹ *Id.* page 1.

Continuance, Enclosure 2, Defense MTS Enclosures 1-6, and Government MFAR Substitute Adequacy, Enclosures 1-5.

7. **Relief Requested.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(7) and (R.C.M.) 703(d), the Government respectfully requests that the Court deny the Defense 15 April 2022 *Motion to Compel Expert Consultant*. Specifically, Government asks the Court to: 1) deny the Defense request to compel the production of an expert consultant on false confessions, and 2) deny the Defense request to produce Dr. [REDACTED] in lieu of Dr. [REDACTED]

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO DISMISS
(Failure to State an Offense)**

22 APRIL 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 907(b), the Government respectfully requests that the Court deny the Defense's 15 April 2022 *Motion to Dismiss (Failure to State an Offense)*.

2. **Facts.** For the purposes of this motion, the Government concurs with the defense's recitation of facts and adds the following:

- a. [REDACTED] alleges that in mid-November 2020, CSSSN Marshall called her and her sister, [REDACTED] via video call and began masturbating his exposed penis in her view.¹
- b. [REDACTED] alleges that around November 2020, CSSSN Marshall were on a video call with CSSSN Marshall where CSSSN Marshall exposed his penis full view of the camera.²

3. **Burden.** As the moving party, Defense bears the burden of proof by a preponderance of the evidence.³

4. **Law.**

In 2010, the Court of Appeals for the Armed Forces (C.A.A.F.) reviewed the prohibition against indecent exposure under UCMJ Article 134 published under the 2005 edition of the Manual for Courts Martial (M.C.M.) in *United States v. Ferguson*.⁴ In *Ferguson*, C.A.A.F. upheld a conviction for indecent exposure where the accused transmitted live video images of his penis.⁵

After the 2012 revisions to the M.C.M., the Army Court of Criminal Appeals in *United States v. Williams* ruled in 2016 that an accused who showed a previously-captured digital image of his penis was not guilty of indecent exposure.⁶ The Court in *Williams* reasoned that the 2012 revisions to Article 120b and Article 120c demonstrated that Congress purposed to include

¹ Def MFAR UMC, Encl. 3, page 1.

² Def MFAR UMC, Encl. 4, page 1

³ RCM 905(c).

⁴ *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010).

⁵ *Id.*

⁶ *United States v. Williams*, 75 M.J. 663 (A. Crim. App. 2016)

exposure via communication technology in Article 120b and purposefully exclude exposure via communication technology in Article 120c.⁷ The *Williams* Court also noted that Article 120c expressly proscribed making and distributing indecent visual recordings.⁸

The Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) in *United States v. Uriostegui* followed *Williams* in finding that a previously-captured photo of the accused's penis did not constitute indecent exposure.⁹ The *Uriostegui* Court specifically distinguished its facts from *Ferguson* finding:

“...the indecent exposure there involved an appellant “transmit[ing] *live images of himself* over the Internet, intentionally exposing his naked body and erect penis *while ejaculating* to a person he thought was a fourteen-year-old boy.” *Ferguson*, 68 M.J. at 433 (emphasis added). Those facts clearly distinguish *Ferguson* from the conduct in this case, and only support the proposition that indecent exposure traditionally criminalizes certain exposures performed live before some potential audiences—and not the publication of a previous lawful exposure which is captured in a photograph.”¹⁰ (emphasis in original *Uriostegui* decision, as added by the Court to its citation of the *Ferguson* decision)

5. Argument.

This issue is strictly a question of law: Whether indecent exposure can only occur in instances that are “live” or whether there is an additional requirement for the exposure to occur without any technological intermediary. This is unsettled law. No case after the 2012 changes to Articles 134 and 120c has ruled specifically on whether live streaming (in contrast to a previously-captured recording) of genitalia can constitute indecent exposure.

Under the pre-2012 language, the Court ruled in *Ferguson* that live images constituted indecent exposure.¹¹ Post-2012, in *Uriostegui*, the Court specifically distinguished its ruling from *Ferguson* because its facts consisted of a previously-captured (non-live) recording of exposed genitalia.¹²

It is true that the reasoning in *Uriostegui*¹³ could be used to support a narrow reading of indecent exposure to exclude the use of any communication technology. However, the N.M.C.C.A. did go so far in *Uriostegui* and C.A.A.F. has not overruled the decision in *Ferguson*. Rather, *Uriostegui* focused on the fact that the victim must view the *actual* body parts not images or likenesses of the parts. Can you view an “actual” body part via communication technology? In its analysis of *Ferguson*, the Court in *Uriostegui* did not distinguish its facts from *Ferguson* by saying that viewing genitalia via technology is not an actual body part, rather the Court focused

⁷ *Id.*, 75 M.J. at 668.

⁸ *Id.*, 75 M.J. at 669.

⁹ *United States v. Uriostegui*, 75 M.J. 857, 864 (N-M Crim. App. 2016).

¹⁰ *Id.*, 75 M.J. at 865.

¹¹ *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010).

¹² *United States v. Uriostegui*, 75 M.J. 857, 865 (N-M Crim. App. 2016).

¹³ Specifically, the Court's comparison of the language of Article 120b that specifically includes using any “communication technology” with the absence of that language in 120c for indecent exposure. See *Uriostegui*, 75 M.J. at 865.

on the difference between live streaming and non-live recordings.¹⁴

Here, evidence supports that CSSSN Marshall exposed himself during a live video call. This was not a previous recording or a previously-captured digital image as in *Uriostegui*. [REDACTED] did not view an image of CSSSN Marshall's penis, but CSSSN Marshall exposed his actual penis via video-communication technology.

Government contends that C.A.A.F.'s *Ferguson* decision is controlling and that the live video stream of CSSSN Marshall exposing his penis is legally sufficient to support a charge of indecent exposure under Article 120c.

6. **Evidence and Enclosures.** Government relies on previously submitted Defense MFAR UMC, Enclosures 3 and 4.

7. **Relief Requested.** Pursuant to Rule for Courts-Martial (R.C.M.) 907(b), the Government respectfully requests that the Court deny the Defense's 15 April 2022 *Motion to Dismiss (Failure to State an Offense)*.

[REDACTED]

G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]

G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

¹⁴ *Id.*

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
WITNESS PRODUCTION**

22 APRIL 22

1. **Nature of Motion.** Government agrees to invite Mr. [REDACTED] to testify on Government travel orders and asks this Court to reserve ruling on compelling production as this issue is not yet ripe.

2. **Facts.**

a. Trial Counsel has been unable to reach Mr. [REDACTED] at the contact information provided to confirm whether Mr. [REDACTED] is willing to travel, able to travel, and has a non-expired passport or the ability to obtain one.

b. In discussion with Defense, the Government has agreed to attempt to invite Mr. [REDACTED] to testify for presentencing proceedings and is working with Defense to obtain responsive contact information for Mr. [REDACTED]

3. **Burden.** As the moving party, Defense bears the burden of proof by a preponderance of the evidence.¹

4. **Law.**

During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses.² Whether a witness shall be produced to testify during presentencing proceedings is a matter within the discretion of the military judge.³

A witness may be produced to testify during presentencing proceedings through subpoena or travel orders at Government expense only if the significance of personal appearance of the witness to the determination of an appropriate sentence favors production of the witness when balanced against the practical difficulties of producing the witness, including the potential delay in the presentencing proceeding.⁴

¹ RCM 905(c).

² R.C.M. 1001(f)(1).

³ *Id.*

⁴ R.C.M. 1001(f)(2)(E).

Remote testimony can include testimony by videoteleconference, closed circuit television, telephone, or similar technology.⁵

5. **Argument.**

Government agrees to attempt to invite Mr. [REDACTED] on Government travel orders to testify in-person for presentencing. Should Mr. [REDACTED] be unable or unwilling to take the necessary steps to travel to Guam for trial,⁶ Government objects to compelling production if the practical difficulties of producing Mr. [REDACTED] would cause delay in presentencing proceedings. Should Mr. [REDACTED] be negligent in working with the Government to arrange his travel for in-person appearance, Government agrees to produce Mr. [REDACTED] via the more effective of either telephonic or videotelephonic means.

6. **Relief Requested.** Government asks the Court to reserve ruling on compelling production as this issue is not yet ripe.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

⁵ R.C.M. 914B(b)

⁶ Specifically, to correspond with the Government with information required to book travel, to obtain or maintain a valid passport required for travel to Guam, and to complete any Government-sponsored pre-flight COVID testing that may be required.

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO SUPPRESS
UNWARNED STATEMENTS AND
EVIDENCE OUTSIDE THE SCOPE OF
THE PASS**

22 APRIL 22

1. **Nature of Motion.** The Government requests that the Court deny the Defense's 15 April 2022 *Motion to Suppress Unwarned Statements and Evidence Outside the Scope of the Pass*. A preponderance of the evidence shows that the Accused's statements to NCIS Special Agent [REDACTED] on 15 December 2020 about deleting messages were voluntary, and the context of the conversation between Special Agent [REDACTED] and CSSSN Marshall shows that CSSSN Marshall consented to the search of all electronic storage media and data files on his phone.

2. **Facts.**

a. On 15 December 2020, [REDACTED] and [REDACTED] were detained on board Naval Base Guam for trespassing.¹ [REDACTED] alleged she had been brought on base in the trunk of a car driven by CSSSN Marshall.²

b. On 15 December 2020, NCIS Special Agent [REDACTED] and Naval Base Guam CID Investigator [REDACTED] interviewed CSSSN Christopher Marshall on Naval Base Guam.³

c. Prior to questioning CSSSN Marshall, Special Agent [REDACTED] reviewed with CSSSN Marshall his Article 31(b) rights.⁴ Special Agent [REDACTED] informed CSSSN Marshall that he was suspected of "assisting in unlawful access to a naval installation and child pornography."⁵ CSSSN Marshall acknowledged and waived his rights and elected to provide a statement.⁶

d. Special Agent [REDACTED] interviewed CSSSN Marshall for approximately 3 hours and 30 minutes.⁷ This included an 8 minute break where CSSSN Marshall was offered water.⁸ After the interview, CSSSN Marshall was offered food, drink, and opportunity to use the restroom,⁹ and after an approximately 14 minute break,¹⁰ Special Agent [REDACTED] returned and reviewed with

¹ Def MFAR UMC, Enclosure 2, page 1.

² *Id.*

³ Def MTS, Enclosure 1, page 1.

⁴ Def MTS, Enclosure 3, timestamp 10:05-13:25

⁵ Def MTS, Enclosure 2; Def MTS, Enclosure 3, timestamp 10:23-10:35.

⁶ Def MTS, Enclosure 2; Def MTS, Enclosure 3, timestamp 10:05-13:25.

⁷ Def MTS, Enclosure 3, timestamp 00:00-2:46:50 and Def MTS, Enclosure 4, timestamp 02:41-46:40.

⁸ Def MTS, Enclosure 3, timestamp 53:55-1:01:25.

⁹ Def MTS, Enclosure 4, timestamps 38:39-39:01 and 46:40-46:55.

¹⁰ Def MTS, Enclosure 4, timestamp 46:55-1:00:55

CSSSN Marshall two Permissive Authorization for Search and Seizure forms for CSSSN Marshall's barracks and cell phone respectively.¹¹

e. CSSSN Marshall acknowledged his rights and consented to the search of his barracks and his phone.¹² In granting the Permissive Authorization for Search and Seizure of his phone, CSSSN Marshall was advised that NCIS was conducting an investigation concerning "assisting in unlawful access to a naval installation and child pornography."¹³ CSSSN Marshall agreed to allow NCIS Special Agents to conduct forensic reviews and examination of "all electronic storage media and data files" of his phone "for investigative purposes pursuant to the investigation listed."¹⁴

f. After granting the Permissive Authorizations for Search and Seizure, CSSSN Marshall unlocked his phone, his biometric data was collected, and he was released to his command approximately 5 hours and 20 minutes after the start of his interview.¹⁵

g. In his interview with Special Agent ██████████ CSSSN Marshall stated that he had brought ██████████ on base on multiple occasions by hiding her in the trunk of a vehicle.¹⁶ CSSSN Marshall said he made no attempt to contact the visitor center or get a base pass for her.¹⁷

h. During his interview, CSSSN Marshall stated that he had made videos with ██████████ of them having sex.¹⁸ CSSSN Marshall said that he saved the videos on Snapchat and when asked if he still had the videos on his phone, CSSSN Marshall replied "possibly."¹⁹

i. CSSSN Marshall stated that he texted TMFN ██████████ regarding the car being ready before CSSSN Marshall went to pick up "the girls" and spoke with TMFN ██████████ about the girls getting caught.²⁰ Special Agent ██████████ followed up CSSSN Marshall's statement about speaking with TMFN ██████████ about the girls getting caught with the question of whether CSSSN Marshall talked about deleting messages.²¹

j. Special Agent ██████████ asked CSSSN Marshall if he had deleted the Snapchat videos, and CSSSN Marshall responded that he had deleted the videos and messages between himself and TMFN ██████████ himself and ██████████ and himself and ██████████ in order to "cover up."²²

k. When Special Agent ██████████ asked CSSSN Marshall about his understanding of the technology of his phone CSSSN Marshall told Special Agent ██████████ that he had gone to college

¹¹ Def MTS, Enclosure 4, timestamp 1:00:55 – 1:04:02, 1:05:10-1:08:29; *See also* Def MTS, Enclosures 5 and 6.

¹² *Id.*

¹³ Def MTS, Enclosure 6.

¹⁴ *Id.*

¹⁵ Def MTS, Enclosure 4, timestamp 1:08:29-2:40:54.

¹⁶ Def MTS, Enclosure 3, timestamp 13:56-16:20.

¹⁷ *Id.*

¹⁸ Def MTS, Enclosure 3, timestamp 1:12:06-1:17:13.

¹⁹ Def MTS, Enclosure 3, timestamp 1:21:30-1:21:45.

²⁰ Def MTS, Enclosure 3, timestamp 1:41:26-1:42:51.

²¹ *Id.*

²² Def MTS, Enclosure 3, timestamp 2:16:32-2:18:26.

for Cybersecurity and Information and understood how a file deleted from his phone may still be on his phone.²³

1. In a review of CSSSN Marshall's phone, NCIS recovered messages between CSSSN Marshall and [REDACTED] on the WhatsApp application on the morning of 15 December 2020 discussing deleting Snapchat and moving videos to a secure place.²⁴

3. **Burden.** The Government bears the burden of proof to establish by a preponderance of the evidence that the statement of the accused was made voluntarily.²⁵ The Government bears the burden of proof to establish by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search of seizure.²⁶ Additionally, the Government must prove consent for the search by clear and convincing evidence.²⁷

4. **Law.**

a. Voluntariness of a confession

A confession is involuntary, and thus inadmissible, if it was obtained "in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."²⁸ The prosecution bears the burden of establishing by a preponderance of the evidence that the confession was voluntary.²⁹ A determination of whether a confession is voluntary requires an assessment of the totality of all the surrounding circumstances of both the characteristics of the accused and the details of the interrogation.³⁰

A totality of circumstances analysis can include the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.³¹ Further, the use of promises, lies, threats, inducements, or ploys are not determinative of involuntariness, but rather considered as factors in the totality of circumstances.³²

b. Article 31 requirement to inform the suspect of the nature of the accusation

Article 31(b), UCMJ prohibits interrogation of a person suspected of an offense without first informing the person of the "nature of the accusation and advising him that he does not have to

²³ Def MTS, Enclosure 4, timestamp 35:31-36:20.

²⁴ Def MTS, Enclosure 7, page 3, 30-34.

²⁵ M.R.E. 304(f).

²⁶ M.R.E. 311(d)(5).

²⁷ M.R.E. 314(e)(5).

²⁸ M.R.E. 304(a).

²⁹ *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996); M.R.E. 304(f).

³⁰ *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, (1973)).

³¹ *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002).

³² *United States v. Freeman*, 65 M.J. 451, 455 (C.A.A.F. 2008).

make any statement regarding the offense of which he is accused or suspected.”³³

“The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.”³⁴ “It is not necessary that an accused or suspect be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated. Nevertheless, the accused or suspect must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event.”³⁵

In *United States v. Simpson*, the accused was suspected of failing to obey an order, assault, indecent acts or liberties with a child, sodomy, and rape.³⁶ When provided his rights, however, the accused was only notified of the investigation of “indecent acts or liberties with a child.”³⁷ The Court upheld this notification because the offenses were sufficiently related so that the warning oriented the accused towards the nature of the accusations against him.³⁸ The *Simpson* Court listed several possible factors to be considered including 1) whether the conduct is part of a continuous sequence of events, 2) whether the conduct was within the frame of reference supplied by the warnings, and 3) whether the interrogator had previous knowledge of the unwarned offenses.³⁹

Similarly, in *United States v. Pipkin*, the Court found that, where an accused was notified of suspected use, possession and distribution of controlled substances, the charge of conspiracy to distribute drugs was within the frame of referenced supplied by the warnings for the purposes of Article 31.⁴⁰ In *United States v. Skinner*, the Court found that where the accused was aware of the suspicion surrounding him in relation to the alleged victim, “[i]t was not then necessary for NCIS to provide specific warnings about each and every possible crime that the appellant might have perpetrated against the victim while in the bathroom that night.”⁴¹

Finally, in *United States v. Delva*, the Navy-Marine Corps Court of Criminal Appeals found persuasively that where during an interrogation the accused makes a denial that investigators suspect is false, there is no requirement to stop the interview and provide a renewed warning for false official statement.⁴²

c. Consent Searches

³³ Article 31(b), UCMJ.

³⁴ *United States v. Rice*, 29 C.M.R. 340, 342 (U.S. C.M.A. 1960)

³⁵ *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000)

³⁶ *Id.*, 54 M.J. at 282.

³⁷ *Id.*, 54 M.J. at 283.

³⁸ *Id.*, 54 M.J. at 284.

³⁹ *Id.*

⁴⁰ *United States v. Pipkin*, 58 M.J. 358, 361 (C.A.A.F. 2003)

⁴¹ *United States v. Skinner*, Docket No. NMCCA 201000555, 2011 CCA LEXIS 140, at *11 (N-M Crim. App. July 29, 2011).

⁴² *United States v. Delva*, Docket No. NMCCA 201200446, 2013 CCA LEXIS 450, (N-M Crim. App. May 28, 2013)

Consent “may be limited in any way by the person granting consent, including limitations in terms of time, place, or property, and may be withdrawn at any time.”⁴³ Consent must be voluntarily given, which is a determination from all circumstances.⁴⁴ A person must expressly limit the scope of the consent search; limitations will not be inferred, and the individual’s subjective intent does not control.⁴⁵ The scope of consent is determined by “objective reasonableness,” asking “what would the typical reasonable person have understood by the exchange between the officer and the suspect?”⁴⁶ Neither the subjective intentions of the suspect nor the “boilerplate language of the PASS solely control the scope of consent.”⁴⁷ The scope of a search is generally defined by its expressed object.⁴⁸

d. Inevitable Discovery

Evidence obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.⁴⁹ In order to use the doctrine of “inevitable discovery,” the Government must show, by a preponderance of evidence, that (1) government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence, and (2) that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.⁵⁰

5. Argument.

a. CSSSN Marshall was properly oriented as to the nature of the accusations against him

CSSSN Marshall’s interview shows that he was clearly oriented to the fact that the accusations against him were in relation to alleged misconduct in bringing █████ on base and related to child pornography involving her. The obstruction of justice charge is within the same frame of reference of these notices for three reasons.

