[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Richard	Kathleen	E	[redacted]	YN2
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

Base Kodiak	USCG	Kodiak, AK
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commander

(Title of Convening Authority)

Director of Operational Logistics

(Unit/Command of Convening Authority)

Tried at

Norfolk, VA On 10 January 2022 - 8 February 2022

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

Companion and other cases

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

[redacted]

CONVENING ORDER

GENERAL COURT-MARTIAL	)	United Stated Coast Guard
	)	Director of Operational Logistics
	)	
	)	Norfolk, VA
CONVENING ORDER	)	
NO. 01-19	)	
AMENDMENT NO. 3	)	Date: JAN 07 2022
	)	

UNITED STATES COAST GUARD, DIRECTOR OF OPERATIONAL LOGISTICS

1. In addition to DOL General Court-Martial Convening Order No. 01-19 Amendment No. 2, I excuse the following additional members from DOL General Court-Martial Convening Order No. 01-19 and DOL General Court-Martial Convening Order No. 01-19 Amendment No. 2 related to the case of United States v. YN2 Kathleen Richard, USCG:

CDR [redacted]
CDR [redacted]
LCDR [redacted]
LCDR [redacted]
LT [redacted]
LT [redacted]
CWO [redacted]
YNCM [redacted]
YNCS [redacted]
BMCS [redacted]
EMCS [redacted]
ETCS [redacted]
AMTC [redacted]
AETC [redacted]
ETC [redacted]
AETC [redacted]
GMC [redacted]
AMT1 [redacted]
HS1 [redacted]
AET2 [redacted]

2. In the event the number of members of the court-martial is reduced below the number of members required under R.C.M. 501(a), or the number of enlisted members is reduced below one-third of the total membership, the following members shall be detailed to this court-martial in the case of United States v. YN2 Kathleen Richard, USCG:

MKCM [redacted]
GMCS [redacted]
AMTCS [redacted]
YNCS [redacted]
SKC [redacted]
AETC [redacted]

3. While I initially selected the following members be detailed to this court marital in addition to those members in Paragraph (2), they are excused:

OSCS [redacted]
EMC [redacted]
ET1 [redacted]
MK1 [redacted]

[redacted]

J. F. HICKEY
Rear Admiral, U.S. Coast Guard
Director of Operational Logistics

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Richard, Kathleen E.	[redacted]	YN2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
U.S. Coast Guard Base Kodiak	02/19/2019	4 YR

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
[redacted] 3273.30 ~~3,187.20~~	N/A	3273.30 ~~3,187.20~~	None	N/A

01 FEB 2022

II. CHARGES AND SPECIFICATIONS

10.

(See attached continuation page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-7/YN	U.S. Coast Guard District 11 Legal

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20210201

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of February, 2021, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

[redacted]

Lieutenant / O-3
Grade

Legal Service Command (LSC-LMJ)

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

[redacted]

12

On 01 FEB, 2021, the accused was informed of the charges against her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

U.S. Coast Guard Base Kodiak
Organization of Immediate Commander

[redacted] Captain / O-6

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13

The charges were received at 1044 hours, 01 FEB, 2021, at U.S. Coast Guard Base Kodiak
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

[redacted]
Typed Name of Officer

FOR THE [1]

Captain / O-6

[redacted]

U.S. Coast Guard Base Kodiak
Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE (YYYYMMDD)
Director of Operational Logistics (DOL)	Norfolk, VA	2021 06 25

Referred for trial to the General court-martial convened by Director of Operational Logistics (DOL) Convening Order No. 01-19 dated 28FEB19, subject to the following instructions: [2] To be tried with the charge and specification preferred against the accused on 22JUN21.

By XXXXXXXX of XXXXXXXXXXXXXXXXX
Command or Order

[redacted]
Typed Name of Officer

Acting Convening Authority
Official Capacity of Officer Signing

CAPT / O6

[redacted]

15

On 25 JUNE, 2021, I caused to be served a copy hereof on the above named accused.

Allison B. Murray
Typed Name of Trial Counsel

LIEUTENANT COMMANDER / O-4
~~Lieutenant / O-3~~
Grade or Rank of Trial Counsel

[redacted]

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

DD FORM 458, (BACK), MAY 2000

DD 458 – Continuation Sheet
United States v. YN2 Kathleen Richard

CHARGE I: Violation of the UCMJ, Article 118 (Murder)

Specification 1: In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia. [redacted] 22 JUN 2021

Specification 2: In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: by asphyxia. [redacted] 22 JUN 2021

CHARGE II: Violation of the UCMJ, Article 131b (Obstructing Justice)

Specification: In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, from on or about April 18, 2020 to June 2020, wrongfully do certain acts, to wit: delete electronic data, ~~including text messages, photographs, and internet search and browser history,~~ from her personal phone (red Apple iPhone 11, Serial Number [redacted], laptop (silver Apple Macbook Air, Serial Number [redacted], and Apple iCloud Account (associated with telephone number [redacted] with intent to influence, impede and obstruct the due administration of justice in the case of the said Petty Officer Kathleen RICHARD, against whom the accused had reason to believe that there were or would be criminal proceedings pending. [redacted] 22 JUN 2021

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED *(Last, First, MI)*	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Richard, Kathleen E.	[redacted]	YN2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
U.S. Coast Guard Base Kodiak	02/19/2019	4 YR

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
3,187.20	N/A	3,187.20	None	N/A

II. CHARGES AND SPECIFICATIONS

10.

(See attached continuation page)

III. PREFERRAL

11a. NAME OF ACCUSER *(Last, First, Middle Initial)*	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-7/YN	U.S. Coast Guard District 11 Legal

d. SIGNATURE OF ACCUSER	e. DATE *(YYYYMMDD)*
[redacted]	20210622

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 22nd day of June, 2021, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

[redacted]

Lieutenant Commander / O-4
Grade

Legal Service Command (LSC-LMJ)

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

[redacted]

12.