First, the charge of obstruction of justice is inherently related to investigation of another offense; a necessary element of Article 131b being a reason to belief there was or would be criminal or disciplinary proceedings pending. In *Delva*, an investigator is not required to issue a separate warning for a suspected false official statement related the very same conduct previously warned.⁵¹ Here Special Agent █████ was not required to issue a separate warning for suspected obstruction of justice of an investigation regarding unlawful access and child

⁴³ M.R.E. 314.

⁴⁴ *Id.*

⁴⁵ *United States v. Gitto*, 2019 CCA LEXIS 6, 16 (N-M. Ct. Crim. App. 2019).

⁴⁶ *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)).

⁴⁷ *United States v. Crocker*, 2020 CCA Lexis 80, No.201900226 *22 (N-MCCA 2020).

⁴⁸ *United States v. Ross*, 456 U.S. 798, 821-24 (1982).

⁴⁹ M.R.E. 311(c)(2).

⁵⁰ *United States v. Hoffmann*, 75 M.J. 120, 124-25 (C.A.A.F. 2016).

⁵¹ *United States v. Delva*, Docket No. NMCCA 201200446, 2013 CCA LEXIS 450, (N-M Crim. App. May 28, 2013).

pornography when he had already provided notice of the underlying suspicion of unlawful access and child pornography itself.

Second, when asked about the child pornography, CSSSN Marshall volunteers that the alleged child pornography was “possibly” on his phone.⁵² It is within the same scope and frame of reference for Special Agent [REDACTED] to ask what may have been removed from the phone and how that removal happened.

Third, as in *Skinner*, there is no requirement to notify CSSSN Marshall of every possible crime associated with his interactions with [REDACTED].⁵³ Here, CSSSN Marshall was notified of suspicions that he was involved with unlawful access to Naval Base Guam. The conversations he referenced deleting were directly related to bringing the girls on base and them getting caught on base. CSSSN Marshall bringing [REDACTED] on base on 14 December 2020 is in the same frame of reference of his deleting conversations about her being on base on 15 December 2020.

b. CSSSN Marshall’s Statement was voluntary based on the totality of the circumstances.

In examining the totality of the circumstances, courts look to the characteristics of the accused and the details of the interrogation.⁵⁴

In this case, the characteristics of CSSSN Marshall support a finding that his statement was voluntary. First, there no evidence that CSSSN Marshall is not of average intelligence, has not completed high school, cannot read and write, or is in any way mentally impaired.⁵⁵ CSSSN Marshall did not complain about the process, never asked for an attorney, never asked to stop the interview or leave, or in any other way indicate that he felt coerced or pressured into making a statement.⁵⁶

The details of the interrogation also support a finding that CSSSN Marshall’s statement was voluntary. Before being questioned CSSSN Marshall was properly advised of his rights.⁵⁷ CSSSN Marshall elected to waive his rights and make a statement.⁵⁸ CSSSN Marshall’s interrogation lasted a total 3 hours, 30 minutes.⁵⁹ The length of his interrogation was not inordinately long.⁶⁰ Throughout the interview, Special Agent [REDACTED] spoke in a calm, relaxed manner and CSSSN Marshall maintained a calm demeanor, occasionally making jokes or

⁵² Def MTS, Enclosure 3, timestamp 1:21:30-1:21:45.

⁵³ *United States v. Skinner*, Docket No. NMCCA 201000555, 2011 CCA LEXIS 140, at *11 (N-M Crim. App. July 29, 2011).

⁵⁴ *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, (1973)).

⁵⁵ See *United States v. Freeman*, 65 M.J. 451, 454 (C.A.A.F. 2008) (Finding the accused statement voluntary in part based on these same factors)

⁵⁶ *Id.*

⁵⁷ Def MTS, Enclosure 2; Def MTS, Enclosure 3, timestamp 10:05-13:25.

⁵⁸ *Id.*

⁵⁹ Def MTS, Enclosure 3, timestamp 00:00-2:46:50 and Def MTS, Enclosure 4, timestamp 02:41-46:40.

⁶⁰ *United States v. Scholz*, Docket No. NMCCA 200800512, 2009 CCA LEXIS 43, at 6 (N-M Crim. App. Feb. 10, 2009) (finding that an interrogation of 10 hours on one occasion and less than four on another were not inordinately long interrogations).

engaging in small talk with Special Agent [REDACTED] and actively clarifying any answers that Special Agent [REDACTED] appeared to misunderstand.⁶¹

c. Evidence from CSSSN Marshall's phone should not be suppressed

CSSSN Marshall has a background of college classes in cybersecurity and information and told Special Agent [REDACTED] that he understood how files that are deleted by the user may still be on the phone.⁶² When asked, CASSN Marshall consented to allow NCIS Special Agents to conduct “complete forensic examination of all electronic storage media” of his phone.⁶³ At no time did CASSN Marshall expressly limit the scope of his consent.⁶⁴

Even if CASSN Marshall had expressly limited the scope of his consent to just evidence relating to bringing [REDACTED] on base or child pornography, NCIS was actively pursuing evidence or leads to investigate bringing [REDACTED] on base and possession of child pornography. Such a search would have inevitably discovered the text messages relating to deleting videos of possible child pornography or deleting evidence of bringing [REDACTED] on base.

6. **Evidence and Enclosures.** Government relies on previously submitted Defense MFAR UMC, Enclosure 2 and Defense MTS, Enclosures 1-7.

7. **Relief Requested.** The Government requests that the Court deny the Defense's 15 April 2022 *Motion to Suppress Unwarned Statements and Evidence Outside the Scope of the Pass.*

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

⁶¹ Def MTS, Enclosures 3 & 4.

⁶² Def MTS, Enclosure 4, timestamp 35:31-36:20.

⁶³ Def MTS, Enclosure 6; See also Defense Enclosure 4, timestamp 1:05:26-1:08:28.

⁶⁴ See *United States v. Gitto*, 2019 CCA LEXIS 6, 16 (N-M. Ct. Crim. App. 2019).

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO COMPEL
DISCOVERY**

22 APRIL 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 701, the Government respectfully requests the Court deny Defense's 15 April 2022 *Motion to Compel Discovery*.

2. **Facts.**

a. In October 2020, the Accused met [REDACTED] a [REDACTED] child, and soon began a sexual relationship with her.¹

b. Shortly after beginning the relationship, the Accused smuggled unauthorized persons, including [REDACTED] and other minors, in to Naval Base Guam (NBG); specifically, the Accused hid [REDACTED] in a vehicle while entering NBG through its base access control point on at least 8 November 2020, 3 December 2020, 10 December 2020, and 14 December 2020.²

c. The Accused then allowed [REDACTED] into his unaccompanied housing, a violation a lawful order of Commanding Officer, Naval Base Guam, on 8 November 2020, 3 December 2020, 10 December 2020, and 14 December 2020.³

d. On 8 November 2020 and 15 December 2020, the Accused created explicit videos of himself and [REDACTED] engaging in sexual intercourse.⁴

e. The Accused admitted he knew [REDACTED] was [REDACTED] at the time of filming the child pornography.⁵

f. The Accused also sexually assaulted [REDACTED] a [REDACTED] child, on or about 30 October 2020 by coercing her into having sexual intercourse.⁶

g. The Accused then exposed his genitalia to [REDACTED] while on a WhatsApp video chat on 8

¹ Government MTC Discovery, Enclosure 1, page 1; Government MTC Discovery, Enclosure 2, page 1.

² Government MTC Discovery, Enclosure 2, pages 1-2.

³ Government MTC Discovery, Enclosure 2, pages 1-2.

⁴ Government MTC Discovery, Enclosure 3, page 1; Government MTC Discovery, Enclosure 1, page 2.

⁵ Government MTC Discovery, Enclosure 2, page 2.

⁶ Government MTC Discovery, Enclosure 4, pages 1-2.

November 2020 and 9 November 2020.⁷

h. The Accused also exposed his genitalia to [REDACTED] on 9 November 2020.⁸

i. On 16 February 2022, Defense requested the Government to provide it with “[t]he total number of NBG and CID quarterly reports of persons unlawfully onboard NBG from 15 September 2011 to 15 September 2021.” The Government denied the request on 5 March 2022 absent a showing of relevance by Defense.

j. On 18 April 2022, the Government from NBG’s Security Officer, LT [REDACTED] whether any reports responsive to Defense’s request were within NBG’s possession or control; LT [REDACTED] indicated that “[NBG does not] compile or generate reports or statistics on the total number of persons found unlawfully on government property.”⁹

3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.** The Government generally concurs with the Defense recitation of the law but adds the following:

The Government is required to provide the defense “any books, papers, documents, data, photographs, tangible objects ... or copies or portions of these items, *if the item is within the possession, custody, or control of military authorities.*”¹⁰

“[C]ourts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff’s office and the object remains in the possession of the local law enforcement.”¹¹

Under R.C.M. 703, the Government is only required compel the production evidence not within its possession upon sufficient showing by the Defense that the evidence is both relevant and necessary.¹²

In order for the Defense to demonstrate that evidence is relevant and necessary, the Defense first has a burden to demonstrate that evidence exists. “[W]e conclude that Appellant did not carry his burden as the moving party to demonstrate that the [evidence] he requested existed. Consequently, he did not show that [it was] relevant and necessary and should have been produced through compulsory process.”¹³

⁷ Defense MFAR UMC, Enclosure 3, pages 1-2.

⁸ Defense MFAR UMC, Enclosure 4, pages 1-2.

⁹ Government MTC Discovery, Enclosure 5, page 1.

¹⁰ R.C.M. 701(a)(2)(A)(emphasis added).

¹¹ *United States v. Stellato*, 74 M.J. 473, 484-485 (C.A.A.F. 2015).

¹² R.C.M. 703(g)(3).

¹³ *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

“Materiality is a common law term that has been merged with the concept of relevance under the Military Rules of Evidence. The term materiality refers to a fact that is of consequence in determining the action.”¹⁴

5. **Argument.**

a. Defense’s motion should be denied because Defense has failed to demonstrate that the demanded evidence is material.

Defense’s motion failed to show how the evidence demanded is material. Instead, Defense asserted the evidence will help in its preparation and implied unlawful base access—which the Defense seems to have stipulated the Accused committed in its statement of facts—is a lesser offense and should not be taken to courts-martial. However, the Defense has not stated how the demanded information would help in its preparation. Regardless, such information would have no bearing on the case’s outcome and is not material.

Defense intimates the intent to contest the validity of the charges related to smuggling unlawful persons onto base by challenging a convening authority’s discretion to determine which charges to refer versus which charges to dispose by alternate means. While the Accused’s charged orders violations and derelictions of duty may be dealt with by nonjudicial punishment, the number of times such offenses occurred in the past has no relevance in determining whether the elements underlying the charges are true or not. How a convening authority chooses to dispose of misconduct is within the discretion of that convening authority. Additionally, given the breadth of Defense’s demand, the information requested would concern how other commanding officers chose to exercise their discretion. Such information—if it exists—does not make any fact of consequence in determining the action or more less likely.

b. Defense’s motion should be denied because Defense has failed to demonstrate that the demanded evidence even exists, let alone is in the possession or control of the Government.

Even if this Court were to determine the evidence were relevant, the evidence is not in the possession or control of the Government. Similar to the analysis under R.C.M. 703, this Court should require the Defense to demonstrate that such evidence exists. Nonexistent evidence cannot be relevant. The Defense has baldly asserted that the Government possesses reports of people unlawfully onboard NBG. The Government does not possess any of the pertinent evidence and NBG does not maintain or compile any such reports, as demonstrated by NBG SECO’s 19 April 2022 email.

6. **Evidence and Enclosures.** With the referenced previously submitted enclosures, the Government respectfully submits the following enclosure in support of this motion:

a. Government MTC Discovery, Enclosure 1: ROI of [REDACTED] 15 Dec 20 NCIS Interview, 2 pages.

¹⁴ *United States v. Steen*, 81 M.J. 261, 264 (C.A.A.F. 2021)(internal citations and quotation marks omitted).

b. Government MTC Discovery, Enclosure 2: ROI of CSSSN Marshall's 15 Dec 20 NCIS Interview, 2 pages.

c. Government MTC Discovery, Enclosure 3, ROI the NCIS Review of the content of [REDACTED] iPhone X and iCloud, 2 pages.

d. Government MTC Discovery, Enclosure 4, ROI of [REDACTED] 5 Nov 21 NCIS Interview, 3 pages.

e. Government MTC Discovery, Enclosure 5, 19 April 2022 Email from NBG SECO, 3 pages.

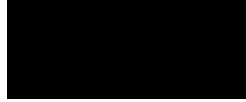
7. **Relief Requested.** The Government respectfully requests that the Court deny Defense's 15 April 2022 *Motion to Compel Discovery*.

[REDACTED]

N.G. WEHRLI
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2022, a copy of this motion was served on Defense Counsel.



N.G. WEHRLI
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION TO SUPPRESS
EVIDENCE DERIVED FROM THE
ILLEGAL SEARCH OF [REDACTED] PHONE**

21 JUN 22

1. **Nature of Motion**. Pursuant to R.C.M. 905(b)(3), Mil. R. Evid. 311, and the Fourth Amendment to the United States Constitution, the Defense moves to suppress all evidence derived from NCIS's illegal search of [REDACTED] phone to include the evidence collected from CSSSN Marshall's phone because, but for that initial illegal search, NCIS would not have obtained the evidence from his phone. Alternatively, the Defense moves to suppress evidence of CSSSN Marshall's internet searches as outside the scope of his consent to search and seize matters from his cell phone.

2. **Facts**

a. The Government has charged CSSSN Marshall with: assisting in unlawful base access, production and possession of child pornography and Obstruction of Justice, among others. (Charge Sheet, 10 Jan. 2022.)

b. At 0706 on 15 December 2020, Naval Security Forces (NSF) personnel "observed two school-aged females that looked lost" near building 24, one of whom was later identified as [REDACTED]

c. After requesting assistance from CID for the two females "smuggled onto NBG," [REDACTED] signed a Civilian Acknowledgment and Waiver of Rights at 0837 for "Unlawful Entry."²

d. During her interview, she disclosed that [REDACTED] was in fact [REDACTED] not [REDACTED] like she had initially stated.³

e. CID requested NCIS assistance to confirm [REDACTED] identity. After doing so, NCIS called and escorted [REDACTED] mother, [REDACTED] onto base. Ms. [REDACTED] signed a Civilian Acknowledgment and Waiver of Rights for "Trespass" on behalf of her minor daughter at 1231.⁴

¹ Enclosure (1): NCIS ROI Sexual Exploitation of 18 Dec 20. BS 780-88.

² *Id.*

³ *Id.*

⁴ *Id.*

[REDACTED]

g. At 1408, Ms. [REDACTED] signed a PASS for “Child Pornography” for [REDACTED] phone.⁶

h. Although Ms. [REDACTED] signed both the Waiver of Rights and PASS on behalf of her daughter, she did not understand what she was signing, nor that she could refuse to sign. Ms. [REDACTED] primary language is Tagalog. She has difficulty understanding English, and there was no interpreter present. An interpreter was present the second time she met with NCIS.⁷

i. In his initial review of [REDACTED] phone on 15 December 2020, Inv. [REDACTED] identified videos dated 8 November 2020 of CSSSN Marshall and [REDACTED] having sex.⁸

j. [REDACTED] interview was not recorded.⁹

k. CSSSN Marshall was interrogated later that same day, signing his 31b Rights Acknowledgment at 1930.¹⁰

l. During his over four hour interrogation, CSSSN Marshall admitted to making a sex video with [REDACTED] using her phone, which she later sent him via SnapChat and he saved.¹¹

m. In addition, CSSSN Marshall stated that he had deleted various WhatsApp messages to include messages between himself and TMFN [REDACTED].¹²

n. At 2314, CSSN Marshall signed a PASS consenting to search and seizure of his phone for “all electronic media and data files” related to “assisting in unlawful access to a naval installation and child pornography.” Specifically, “computer forensic reviews and examination of all electronic storage media and files, to include text and graphical image files, contained on the electronic storage contained in or attached to the described seized equipment.”¹³

o. While explaining the PASS consent form to CSSSN Marshall, SA [REDACTED] emphasized:
[REDACTED]

p. NCIS searched and seized CSSSN Marshall’s phone, discovering the previously described WhatsApp messages and sex video, in addition to pictures of [REDACTED] and CSSSN Marshall

⁵ *Id.* This excerpt from CID’s report is critical given that [REDACTED] interview is not recorded.

⁶ Enclosure (2): Results of Review of [REDACTED] phone X and Icloud. BS 8-10.

⁷ Enclosure (3): [REDACTED] Interpreter Notes.

⁸ Enclosure (2).

⁹ Enclosure (4): ROI of [REDACTED] of 15 Dec 20. BS 5-6.

¹⁰ Enclosure (5): CSSSN Marshall 31b Rights Advisement. BS 15.

¹¹ Enclosure (6): CSSSN Marshall interrogation of 15 Dec 20 (Videos 1 and 2).

¹² *Id.*

¹³ Enclosure (7): PASS of Phone of 15 Dec 20, BS 18.

¹⁴ *Id.* at Enclosure (1).

in what appears to be his barracks room.¹⁵

q. In accordance with this Court's Trial Management Order of 18 January 2022, the Government provided evidentiary notice under Mil. R. Evid. 304(d) on 27 January 2022 of its intent to offer evidence seized from CSSSN Marshall's phone to include "videos, photographs, electronic communication, and associated metadata."¹⁶

r. Separately, the only Mil. R. Evid. 404(b) notice the Government provided was evidence that "CSSSN Marshall and [REDACTED] had an ongoing sexual relationship."¹⁷

s. On 10 June 2022, five months passed the evidentiary notice deadline, in accordance with this Court's ruling on the Defense's Motion to Suppress of 15 April 2022—and without providing any Mil. R. Evid. 404(b) notice—the Government disclosed its intent to introduce at trial CSSSN Marshall's internet searches. Specifically: (1) "what happens if you sneak into a military base" (12/14/20 9:48:58 PM UTC, 12/15/20 7:48:58 AM Guam local time), (2) "can you get married at [REDACTED]" (12/14/20 10:01:38 AM UTC, 12/14/20 8:01:38 PM Guam local time), and (3) "what does plausible deniability mean" (12/07/20 8:32:47 AM UTC, 12/07/20 6:32:47 PM Guam local time).¹⁸

t. On 5 May 2022, this Court signed a second Trial Management Order setting an additional motions filing deadline for 21 June 2022.¹⁹

3. **Burden.** Pursuant to Mil. R. Evid. 311(d)(5) the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some valid exception applies. Pursuant to Mil. R. Evid. 314(e)(5), the prosecution must prove consent for a search by clear and convincing evidence.

4. **Law**

The Defense adopts the law in its Motion to Suppress Unwarned Statements and Evidence Outside the Scope of the PASS of 15 April 2022 and adds the following.

Pursuant to Mil. R. Evid. 311, "evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if: (1) the accused makes a timely motion to suppress [...]; (2) the accused had a reasonable expectation of privacy in the person, place or property searched [...]; and (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches and seizures."

5. **Argument**

¹⁵ Enclosure (8): Results of DC3 Report 24 Jun 21 and DC3 Report, BS 40-101.

¹⁶ Enclosure (9): Government Evidentiary Notices of 27 Jan 22.

¹⁷ *Id.*

¹⁸ Government Response to Defense Motion to Suppress Unwarned Statements and Evidence Outside the Scope of the PASS – List of Evidence of 10 Jun 22.

¹⁹ US v. Marshall Trial Management Order of 5 May 22.

- a. In accordance with Mil. R. Evid. 311, the Court should suppress all evidence derived from NCIS's illegal search of [REDACTED] phone.

Here, all three requirements of Mil. R. Evid. 311 are met. This motion is timely in accordance with this Court's Trial Management Order of 5 May 2022. CSSSN Marshall had a reasonable expectation of privacy in *his* intimate, sex video with his girlfriend, [REDACTED] regardless of the video being on her phone. Without an interpreter present, NCIS conducted an illegal search of [REDACTED] phone because [REDACTED] mother did not understand the Rights Advisement Waiver or PASS that she signed on behalf of [REDACTED]. Suppression of all evidence derived from NCIS's illegal search of [REDACTED] phone, to include evidence collected from CSSSN Marshall's phone—because NCIS would not have gotten that evidence but for the initial illegal search of [REDACTED] phone—is the only remedy to cure this egregious Fourth Amendment violation and deter NCIS from conducting future unlawful searches and seizures.

- b. Even if NCIS's search of [REDACTED] phone was legal, investigators exceeded the scope of CSSSN Marshall's consent to search his phone for media and data files when they also reviewed his internet searches.

Here, even the expansive boilerplate language of the permissive authorization does not plainly allow for internet searches, but even if it had, it would exceed the scope of CSSSN Marshall's consent, which was limited to "electronic media and data files" related to "assisting in unlawful access to a naval installation and child pornography." Therefore, even if consenting to a general search of his phone, that search still needed to be logically related to the unlawful access and child pornography he was suspected of, which when taking into account the various statements CSSSN Marshall made during his over four-hour long interrogation, would be limited where evidence of that criminal activity could be found—here, SnapChat and WhatsApp.

Further, the search was narrowly tailored by SA [REDACTED] comments to CSSSN Marshall as he reviewed the PASS form—he reiterated NCIS will search his phone "to make sure the stuff [they] talked about was there," referring again to the SnapChat video and WhatsApp messages previously discussed. Despite the "objective reasonableness" of CSSSN Marshall's consent, especially in light of SA [REDACTED] comment, the Government searched the entirety of his phone—to include his internet web searches—looking for additional criminality, exactly what the Fourth Amendment was designed to prevent. As such, NCIS exceeded the scope of CSSSN Marshall's consent and infringed on his reasonable expectation of privacy. The only remedy is suppression of his internet searches.

6. Evidence and Enclosures

The Defense respectfully submits the following enclosures in support of this motion.

- Enclosure (1): NCIS ROI Sexual Exploitation of 18 Dec 20. BS 780-88.
- Enclosure (2): Results of Review of [REDACTED] iPhone X and iCloud. BS 8-10.
- Enclosure (3): [REDACTED] Interpreter Notes.
- Enclosure (4): ROI of [REDACTED] of 15 Dec 20. BS 5-6.

Enclosure (5): CSSSN Marshall 31b Rights Advisement. BS 15.
Enclosure (6): CSSSN Marshall's interrogation of 15 Dec 20. Videos 1 and 2.
Enclosure (7): PASS of Phone of 15 Dec 20. BS 18.
Enclosure (8): Results of DC3 Report 24 Jun 21 and DC3 Report. BS 40-101.
Enclosure (9): Government Evidentiary Notices of 27 Jan 22.


7. **Relief Requested**

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rules of Evidence (Mil. R. Evid.) 304, 305, 311, 314, and the Fourth Amendment to the United States Constitution, the Defense moves to suppress all evidence derived from NCIS's illegal search of [REDACTED] phone. Alternatively, the Defense moves to suppress CSSSN Marshall's internet searches as outside the scope of CSSSN Marshall's PASS.

[REDACTED]
A. M. BURGOS-SOLIS
LT, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June 2022, a copy of this motion was served on Trial Counsel.



A. M. BURGOS-SOLIS
LT, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
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v.

CHRISTOPHER MARSHALL
CSSSN/E-3, USN

GOVERNMENT RESPONSE TO
DEFENSE MOTION TO SUPPRESS
EVIDENCE DERIVED FROM THE
ILLEGAL SEARCH OF [REDACTED] PHONE

28 JUNE 22

1. **Nature of Motion.** The Government requests that the Court deny the Defense's 21 June 2022 *Motion to Suppress Evidence Derived from the Illegal Search of [REDACTED] Phone*. Additionally, Government requests that the Court deny the Defense's alternate remedy presenting in the 21 June 2022 *Motion In Limine to Exclude Evidence Under Mil. R. Evid. 404(b)*.

2. **Facts.** For the purpose of this motion only, the Government adopts the Defense facts (a) through (g) and (i) through (t).

3. **Burden.** The Government bears the burden of proof to establish by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search of seizure.¹ Additionally, the Government must prove consent for the search by clear and convincing evidence.²

4. **Law.**

Admissibility of evidence obtained in a search procedure is subject to challenge only if one meets the standards for establishing standing.³ It is not enough to establish standing that evidence obtained by an illegal search will be used against the accused, but one who has a reasonable expectation of privacy that is violated by the intrusion has standing.⁴ Standing may be shown from legitimate presence at the scene of the search; ownership of, or possessory interest in, the place or thing searched; or being charged with an offense having possession of the seized item at the time of the search as an essential element.⁵

Where law enforcement officials have violated a citizen's Fourth Amendment rights by performing an unreasonable search, the victim of the search may move to have the illegally obtained evidence suppressed.⁶ If a person has a recognizable interest in the place searched, and a reasonable expectation of privacy, then he has standing to seek redress and can benefit from the

¹ M.R.E. 311(d)(5).

² M.R.E. 314(e)(5).

³ *United States v. Harris*, 5 M.J. 44, 46 (C.M.A. 1978).

⁴ *Id.*

⁵ *Id.*

⁶ *United States v. Jones*, 20 M.J. 594, 596 (N-M.C.M.R. 1985).

exclusionary rule.⁷

5. **Argument.**

a. CSSSN Marshall has no reasonable expectation of privacy over [REDACTED] phone.

CSSSN Marshall has no reasonable expectation of privacy over any videos on [REDACTED] phone. Even if the videos are of an intimate nature, CSSSN Marshall has no ownership or possessory interest in [REDACTED] cell phone. Accordingly, CSSSN Marshall has no standing to object to the search of [REDACTED] phone.

b. CSSSN Marshall's internet searches are admissible

The internet search history of CSSSN Marshall's phone concerning "what happens if you sneak into a military base," "can you get married at [REDACTED] or "what does plausible deniability mean," are not crimes, wrongs or other acts under MRE 404(b), but rather evidence seized from the Accused's cell phone. Government's evidentiary notices on 27 January 2022 provided Defense notice of Government's intent to use the evidence seized from CSSSN Marshall's cell phone. The evidence from CSSSN Marshall's internet searches were located on CSSSN Marshall's cell phone.

Even if this evidence is MRE 404(b) evidence, the Government has provided reasonable notice, both in its general notice on 27 January 2022 that it intended to use the results of CSSSN Marshall's cell phone, and its specific notice on 10 June 2022. This notice has occurred months before trial and there is no prejudice to the Defense if the Government was incorrect in noticing under MRE 311 rather than MRE 404(b).

Assuming arguendo that this evidence is MRE 404(b) evidence, it would go directly to CSSSN Marshall's intent, preparation, knowledge, absence of mistake, and consciousness of guilt. Specifically, the search "what happens if you sneak into a military base" goes to CSSSN Marshall's knowledge of [REDACTED] presence on base and preparation to obstruct justice by deleting evidence of [REDACTED] presence on base. The search "can you get married at [REDACTED] goes to CSSSN Marshall's knowledge of [REDACTED] age and absence of mistake regarding her age. Finally, the search "what does plausible deniability mean" goes to CSSSN Marshall's consciousness of guilt.

6. **Relief Requested.** The Government requests that the Court deny the Defense's 21 June 2022 *Motion to Suppress Evidence Derived from the Illegal Search of [REDACTED] Phone*. Additionally, Government requests that the Court deny the Defense's alternate remedy presenting in the 21 June 2022 *Motion In Limine to Exclude Evidence Under Mil. R. Evid. 404(b)*.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

⁷ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**DEFENSE MOTION FOR
APPROPRIATE RELIEF
(TMO MODIFICATION)**

7 JUL 22

1. Nature of Motion.

Pursuant to Rule for Courts-Martial 906, the Defense respectfully requests this Court to modify the trial management order (TMO) to continue today's Article 39(a) session to 11 August 2022 in order for the Accused's IMC request to be routed through the Convening Authority and for Defense counsel to have the opportunity to consult with supervisory counsel present and receive the benefit of their presence at the Article 39a session. The Defense requests all other TMO milestones remain the same.

2. Facts.

a. On 7 July 2022, CSSSN Marshall routed an IMC request for LT [REDACTED] JAGC, USN.¹

b. CDR [REDACTED] DSO Pacific's Executive Officer, is on paternity leave until 25 July 2022.

c. LT [REDACTED] is acting Senior Defense Counsel until 15 July 2022, and as the co-accused's Detailed Defense counsel, is conflicted from this case.

d. LCDR [REDACTED], incoming Senior Defense Counsel, has not reported onboard and is conflicted from this case having acted as Senior Trial Counsel.

3. 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. RC.M. 905(c).

4. Law.

A continuance may be granted only by the military judge. The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.

¹ Enclosure (1): CSSSN Marshall IMC Request of 7 Jul 22.

Whether a request for a continuance should be granted is a matter within the discretion of the military judge.

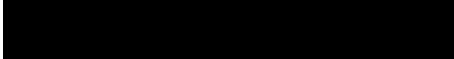
5. **Argument.**

The Defense asks for a limited modification to the TMO to ensure that CSSN Marshall can receive the benefit of a decision on his request for Individual Military Counsel and so that, if granted, such IMC would be available to participate in CSSN Marshall's defense. In addition, the requested continuance is necessary so that defense counsel may properly consult supervisory counsel.

6. **Relief Requested.**

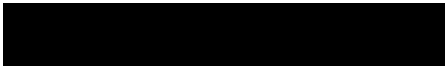
Pursuant to Rule for Courts-Martial 906, the Defense respectfully requests this Court to modify the trial management order to continue today's Article 39(a) session to 11 August 2022. The Defense requests all other TMO milestones remain the same.

The Defense requests oral argument only if the Government opposes this motion.


A. M. BURGOS-SOLIS
LT, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July 2022, a copy of this motion was served on Trial Counsel.


A. M. BURGOS-SOLIS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**MOTION FOR APPROPRIATE
RELIEF FOR PRELIMINARY RULING
ON ADMISSIBILITY OF
STATEMENTS OF THE ACCUSED**

28 JUL 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13) and Military Rules of Evidence (M.R.E.) 304, 502, and 510 the Government respectfully requests that the Court make a preliminary ruling on the admissibility of statements made by the Accused on 5 July 2022 as recorded in the 5 July 2022 affidavit by LN1 [REDACTED]

2. **Request for Consideration of Late-Filed Motion Based on Good Cause.**

a. On 7 March 2022, the Court granted a Defense motion for a continuance and set the deadline for motions filing for 15 April 2022 and a hearing was held on 28 April 2022. On 5 May 2022, the Court issued a Trial Management Order (TMO) which set a deadline for a second motions filing for 21 June 2022 for any motion in which good cause existed to file out of time.

b. On 21 June 2022, Defense Counsel filed the Defense *Motion to Suppress Evidence Derived From the Illegal Search of [REDACTED] Phone* with an accompanying evidentiary package which referenced nine enclosures.¹ On 5 July 2022, Defense Counsel filed supplementary enclosures 10-13 for the same motion.²

c. The Government's above-titled motion is based on new evidence filed in support of Defense's *Motion to Suppress Evidence Derived From the Illegal Search of [REDACTED] Phone* as enclosure 13 and could not have been filed before the Defense's supplementary evidence package on 5 July 2022. Government provided prompt notice to the Court on 6 July 2022 requesting to make an oral motion for the scheduled 7 July 2022 Article 39(a) hearing. On 7 July 2022, the Court indicated its intent to grant a Defense motion to continue the 7 July 2022 Article 39(a) hearing until 11 August 2022 and provided 28 July 2022 as a date for filing additional motions for good cause. Good cause exists in this case because the evidence at issue was newly discovered evidence, not available to the Government prior to 5 July 2022, and the evidence is highly relevant to Specifications 1 and 2 of Charge I against the accused. Accordingly, the Government respectfully requests consideration of this late-filed motion, filed by 28 July 2022.

2. **Facts.**

¹ Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone

² Marshall - MTS Evidence Derived From the Illegal Search of [REDACTED] Phone Supplementary Evidence Package - Def

a. The Accused is charged with two specifications of violations of Article 134 (production and possession of child pornography), nine specifications of violations of Article 92 (failure to obey an order and dereliction of duty), five specifications of violation of Article 131 (obstruction of justice), and three specifications violations of Article 120b (sexual assault of a child and sexual abuse of a child).

b. On 15 December 2020, CSSSN Marshall made statements to NCIS Special Agent [REDACTED] that he had made videos with [REDACTED] of them having sex.³ CSSSN Marshall stated that it was his idea to make the videos, that [REDACTED] recorded two videos on her phone on one occasion before he went underway, and that [REDACTED] sent altered videos to his Snapchat and that he had never seen the original videos.⁴

c. A search of [REDACTED] cellphone identified IMG_5388.mp4 as an 11-second video showing CSSSN Marshall having penetrative vaginal sex with an unidentified female timestamped 8 November 2020 at 1:29:26 (UTC).⁵

d. A search of CSSSN Marshall's cell phone identified [REDACTED] as an identical video to IMG_5388 timestamped 15 December 2020 at 08:10:18 (UTC).⁶

e. On 21 June 2022, Defense Counsel filed the *Defense Motion to Suppress Evidence Derived From the Illegal Search of [REDACTED] Phone* with an accompanying evidentiary package.⁷ Defense filed an additional supplementary evidence package on 5 July 2022 which included Enclosure 13, "LN1 [REDACTED] affidavit of 5 Jul 22."⁸

f. On 5 July 2022, CSSSN Marshall made statements to his Defense Counsel and to LN1 [REDACTED] that [REDACTED] grabbed her phone and started filming them having sexual intercourse without being prompted, that [REDACTED] handed the phone to CSSSN Marshall and he filmed the sexual intercourse from his perspective.⁹ CSSSN Marshall stated that [REDACTED] sent a version of the video to CSSSN Marshall via Snapchat for him to have while he was underway.¹⁰

g. On 6 July 2022, [REDACTED] made statements that while having sexual intercourse, she grabbed her phone and started filming, she handed the phone to CSSSN Marshall to film from his perspective, and after a few seconds he returned the phone to her.¹¹ [REDACTED] stated that she sent the video to CSSSN Marshall via Snapchat after a period of not seeing him.¹²

h. On 7 July 2022, Defense Counsel withdrew its *MTS Evidence Derived from the Illegal*

³ Def MTS, Enclosure 3, timestamp 1:12:06-1:17:56.

⁴ *Id.*

⁵ Def MTS, Enclosure 7, page 1-2.

⁶ Def MTS, Enclosure 7, page 2.

⁷ Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone

⁸ Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone, Enclosure 13.

⁹ Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone, Enclosure 13.

¹⁰ *Id.*

¹¹ Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone, Enclosure 14.

¹² *Id.*

Search of [REDACTED] Phone and all supporting enclosures.¹³

i. On 7 July 2022, Government filed notice pursuant to MRE 304(d) of its intent to offer statements of the Accused made on 5 July 2022 to LN1 [REDACTED] regarding CSSSN Marshall's actions on 8 November 2020.¹⁴

3. **Burden.** The Government bears the burden of establishing the admissibility of evidence pursuant to M.R.E. 304.¹⁵

4. **Law.**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.¹⁶ Relevant evidence is generally admissible unless prohibited under the Constitution, applicable federal statute, the Military Rules of Evidence, or the Manual for Courts-Martial.¹⁷

A voluntary oral admission of the accused may be proved by the testimony of anyone who heard the accused make it.¹⁸

A client has privilege to prevent any other person from disclosing confidential communications made between the client and the lawyer or the lawyer's representative and made for the purpose of facilitating the rendition of professional legal services to the client.¹⁹ A lawyer's representative includes a person assigned to assist the layer in providing professional legal services.²⁰ A communication is "confidential" if not intended to be disclosed to third persons.²¹ Statements intended to be communicated to third parties are not confidential.²² Privilege is waived if the holder of the privilege consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.²³ Waiver of privilege can be explicit or implicit, with implicit waiver occurring when the holder of privilege relies on a legal claim which requires examining the confidential communication.²⁴

In *United States v. Morgan*, the Army Court of Criminal Appeals found that the accused's

¹³ Defense - Motion to Withdraw Defense MTS of 21 Jun

¹⁴ Gov MFAR Prelim Rul Statements, Enclosure 1.

¹⁵ M.R.E. 304(f)(6).

¹⁶ M.R.E. 401.

¹⁷ M.R.E. 402.

¹⁸ M.R.E. 304(i).

¹⁹ M.R.E. 502(a).

²⁰ M.R.E. 502(b)(3).

²¹ M.R.E. 502(b)(4).

²² *United States v. Romano*, 46 M.J. 269, 273 (C.A.A.F. 1997); *See also United States v. Winchester*, 30 C.M.R. 74, 78 (U.S. C.M.A. 1961) (finding communication to the accused's attorney for the purpose of providing information to the reviewing authority was not privileged).

²³ M.R.E. 510(a).

²⁴ *United States v. Jackson*, 30 M.J. 687, 689 (A.C.M.R. 1990) (citing *Lorenz v. Valley Forge Insurance Company*, 815 F.2d 1095, 1098 (7th Cir. 1987) (citing *United States v. Mierzwicki*, 500 F. Supp. 1331 (Dist. Ct. Md. 1980))).

communication to his attorney of his decision regarding forum was not protected by the attorney-client privilege because the accused knew that his forum decision would be revealed in open court to the military judge.²⁵ Similarly, in *United States v. Smith*, the Air Force Court of Military Review found that attorney-client privilege did not apply to the accused's production of an Air Force Form 807 because the accused provided this document to his attorney to be used as evidence.²⁶

5. Argument.

CSSSN Marshall's statements to LN1 [REDACTED] on 5 July 2022 should be ruled admissible because they are relevant, voluntary statements of the Accused that were intended to be communicated to a third party.