On 22 JUNE, 2021, the accused was informed of the charges against her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

U.S. Coast Guard Base Kodiak
Organization of Immediate Commander

Captain / O-6

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The charges were received at 1245 hours, 22 JUNE, 2021, at U.S. Coast Guard Base Kodiak
Designation of Command or Officer exercising

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

[redacted]
Typed Name of Officer

FOR THE [1]

Captain / O-6

[redacted]

U.S. Coast Guard Base Kodiak
Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Director of Operational Logistics (DOL)	Norfolk, VA	2021 06 25

Referred for trial to the General court-martial convened by Director of Operational Logistics (DOL) Convening Order No. 01-19 dated 28FEB19, subject to the following instructions: [2] To be tried with the charges and specifications preferred against the accused on 01FEB21.

By XXXXXXXX of XXXXXXXXXXXXXXXXX
Command or Order

[redacted]
Typed Name of Officer

Acting Convening Authority
Official Capacity of Officer Signing

CAPT / O6

[redacted]

15

On 25 JUNE, 2021, I caused to be served a copy hereof on the above named accused.

Allison B. Murray

[redacted]

Lieutenant Commander / O-4
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.

DD FORM 458, (BACK), MAY 2000

DD 458 – Continuation Sheet
United States v. YN2 Kathleen Richard

~~**ADDITIONAL CHARGE I: Violation of the UCMJ, Article 119 (Manslaughter)**~~ WITHDRAWN AND DISMISSED WITHOUT PREJUDICE BY ORDER OF MILITARY JUDGE 12 NOV 2020

Specification: In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, by culpable negligence, unlawfully kill [redacted] a child under the age of 16 years, by asphyxia.

TRIAL COURT MOTIONS & RESPONSES

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR RECONSIDERATION – RULING ON MOTION TO COMPEL FUNDING FOR A HOMICIDE INVESTIGATOR 11 Oct 2021

1. **Nature of Motion.**

Pursuant to R.C.M. 905(f), the Defense moves for reconsideration of the Court's Ruling of 27 September 2021, which denied, in part, the Defense Motion to Compel the Production of Expert Witness, homicide investigator [redacted] Defense Counsel requests that the Court reconsider this ruling for the reasons stated in this motion.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

A hearing was held on 30 August 2021 to discuss Defense Counsel's Motion to Compel the Government to provide the defense an expert witness in the area of homicide investigations. On 27 September 2021, the Court denied this request.

4. **Law and Argument.**

The Government has had access to unlimited investigators and funding for over a year. The defense has no investigator. Without access to a defense investigator with expertise in homicide investigations, Defense Counsel is precluded from offering meaningful evidence in support of a third party defense. If the panel is convinced that the child was a victim of homicide, then the issue becomes "who did it." If YN2 Richard did not do it, then who did? Depriving YN2 Richard of the opportunity to investigate and present evidence that BM2 [redacted]

[redacted] is responsible for the death of the child is denying YN2 Richard a meaningful opportunity to present a complete defense.

There is ample evidence to show that the Government investigators failed to investigate any other person other than YN2 Richard. In spite of the biased investigation, there is evidence that BM2[redacted] had the means, opportunity, motive, and predisposition to kill the child. By focusing solely on YN2 Richard as the perpetrator, they collected no evidence that would support a third-party defense.

One glaring example of investigative bias is that the investigators discovered that YN2 Richard gave away the baby car seat shortly after the death of the child. Government Counsel has offered this as evidence that YN2 Richard is responsible for the death of the child. If giving away a car seat following the death of child is an indication of guilt, then why, in the 100,000 pages of investigation, is it never mentioned that BM2[redacted] did exactly the same thing? The Government, with all of its power and resources, failed to fairly and fully investigate this case thereby denying YN2 Richard the opportunity to present a meaningful and complete defense.

The constitutional right to due process guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984). "Few rights are more fundamental than that of an accused to present witnesses [evidence] in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Failing to provide a qualified defense investigator to the Defense team is precluding YN2 Richard from her right to a fair trial.

5. **Relief Requested.**

Defense Counsel requests the following relief:

a. That the Court reconsider its denial of the defense request to compel funding for Mr.[redacted] and issue an order requiring the government fund 120 hours for Mr.[redacted] to conduct an independent investigation.

b. If the Court denies the request to reconsider this request for funding Mr. [redacted] Defense Counsel requests to continue oral argument on this issue at a future hearing.

6. **Enclosure.** There are no additional enclosures to this motion.

7. **Oral Argument.**

If this motion is opposed by Government Counsel, Defense Counsel requests oral argument on this matter.

Dated this 11th day of October, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 11th day of October 2021.

Dated this 11th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
PRE-REFERRAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO QUASH 12 May 2021

RELIEF SOUGHT

The Government requests that the Military Judge DENY Petitioner YN2 Richard's motion to quash the Military Judges's 21 April 2021 investigative subpoena. The Government requests an Order from the Military Judge denying the motion to quash.

SUMMARY

Petitioner's motion should be denied. Petitioner lacks standing to request relief under R.C.M. 703(g)(3)(G). Petitioner is under investigation for murder and obstructing justice and the records sought directly relate to an ongoing criminal investigation.

HEARING

The Government is prepared to argue at an ex parte Art. 30(a) session but does not believe oral argument is necessary. Because the Government's initial request for the investigative subpoena was filed ex parte, if an *in camera* review becomes necessary, the Government requests that it too be conducted ex parte as this investigation remains active and ongoing under the Uniform Code of Military Justice.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Only after establishing standing to bring this motion, the Defense, as the moving party, would have the burden of proof and the burden of persuasion. R.C.M. 905(c). The standard of proof is preponderance of the evidence. *Id.*

FACTS

On 14 April 2021, CDR Tamara Wallen, Chief Circuit Judge for the Western Judicial Circuit, detailed CDR Jeffery Barnum, Military Judge, to preside over pre-referral judicial proceedings pursuant to R.C.M. 309 and Art. 30a in the criminal investigation of YN2 Kathleen Richard.

On 19 April 2021, the Government submitted an application for a pre-referral investigative subpoena for non-content business records held by third party AT&T Mobility, LLC and AT&T Corporation. The Government's application included an affidavit explaining the investigative relevance of these records and the scope of records requested.

Having heard specific and articulable facts showing that there were reasonable grounds to believe that the records or other information sought were relevant and material to an ongoing criminal investigation, on 21 April 2021, CDR Barnum issued the pre-referral investigative subpoena at issue. He did so through his capacity under R.C.M. 703(g)(3)(D). This subpoena ordered third-party AT&T Mobility, LLC and AT&T Corporation to produce records in their custody, possession, or control. **Enclosure 1.**

The Rules for Court-Martial do not require nor entitle Defense Counsel to receive a copy of the affidavit used to obtain this pre-referral investigative subpoena at this time. Likewise, prior notification to the subscriber or customer is not required for the type of subpoena issued, particularly in an ongoing criminal investigation.

On 1 May 2021, AT&T provided YN2 Richard with notice of the subpoena. It did so inadvertently, believing the records sought were for a civil matter. The letter warned that it planned to respond to this subpoena on Saturday, May 8, 2021. If before such response date AT&T received a copy of a filing contesting the subpoena, AT&T would respond to the subpoena in accordance with the subsequent ruling of the Military Judge. **Enclosure 2.**

On 6 May 2021, Defense Counsel requested Trial Counsel provide a copy of the affidavit used to obtain the subpoena. Later that evening, Coast Guard Investigative Service contacted the AT&T National Compliance Center in an effort to determine the source of the disclosure of the investigative subpoena. CGIS learned that it is the practice of AT&T not to disclose to subscribers the existence of subpoenas in criminal matters, but that disclosure was practiced in civil matters.

On 7 May 2021, CGIS received a telephone call from [redacted] Associate Director Asset Protection, AT&T Global Legal Demand Center. In the course of this telephone call, Mr. [redacted] apologized, stating that AT&T should never have disclosed their receipt of this subpoena to the customer, and in doing so, it was error on their part.

On 8 May 2021, Defense Counsel filed a motion to quash the investigative subpoena, providing notice to the Military Judge and AT&T National Compliance Center. **Enclosure 3.**

CGIS received a copy of the requested records from AT&T also on 8 May 2021. CGIS has not viewed the records obtained from AT&T and has since sealed the records per the Military Judge's 9 May 2021 order.

LEGAL AUTHORITY AND ARGUMENT

Petitioner Lacks Standing

In support of its motion to quash, Petitioner cites R.C.M. 703(g)(3)(G) and argues that the subject subpoena is overbroad. However, Petitioner does not have standing to challenge this investigative subpoena because Petitioner is not the person in receipt of the subpoena or the custodian of records, and does not have a Constitutional privacy right or legally-cognizable interest in the requested records.

The subjects of the subpoena are AT&T Mobility, LLC and AT&T Corporation. Neither have moved for relief under R.C.M. 703(g)(3)(G). As a customer and not a representative of AT&T, Petitioner may not seek relief under R.C.M. 703(g)(3)(G).

Moreover, nothing in R.C.M. 309 gives Petitioner standing to file this motion. Rule for Court-Martial 309(b)(3) provides no relief for the target or suspect of a pre-referral investigative subpoena. Indeed, only "a person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C) or a service provider in receipt of an order to disclose information about wire or electronic communications under R.C.M. 703A may request relief on grounds that compliance with the subpoena or order is unreasonable, oppressive, or prohibited by law." R.C.M. 309(b)(3). An inadvertent disclosure by a service provider does not create standing.

In addition to lacking standing under R.C.M. 703(g)(3)(G), the third-party doctrine limits a Constitutional claim by Petitioner to the requested records. Under the third-party

doctrine, an individual who discloses information to a third party loses control over that information, *see Smith v. Maryland*, 442 U.S. 735 (1979); *Hoffa v. United States*, 385 U.S. 293 (1966). If the Government seeks information about a suspect from a third party, it is an issue between the Government and the third party rather than the individual and the Government. The information held by the third party effectively belongs to the third party instead of the suspect.

The third party doctrine applies to a variety of records, including telephone and bank records. In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court applied the third-party doctrine to bank transactions, where the defendant Miller sought to raise a Fourth Amendment challenge to the government's acquisition of bank records through a grand jury subpoena. After Miller was indicted, his Defense Counsel moved to suppress all evidence derived from the information contained in the bank records. The Supreme Court ruled that Miller had no protected Fourth Amendment interest in the bank records because all of the documents obtained, including financial statements and deposit slips, contained only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Court reasoned that "the depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443.

Over time, lower courts have held that individuals have no Fourth Amendment rights in their telephone records, *see United States v. Fregoso*, 60 F.3d 1314, 1321 (8th Cir. 1995); hotel registry records, see *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000); records of utility bills, see *United States v. McIntyre*, 683 F.Supp.2d 1026 (D.Neb. 2010); and records of money transfers, *see In re Grand Jury Proceedings*, 827 F.2d. 301, 302-03 (8th Cir. 1987).

Most recently, in *United States v. Carpenter*, 138 S.Ct. 2206, 2216 (2018), the Supreme Court, in declining to extend *Smith* and *Miller* to historical cell-site location information due to its unique nature, reinforced that the third-party doctrine remains alive and well in current jurisprudence.

Here, Petitioner would have no Fourth Amendment interest in the telephone and business records sought from AT&T, as any data collected was voluntarily given to third party

AT&T. Historical cell-site location data was not requested. Likewise, because the records requested via subpoena are held by a third-party and do not ask for content (non-testimonial in nature), any claim by Defense Counsel under a Fifth Amendment self-incrimination theory would similarly fail.

Though Defense Counsel cite *United States v. Johnson*, 53 M.J. 459 (C.A.A.F. 2000), as dispositive of a right to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought, a crucial distinction between the facts at hand and the facts in *Johnson* is an important, legally-cognizable interest. In *Gravel v. United States*, 408 U.S. 606 (1972), the case referenced in *Johnson*, the Court recognized a right in Senators to move to quash subpoenas directed at aides where the subpoena was designed to circumvent the Speech or Debate Clause bestowed to Senators. Here, Petitioner has not demonstrated a legally cognizable right under any Constitutional theory to prevent the disclosure of AT&T's own records.