First, CSSSN Marshall's statements are relevant. CSSSN Marshall is charged with the production and possession of child pornography. CSSSN Marshall's statements to LN1 [REDACTED] on 5 July 2022 directly discuss CSSSN Marshall's actions in the production of the alleged child pornography. Additionally, CSSSN Marshall's statements to LN1 [REDACTED] discuss the circumstances and motives regarding the alleged possession of child pornography on his phone. His statements on 5 July 2022 are not needlessly cumulative with his statements made to NCIS on 15 December 2020, because they provide additional details not disclosed to NCIS, they were made at a different time than his statements to NCIS, and they were made under different circumstances to the statements he made to NCIS which goes to whether his statements to NCIS were coerced.

Second, CSSSN Marshall's statements were voluntary. At the time he made the statements, CSSSN Marshall was afforded and he utilized the opportunity to consult with his attorney. His statements were made in the presence of his attorney and were elicited by his attorney.

Third, CSSSN Marshall's statements were not protected by attorney-client privilege because they were intended to be communicated to a third party. CSSSN Marshall made the statements on 5 July 2022, in consultation with his attorney, in order to assert a legal claim regarding the suppression of evidence derived from the search of [REDACTED] phone. The interview took place in the presence of LN1 [REDACTED] who made an affidavit the same day, which was submitted that same day to the Court. The purpose of the interview was to be disclosed to the Court. Because CSSSN Marshall's statements were intended to be communicated to the Court, they were not protected by attorney-client privilege.

Finally, even if CSSSN Marshall's statements were made with the intent of confidentiality at the time. Defense's filing of the affidavit the same day shows that CSSSN Marshall consented to the disclosure and waived any privilege of the disclosed statements.

²⁵ *United States v. Morgan*, Docket No. ARMY 9601890, 2001 CCA LEXIS 444, at *11 (A. Crim. App. May 14, 2001).

²⁶ *United States v. Smith*, 33 M.J. 527, 531 (A.F.C.M.R. 1991).

6. **Evidence and Enclosures.** Government relies on previously submitted Def MTS, Enclosures 3 and 7, Def MTS Evidence Derived From the Illegal Search of [REDACTED] Phone, Enclosures 13 and 14, and submits the following Government Enclosure:

Enclosure 1: Government Supplemental Notices dtd 7 July 2022

If this motion is opposed, the Government intends to call LN1 [REDACTED] for the limited purpose of establishing the circumstances surrounding the 5 July 2022 interview and affidavit.

7. **Relief Requested.** Government respectfully requests that the Court make a preliminary ruling that the statements made by the Accused on 5 July 2022 to LN1 [REDACTED] as recorded in LN1 [REDACTED] 5 July 2022 affidavit are admissible. Government does not seek to introduce any statements made to LN1 [REDACTED] by the Accused that were not recorded in the 5 July 2022 affidavit.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July 2022, a copy of this motion was served on Defense Counsel.

[REDACTED]
G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

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

UNITED STATES v. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	DEFENSE MOTION FOR APPROPRIATE RELIEF: CONTINUANCE 28 JUL 22
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1. **Nature of Motion.** Pursuant to Article 40, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §840, and RCM 906(b)(1), CSSSN Christopher D. Marshall, USN, through Counsel, respectfully moves this Court to continue the docketed trial dates in the above-captioned case from 11-14 October 2022 to 23-27 January 2023, and to amend the motions filing deadline, responses to motion deadline, and Article 39(a) dates to, respectively, 23 September 2022, 5 October 2022, and 11-12 October 2022. CSSSN Marshall additionally requests the amendment of the written notice of pleas and forum deadline to 2 December 2022, of the notice of expert testimony deadline to 20 December 2022, and of the final pretrial matters deadline to 4 January 2023. A continuance is necessary to afford CSSSN Marshall a meaningful exercise of his right to Individual Military Counsel (“IMC”), by allowing undersigned counsel, who has recently been assigned as CSSSN Marshall’s IMC, adequate time to review the discovery and filings in the case and to consider potential motions and trial strategy.

2. **Facts.**

a. CSSSN Marshall is charged with nine specifications of violating Article 92, UCMJ; three specifications of violating Article 120b, UCMJ; five specifications of violating Article 131b, UCMJ; and two specifications of violating Article 131b, UCMJ. The allegations against CSSSN Marshall involve multiple alleged victims and include allegations of misconduct spanning from the production of child pornography and sexual assault of a child to dereliction of duty and failure to obey a lawful order.

b. An Article 39(a) session is currently scheduled for 11 August 2022 and trial is currently scheduled to begin on 11 October 2022.¹

c. On 7 July 2022, detailed Defense Counsel submitted an IMC request.²

d. On 7 July 2022, Trial Counsel forwarded the IMC request to Commander, Joint Region

¹ Ruling, Defense Motion for Appropriate Relief – Continuance – 15 July 2022.

² Enclosure A, page 1.

Marianas.³

e. On 11 July 2022, undersigned counsel detached from Defense Service Office Southeast Detachment Mayport and reported to Defense Service Office West on 20 July 2022 pursuant to PCS orders.

f. On 12 July 2022, Commander, Joint Region Marianas forwarded the IMC request to Chief of Staff, Navy Defense Service Office via Commanding Officer, DSO West. In his endorsement, Commander, Joint Region Marianas noted that pretrial preparation for undersigned counsel would entail review of over 2,500 pages of discovery, 12 hours of video recordings, and preparation for nine potential witnesses and two expert witnesses. He estimated that undersigned counsel would need a minimum of 225 work hours to prepare for trial.⁴

g. On 20 July 2022, Commanding Officer, DSO West forwarded the IMC request to Director, Defense Service Office Operations and recommended its approval.⁵

h. On 20 July 2022, Director, Defense Service Office Operations concurred that undersigned counsel was reasonably available to serve as IMC.⁶

i. On 25 July 2022, undersigned counsel was informed that the IMC request had been approved. Prior to being assigned as IMC, undersigned counsel had not reviewed discovery in the instant case.

j. Under the current TMO, the motions deadline is 28 July 2022 and the responses deadline is 4 August 2022.⁷

k. The Convening Authority has approved funding two Defense expert witnesses: Mr. [REDACTED] a digital evidence consultant, and Dr. [REDACTED] a clinical and forensic psychologist.

l. Dr. [REDACTED] is available for trial the week of 21 November, the week of 12 December, and the month of January 2023.⁹

m. Mr. [REDACTED] is available for trial the month of January 2023.¹⁰

n. Detailed Defense Counsel, who is permanently stationed in Guam, is unavailable from 15-18 November due to an Article 39(a) hearing in Norfolk, VA; from 28 November – 9 December due to a court-martial in Hawaii; and from 9-13 January for a court-martial in Norfolk, VA.

³ *Id.*, page 2.

⁴ *Id.*, page 3.

⁵ *Id.*, page 4.

⁶ *Id.*, page 5.

⁷ Ruling, Defense Motion for Appropriate Relief – Continuance – 15 July 2022.

⁸ Anticipated testimony.

⁹ Anticipated testimony.

¹⁰ Anticipated testimony.

o. The Defense understands that the Government opposes this continuance request.

p. This request is the Defense's second continuance request.

3. **Burden.**

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

4. **Law.**

Article 40 of the UCMJ provides that the "military judge...may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." 10 U.S.C. §840. Consistent with that authority, the military judge is empowered to set the time for each session of a court-martial, RCM 801(a)(1), and is the only person who may grant a continuance. RCM 906(b)(1); *see United States v. Knudson*, 4 U.S.C.M.A. 587 (1954). Reasons for a continuance include, but are not limited to: "insufficient opportunity to prepare for trial; unavailability of an essential witness...and illness of an accused, counsel, military judge, or member." Discussion, RCM 906(b)(1), Manual for Courts-Martial (2019 ed.). Factors used on appeal in assessing a judge's decision to deny a continuance include "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997); *citing* F. Gilligan and F. Lederrer, *Court-Martial Procedure* § 18-32.00 at 704 (1991).

In a non-capital general court-martial, an accused has the right to be represented by military counsel of the accused's own selection, if that counsel is reasonably available. RCM 506(a)(1); *see also* Article 38, UCMJ, 10 U.S.C. § 838. The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *United States v. Evans*, 2022 CCA Lexis 398 at *14 (N.M.C.C.A. 2022) (*citing United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)).

5. **Argument.**

In order for CSSSN Marshall to properly exercise his statutory right to IMC – now approved – a continuance of the trial dates and an amended TMO is necessary and just. Now having IMC assigned, CSSSN Marshall has a right to effective assistance by undersigned counsel. Notably, the IMC request was not approved until approximately a week before the set motions deadline of 28 July. Further, undersigned counsel was not notified of the IMC request approval until 25 July 2022, just three days before the set motions deadline. Discovery in this case involves over 2,500 pages of material and numerous videos of NCIS interrogations and interviews, which undersigned counsel had not reviewed prior to being assigned to the case. The Convening Authority, in forwarding the IMC request, estimated that it would take at least 225 work hours for undersigned counsel to prepare for trial. The present trial dates of 11-14 October provide insufficient opportunity for undersigned counsel to prepare for trial, particularly considering undersigned counsel's arrival on the case only recently. This is a valid reason for a continuance as detailed in Discussion, RCM 906(b)(1).

A continuance would allow undersigned counsel to review a voluminous case file and to properly evaluate potential motions and trial strategy. It would ensure CSSSN Marshall is effectively represented by providing undersigned counsel sufficient time to prepare to litigate a complex general courts-martial where CSSSN Marshall is facing substantial punitive exposure. Without a continuance, undersigned counsel's effective representation would be hindered, affecting CSSSN Marshall's right to representation by IMC and his Sixth Amendment right to counsel. In addition, this is only the Defense's second continuance request, and the request is timely, being submitted shortly after the approval of the IMC request and well before the doorstep of trial.

The requested dates for the court-martial are the first available dates where the full Defense team is available for trial following the currently docketed dates of 11-14 October. Thus, the Defense's continuance request is reasonably diligent. In addition, the Defense submits that continuing the trial would not prejudice the Government's case. Modifying the TMO without continuing the trial dates would be insufficient for CSSSN Marshall to effectively exercise his right to IMC.

6. Evidence and Enclosures.

The Defense respectfully submits the following in support of this motion.

Enclosure (A): IMC Request and Subsequent Processing ICO CSSSN Marshall

The Defense also provides notice of its intent to call Mr. [REDACTED] and Dr. [REDACTED] as telephonic witnesses at the Article 39(a) hearing for the instant motion for the limited purpose of establishing their availability for potential trial dates.

7. Relief Requested.

If this motion is opposed by the Government, the Defense respectfully requests, pursuant to RCM 905(h), an Article 39(a) session to present oral argument and evidence. CSSSN Marshall respectfully moves this Court to continue the docketed trial dates to 23-27 January 2023 and to amend all other pending deadlines as set forth in paragraph 1 of this motion.

RICHEY.DANIEL
PARKER. [REDACTED]
[REDACTED]
Digitally signed by
RICHEY.DANIEL.PARKER
Date: 2022.07.28 05:18:37
-07'00'

D. P. RICHEY
LT, JAGC, USN
Individual Military Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July 2022, a copy of this motion was served on Trial Counsel, Victim's Legal Counsel, and the Court.

RICHEY.DANIEL
PARKER. [REDACTED]
[REDACTED]
Digitally signed by
RICHEY.DANIEL.PARKER
Date: 2022.07.28
05:19:00 -07'00'

D. P. RICHEY
LT, JAGC, USN
Defense Counsel

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

UNITED STATES

v.

**CHRISTOPHER MARSHALL
CSSSN/E-3, USN**

**GOVERNMENT RESPONSE TO
DEFENSE MOTION FOR
APPROPRIATE RELIEF:
CONTINUANCE**

1 AUG 22

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1), the Government objects to a continuance

2. **Facts.**

a. The Accused is charged with two specifications of violations of Article 134 (production and possession of child pornography), nine specifications of violations of Article 92 (failure to obey an order and dereliction of duty), five specifications of violation of Article 131 (obstruction of justice), and three specifications violations of Article 120b (sexual assault of a child and sexual abuse of a child). These violations are alleged to have occurred between October and December 2020.

b. On 18 January 2022, the Court issued a Trial Management Order setting trial for 25-29 April 2022.

c. On 7 March 2022, the Court granted a Defense motion for a continuance and set an Article 39(a) for 28 April 2022.

d. On 5 May 2022, the Court issued a Trial Management Order setting a second Article 39(a) on 7 July and trial for 11-14 October 2022.

e. On 7 July 2022, the Court granted a Defense motion for a continuance and set the second Article 39(a) hearing for 11 August 2022.

f. On 7 July 2022, Defense Counsel requested that LT Daniel Richey be assigned as Individual Military Counsel (IMC) in this case.¹ The IMC request included the trial date of 10-14 October 2022 in the request.²

g. LT Richey has extensive experience litigating sexual assault cases.³

h. On 12 July 2022, Commander, Joint Region Marianas estimated that, in order to prepare

¹ Def MFAR Continuance 28 July, Enclosure A, page 1.

² *Id.*

³ *Id.*

for trial, LT Richey would have to review at least 2,528 pages of documentary evidence, 12 hours of video recordings, and interview at least nine potential witnesses and two expert witnesses. He estimated that LT Richey would need a minimum of 225 work hours to prepare for this trial.⁴

i. In his endorsement, Commanding Officer, Defense Service Office West reviewed the request for LT Richey to serve as IMC in this case. He determined that LT Richey was reasonably available to serve as defense counsel in this case and that LT Richey's current docket load and tour length should enable effective coverage to support the pending court-martial.⁵

j. On 20 July 2022, Director, Defense Service Office Operations reviewed the request for LT Richey to be detailed as IMC in this case and concurred with LT Richey's Commanding Officer's determination that LT Richey was reasonably available to serve in this matter.⁶

3. **Burden.** The Defense bears the burden of proof by a preponderance of the evidence. RCM 905(c).

4. **Law.**

The military judge should grant a continuance upon a showing of reasonable cause for as long and as often as is just.⁷ Under the Sixth Amendment right to counsel, those facing criminal charges have the right to consult with an attorney and to have the attorney investigate the case and prepare a defense.⁸ This includes the right to the "meaningful opportunity to present a complete defense."⁹ The military judge should not deny a continuance if either of the parties may be deprived of essential evidence.¹⁰ Continuances should be granted when new counsel who are unfamiliar with the case are retained not have a "reasonable and adequate opportunity to prepare for trial."¹¹

Where denying the request for a continuance would not materially prejudice the accused's substantial rights by depriving the accused of the right to adequately prepare for trial, the military judge may appropriately deny the request.¹²

The factors used to determine whether a military judge abused his or her discretion by

⁴ *Id.* at page 3.

⁵ *Id.* at page 4.

⁶ *Id.* at page 5.

⁷ R.C.M. 906(b)(1), Discussion.

⁸ *Kansas v. Ventris*, 556 U.S. 586 (2009).

⁹ *United States v. Montalvo*, 2015 CCA LEXIS 218 (2015).

¹⁰ *United States v. Simons*, NMCM 97 00078, 1997 CCA LEXIS 559, at *5 (N-M Crim. App. Nov. 14, 1997).

¹¹ *United States v. Keys*, 29 M.J. 920 (A.C.M.R. 1989) (finding error in denying counsel's request for a two week delay where counsel had been retained the previous day); *See also United States v. Smith*, 40 C.M.R. 418 (A.C.M.R. 1968).

¹² *United States v. Lucero*, Docket No. ARMY 20020869, 2007 CCA LEXIS 616 (A. Crim. App. Sep. 17, 2007) (upholding the military judge's denial of a continuance where civilian counsel hired on 22 July 2002 requested a continuance for trial scheduled 5 August 2002).

denying a continuance include "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice."¹³

1. **Argument.**

The Defense has failed to demonstrate that the currently docketed trial dates of 11-14 October 2022 would hinder CSSSN Marshall's (1) ability to properly exercise his statutory right to IMC or (2) his right to effective assistance by IMC.

CSSSN Marshall's request that LT Richey be assigned as IMC states that "he is available to support this assignment" for a trial "docketed for 10-14 October 2022."¹⁴

In assigning IMC, Commanding Officer, Defense Service Office West and Director, Defense Service Operations, considered that the anticipated volume of work, which included review of at least 2,528 pages of documentary evidence, 12 hours of video recordings, interview at least nine potential witnesses and 2 expert witnesses, and a minimum of 225 hours to prepare for a trial scheduled for 10 October 2022.¹⁵ LT Richey was determined to be reasonably available to serve as defense counsel in this case and that his "current docket load and tour length should enable effective coverage to support the pending court-martial."¹⁶

Here, unlike *Montalvo*, there is no need to investigate and search for new evidence.¹⁷ Here, unlike *Simons*, there is no suggestion that a crucial expert is not available.¹⁸ Instead, Defense Counsel is merely asking for additional time to review the case file and evaluate potential motions and trial strategy.

This is not a case in which new counsel who are unfamiliar with the case are retained by the appellant or when counsel does not have a "reasonably and adequate opportunity to prepare for trial."¹⁹ CSSSN Marshall's IMC request for LT Richey states that his detailed Defense Counsel "would remain on the case."²⁰ There further remain over two months for both of his counsel to work together to prepare for trial.

In this case, there is no material prejudice to CSSSN Marshall's ability to properly exercise his statutory right to IMC or to his right to effective assistance by IMC because Defense Counsel's own request as well as the endorsements supporting that LT Richey be assigned as IMC state that he is reasonably available to support the pending court-martial.

¹³ *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

¹⁴ Def MFAR Continuance 28 July, Enclosure A, page 1.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4-5

¹⁷ See *United States v. Montalvo*, 2015 CCA LEXIS 218 (2015).

¹⁸ See *United States v. Simons*, 1997 CCA LEXIS 559.

¹⁹ Compare with *United States v. Keys*, 29 M.J. 920 (A.C.M.R. 1989) and *United States v. Smith*, 40 C.M.R. 418 (A.C.M.R. 1968).

²⁰ Def MFAR Continuance 28 July, Enclosure A, page 1.

On the other hand, further delay would be prejudicial to the Government. This case has already been delayed from April 2022 to October 2022. It involves two minor victims who, in October 2022, would already be testifying on events that occurred nearly 2 years prior. Additional delay of over three months would result in further diminution of memories.²¹

2. **Relief Requested.** The Government respectfully requests that the Court deny the 28 July 2022 Defense Motion to Continue.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August 2022, a copy of this motion was served on Defense Counsel.



G.A. ESCOBAR
LT, JAGC, USN
Trial Counsel

²¹ See *United States v. Sharp*, 38 M.J. 33, 38 (C.A.A.F. 1993).

REQUESTS

THERE ARE NO REQUESTS

NOTICES

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**VICTIMS' LEGAL COUNSEL
NOTICE OF APPEARANCE ON
BEHALF OF [REDACTED] A MINOR**

18 JAN 22

1. I, LT James P. Wu Zhu, JAGC, USN, Victims' Legal Counsel, Guam, admitted to practice law and currently in good standing in the State of California and the District of Columbia, and, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of [REDACTED] a minor, who is a named victim in the charges.
2. On 9 November 2021, I was detailed to represent [REDACTED] and I have entered into an attorney-client relationship with [REDACTED]. I have not acted in any manner which might disqualify me in the above captioned court-martial.
3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Western Pacific Judicial Circuit Rules of Court.
4. [REDACTED] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve [REDACTED].
5. To permit a meaningful exercise of [REDACTED] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which [REDACTED] rights and privileges are addressed.
6. [REDACTED] has limited standing in this court-martial, and [REDACTED] reserves the right to make factual statements and legal arguments herself or through counsel.
7. My contact information is as follows:

Building 4, Naval Base Guam
[REDACTED]

Respectfully submitted this 18th day of January 2022.