Because neither AT&T Mobility, LLC nor AT&T Corporation have requested relief from the lawfully issued subpoena by the Military Judge, and Petitioner's motion has failed to articulate any grounds for standing, the Defense request to quash the Government's subpoena should be denied.

Defense's Motion was Untimely

In addition to not having standing, the Defense's motion was untimely; AT&T has no obligation to comply with a subsequent ruling of the Military Judge. As shown in Enclosure 2, AT&T told Petitioner that it would respond to the subpoena on "Saturday, May 8, 2021." **Enclosure 2**. It warned that "if *before* such response date," it received a copy of a filing contesting the subpoena, AT&T would respond in accordance with the subsequent ruling. *Id.* Here, Defense Counsel filed on May 8, 2021; in effect, filing a day late.

M.R.E. 502 Does Not Apply

M.R.E. 502 does not apply to the records requested. The content of communications was not requested in the Government's 21 April 2021 subpoena.

Lawful Subpoena

Because Petitioner lacks standing to bring this motion, the Government will not provide

an in depth analysis on the merits at this time; although it should be noted that the Defense's argument for overbreadth would fail.

Even if the target of a subpoena had standing to challenge the subpoena directed at a service provider, the standard of reasonableness established in *Hale v. Henkel*, 201 U.S. 43, 77 (1906), can easily be met here. The subpoena carries with it a presumption of regularity that should be called into question only if the subpoena has sufficient breadth to suggest either that compliance will be burdensome or that the subpoena's scope may not have been shaped by the purposes of the inquiry. 3 Crim. Proc. § 8.7(b) (4th ed.) Petitioner has failed to articulate any evidence that the requested records would be burdensome for AT&T to produce, a threshold finding before turning to the issue of reasonableness. Indeed, AT&T already complied with the subpoena request and provided the requested records to CGIS on 8 May 2021. As to the subpoena's scope, the Government emphasizes that the Military Judge issued the subpoena only after a careful examination of specific and articulable facts showing that there were reasonable grounds to believe that the records or other information sought were relevant and material to an ongoing criminal investigation. The Government is not required to divulge the facts contained in its affidavit at this time to Defense Counsel, as the facts therein are part of an ongoing criminal investigation and the Rules for Court-Martial do not require doing so. The scope and extent of the records, including the dates of the requested records, were carefully evaluated in relation to the facts at hand by the Military Judge. Petitioner's motion has asserted no facts which would undermine the Government's affidavit supporting this subpoena. Thus, the Defense has not met its burden and its motion would fail on the merits.

WITNESSES/EVIDENCE

The Government does not intend to present any witnesses.

Enclosure (1), Subpoena

Enclosure (2), AT&T Notice to Customer

Enclosure (3), Defense Motion Filing Email

CONCLUSION

The Government respectfully requests that the Military Judge DENY the Defense motion to quash the Government's lawful subpoena issued pursuant to R.C.M. 309(b)(1) and R.C.M.

703(g)(3)(G).

[redacted]

Allison B. Murray
LT, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 12 May 2021.

[redacted]

Allison B. Murray
LT, USCG
Trial Counsel

UNITED STATES v. **Kathleen Richard** **YN2/E-5 USCG**	**DEFENSE MOTION TO QUASH** **8 May 21**

NATURE OF MOTION

Pursuant to Rules for Courts-Martial (RCM) 703(g)(3)(G), the defense moves to quash the government subpoena compelling AT&T Mobility, LLC and AT&T Corporation (AT&T) to release any information and/or records for the telephone number [redacted] from 22 May 2020 to present as overly broad. In the alternative, we request a modification of the dates requested from 22 May 2020 to 24 June 2020.

PROCEDURAL HISTORY

On 21 April 2021, LT Murray, USCG (trial counsel), submitted a request for a subpoena before CDR Jeffery Barnum, a military judge pursuant to RCM 703(g)(3)(D). The contents of this request with supporting affidavit have not be supplied to defense counsel.

On 6 May 2021, YN2 Richard received an email from AT&T regarding the subpoena and informed her of their intention to comply by 8 May 2021 unless otherwise notified. The defense then sent an email to trial counsel requesting a copy of the affidavit utilized to obtain the subpoena. As of the filing of this motion, defense has not yet received the affidavit nor a response from trial counsel.

LAW

Although defense has been provided with minimal information, it appears the requested information is pursuant to RCM 703A(a)(4). A military judge can issue an order for disclosure of the information requested in RCM 703(a)(4) if trial counsel "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of [...] the records or other information sought, are relevant and material to an ongoing criminal investigation." RCM 703A(c)(1)(A).

Military Rule of Evidence (MRE) 401 governs the relevance determination. MRE 401 (stating a fact is relevant if it has any tendency to make a fact more or less probable and is of consequence in determining the outcome). Relevant evidence is necessary when it is not cumulative and "when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Breeding*, 44 M.J. 345, 350 (C.A.A.F. 1996) (citing to discussion in RCM 703).

Black's Law Dictionary defines 'material' as "important; more or less necessary; having influence or effect; going to the merits; having to do with matter as distinguished from form. [...] Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision on the case."

A subpoena may be quashed if it seeks information that is not relevant to the case at hand. *See United States v. Nixon*, 418 U.S. 683, 698 (1974) (moving party for subpoena must show that sought-after documents are relevant, not otherwise procurable, necessary for trial expediency, and that the subpoena was made in good faith).

Pursuant to RCM 703(g)(3)(G), the party upon whom the subpoena is issued may request relief from compliance with the subpoena if compliance is unreasonable, oppressive, or prohibited by law. A third party may contest a subpoena where he has a sufficiently important, legally-cognizable interest in the materials sought. *United States v. Johnson*, 2000 53 M.J. 459, 2000 CAAF LEXIS 954,*6 (C.A.A.F. 2000).

DISCUSSION

The government's requested subpoena is overly broad and therefore not relevant and material. The government has charged actions stemming from the following dates: 18 April 2020 to June 2020. The requested subpoena seeks information from 22 May 2020 to present. The Article 32 hearing in this case took place on 5 May 2021. During the Article 32, the trial counsel did not request the hearing officer to consider modification of the dates to encompass from 22 May 2020 to present. This shows that that government is merely on a fishing expedition and failed to show the information requested is relevant and material and as such the subpoena should be quashed.

Furthermore, YN2 Richard obtained counsel in June 2020. YN2 Richard communicates with counsel regularly via phone, email and text/SMS messaging since June 2020 to present. Any information obtained by the government will certainly include attorney-client privilege material pursuant to MRE 502.

RELIEF REQUESTED

The Defense respectfully requests that the military judge **GRANT** this Motion to Quash the government subpoena compelling AT&T Mobility, LLC and AT&T Corporation (AT&T) to release any information and/or records for the telephone number [redacted] from

22 May 2020 to present as overly broad. In the alternative, we request a modification of the dates requested from 22 May 2020 to 24 June 2020.

[redacted]
S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

Encl: Charge Sheet dtd 1 Feb 2021

I certify that I have served a true copy (via e-mail) of the above on trial counsel and CDR Jeffery Barnum, USCG, Military Judge.

[redacted]
S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**IMPROPER REFERRAL**
	)	
	)	
	)	
KATHLEEN RICHARD	)	27 August 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to dismiss for improper referral. The Defense motion raises constitutional and statutory challenges to the Convening Authority's exercise of court-martial authority and his discretionary decision to refer these charges to a general court-martial. The United States respectfully requests that the court deny the defense motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

The Facts relevant to the issues raised in this motion are as follows:

1. Charges in this case were preferred on 1 February 2021 and on 5 May 2021, a preliminary hearing was held in this case.

2. On 17 May 2021, the preliminary hearing officer (PHO) submitted his report to the special court-martial convening authority (SPCMCA).

3. The PHO found no probable cause for specification 1 of charge I (intentional but unpremeditated murder) and the sole specification of charge II (obstruction of justice).

4. The PHO found probable cause for specification 2 of charge I (murder while engaging in an inherently dangerous act), and considered and recommended an additional charge of manslaughter under Article 119.

5. On 2 June 2021, the SPCMCA (Base Kodiak) forwarded the case to the GCMCA (CG DOL) for disposition recommending that the GCMCA refer all charges to GCM.

6. In alignment with the recommendation provided by the PHO, on 22 June 2021, an additional charge was preferred against YN2 Richard.

7. On 24 June 2021, the Staff Judge Advocate (SJA) for the GCMCA provided advice under Article 34 and RCM 406 to the GCMCA. The SJA recommended referring the charges and the additional charge to GCM.

8. On 25 June 2021, the GCMCA referred the charges and the additional charge to GCM.

LEGAL AUTHORITY AND ARGUMENT

I. Referral of Charges Against the PHO's Recommendation Does Not Violate A Military Accused's Rights

A. Significant Differences Exist Between Civilian and Military Criminal Cases

The defense's motion fails to recognize that there are significant and distinct differences between civilian criminal justice and military justice. These differences pertain to all aspects of the system, beginning with the fact that military courts derive their authority from Article I of the Constitution whereas federal civilian courts derive their authority from Article III.

Beyond this initial principle, there is long-standing controlling authority holding that military service members have limited constitutional rights when compared to their civilian

counterparts. In general, the Supreme Court has held that service members are not entitled to all the procedural safeguards of Article III trials because the Fifth Amendment exempts "cases arising in the land or naval forces. . ." *Ex parte Quirin*, 317 U.S. 1 (1942). CAAF has reiterated this principle in numerous cases, as an example holding that there is no right to a grand jury or presentment of an indictment in military practice, though such would be constitutionally required in civilian practice. *United States v. Gray*, 51 M.J. 1 (CAAF 1999). Likewise, a military accused has no Sixth Amendment right to a jury trial, rather he only enjoys a statutory right to a panel of members which involves different standards and requirements.[1] *United States v. Lambert*, 55 M.J. 293 (CAAF 2001) (citing *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942)). Similarly, double jeopardy attaches and acts differently in the military context than it does in the civilian world, because a military accused does not have the same protected interest in retaining the panel of his choosing as would a defendant with a civilian jury. *United States v. Easton*, 71 M.J. 168 (CAAF 2012).

Many protections found in the First and Fifth Amendments available to civilians are inapplicable to the military. The Supreme Court has recognized that the military mission is unique and as such "render[s] permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy*, 417 U.S. 733 (1974). While service members enjoy many constitutional rights they do not enjoy those which are expressly or by necessary implication inapplicable to the armed forces. *United States v. Jacoby*, 11 C.M.R. 244, 246-47 (CMA 1960).

[1] Most notably, panels are fellow service members hand-picked by a convening authority versus a pool of jurors selected at random from the community. Additionally, different rules apply relating to voting, percentages required to convict/acquit, and the selection process.

Perhaps more important, there are many instances where constitutional rights simply apply differently to the military than they do to civilians. *United States v. Marcum*, 60 M.J. 198 (CAAF 2004). In applying constitutional provisions to the military, CAAF has relied on Supreme Court civilian precedent, but has also applied them differently to address unique contextual factors involving military life. *Id.* (citing *United States v. Priest*, 45 C.M.R. 338, 344 (1972)). CAAF has specifically held in the constitutional rights context, "in light of the military mission, it is clear that servicemembers, as a general matter, do not share the same autonomy as civilians." *Id.* (citing *Parker*, 417 U.S. at 758).

Ultimately, while many constitutional rights apply to the military, certain rights do not when by their text or scope they are inapplicable. *Id. See also United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011); *United States v. Barberi*, 71 M.J. 127 (CAAF 2012). Therefore, military member's rights simply are not coextensive with those enjoyed by civilians, making many if not most of the cases cited by the Defense inapplicable. *See United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013). CAAF and its predecessor the CMA have held that military accused are entitled to "military due process" a concept which protects certain rights and privileges, but those rights and privileges are based upon laws enacted by Congress and not the Constitution. *United States v. Clay*, 1 C.M.R. 74 (C.M.A. 1951); *see also United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (calling "military due process" an "amorphous concept" that does not afford service members other due process protections not found in the Constitution, UCMJ, and the MCM). The Courts give legal effect to the rights granted by Congress but those specifically delineated rights are often different than the Constitutional provisions governing civilian criminal. *Id.* Military personnel, in effect, enjoy largely statutory rights which make up military due process. *Id.*

In some instances Congress has opted to provide service members with statutory rights that exceed the Constitutional rights available to the ordinary citizen, but when that is the case, such as comparing the Fifth Amendment's right against compulsory self-incrimination with Article 31, UCMJ, Congress's intent is explicit. *United States v. Rosato*, 11 C.M.R. 143, 145 (CMA 1953).