WUZHU.JAMES.PHILIP
ZHIMING. [REDACTED]

Digitally signed by
WUZHU.JAMES.PHILIP
ZHIMING. [REDACTED]
Date: 2022.01.18 12:01:22 +10'00'

J. P. WU ZHU
LT, JAGC, USN
COUNSEL FOR [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2022, a copy of this response was served on Trial Counsel and Defense Counsel.

WUZHU.JAMES.PHILIP
ZHIMING. [REDACTED]

Digitally signed by
WUZHU.JAMES.PHILIP
ZHIMING. [REDACTED]
Date: 2022.01.18 12:01:40 +10'00'

J. P. WU ZHU
LT, JAGC, USN
COUNSEL FOR [REDACTED]

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

UNITED STATES

v.

**CHRISTOPHER D. MARSHALL
CSSSN/E-3, USN**

**VICTIMS' LEGAL COUNSEL
NOTICE OF APPEARANCE ON
BEHALF OF [REDACTED] A MINOR**

13 JUL 22

1. I, LT Emily R. Endieveri, JAGC, USN, Victims' Legal Counsel, Guam, admitted to practice law and currently in good standing in the State of Wisconsin and, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of [REDACTED] a minor, who is a named victim in the charges.

2. On 5 July 2022, I was detailed to represent [REDACTED] and I have entered into an attorney-client relationship with [REDACTED]. I have not acted in any manner which might disqualify me in the above captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Western Pacific Judicial Circuit Rules of Court.

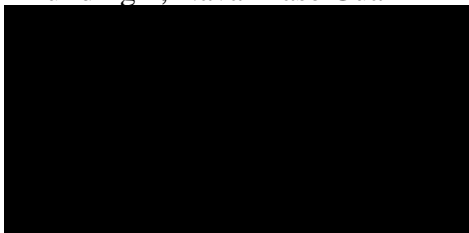
4. [REDACTED] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve [REDACTED].

5. To permit a meaningful exercise of [REDACTED] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which [REDACTED] rights and privileges are addressed.

6. [REDACTED] has limited standing in this court-martial, and [REDACTED] reserves the right to make factual statements and legal arguments herself or through counsel.

7. My contact information is as follows:

Building 4, Naval Base Guam



Respectfully submitted this 13th day of July 2022.

[REDACTED]
E.R. ENDIEVERI
LT, JAGC, USN
COUNSEL FOR [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July 2022, a copy of this response was served on Trial Counsel and Defense Counsel.

[REDACTED]
E.R.ENDIEVERI
LT, JAGC, USN
COUNSEL FOR [REDACTED]

COURT RULINGS & ORDERS

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

UNITED STATES V. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF – CONTINUANCE 7 MAR 2022
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1. Statement of the Case.

The Defense filed a motion for a continuance pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1) and provided supporting evidence.¹ The Government did not oppose the continuance but requested two trials date, both of which were earlier than the date proposed by the Defense.²

2. Issues

- a. Should the Court continue the court-martial?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

- a. The motions filing deadline was established as 7 March 2022. Currently, an Article 39(a) hearing is set for 17 March 2022 to hear motions in this case. Trial is scheduled to begin on 25 April 2022 in Guam.
- b. As of 3 March 2022, the Accused is on command-approved convalescent leave for thirty days.
- c. The Defense submitted a second request for funding of Dr. [REDACTED] a forensic psychologist, as an expert consultant on 1 March 2022. The Government has indicated it will offer one of two military forensic psychologists as an alternative expert consultant. However, as of 4 March 2022, the Government had not determined which military forensic psychologist would be offered.
- d. Dr. [REDACTED] is available for trial 5-8 and 11-15 July 2022. The military forensic psychologists are available 21-24 June or 27 June to 1 July 2022.

¹ Appellate Exhibits (AE) IV and V.

² AE VI.

e. The Defense filed a request for a bill of particulars on 16 February 2022. The Government responded on 4 March 2022.

f. The Defense filed a discovery request on 16 February 2022. The Government had not responded as of 4 March 2022.

4. Statement of Law.

Where there is reasonable cause, a military judge may “grant a continuance to any party for such time, and as often, as may appear to be just.”³ This is reiterated by the Discussion to R.C.M. 906(b)(1). The burden is on the moving party to prove there is reasonable cause for a continuance.⁴ “Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.”⁵

A judge's decision to deny a continuance is reviewed for an abuse of discretion.⁶ Appellate Courts consider several factors in assessing whether a military judge abused his discretion by denying a continuance.⁷ Those factors include: “surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.”⁸ Not all of the factors will be present in each case.

5. Analysis and Conclusions of Law.

The Defense has established there is reasonable cause for a continuance. The Government has failed to respond to the Defense discovery request or identify which alternate forensic psychologist it would offer the Defense. Though the Government indicated it would provide an alternate forensic psychologist, by not identifying which forensic psychologist they will provide, the Government has prevented the Defense from consulting with that forensic psychologist, determining if that alternate is adequate, and filing appropriate pre-trial motions.⁹ Further, the Defense is unable to prepare a specified motion to compel discovery. Accordingly, the Defense has not had sufficient opportunity to prepare for trial.

The Court suspends the current Trial Management Order (TMO)¹⁰ and issues new trial milestones, up to the Article 39(a), as set forth below. However, as the Government has not identified which military forensic psychologist will be offered, the Court cannot set a trial date.

³ Article 40, Uniform Code of Military Justice (U.C.M.J.). See R.C.M. 906(b)(1).

⁴ R.C.M. 905(c).

⁵ Discussion, R.C.M. 906(b)(1).

⁶ *United States v. Weisbeck*, 50 M.J. 461, 464 (1999).

⁷ *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). ; citing F. Gilligan and F. Lederrer, *Court-Martial Procedure* § 18-32.00 at 704 (1991).

⁸ *Id.*

⁹ Defense might file motions based on their consultation with the military forensic psychologist or a motion to compel the production of Dr. [REDACTED]

¹⁰ AE II.


Unless the parties agree upon a trial date beforehand, the Court will set a trial date at the Article 39(a), at which point the question of who will be the Defense's expert forensic psychologist will be answered.

6. Ruling.

The Defense motion is **GRANTED IN PART.**

The Court sets the following trial milestones:

- | | |
|---------------------------|-----------|
| a. Motion(s) filing | 15 APR 22 |
| b. Responses to motion(s) | 22 APR 22 |
| c. Article 39(a) | 28 APR 22 |



B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

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

UNITED STATES V. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	RULING – DEFENSE MOTION TO SUPPRESS – STATEMENTS AND EVIDENCE 26 MAY 2022
--	--

1. Statement of the Case.

The Defense filed a motion to suppress statements of the Accused and evidence from his cell phone and provided documentary evidence to support their motion.¹ The Government responded on 22 April 2022.² On 28 April 2022, the Court held an Article 39(a) session at Building 1555, [REDACTED] No witnesses testified.

2. Issues

- a. Were the Article 31(b) rights warning sufficient to orient the Accused to the nature of the allegation?
- b. Did the Accused limit the scope of the search of his phone on 15 December 2020?
- c. Did the Government exceed the scope of the Permissive Authorization for Search and Seizure (PASS) during its search of the Accused's phone?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

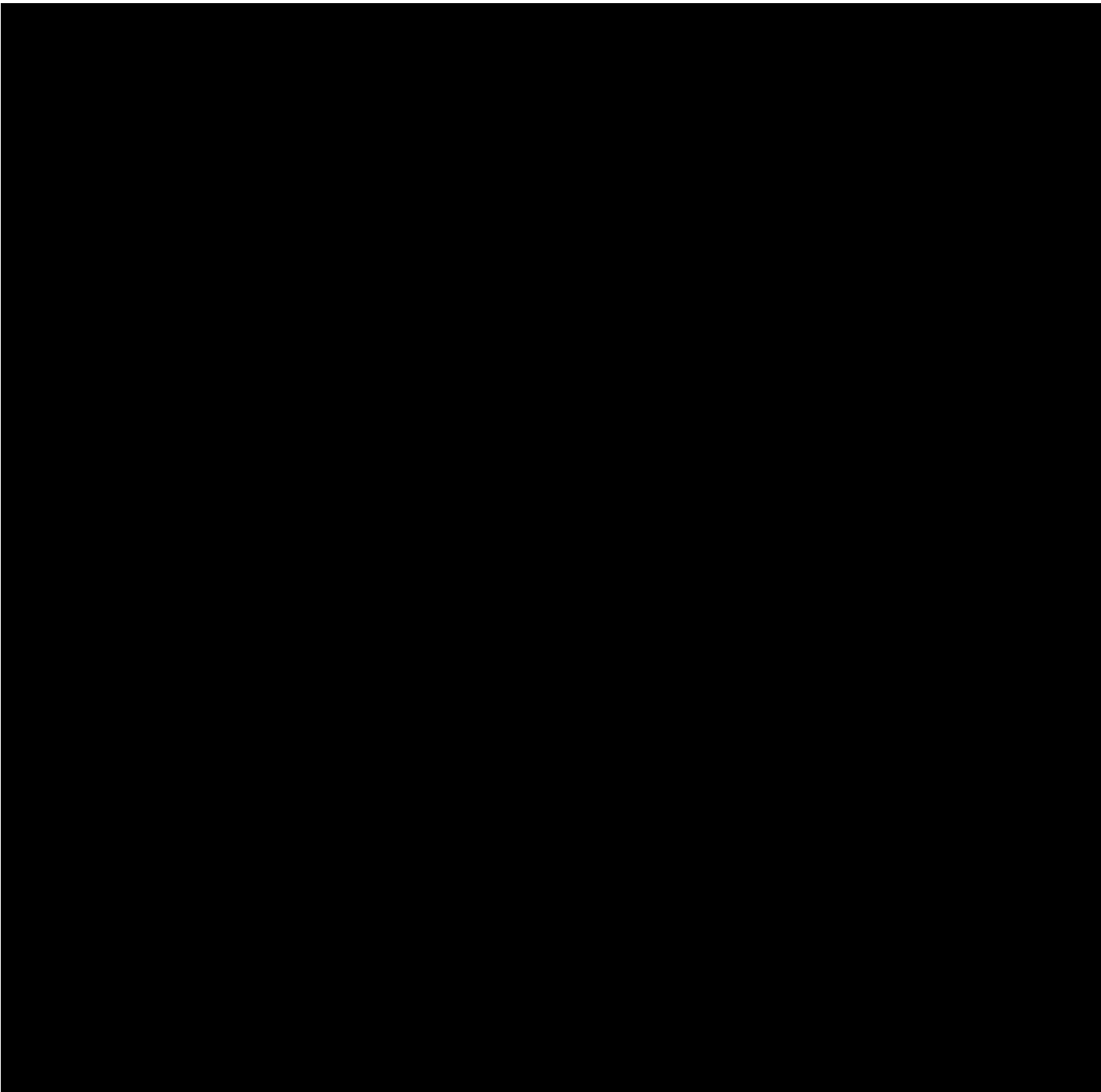
- a. Representatives of Naval Criminal Investigative Service (NCIS) and Criminal Investigative Division (CID) interrogated the Accused on 15 December 2020 after he was apprehended outside his barracks room.
- b. The interrogation was video recorded.³ The camera faced the Accused and appears to have been placed on the table, at the right side of NCIS Special Agent (SA) [REDACTED] Neither SA

¹ AEs XVII and XVIII respectively.

² AE XXXI.

³ The timestamp on the video recording is incorrect. Though it says approximately 0916 at the beginning of the interrogation, the interrogation started sometime after 1900. The exact time is not relevant to any issues here.

██████████ nor CID Investigator (INV) ██████████ is visible during the interview. Despite COVID protocols at the time, the Accused is not wearing a mask.⁴

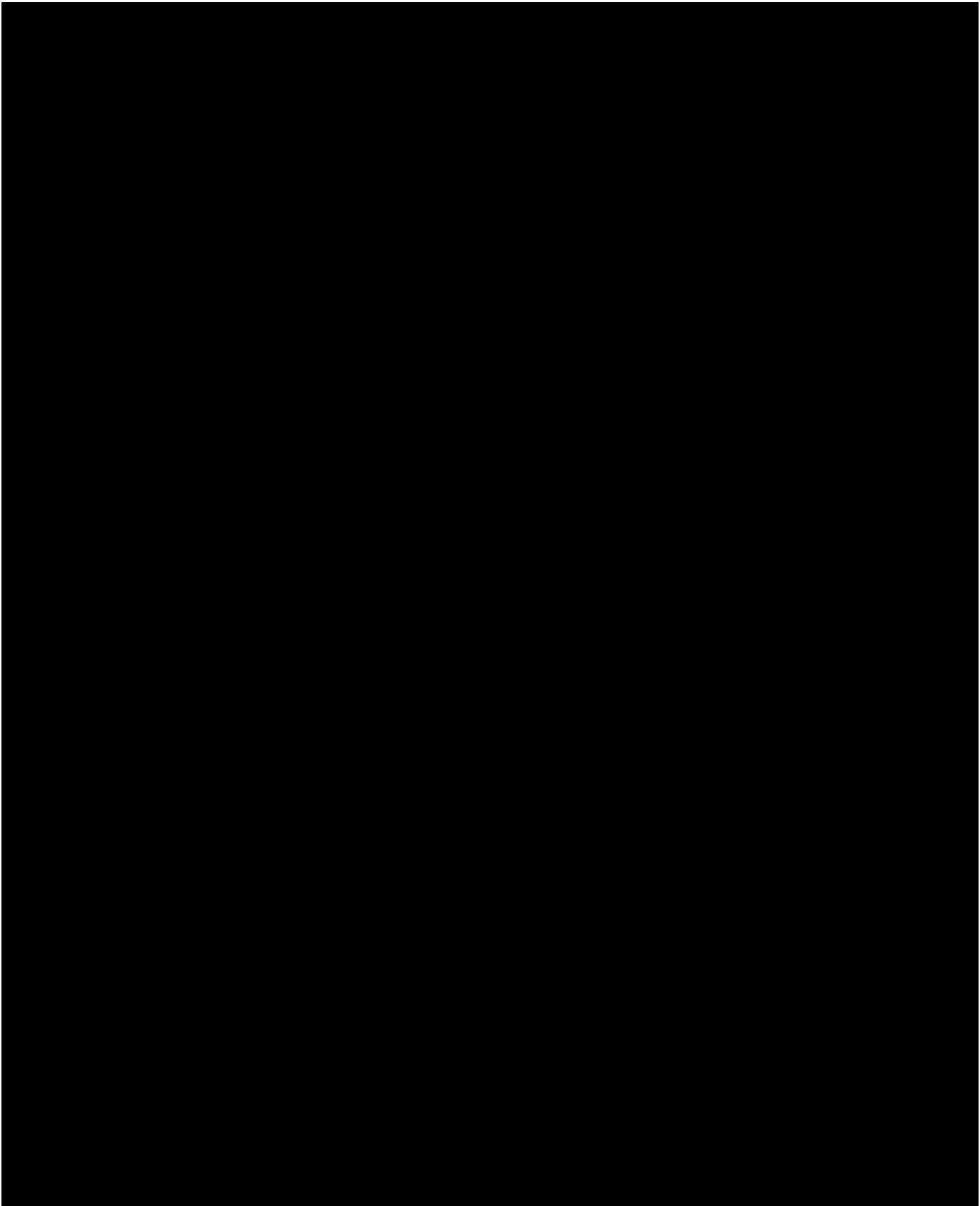


⁴ This fact is mentioned to explain how the Court was able to see the Accused's facial expressions. The Court took no negative inferences from the Accused not wearing a mask.

⁵ Though the Accused wrote the time as 7:30 PM, it was announced on the video as 1933.

⁶ The Accused feigned surprise that ██████████ was ██████████ claiming she looked ██████████.

⁷ In response to one of INV ██████████ follow-up ██████████ he Accused looked at him, pointed with his index finger, and said "Bingo."



⁸ At approximately 10:10 on the video's timestamp.

⁹ Video timestamp.

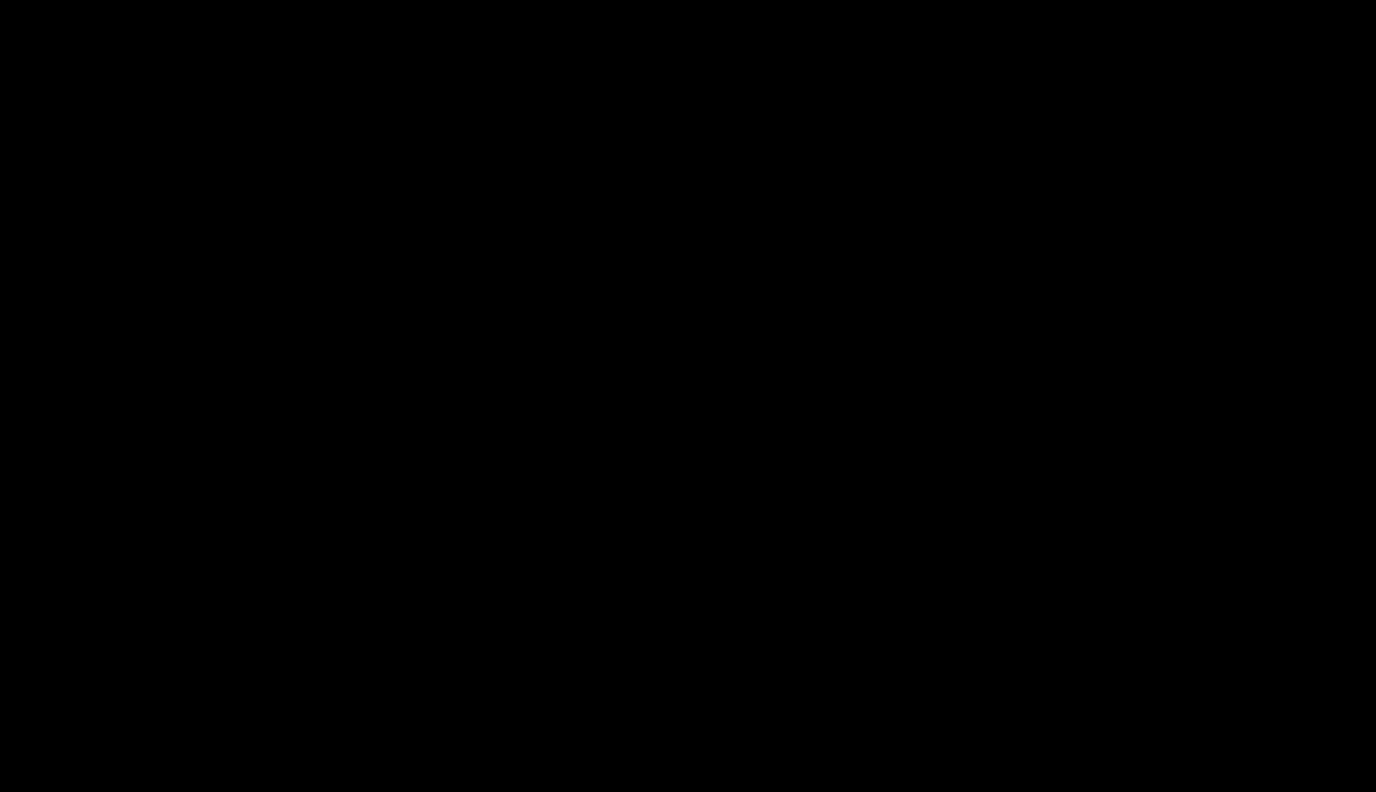
¹⁰ At approximately 11:34 on the video's timestamp.