B. The Defense Fails to Cite Controlling Published Coast Guard Court of Criminal Appeals Decisions which are Dispositive on the Issue Raised

It is well established in our service's jurisprudence that the PHO's Article 32 findings and recommendations are not binding. *United States v. Meador*, 75 M.J. 682, 683 (C.G. Ct. Crim. App. 2016). In *Meador*, after some statutory changes to the Article 32 framework, a military judge dismissed charges for an improper referral because the judge viewed the statutory changes as making the PHO's probable cause determination dispositive. *Id.* In a published and controlling opinion, the CGCCA reversed and held "the statutory scheme does not make the PHO's determination as to probable cause binding on the SJA or the convening authority (CA)." *Id.*

In essence, though it is shrouded in constitutional claims, the Defense is arguing that this Court need not follow the CCA's controlling opinion in *Meador*. Since *Meador* is not cited nor attempted to be distinguished it remains unknown how the Defense would articulate the Court's ability to deviate from *Meador's* holding.

The Defense cites *United States v. Lewis*, 2020 CCA LEXIS 199 (N-M. Ct. Crim. App. 2020), an unpublished NMCCA opinion for the idea that the PHO's finding that a specification lacks probable cause should be met with serious analysis. Def Motion at 9. While the notions in *Lewis* are certainly admirable, it does little to change the fact that dicta from an unpublished persuasive case does not trump *Meador's* holding. Meador's holding has also been directly adopted and promulgated into the Rules for Courts-Martial. R.C.M. 405(l) (the preliminary

hearing officer's report "is advisory and does not bind the staff judge advocate or convening authority").

Finally, the Defense cites general notions of a "constitutionally proper" Article 32 process. Def Motion at 9. Even the term "constitutionally proper" when referred to the Article 32 process is internally contradictory. As the Court is well aware, Article 32 and the rights provided therein, are statutory. Therefore, there is no such thing as a constitutionally proper Article 32 because an Article 32 is not constitutional in nature. The constitution requires an indictment by a Grand Jury, but as the Supreme Court has held, that requirement does not extend to the military. *Ex parte Quirin*, 317 U.S. 1 (1942). While the Article 32 is often thought of in common parlance as a substitute for the Grand Jury process, it is entirely statutory in nature. 10 U.S.C. § 832. While one could correctly assert that "military due process" as defined by *Clay* applies to an Article 32, military due process is satisfied by substantial compliance with the Rules for Courts-Martial governing Article 32 hearings. *See United States v. Mercier*, 75 M.J. 643, 646 (C.G. Ct. Crim. App. 2016) (noting that a charge may be referred to general court-martial after completion of a preliminary hearing in substantial compliance with R.C.M. 405); *Clay*, 1 C.M.R. at 74.

The Defense lastly makes a general argument that the Article 34 advice was misleading and incomplete, again referencing purported due process rights. Def. Motion at 9. Article 34, like Article 32, encompasses statutory rights, not Constitutional Due Process. The extent of "military due process" that an accused is due is substantial compliance with Article 34 and R.C.M. 406. *See Mercier*, 75 M.J. at 646. In this case, the SJA's Article 34 advice contained all of Article 34 and RCM 406's required elements. To specifically address the issue, there is no requirement that the SJA specifically note the areas in which he disagrees with the PHO. Likewise, there is no requirement that the SJA engage in a robust legal analysis to support his legal conclusions. Both

the PHO's report and the Article 34 advice were provided to the CA. The SJA's decision not to engage in a robust legal analysis supporting his legal conclusions does not make the Article 34 advice defective or misleading.

Ultimately, issue I raised by the Defense states no legal grounds upon which the Court can grant relief.

II. The PHO's Consideration and Recommendation of An Additional Charge Does Not Constitute an Unconstitutional Punishment

Initially, and as previously explained, the Article 32 process is not a constitutionally rooted procedure. As such, there is no Constitutional analysis regarding any purported violations of the process. More important, however, is that the PHO's recommendation of an additional charge is in direct compliance with R.C.M. 405(e)(2). RCM 405(e)(2) states "if evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense, the preliminary hearing officer may. . . make the determinations specified in subsection (a) regarding such offense without the accused first having been charged with the offense." As such, the PHO's consideration and recommendation for an additional charge was in substantial compliance with R.C.M. 405(e)(2).

Additionally, at least some authority exists that the additional charge, involuntary manslaughter, is a lesser included offense of Article 118(2) and 118(3). *United States v. McMonagle*, 34 M.J. 852, 863 (ACMR 1992) *overturned on other grounds*, 38 M.J. 53 (CMA 1993). *See also United States v. Winter*, 32 M.J. 901 (AFCMR 1991) (considering involuntary manslaughter as an LIO of 118(2)). Therefore, the additional charge of involuntary manslaughter was added merely to ensure proper notice.

III. The Accused's Discrimination Claims Do Not Provide a Legal Basis for Relief

There is simply no authority supporting the proposition that an Accused who has submitted an administrative claim of discrimination is somehow immune from prosecution. Such a standard would lead to an absurd result of individuals making civil rights claims in order to shield themselves from prosecution for future misconduct. This is a novel theory without any legal support and does not warrant further discussion or provide a meaningful basis for this Court to grant any relief.

The Defense has not shown a need for a new Convening Authority.

As a tangential matter, the Defense claims that a new Convening Authority ought to be designated because of alleged taint by the Commanding Officer, Base Kodiak (herein identified as CAPT [redacted]. Def. Motion at 13. According to the Defense, CAPT [redacted] as the Summary Court-Martial Convening Authority, is an accuser because, "at a minimum, [he] has the appearance of a conflict of interest," due to YN2 Richard's filing of a discrimination claim against members of her chain of command. *Id.*[2] This, in turn, supposedly means the Convening Authority, who is not CAPT [redacted] needs replacing.

Whether CAPT [redacted] is an accuser is irrelevant to whether the officer exercising general court-martial jurisdiction (OEGCMJ) could properly refer the charges to a general court-martial. To be sure, CAPT [redacted] is neither an accuser nor the Convening Authority. He did not sign and swear to the charges, and he did not direct charges nominally be signed and sworn by another. Rather, the Defense asserts the mere filing of a discrimination claim against members of Base Kodiak, who fall under the ultimate supervision of CAPT [redacted] disqualifies him as a

[2] The Defense provided no evidence of said discrimination claim.

summary court-martial convening authority (and presumably unable to direct a preliminary hearing and forward the matter to the OEGCMJ) as he must have some interest other than an official interest in the prosecution of YN2 Richard. This assertion, though, is wholly without merit. Even if CAPT [redacted] were a "type three accuser," neither Article 32, UCMJ, nor R.C.M. 405 prohibit an accuser from directing a preliminary hearing. *See also McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997) (denying a writ to disqualify the officer directing a pretrial investigation because of his status as an accuser). Moreover, CAPT [redacted] did exactly what the R.C.Ms demand from a convening authority not authorized to convene a court-martial: forward it to a superior commander for disposition. R.C.M.s 402 & 403.

The Defense also asserts that a new Convening Authority is warranted because CAPT [redacted] "denied the Accused the opportunity to participate in her defense" when CAPT [redacted] did not approve her request for temporary duty travel orders to accompany her defense counsel to [redacted] Def. Motion at 13. Whether this assertion relates to the claimed accuser issue or is a separate ground for disqualifying the Convening Authority, it too is without merit. A service member is entitled only to travel allowances for the member to attend their own hearing(s) for a court-martial and associated military justice proceedings. Joint Travel Regulations 030706, https://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf. The Defense cites no authority that CAPT [redacted] abused his discretion here, and in any event, the Defense has not specified how YN2 Richard's presence in [redacted] was necessary to assist her defense counsel who was there on her behalf.

IV. The General Constitutional Claims and General Assertion of Vindictive Prosecution Are Not Sufficiently Developed or Articulated and Warrant No Relief From this Court

In a general and summary fashion, the Defense asserts that the prosecution of YN2 Richard somehow violates notions of equal protection and due process. Additionally, the Defense alludes to a claim of selective prosecution. The genesis of the Defense's claim seems to be the Defense's displeasure that YN2 Richard is being prosecuted instead of BM2 [redacted] Again, the legal argument to assert either an equal protection violation or selective prosecution is not well developed.

Ultimately, YN2 Richard is being prosecuted and not BM2 [redacted] because the evidence discovered during the investigation demonstrates YN2 Richard's guilt. The medical evidence, the physical injuries, and the medical expert's opinions regarding the time of death and cause of death all point to actions taken by YN2 Richard. There simply is no evidence indicating that BM2 [redacted] shares any culpability. It is the evidence, and the evidence alone, that determined who would be prosecuted and how. There was no impropriety in this decision making or the reasons underlying the various convening authority's decisions that ultimately resulted in this case being at a GCM.

This allegation, like many other allegations in this motion should not be decided on Constitutional grounds, as the allegations are not supported by sufficient evidence to raise Constitutional concerns. Courts are generally encouraged to avoid deciding issues on constitutional grounds when the issue can be decided on non-constitutional grounds. *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). Each decision made in this case is supported by evidentiary reasons grounded in fact and not on phantom notions of disparate treatment, or an intent to treat YN2 Richard different than any other suspect. As such, this motion should be denied.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion to dismiss.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

Appellate Exhibit 20
Page 11 of 11

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Bill of Particulars) 27 Aug 2021

RELIEF SOUGHT

The government respectfully requests the military judge deny the defense's request for a bill of particulars.

HEARING

The government opposes the defense's request; however, the government believes this issue can be resolved on the pleadings. Nevertheless, the government will be prepared to answer any questions from the military judge.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense must prove its factual claims by a preponderance of evidence. Rule for Courts-Martial 905(c)(1)-(2). The decision to grant a bill of particulars is within the discretion of the military judge. *United States v. Williams*, 40 M.J. 379, 381 n.4 (C.M.A. 1994). However, a military judge should only grant a bill of particulars if appellant has shown he would suffer "actual surprise or prejudice at trial." *Id.*

RESPONSE

An accused may receive a bill of particulars when the language used in the charge may not provide enough clarity for the accused to defend himself. For example, in *United States v. Steele*, the appellant was charged with engaging in conduct unbecoming an officer for, as the

specification said, "providing special privileges" to a civilian employee. ARMY 20071177, 2011 WL 414992, *5 (A. Ct. Crim. App. Feb. 3, 2011). The appellant requested a bill of particulars and was provided one, which detailed the special privileges the appellant provided.

In contrast, the drafters of the *Manual for Courts-Martial* do not consider a bill of particulars appropriate for (1) discovery of the government's theory; (2) detailed disclosure of acts underlying a charge; and (3) restricting the government's proof at trial. Rule for Courts-Martial 906(b)(6), Discussion, UNITED STATES (2019). This guidance has been part of the Manual since 1984. https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf. More importantly, our superior appellate court's predecessor has recognized this guidance as controlling. *United States v. Mobley*, 31 M.J. 273, 278 (C.M.A. 1990).

The defense's requested bill does all three. The defense's request to know the specific act that led to the death of [redacted] and the sole motivation behind her death is really a request to limit the government to one and only one factual theory. This is because "[w]hen a bill of particulars has been furnished, the government is strictly limited to the particulars which it has specified, *i.e.*, the bill limits the scope of the government's proof at the trial." *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965). However, because of the general verdict doctrine in the armed forces, the government can proceed on multiple theories and is not required to limit itself to one theory. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 1997).