¹¹ Video timestamp.

¹² Video timestamp.

¹³ About two minutes after they left the room, INV [REDACTED] opened the door and asked the Accused a question.

¹⁴ The Accused said he may have a 9mm bullet in his room. This statement raised no concern with SA [REDACTED] or INV [REDACTED]



r. Though the interview lasted approximately 4 hours, until approximately 2320 on 15 December 2020, the Accused did not seem affected by the length or lateness. While he did yawn several times and may have fallen asleep during one of the times he was left alone in the room, his thought process remained clear and he did not appear to have any difficulty concentrating. In fact, he apologized to SA [REDACTED] and INV [REDACTED] for keeping them up late, noting INV [REDACTED] had been up since at least 0700.¹⁷

s. NCIS sent the Accused's phone and [REDACTED] phone to the Defense Cyber Crime Center (DC3) for analysis.¹⁸ SA [REDACTED] requested DC3 analyze the two phones and:

Document any messages or communication logs documenting contact between [the Accused] and [REDACTED] on their devices. Document any sexual and/or child pornographic images or videos present on either device or evidence indicating such materials were transmitted to, or received from, third parties. Recover any deleted data associated with known previously deleted child pornographic videos recording using [REDACTED] device and transmitted to [the Accused] (almost certainly by WhatsApp or SnapChat).

¹⁵ Video timestamp

¹⁶ Video timestamp.

¹⁷ INV [REDACTED] noted he had in fact been up since 0400.

¹⁸ [REDACTED] ed to the search of her phone.

DC3 returned the results of their analysis to SA [REDACTED] who reviewed the reports and individual files identified by DC3.¹⁹ SA [REDACTED] issued an Investigative Action (IA) which summarized his review.

t. DC3 found photos on both phones which it deemed relevant to SA [REDACTED] request because they contained: sexual content; persons visually similar to the Accused or [REDACTED] metadata appearing to place [REDACTED] on Naval Base Guam; and/or file paths that indicated the photos had been shared between the Accused and [REDACTED].²⁰ DC3 produced two extractions for the Accused's phone, "Physical_01" and "Secure_Folder_01." The later extraction was the result of a decrypted "Secure Folder" area apparently set up by the Accused. Four reports, comprising 1172 total photos, were produced from the two extractions. The Government provided little evidence to explain how the "Physical_01" and "Secure_Folder_01" extractions were created, where the included files were located on the Accused's phone, or what led DC3 to the files contained within those extractions. Though DC3's report stated that the majority of the photos were found in the "DCIM folder," it provided no further explanation about that folder/location.²¹

u. When SA [REDACTED] reviewed DC3's report he identified images and videos of "intimate interactions" between the Accused and [REDACTED] in the Accused's barracks room. The images he specifically identified included IMG_6190.HEIC, IMG_6191.HEIC, IMG_6192.HEIC, IMG_6194.HEIC, and IMG_6542.HEIC. The first four images were timestamped on 3 December 2020 and appear to have been taken in the Accused's barracks room. The fifth image was timestamped 10 December 2020 and appears to have been taken in TMFN [REDACTED] barracks room.

v. DC3 found videos on both phones which it deemed relevant to SA [REDACTED] request because they contained: sexual content; persons visually similar to the Accused or [REDACTED] metadata appearing to place [REDACTED] on Naval Base Guam; and/or file paths that indicated the videos had been shared between the Accused and [REDACTED]. Again, the DC3 report is very detailed in describing where the videos were found on [REDACTED] phone. The report explained that one video, with a MD5 Hash value matching that of a video found on [REDACTED] phone, was found in the Snapchat application on the Accused's phone. DC3 generated three reports, comprising 76 videos, from the "Physical_01" and "Secure_Folder_01" extractions. As with the photos, the DC3 report provided very little information about the specific location of these videos on the Accused's phone or what led DC3 to the files contained within those extractions.

w. SA [REDACTED] identified at least five videos of sexual activity between the Accused and [REDACTED] on [REDACTED] phone. Of note, videos IMG_5388.mp4 and IMG_5389.mp4 show a penis penetrating a vulva. These videos were timestamped within approximately five minutes of each other. The Accused's face appears towards the end of IMG_5388.mp4. SA [REDACTED] IA explained that DC3

¹⁹ The photos in the DC3 report have been redacted.

²⁰ DC3 identified photos IMG_5388.jpg, IMG_5389.JPG, and IMG_5426.jpg from [REDACTED] phone. They were found in the DCIM folder, which DC3 states is the default location used by the operating system to store photos either taken by the phone's camera, screenshotted by the phone, or downloaded to the phone.

²¹ As the Accused's phone and [REDACTED] phone use different operating systems, the Court will not assume that the DCIM folder on the Accused's phone is a default photo storage location as DC3 explained the DCIM folder was the default photo storage location on [REDACTED] phone.

²² Though the IA uses the term "vagina," the Court will use the medically correct term.

also found two modified versions of IMG_5388 and IMG_5389; an emoji covered the Accused's and [REDACTED] genitals in each modified image. Another video showed a penis being stimulated by a hand. This video appears to have been taken in the Accused's barracks room.

x. According to SA [REDACTED] IA, DC3 found videos on the Accused's phone identical to: IMG_5388.mp4; the emoji-modified version of IMG_5389.mp4; and the video of the penis being stimulated by a hand. Based on the file names for these videos on the Accused's phone, they appear to have been shared via Snapchat. The video identical to IMG_5388.mp4 and the emoji-modified version of IMG_5389.mp4 match the description of the videos the Accused told SA [REDACTED] sent him via SnapChat. The Accused had told SA [REDACTED] and INV [REDACTED] he had [REDACTED] emoji-modified video from his phone.

y. DC3 reviewed the Snapchat and WhatsApp calls and messages on both phones and found communications "relevant to the request based on their content and time frame." No information is provided in either the DC3 Report or SA [REDACTED] IA about what time frame was designated by SA [REDACTED] and/or used by DC3 during their analysis.

z. DC3 reviewed the Accused's WhatsApp messages and found several messages with the contact "Sis." The number associated with "Sis," 1-671-483-1820, is the phone number NCIS used to communicate with [REDACTED] mother once [REDACTED] phone had been seized. This same number was used by [REDACTED] phone in some capacity in December 2020. At approximately 18:09, 15 December 2020, "Sis" messaged the Accused "they might check your phone or ask if you saved our videos."²³ In the subsequent conversation, the Accused asked if "Sis" had deleted him on "sc" and "Sis" advised the Accused to change his "sc" password. Based on other messages in the conversation, the Court finds [REDACTED] was using the "Sis" account at this time. At approximately 18:24, the Accused asked "Sis," "Did you delete everything even b4 I started msging you? I mean on whatsapp."

aa. Snapchat messages between the Accused and [REDACTED] were "partially recovered."²⁴ In messages on 14 December 2020, they talked about [REDACTED] meeting another guy, TMFN [REDACTED] and their own sexual desires. The next morning, around 0705, they discussed people asking [REDACTED] how she got on base and the Accused told her he would go to "federal prison" if she revealed his name. It is not clear if the messages included in the DC3 report were recovered from the Accused's phone or [REDACTED] phone.

bb. DC3 reviewed the internet search history on the Accused's phone.²⁵ At approximately 0948, 15 December 2020, the Accused's phone was used to conduct a search for "what happens if you sneak into a military base."²⁶ At approximately 1805 on 6 December 2020, a search was conducted for "what happen if you got in trouble on military."

²³ This message appears to have been sent via WhatsApp.

²⁴ This is the phrase SA [REDACTED] used in his IA. According to DC3 many messages from [REDACTED] Snapchat account had been deleted and recovered using a forensic tool; the message content was not recovered for every message.

²⁵ DC3 also reviewed the internet search history on [REDACTED] phone.

²⁶ Guam is ten hours ahead of UTC.

cc. The evidence concerning the potential evidence found on the Accused's phone is limited to the DC3 Report and SA [REDACTED] IA.

dd. The Government has notified the Defense it intends on introducing statements of the Accused "recorded in the extraction of [his] phone" and evidence from his phone "which contains videos, photographs, electronic communication, and associated metadata." No further detail was provided as to which specific statements or other evidence would be used by the Government at trial.

4. Statement of Law.

Nature of the Accusation

An "involuntary statement" is a statement "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."²⁷ In response to a timely-made defense objection to the introduction of an accused's statement, the Government must demonstrate by a preponderance of the evidence that the accused made the statement voluntarily before it may be received into evidence.²⁸

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against [themselves]."²⁹ This constitutional right to remain silent "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."³⁰ The Fifth Amendment's protection against self-incrimination "addresses 'real and appreciable, and not merely imaginary and unsubstantial, hazards of self-incrimination.'"³¹ "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled."³²

In *Miranda v. Arizona*,³³ the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. These prophylactic measures were adopted to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation.³⁴

²⁷ M.R.E. 304(a)(1)(A). See *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

²⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. (M.R.E.) 304(f)(6) and (7) (2019); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019); quoting *United States v. Freeman*, 65 M.J. at 453.

²⁹ U.S. Const., Amend. V.

³⁰ *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972).

³¹ *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015); quoting *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

³² *Castillo*, 74 M.J. at 165; quoting *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 189 (2004).

³³ 384 U.S. 436 (1966).

³⁴ *Id.* at 467.

Article 31(b), a statutory precursor to *Miranda*, implements the Article 31(a) privilege against self-incrimination in the military.³⁵ Article 31(b) requires:

No person subject to this chapter may interrogate, or request any statement from, an accused or person suspected of an offense without first informing [them] of the nature of the accusation and advising [them] that [they do] not have to make any statement regarding the offense of which [they are] accused or suspected and that any statement made by [them] may be used as evidence against [them] in a trial by court-martial.³⁶

These rights were enacted to protect servicemembers from the “subtle pressures which exist[] in military society” and can transform “the mere asking of a question under certain circumstances [into] the equivalent of a command.”³⁷ “Article 31(b) warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.”³⁸ More succinctly, “Article 31(b) requires rights’ warnings if: (1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry.”³⁹ A statement taken in violation of Article 31 or “through the use of coercion, unlawful influence, or unlawful inducement” is inadmissible at a court-martial.⁴⁰

Article 31(b) provides in pertinent part that an accused must be informed of “the nature of the accusation” and advised “that he does not have to make any statement regarding the offense of which he is accused or suspected.” An interviewer’s “[a]dvice as to the nature of the charge” to the interviewee “need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge” to comply with Article 31(b).⁴¹ “[P]aternal advice, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy ... Article 31.”⁴² While Article 31(b) does not spell out the degree of specificity required, case law sets forth that:

[t]he purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.⁴³

³⁵ *United States v. Evans*, 75 M.J. 302, 304-305 (C.A.A.F. 2016).

³⁶ U.C.M.J. (2019). *See* M.R.E. 305(c)(1).

³⁷ *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014); *quoting United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981)

³⁸ *Jones*, 73 M.J. at 361; *citing United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (internal citations omitted).

³⁹ *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *citing United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996). C.A.A.F. rejected *Duga*’s second prong, that “the person questioned perceived that the inquiry involved more than a casual conversation,” in *Jones*.

⁴⁰ Article 31(d).

⁴¹ *United States v. Simpson*, 54 MJ 281, 284 (C.A.A.F. 2000); *quoting United States v. Davis*, 8 U.S.C.M.A. 196, 198 (1957).

⁴² *Id.*

⁴³ *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997); *quoting United States v. Rice* 29 C.M.R. 340, 342

Courts have further explained:

It is not necessary that an accused or suspect be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated. Nevertheless, the accused or suspect must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event.⁴⁴

Such factors to be considered include “whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses.”⁴⁵ “The key to the inquiry as to sufficiency of the notice requires considering the precise wording of the warning in the context ‘of the surrounding circumstances and the manifest knowledge of the accused ...’”⁴⁶

Scope of Consent

The Fourth Amendment to the Constitution of the United States provides: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” “A search that is conducted pursuant to a warrant is presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions.”⁴⁷ MREs 311-317 implement the protection of the Fourth Amendment for military members.⁴⁸

Data stored within a cell phone falls within the Fourth Amendment’s protections.⁴⁹ “Therefore, cell phones may not be searched without probable cause and a warrant unless the search and seizure falls within one of the recognized exceptions to the warrant requirement.”⁵⁰ As such, evidence obtained from a Government search of cell phone data generally will be inadmissible unless (1) the search was conducted pursuant to a search authorization or warrant, or (2) a recognized exception applies. The nature of electronic devices and their vast storage ability “present distinct issues surrounding where and how incriminating evidence may be

(C.M.A. 1960) (further citation omitted).

⁴⁴ *Simpson*, 54 M.J. at 284; citing *United States v. Huelsman*, 27 M.J. 511, 513 (A.C.M.R. 1988) (further citations omitted). See *United States v. Nitschke*, 31 C.M.R. 75 (1961) (Advising a suspect that the agent was investigating a traffic accident was sufficient to warn him of a negligent homicide connected to the accident.).

⁴⁵ *Simpson*, 54 M.J. at 284; citing *United States v. Willeford*, 5 M.J. 634 (A.F.C.M.R. 1978); *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978); and *United States v. Davis*, 24 C.M.R. 6 (C.M.A. 1957).

⁴⁶ *Rogers*, 47 M.J. at 137; quoting *Davis*, 24 C.M.R. at 8.

⁴⁷ *United States v. Wicks*, 73 M.J. 93, 99 (CAAF 2014); quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal quotations omitted).

⁴⁸ *United States v. Nieto*, 76 M.J. 101, 106 (CAAF 2017); citing *United States v. Hoffman*, 75 M.J. 120, 123 (CAAF 2016).

⁴⁹ *Riley v. California*, 573 U.S. 373, 401–03 (2014). See also *Wicks*, 73 M.J. at 99.

⁵⁰ *Wicks*, 73 M.J. at 99.

located.”⁵¹ Searches of electronic devices must be “expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent.”⁵²

A search incident to lawful, voluntary consent does not require probable cause.⁵³ Whether consent was voluntary, and therefore valid, is based on all the circumstances.⁵⁴ The burden is on the Government to prove consent to search by clear and convincing evidence.⁵⁵ The person granting consent to search may limit that search “in terms of time, place, or property.”⁵⁶ The scope of the search may also be limited, but “the onus is on the [person granting consent] to expressly limit the scope of his consent.”⁵⁷ “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the [law enforcement] officer and the suspect?”⁵⁸ However, “investigators [must] account for any express or implied limitations on a consent to search.”⁵⁹

Evidence may also be lawfully seized if, during the course of otherwise lawful activity, to include executing a search based on consent, a government agent observes in a reasonable fashion property or evidence that the person has probable cause to seize.⁶⁰ “[F]or the plain view exception to apply: (1) the officer must not violate the Fourth Amendment in arriving at the spot from which the incriminating materials can be plainly viewed; (2) the incriminating character of the materials must be immediately apparent; and (3) the officer must have lawful access to the object itself.”⁶¹

Evidence obtained during an unlawful search may be admissible “when the evidence would have been obtained even if such unlawful search ... had not been made.”⁶² This “exception to the exclusionary rule allow[s] admission of evidence that, although obtained improperly, would have been obtained by another lawful means.”⁶³ To qualify for the inevitable discovery exception the Government “must establish by a preponderance of the evidence, ‘that *when the illegality*

⁵¹ *United States v. Richards*, 76 M.J. 365, 370 (C.A.A.F. 2017). See *United States v. Betancourt*, 2017 CCA LEXIS 386, *17 (“Modern cell phones are a door to a house with an infinite number of rooms, and those rooms can be filled with all of the most personal makers of our private lives.”); See *Riley*, 134 S. Ct. at 2489 (“One of the most notable distinguishing features of modern cell phones is their immense storage capacity.”).

⁵² *Richards*, 76 M.J. at 370; citing *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) (“On one hand, it is clear that because criminals can – and often do – hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required ... On the other hand, ... granting the Government a *carte blanche* to search every file on the hard drive impermissibly transforms a ‘limited search into a general one.’”)

⁵³ MRE 314(e). See *Schneekloth v. Bustamonte*, 412 U.S. 218, (1973).

⁵⁴ MRE 314(e)(4).

⁵⁵ MRE 314(e)(5).

⁵⁶ MRE 314(e)(3); See *Hoffman*, 75 M.J. at 124 and *United States v. Dease*, 71 M.J. 116, 120 (CAAF 2012).

⁵⁷ *United States v. Gitto*, 2019 CCA Lexis 6, *16 (N.M.C.C.A. 2019) (“Limitations will not be inferred ... subjective intent does not control.”); citing *United States v. Wallace*, 66 M.J. 5, 8 (C.A.A.F. 2008).

⁵⁸ *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (further citation omitted).

⁵⁹ *United States v. Crocker*, 2020 CCA Lexis, 80, *14 (N.M.C.C.A. 2020); quoting *Wallace*, 66 M.J. at 8 (alternation in *Crocker*).

⁶⁰ M.R.E. 316(c)(5)(C). See *Crocker*, at *26-27.

⁶¹ *Richards*, 76 M.J. at 371; citing *Horton v. California*, 496 U.S. 128, 136-37 (1990). See *Crocker*, at 27.

⁶² M.R.E. 311(c)(2).

⁶³ *Wallace*, 66 M.J. at 10; citing *Nix v. Williams*, 467 U.S. 431, 444 (1984).

occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.”⁶⁴

5. Analysis and Conclusions of Law.

a. Nature of the Accusation

On 15 December 2020, the Accused was suspected of an offense, SA [REDACTED] and INV [REDACTED] were participating in an official law enforcement investigation, and the Accused was subject to a custodial interrogation. Prior to any questioning, SA [REDACTED] advised the Accused of his rights pursuant to *Miranda* and Article 31(b) using a standard rights advisement form. The Accused was notified that he was suspected of “assisting in unlawful access to a naval installation and child pornography.” The sole Defense challenge to the rights advisement is that SA [REDACTED] did not appropriately advise the Accused of the nature of the accusations against him. More specifically, the Court must determine whether SA [REDACTED] failure to advise the Accused he was suspected of obstruction of justice renders the Accused’s statements about deleting evidence or instructing others to delete evidence inadmissible.

The Court finds that the notification that the Accused was suspected of “assisting in unlawful access to a naval installation and child pornography” was sufficient to orient him to the nature of the allegations against him, to include obstruction of justice. The conduct that forms the basis of obstruction of justice is the Accused allegedly telling TMFN [REDACTED] to delete messages and deleting messages with TMFN [REDACTED] and [REDACTED] from his phone. Given the specific facts of this case and the knowledge of the Accused, the notice SA [REDACTED] provided is closely related to the offense of obstruction of justice by deleting evidence.

The Accused’s alleged obstruction of justice is part of a continuous sequence of events with his alleged “assist[ance] in unlawful access to a naval installation.” On 14 December 2020, the day before the interrogation, the Accused had brought [REDACTED] and [REDACTED] on base in the trunk of his car. The next morning, the Accused, [REDACTED] and [REDACTED] were approached by law enforcement and the Accused was asked if he knew the girls. The Accused denied knowing them and went on his way. Later that day, the Accused received messages from [REDACTED] which warned him that “they,” presumably law enforcement, might check his phone or ask about “our videos.” The Accused and [REDACTED] then discussed steps they should take to protect information on their Snapchat accounts. At another point during the day, the Accused advised TMFN [REDACTED] to delete messages between them. The Accused did this in order to “cover up” his history of communicating with TMFN [REDACTED] and [REDACTED] in order to bring unauthorized people on to Naval Base Guam. His actions throughout the day on 15 December 2020 were well on his mind when he was brought into NCIS that evening.

Similarly, SA [REDACTED] notice to the Accused that he was suspected of “child pornography,” sufficiently oriented him to the alleged incident of obstruction of justice by deleting child pornography images or videos.⁶⁵ As discussed above, in the hours before he was interrogated by

⁶⁴ *Hoffman*, 75 M.J. at 124-25; *quoting Dease*, 71 M.J. at 122 (further citation omitted).

⁶⁵ Though he was not charged with obstruction of justice for deleting the videos he received from [REDACTED] on Snapchat,

SA [REDACTED] and INV [REDACTED] told the Accused “they might check your phone or ask if you saved our videos” and they discussed securing their Snapchat accounts. The impact these conversations had on the Accused were evident as he initially denied having produced any “sex videos” with [REDACTED] when SA [REDACTED] first asked about them. Given the close proximity in time of the conversation with [REDACTED] and his interrogation, obstructing of justice by deleting evidence of child pornography was within the same frame of reference provided by the given notice.

As in *United States v. Burkett*, the SA [REDACTED] warnings “adequately oriented [the Accused] to the nature of the incident the authorities were investigating.”⁶⁶ The nature of the accusation SA [REDACTED] gave the Accused would have oriented him to obstructing justice, whether it was for deleting evidence or instructing others to delete evidence. When he heard his Article 31(b) warnings, the Accused would have been aware that any discussion about “assisting in unlawful access to a naval installation and child pornography” would have included a discussion of the evidence of those alleged acts. Considering the Accused’s involvement with law enforcement and communications with [REDACTED] and TMFN [REDACTED] earlier that day, this is especially true.

Further, the evidence does not show that SA [REDACTED] intentionally left out obstruction of justice in order to surprise the Accused with questions about it later.⁶⁷ While SA [REDACTED] provided only partial notice of the offenses the Accused was suspected of, it is “not necessary to that an accused ... be advised of each and every possible charge under investigation.”⁶⁸ Given the facts of this case and the knowledge of the Accused, the warnings in this case were sufficient to meet the purpose of Article 31(b).

b. Scope of Consent

The circumstances surrounding the Accused’s consent to a search of his phone here are sufficiently similar to those in *United States v. Gitto*⁶⁹ to warrant a similar finding; the Accused did not limit the scope of his consent beyond what was identified in the PASS. The language in the PASS the Accused signed matches that quoted by NMCCA in *Gitto*.⁷⁰ However, in *Gitto*, the suspect expressed his hesitance for the investigators to search his entire phone stating, “I just have like ... other ... personal stuff on there.”⁷¹ The same detailed conversation, and hesitance on behalf of the Accused, is missing in this case.

On 15 December 2020, SA [REDACTED] made it clear he would search the Accused’s entire phone for child pornography and evidence of unauthorized access to a naval installation. The Accused

the Accused was questioned about deleting them, which appropriately raises the issue of notice as it applies to deleting those videos.

⁶⁶ 1998 CCA Lexis 411, *10 (N.M.C.C.A. 1998) (Warnings adequate where the suspect was notified was suspect of theft of Government property, but not that he was also suspected of conspiring to sell and selling the same property.)

⁶⁷ *United States v. Skinner*, 2011 CCA Lexis 140, *11 (N.M.C.C.A. 2011) (Finding “no reason to believe that the NCIS agents were advising the appellant that he was suspected of one crime as a ruse to lure him into confessing to another crime.”).

⁶⁸ *Simpson*, 54 M.J. at 284; citing *Huelsman*, 27 M.J. at 513 (further citations omitted). See also *Simpson*, 54 MJ at 284; quoting *Davis*, 8 U.S.C.M.A. at 198.

⁶⁹ 2019 CCA Lexis 6 (N.M.C.C.A. 2019).

⁷⁰ *Id.* at *7.

⁷¹ *Gitto*, at *5-6.

made no attempt to limit the scope of that search in any manner. The PASS clearly stated SA [REDACTED] would search the “all electronic media files and data files” on the Accused’s phone. SA [REDACTED] statements that “we are going to go through the phone, we’re going to make sure the stuff we talked about is there and nothing else,” did not limit the scope of consent to only areas where child pornography might be found. When taken in context, that statement was merely indicative of what SA [REDACTED] primary, but not only, focus would be during the search. The impact of the statements is outweighed by the plain language of the PASS and the rest of the discussion concerning the subsequent search. As in *Wallace*,⁷² the additional dialogue between the Accused and SA [REDACTED] was insufficient to support a finding that a reasonable observer would have found the scope of consent as limited beyond the search authorized by the language of the PASS.

There is no evidence the Accused had a subjective belief he had limited the search of his phone only to those areas where child pornography might be found. Though he had studied cyber security at the college level and demonstrated some knowledge of how phone storage and deletion worked, the Accused asked no questions about the search and did not attempt to impose any limitations.⁷³ The Accused quickly agreed to a search; he expressed no hesitancy about the search and “when completing the consent form, he did not write any limitations on the consent form.”⁷⁴ Considering all the circumstances, the Accused consented to a broad and wide-ranging search of his phone for evidence of “assisting in unlawful access to a naval installation and child pornography.” As in *Richards*,⁷⁵ the Government was therefore entitled to search the Accused’s phone for any communication that related to his allegedly bringing the [REDACTED] and [REDACTED] on base in violation of the installation regulations.⁷⁶

The Court finds a reasonable objective observer would believe the Accused consented to a general search of his phone where evidence of “assisting in unlawful access to a naval installation and child pornography” would be found. Accordingly, a reasonable observer would have expected NCIS to search the Accused’s entire phone looking for child pornography and evidence associated with him and TMFN [REDACTED] bringing the [REDACTED] and [REDACTED] on base. Such a search would likely include messages between the Accused and TMFN [REDACTED] and the girls using Snapchat and WhatsApp. A reasonable observer would find that text messages, regardless of application, would be considered “electronic media and data files.” A search for such messages would also include unallocated space as the Accused indicated earlier in his interrogation that he had deleted communications with TMFN [REDACTED] and [REDACTED].

c. Did the Government exceed the scope of the PASS during its search his phone?

Though the Accused did not narrow the scope of the search beyond what was written on the PASS, the Court cannot make a ruling on the admissibility of any evidence found on the Accused’s phone. There is insufficient evidence for the Court to determine if the Government

⁷² 66 M.J. at 7-8.

⁷³ Both *Gitto* and *Spinoza* (2019 CCA Lexis 40) involved broader, more detailed discussions between the suspects and law enforcement. However those resulted from Gitto’s hesitance to give consent and his articulated concern about “personal stuff” on his phone and Spinoza asking NCIS if they would only look at his text messages.

⁷⁴ *Spinoza*, 2019 CCA Lexis 40, *17-18.

⁷⁵ 76 M.J. 365.

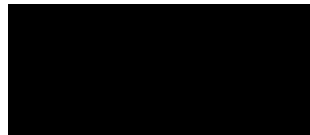
⁷⁶ 76 M.J. at 370.

exceeded the scope of the search, as detailed above, when it found the evidence on the Accused's phone. It is worth noting, the Government has not provided a particularized list of the evidence it found on the Accused's phone and intends on introducing at trial. Until such time as the Court knows the particular evidence the Government seeks to admit, the Court cannot determine if that evidence was found within the scope of consent granted by the Accused.⁷⁷

If the Government seeks to introduce evidence from the Accused's phone, it must submit a list of the evidence to the Court no later than 21 June 2022. The Government will have the opportunity to demonstrate the admissibility of that evidence pursuant to M.R.E.s 311 and 314 at the 7 July 2022 Article 39(a).

6. Ruling.

The Defense motion is **GRANTED IN PART** and **DENIED IN PART**.



B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

⁷⁷ See M.R.E. 311(d) and 314(e).

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

UNITED STATES V. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	RULING – DEFENSE MOTION TO DISMISS – FAILURE TO STATE AN OFFENSE 6 JUL 2022
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1. Statement of the Case.

The Defense filed a motion to dismiss the Sole Specification of Additional Charge II for failure to state an offense pursuant to Rule for Courts-Martial 907(b)(2)(E).¹ The Government responded on 22 April 2022.² On 28 April 2022, an Article 39(a) session was held at Building 1555, [REDACTED]. The Defense supplemented their filing on 1 May 2022 with additional case law.³

2. Issues

- a. Does the Sole Specification of Additional Charge II state an offense?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

a. In November 2020, the Accused video-called [REDACTED] and [REDACTED] using WhatsApp [REDACTED] and [REDACTED] were in their shared bedroom at home, the Accused was in his barracks room onboard Naval Base Guam. During the call, the Accused allegedly exposed his penis and began masturbating. [REDACTED] and [REDACTED] claim they could clearly see the Accused's penis.

b. At the time of the video-call, [REDACTED] was [REDACTED] and [REDACTED] was [REDACTED]

4. Statement of Law.

The military is a notice pleading jurisdiction.⁴ A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a

¹ AE XII.

² AE XXIX.

³ AE XXXV.

⁴ *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011).

defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”⁵

The test for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.”⁶

Under Article 120c(c), Uniform Code of Military Justice (U.C.M.J.) “[a]ny person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia ... is guilty of indecent exposure.”⁷ An “indecent manner” is defined as “conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”

In *United States v. Uriostegui*,⁸ the Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) held that sending an image of an exposed penis via electronic means, in that case text message, was legally and factually insufficient to support a conviction for indecent exposure under Article 120c(c). In reaching its holding, N.M.C.C.A. compared Articles 120b and 120c which were enacted at the same time. In Article 120b, Congress “defined sexual abuse of a child ... as the commission of a ‘lewd act’ upon a child, to include (among other conduct) intentionally exposing ‘one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.’”⁹ Citing an Army Court of Criminal Appeals (A.C.C.A.) case, N.M.C.C.A. highlighted the fact that the language “via any communication technology” is “notably absent” from Article 120c(c).¹⁰ The absence of that language was persuasive, as “where ‘Congress includes particular language in one section of a statute but omits it in another section ... it is generally presumed that Congress acts intentionally, and purposely in the disparate ... exclusion.’”¹¹ Following the lead of the A.C.C.A., N.M.C.C.A. held that Article 120c(c) includes a “temporal and physical presence aspect” which means “violations occur when a victim [may be] present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts.”¹² N.M.C.C.A. has consistently followed this holding in subsequent indecent exposure cases.¹³

⁵ *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007); *United States v. Sutton*, 68 M.J. 455, 455 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

⁶ *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987); citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

⁷ This version of Article 120c(c) was effective 28 June 2012.

⁸ 75 M.J. 857 (N.M.C.C.A. 2016).

⁹ 75 M.J. at 864; quoting Article 120b(h)(5)(B) (emphasis in *Uriostegui*).

¹⁰ 75 M.J. at 864; quoting *United States v. Williams*, 75 M.J. 663, 664, (A.C.C.A. 2016) (“[T]here is an added danger and discomfort when people physically expose in the presence of their victims as opposed to displaying or sending people a pornographic picture.”).

¹¹ 75 M.J. at 864; quoting *United States v. Wilson*, 66 M.J. 39, 45-46 (C.A.A.F. 2008) (further citation omitted).

¹² 75 M.J. at 865; quoting *Williams*, 75 M.J. at 666 (modification and emphasis in *Uriostegui*).

¹³ See *United States v. Calixto*, 2016 CCA Lexis 706 (N.M.C.C.A. 2016) (Accused sent a picture of his exposed penis to an undercover NCIS agent.); *United States v. Sanchez*, 2016 CCA Lexis 717 (N.M.C.C.A. 2016) (Accused sent a “digital image of his exposed penis” to an NCIS agent posing as a 14-year-old girl.); *United States v. Sarkozy*, 2017 CCA Lexis 47 (N.M.C.C.A. 2017) (Accused sent a picture of his erect penis to an NCIS agent posing as a 14-

5. Analysis and Conclusions of Law.

The Sole Specification of Additional Charge II alleges that the Accused “on or about 9 November 2020, intentionally expose[d] his genitalia, in an indecent manner, to wit: displaying his penis on camera to [REDACTED].” As Article 120c(c) has been interpreted by N.M.C.C.A. in *Uriostegui* and subsequent cases, this specification does not state an offense because it does not allege [REDACTED] viewed the Accused’s *actual* penis. A video of a penis, whether produced contemporaneously with a viewing by a victim, is still an image or a likeness of the penis. Accordingly, live-streaming video images of his exposed penis via WhatsApp does not meet the temporal and physical presence aspects required by Article 120c(c).

This Court declines the Government’s invitation to find Article 120c(c) includes the conduct alleged in the Sole Specification of Additional Charge II based on the Court of Appeals for the Armed Forces’ (C.A.A.F.) holding in *United States v. Ferguson*.¹⁴ There the accused’s guilty plea to indecent exposure, in violation of Article 134, was found provident where he had “transmitted live images of himself over the Internet, intentionally exposing his naked body and erect penis while ejaculating to a person he thought was a fourteen-year-old boy.”¹⁵ However, this case is distinct from *Ferguson*. The conduct at issue there, intentionally exposing his penis to a 14-year-old via live images over the internet, is now a violation of Article 120b, as the Government has charged in Additional Charge I, Specification 3.¹⁶ As discussed above, since *Ferguson* was decided, Congress has criminalized the exposure of one’s genitalia to children over “any communication technology,” but not such an exposure to adults.¹⁷ Due to the change in the law in 2012, *Ferguson* does not apply in this case.

6. Ruling.

The Defense motion is **GRANTED**. The Sole Specification of Additional Charge II is **DISMISSED WITHOUT PREJUDICE**.

[REDACTED]
B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

year-old girl.); *United States v. Dellacamera*, 2017 CCA Lexis 209 (N.M.C.C.A. 2107) (Accused sent “an image of his own naked torso and partially exposed penis” to a 14-year-old girl.); *United States v. Wiley*,¹³ 2017 CCA Lexis 538 (N.M.C.C.A. 2017) (Accused sent digital pictures of his exposed penis via text message.); and *United States v. Vankemseke*, 2017 CCA Lexis 560 (N.M.C.C.A. 2017) (Accused sent “photographs of his naked, erect penis via text message.”).

¹⁴ 68 M.J. 431 (2010).

¹⁵ *Id.* At 433.

¹⁶ See *Uriostegui*, 75 M.J. at 865.

¹⁷ *Id.*

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

UNITED STATES V. CHRISTOPHER D. MARSHALL CSSSN/E-3, USN	RULING – DEFENSE MOTION FOR APPROPRIATE RELIEF – CONTINUANCE 15 JUL 2022
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1. Statement of the Case.

The Defense filed a motion for a continuance pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1).¹ In an R.C.M. 802 Conference on 7 July 2022, the Government objected to continuing the Article 39(a) session.² Given the timing of the motion and the Article 39(a) hearing the Defense sought to continue, the Court granted the Defense motion at the 7 July 2022 802 Conference. This written ruling memorializes the Court's ruling.

2. Issue

Should the Article 39(a) scheduled for 7 July 2022 be continued?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

a. On 5 May 2022, the Court issued a Trial Management Order (TMO) which set an Article 39(a) date for 7 July 2022.³ Defense Counsel filed motions in accordance with this TMO, to include a motion to suppress evidence found on [REDACTED] phone.⁴

b. The Government notified the Court in a 6 July 2022 email that they intended on making an oral motion to introduce statements of the Accused at the 7 July 2022 Article 39(a) hearing.

c. On 7 July 2022, the Accused submitted a request for LT Richey to be assigned as his Individual Military Counsel (IMC).

d. Defense Service Office Pacific (DSO PAC) is currently short-staffed. The Executive Officer (XO) is on paternity leave and the Senior Defense Counsel (SDC) executed a permanent

¹ AEs XLIX and L.

² AE LI.

³ AE XXXIX.

⁴ AEs LXIII, XLIV, XLIV(a), and XLIV(b). [REDACTED] is a witness and alleged victim in this case.

change of station (PCS) on 1 July 2022. The acting SDC is detailed to represent TMFN [REDACTED] a potential witness against the Accused. The only other core counsel at DSO PAC is located at Fleet Activities Sasebo.

4. Statement of Law.

Where there is reasonable cause, a military judge may “grant a continuance to any party for such time, and as often, as may appear to be just.”⁵ This is reiterated by the Discussion to R.C.M. 906(b)(1). Accordingly, the burden is on the moving party to prove there is reasonable cause for a continuance.⁶ “Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.”⁷

A judge's decision to deny a continuance is reviewed for an abuse of discretion.⁸ Appellate Courts consider several factors in assessing whether a military judge abused his discretion by denying a continuance.⁹ Those factors include: “surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.”¹⁰ Not all of the factors will be present in each case.

5. Analysis and Conclusions of Law.

The Defense has established there is reasonable cause to continue the Article 39(a) hearing currently scheduled for 7 July 2022. Additionally, the *Miller* factors also support granting the requested continuance. The Accused has recently submitted a request for an IMC. Though this request has been submitted late in the trial process, it was due to an emergent issue in the case and not due to a lack of diligence by the Accused or Detailed Defense Counsel. Accordingly, the Court will afford the Accused the opportunity to have that request processed.

The five-week continuance requested is not a significant delay when the current 11 October 2022 trial date is considered.¹¹ Granting the continuance would allow the Accused the opportunity to have his IMC request heard and give the IMC, if granted, sufficient time to prepare for the Article 39(a) hearing. Time to prepare for the hearing is critical here, as the hearing will concern the admissibility of cell phone-based evidence against the Accused. The continuance will also give both parties the opportunity to fully research and file written motions concerning the Accused's statements the Government seeks to introduce at trial.

The Government will suffer no prejudice due to the requested continuance. Holding the

⁵ Article 40, Uniform Code of Military Justice (U.C.M.J.). See R.C.M. 906(b)(1).

⁶ R.C.M. 905(c).

⁷ Discussion, R.C.M. 906(b)(1).

⁸ *United States v. Weisbeck*, 50 M.J. 461, 464 (1999).

⁹ *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997); citing F. Gilligan and F. Lederrer, *Court-Martial Procedure* § 18-32.00 at 704 (1991).

¹⁰ *Id.*

¹¹ Neither party has asked to continue the trial date.

hearing on 11 August 2022 still provides the Government approximately two months to prepare for a contested court-martial based on the Court's rulings. The continuance will not prevent the Government from calling any witnesses at the Article 39(a) nor will it cause logistical issues for the contested court-martial, as that date remains as set on 11 October 2022.

6. Ruling.

The Defense motion is **GRANTED**.

The Article 39(a) hearing is set for 11 August 2022. Any motions the parties intend file, with good cause shown for late filing, must be filed no later than 28 July 2022. Responses to those motions are due on 4 August 2022. This includes the Government's motion to introduce statements of the Accused.



B. C. ROBERTSON
CDR, JAGC, USN
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS				
SECTION A - ADMINISTRATIVE				
1. NAME OF ACCUSED (last, first, MI) Marshall, Christopher D.	2. BRANCH Navy	3. PAYGRADE E-3	4. DoD ID NUMBER [REDACTED]	
5. CONVENING COMMAND Joint Region Marianas	6. TYPE OF COURT-MARTIAL General	7. COMPOSITION Judge Alone - MJA16	8. DATE SENTENCE ADJUDGED Oct 11, 2022	
SECTION B - FINDINGS				
SEE FINDINGS PAGE				
SECTION C - TOTAL ADJUDGED SENTENCE				
9. DISCHARGE OR DISMISSAL Dishonorable discharge	10. CONFINEMENT 36 months	11. FORFEITURES N/A	12. FINES N/A	13. FINE PENALTY N/A
14. REDUCTION E-1	15. DEATH Yes <input type="radio"/> No <input checked="" type="radio"/>		16. REPRIMAND Yes <input type="radio"/> No <input checked="" type="radio"/>	
17. HARD LABOR Yes <input type="radio"/> No <input checked="" type="radio"/>		18. RESTRICTION Yes <input type="radio"/> No <input checked="" type="radio"/>		
19. HARD LABOR PERIOD N/A				
20. PERIOD AND LIMITS OF RESTRICTION N/A				
SECTION D - CONFINEMENT CREDIT				
21. DAYS OF PRETRIAL CONFINEMENT CREDIT 0 days	22. DAYS OF JUDICIALLY ORDERED CREDIT 0 days	23. TOTAL DAYS OF CREDIT 0 days		
SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT				
24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT Dishonorable Discharge will be adjudged; no fines may be adjudged; confinement may be adjudged as set forth in Table A of the plea agreement; all terms of confinement will be served concurrently; and no other lawful punishments may be adjudged.				
SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION				
25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?	Yes <input type="radio"/> No <input checked="" type="radio"/>	26. PORTION TO WHICH IT APPLIES N/A	27. RECOMMENDED DURATION N/A	
28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION N/A				
SECTION G - NOTIFICATIONS				
29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?			Yes <input type="radio"/> No <input checked="" type="radio"/>	
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?			Yes <input checked="" type="radio"/> No <input type="radio"/>	
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?			Yes <input type="radio"/> No <input checked="" type="radio"/>	
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?			Yes <input checked="" type="radio"/> No <input type="radio"/>	
SECTION H - NOTES AND SIGNATURE				
33. NAME OF JUDGE (last, first, MI) ROBERTSON, BENJAMIN C.	34. BRANCH Navy	35. PAYGRADE O-5	36. DATE SIGNED Oct 11, 2022	38. JUDGE'S SIGNATURE ROBERTSON.BENJAMIN.CROSS Digitally signed by ROBERTSON.BENJAMIN.CROSS Date: 2022.10.11 17:27:25 +09'00'
37. NOTES				

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I	134	Specification 1:	Not Guilty	W/D			134-CD
		Offense description		Child pornography: production			
		Withdrawn and Dismissed		W/D without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.			
		Specification 2:	Not Guilty	W/D			134-CA
		Offense description		Child pornography: possessing or receiving or viewing			
		Withdrawn and Dismissed		W/D without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.			
Charge II	92	Specification 1:	Guilty	Guilty			092-B-
		Offense description		Failure to obey other lawful written order			
		Specification 2:	Guilty	Guilty			092-B-
		Offense description		Failure to obey other lawful written order			
		Specification 3:	Guilty	Guilty			092-B-
		Offense description		Failure to obey other lawful written order			
		Specification 4:	Guilty	Guilty			092-B-
		Offense description		Failure to obey other lawful written order			
		Specification 5:	Guilty by E&S	Guilty by E&S			092-C1
		Offense description		Dereliction of Duty			
		Exceptions and Substitutions		GUILTY, except for the word "willfully" and substituting the word "negligently." Of the excepted word, NOT GUILTY; Of the specification as excepted and substituted, GUILTY.			
		Specification 6:	Guilty by E&S	Guilty by E&S			092-C1
		Offense description		Dereliction of Duty			
		Exceptions and Substitutions		GUILTY, except for the word "willfully" and substituting the word "negligently." Of the excepted word, NOT GUILTY; Of the specification as excepted and substituted, GUILTY.			
		Specification 7:	Guilty by E&S	Guilty by E&S			092-C1
		Offense description		Dereliction of Duty			
		Exceptions and Substitutions		GUILTY, except for the word "willfully" and substituting the word "negligently." Of the excepted word, NOT GUILTY; Of the specification as excepted and substituted, GUILTY.			
		Specification 8:	Guilty by E&S	Guilty by E&S			092-C1
		Offense description		Dereliction of Duty			
		Exceptions and Substitutions		GUILTY, except for the word "willfully" and substituting the word "negligently." Of the excepted word, NOT GUILTY; Of the specification as excepted and substituted, GUILTY.			
		Additional Specification:	Not Guilty	W/D			092-C2
		Offense description		Dereliction of Duty			
		Withdrawn and Dismissed		W/D without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.			

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 III	131b	Specification 1:	Guilty	Guilty			131B--
		Offense description	Obstructing justice				
		Specification 2:	Guilty	Guilty			131B--
		Offense description	Obstructing justice				
		Specification 3:	Guilty	Guilty			131B--
		Offense description	Obstructing justice				
		Specification 4:	Guilty	Guilty			131B--
		Offense description	Obstructing justice				
Add Charge I	120b	Specification 1:	Not Guilty	W/D			120B1B
		Offense description	Sexual Assault of a Child				
		Withdrawn and Dismissed	W/D without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.				
		Specification 2:	Not Guilty	W/D			120B3A
		Offense description	Sexual Abuse of a Child				
		Withdrawn and Dismissed	W/D without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.				
		Specification 3:	Not Guilty	W/D			120B3A
		Offense description	Sexual Abuse of a Child				
Add Charge II	120b	Specification 1:	No plea entered	Dismissed			120C3A
		Offense description	Indecent Exposure				
		Withdrawn and Dismissed	Dismissed by the Court on 6 July 2022.				

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
Charge II	Specification 1:	1 month	Charge II, Spec 2,3,4,5,6,7,8; and Charge III, Spec 1,2,3,4 and the additional Spec	N/A	N/A
	Specification 2:	3 mos	Charge II, Spec 1,3,4,5,6,7,8; and Charge III, Spec 1,2,3,4 and the additional spec	N/A	N/A
	Specification 3:	6 mos	Charge II, Spec 1,2,4,5,6,7,8; and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Specification 4:	6 mos	Charge II, Spec 1,2,3,5,6,7,8; and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Specification 5:	1 month	Charge II, Spec 1,2,3,4,6,7,8; and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Specification 6:	3 mos	Charge II, Spec 1,2,3,4,5,7,8; and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Specification 7:	3 mos	Charge II, Spec 1,2,3,4,5,6,8; and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Specification 8:	3 mos	Charge II, Spec 1,2,3,4,5,6,7 and Charge III, Spec 1,2,3,4, and the Additional Spec	N/A	N/A
	Additional Specification	N/A	N/A	N/A	N/A
Charge III	Specification 1:	24 mos	Charge III, and Spec 2,3,4, and the Add Spec; and Charge II, Spec 1,2,3,4,5,6,7,8	N/A	N/A
	Specification 2:	24 mos	Charge III, and Spec 1,3,4, and the Add Spec; and Charge II, Spec 1,2,3,4,5,6,7,8	N/A	N/A
	Specification 3:	36 mos	Charge III, and Spec 1,2,4, and the Add Spec; and Charge II, Spec 1,2,3,4,5,6,7,8	N/A	N/A

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
	Specification 4:	36 mos	Charge III, Specs 1,2,3 and the Additional Spec; and Charge II, Specs 1,2,3,4,5,6,7,8	N/A	N/A
	Additional Specification:	36 mos	Charge III, Specs 1,2,3,4, and Charge II, Specs 1,2,3,4,5,6,7,8	N/A	N/A
Additional Charge I	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
	Specification 3:	N/A	N/A	N/A	N/A
Additional Charge II	Specification :	N/A	N/A	N/A	N/A

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
Marshall, Christopher, D.		E3	[REDACTED]
4. UNIT OR ORGANIZATION		5. CURRENT ENLISTMENT	6. TERM
[REDACTED]		15 Jan 20	4 Years
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Commander, Joint Region Marianas	General	Judge Alone - MJA16	11-Oct-2022
Post-Trial Matters to Consider			
11. Has the accused made a request for deferment of reduction in grade?		<input checked="" type="radio"/> Yes	<input type="radio"/> No
12. Has the accused made a request for deferment of confinement?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
13. Has the accused made a request for deferment of adjudged forfeitures?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
14. Has the accused made a request for deferment of automatic forfeitures?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
15. Has the accused made a request for waiver of automatic forfeitures?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
17. Has the accused submitted matters for convening authority's review?		<input checked="" type="radio"/> Yes	<input type="radio"/> No
18. Has the victim(s) submitted matters for convening authority's review?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
19. Has the accused submitted any rebuttal matters?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
20. Has the military judge made a suspension or clemency recommendation?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?		<input type="radio"/> Yes	<input checked="" type="radio"/> No
23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.			
<p>Accused requested clemency on 24 October 2022 to commute reduction in pay-grade from reduction to E-1 to reduction to pay-grade E-2. CA was advised by the Force Judge Advocate (FJA) for Joint Region Marianas of their clemency authority in this case as provided by JAGCNLSCINST 5814.1D, Art. 60a of the UCMJ, and R.C.M 1109. Specifically the FJA advised the CA that he may reduce, commute or suspend, in whole or in part, the reduction in pay-grade as requested by the accused.</p>			
24. Convening Authority Name/Title		25. SJA Name	
Benjamin R. Nicholson, RDML, USN, Commander, Joint Region Marianas		[REDACTED] LCDR, JAGC, USN	
26. SJA signature		27. Date	
[REDACTED]		Nov 7, 2022	

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

1. Action- In U.S. v. Culinary Specialist Submarine Seaman Christopher D. Marshall, U.S. Navy, the sentence is approved as adjudged and will be executed in accordance with the UCMJ, MCM, applicable regulations, and the terms of the plea agreement. No further action is taken.

2. Companion Cases- Though not identified as a companion case in the Statement of Trial Results, U.S. v. TMFN [REDACTED] U.S. Navy, is a similar case that involved similar offenses, was convened by the same convening authority, tried separately by the same judge, and prosecuted by the same trial counsel. On August 18, 2022, TMFN [REDACTED] pleaded guilty and was found guilty of two specifications of failure to obey a lawful order under Art. 92, UCMJ, one specification of willful dereliction of duty under Art. 92, UCMJ, and obstruction of justice under Art. 131b, UCMJ. He was sentenced at a judge only court-martial to a dishonorable discharge, reduction in pay-grade from E-3 to E-1, and 18 months of confinement. Only one (1) of CSSN Marshall's thirteen (13) specifications involved TMFN [REDACTED] (obstruction justice). In deciding my action in this case, I considered the disparity in punishment between these two cases given their similarities (types of offenses, same judge, same location, etc.). Given TMFN [REDACTED] willingness to assist in our prosecution of CSSN Marshall and the fact TFMN [REDACTED] was found guilty of four (4) vice thirteen (13) separate specifications, I determined that this disparity in punishment is warranted.

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

N/A

30. Convening Authority's signature

31. Date

08 NOV 2022

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

ENTRY OF JUDGMENT

Show Instructions		ENTRY OF JUDGMENT	
SECTION A - ADMINISTRATIVE			
1. NAME OF ACCUSED (LAST, FIRST, MI)		2. PAYGRADE/RANK	3. DoD ID NUMBER
MARSHALL, CHRISTOPHER, D.		E3	
4. UNIT OR ORGANIZATION		5. CURRENT ENLISTMENT	6. TERM
		15 Jan 2020	4 YEARS
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
JOINT REGION MARIANAS	General	Judge Alone - MJA16	11-Oct-2022
SECTION B - ENTRY OF JUDGMENT			
MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt			
<p>11. Findings of each charge and specification referred to trial. [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]</p> <p>Charge I: Violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934. Plea: Not Guilty. Finding: Withdrawn and dismissed.</p> <p>Specification 1: Production of child pornography on or about 8 November 2020. Plea: Not Guilty. Finding: Withdrawn and dismissed.</p> <p>Specification 2: Possessing child pornography on or about 15 December 2020. Plea: Not Guilty. Finding: Withdrawn and dismissed.</p> <p>Charge II: Violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. §892. Plea: Guilty. Finding: Guilty.</p> <p>Specification 1: Failure to obey other lawful written order on or about 8 November 2020. Plea: Guilty. Finding: Guilty.</p> <p>Specification 2: Failure to obey other lawful written order on or about 3 December 2020. Plea: Guilty. Finding: Guilty.</p> <p>Specification 3: Failure to obey other lawful written order on or about 10 December 2020. Plea: Guilty. Finding: Guilty.</p> <p>Specification 4: Failure to obey other lawful written order on or about 14 December 2020. Plea: Guilty. Finding: Guilty.</p> <p>Specification 5: Dereliction of duty on or about 8 November 2020. Plea: Guilty, except the word "willfully," substituting the word "negligently." Of the excepted word, NOT GUILTY; of the specification as excepted and substituted GUILTY. Finding: Of the specification as excepted Guilty. The excepted word, "willfully," was withdrawn and dismissed.</p>			

MARSHALL, CHRISTOPHER, D.

12. Sentence to be Entered. Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

On 11 October 2022, a military judge sentenced the Accused to the following:

Reduction to pay grade E-1.

To be confined as follows:

For Specification 1 of Charge II: confinement for 1 month.

For Specification 2 of Charge II: confinement for 3 months.

For Specification 3 of Charge II: confinement for 6 months.

For Specification 4 of Charge II: confinement for 6 months.

For Specification 5 of Charge II: confinement for 1 month.

For Specification 6 of Charge II: confinement for 3 months.

For Specification 7 of Charge II: confinement for 3 months.

For Specification 8 of Charge II: confinement for 3 months.

For Specification 1 of Charge III: confinement for 24 months.

For Specification 2 of Charge III: confinement for 24 months.

For Specification 3 of Charge III: confinement for 36 months.

For Specification 4 of Charge III: confinement for 36 months.

For Additional Specification of Charge III: confinement for 36 months.

The terms of the confinement will run concurrently.

Confinement for a total of 36 months.

A dishonorable discharge.

13. Deferment and Waiver. Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

The Accused requested the Convening Authority commute the reduction in pay grade from E-3 to E-2. The Convening Authority approved the sentence as adjudged.

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

N/A.

MARSHALL, CHRISTOPHER, D.

15. Judge's signature:	16. Date judgment entered:
	2 December 2022
17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.	
18. Judge's signature:	19. Date judgment entered:

MARSHALL, CHRISTOPHER, D.

CONTINUATION SHEET - ENTRY OF JUDGMENT

11. Findings (Continued)

Specification 6: Dereliction of duty on or about 3 December 2020.

Plea: Guilty, except the word "willfully," substituting the word "negligently." Of the excepted word, NOT GUILTY; of the specification as excepted and substituted GUILTY.

Finding: Of the specification as excepted Guilty. The excepted word, "willfully," was withdrawn and dismissed.

Specification 7: Dereliction of duty on or about 10 December 2020.

Plea: Guilty, except the word "willfully," substituting the word "negligently." Of the excepted word, NOT GUILTY; of the specification as excepted and substituted GUILTY.

Finding: Of the specification as excepted Guilty. The excepted word, "willfully," was withdrawn and dismissed.

Specification 8: Dereliction of duty on or about 14 December 2020.

Plea: Guilty, except the word "willfully," substituting the word "negligently." Of the excepted word, NOT GUILTY; of the specification as excepted and substituted GUILTY.

Finding: Of the specification as excepted Guilty. The excepted word, "willfully," was withdrawn and dismissed.

Additional Specification: Dereliction of duty on or about 28 October 2020.

Plea: Not Guilty.

Finding: Withdrawn and dismissed without prejudice to ripen into prejudice upon completion of appellate review.

Charge III: Violation of Article 131b, Uniform Code of Military Justice, 10 U.S.C. §931b.

Plea: Guilty.

Finding: Guilty.

Specification 1: Obstructing Justice on or about 15 December 2020 by deleting messages with TMFN [REDACTED]

Plea: Guilty.

Finding: Guilty.

Specification 2: Obstructing Justice on or about 15 December 2020 by deleting messages with [REDACTED]

Plea: Guilty.

Finding: Guilty.

Specification 3: Obstructing Justice on or about 15 December 2020 by instructing TMFN [REDACTED] to delete messages.

Plea: Guilty.

Finding: Guilty.

Specification 4: Obstructing Justice on or about 15 December 2020 by instructing [REDACTED] to delete messages.

Plea: Guilty.

Finding: Guilty.

Additional Specification: Obstruction Justice on or about 15 December 2020 by instructing [REDACTED] to delete messages.

Plea: Guilty.

Finding: Guilty.

Additional Charge I: Violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. §920b.

Plea: Not Guilty.

Finding: Withdrawn and dismissed.

Specification 1: Sexual Assault of a child on or about 30 October 2020.

Plea: Not Guilty.

Finding: Withdrawn and dismissed.

MARSHALL, CHRISTOPHER, D.

CONTINUATION SHEET - ENTRY OF JUDGMENT

11. Findings (Continued)

Specification 2: Sexual Abuse of a Child on or about 8 November 2020.

Plea: Not Guilty.

Finding: Withdrawn and dismissed.

Specification 3: Sexual Abuse of a Child on or about 9 November 2020.

Plea: Not Guilty.

Finding: Withdrawn and dismissed.

Additional Charge II: Violation of Article 120c, Uniform Code of Military Justice, 10 U.S.C. §920c.

Plea: No plea entered.

Finding: Dismissed by the Court on 6 July 2022 for failure to state an offense.

Specification 1: Indecent Exposure on or about 9 November 2020.

Plea: No plea entered.

Finding: Dismissed by the Court on 6 July 2022 for failure to state an offense.

MARSHALL, CHRISTOPHER, D.

APPELLATE INFORMATION

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

REMAND

THERE WERE NO REMANDS

**NOTICE OF COMPLETION OF
APPELLATE REVIEW**