The defense's requests to know the evidence the government will be presenting to show intent, the specific data that YN2 Richard deleted, the dates YN2 Richard deleted the data, and the witnesses to lay foundation to prove the deletion are all requests for discovery of the government's theory and detailed disclosure of acts underlying a charge. None of the charges for which the accused must defend contain nebulous phrases like "providing special privileges."

Instead, the defense's request is akin to the appellant's request in *United States v. Jacinto*, 79 M.J. 870, 886-87 (N.-M. Ct. Crim. App. 2020) *aff'd in part, set aside in part on other grounds*, -- M.J. --, 2021 WL 3043325 (C.A.A.F. July 15, 2021). There, the appellant requested a bill of particulars to know a more precise date of when he committed the child sex-offense alleged so that he could raise an alibi defense. *Id.* The government did not provide one, and the military judge denied the request. While recognizing that the government could not provide a more certain date due to their child witness' limited memory, the service court of criminal appeals stated that it is not the purpose of a bill of particulars to make it easier for an accused to defend against a charge. *Id.* Significantly, the service court noted that the government "the full investigation" of the child's claims, which defeated any claim of surprise. *Id.*; *see also Mobley*, 31 M.J. at 278; *accord United States v. Vasquez*, 867 F.2d 872, 874 (5th Cir. 1989) ("It is well established that if the government provides the requested information called for in some other satisfactory form, then no bill of particulars is required."). In this case, the government has stated and continues to state that it will continue to provide relevant discovery as soon as it becomes known and within the possession of the government.

CONCLUSION

Because the defense cannot demonstrate unfair surprise or prejudice at trial on account of the charges and specifications as written, the government respectfully requests the military judge deny their requested relief.

Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 27 Aug 2021.

Jason W. Roberts
LCDR, USCG
Trial Counsel

APPELLATE EXHIBIT 23
PAGE 4 OF 4 PAGE (S)

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	MOTION FOR APPROPRIATE RELIEF: ENFORCEMENT OF CGIS PROMISES TO YN2 RICHARD 20 July 2021

1. Nature of the Motion. The Defense respectfully requests this Court enforce Special Agent [redacted] and Special Agent [redacted] promises of leniency to YN2 Richard.

2. Burden of Proof.

As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c). However, the Government has the burden to establish the admissibility of YN2 Richard's statements by a preponderance of the evidence. M.R.E. 304(f)(6)-(7).

3. Relevant Factual Background.

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. Coast Guard Investigative Service ("CGIS") agents spent over 16 hours interviewing and interrogating YN2 Richard.[1]

c. During the June 19, 2020 interrogation of YN2 Richard, CGIS agents made the following assertions:

[1] (Defense Appellate Exhibit Q, page 10, line 239 to page 11, line 240).

APPELLATE EXHIBIT 25
PAGE 1 OF 10 PAGE (S)

[redacted]

[2] (Defense Appellate Exhibit Q, page 26, lines 661-662).
[3] (Defense Appellate Exhibit Q, page 27, lines 667-668).
[4] (Defense Appellate Exhibit Q, page 33, line 842).
[5] (Defense Appellate Exhibit Q, page 40, line 1036).
[6] (Defense Appellate Exhibit Q, page 43, lines 1094-1095).
[7] (Defense Appellate Exhibit Q, page 62, lines 1607-1608).
[8] (Defense Appellate Exhibit Q, page 72, lines 1887-1888).
[9] (Defense Appellate Exhibit Q, page 37, line 936).
[10] (Defense Appellate Exhibit R, page 15, lines 15-16).
[11] (Defense Appellate Exhibit R, page 16, lines 10-15).

[redacted]

4. Law and Argument.

a. Government Agents' Promises of Leniency to an Accused are Enforceable.

"[T]he Government must abide by an agreement on which an accused has reasonably relied to his detriment."[14] When a prosecuting agency makes a promise which serves as consideration or inducement for the accused to make a concession, the promise must be fulfilled.[15] When an accused relies on the Government's inducement to forgo her constitutional rights, "the court will not let the defendant be prejudiced as a result of that reliance."[16] When the Government enters into an agreement regarding the ultimate resolution of a case, the agreement is binding.[17] When the Government induces detrimental reliance upon a promise, the Government is held to its original promise.[18] The government must bear the responsibility for any lack of clarity in the agreement.[19]

When a Government agent makes a promise to an accused, and the accused relies on that promise to her detriment, the promise will be enforced.[20] Even a civilian Family Advocacy Clinic

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[12] (Defense Appellate Exhibit R, page 16, lines 20-22).
[13] (Defense Appellate Exhibit R, page 11, line 22 to page 12, line 3).
[14] *United States v. Churnovic*, 22 M.J. 401, 405 (U.S.C.M.A. 1986).
[15] *Santobello v. New York*, 404 U.S. 257, 262 (1971).
[16] *U.S. v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974).
[17] *See, e.g. U.S. v. Garcia*, 519 F.2d 1343 (9th Cir. 1975); *U.S. v. Foster*, 823 F. Supp. 884 (D. Kans. 1993); *United States v. Allen*, 683 F. Supp. 1136 (E.D. Mich 1988); *See also Thomas v. Immigration and Naturalization Service*, 35 F.3d 1332 (9th Cir. 1994) (holding the agreement by a U.S. Attorney for a single District not to oppose a defendant at a separate agency's administrative hearing was binding on both the Department of Justice and the separate agency).
[18] *Id.* at 1337.
[19] 35 F.3d at 1337, (citing *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992).
[20] *See United States v. Wagner*, 35 M.J. 721 (A.F.C.M.R. 1992) (unit commander's agreement not to prosecute accused if he refrained from further child sex abuse created enforceable *de facto* immunity agreement. U.S.C.M.R. reversed the conviction for child sexual abuse and dismissed the charges); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (SJA oral promise of immunity to officer

social worker can create an enforceable promise when an accused relies on the promise to her detriment.[21] In *United States v. Spence*, a social worker who assisted in investigating child sexual abuse cases, advised an accused that he would not be prosecuted if he received treatment.[22] The accused in that case relied upon the promise of the social worker to his detriment. In spite of the verbal agreement, he was prosecuted and convicted for committing indecent acts with a child.[23] The appellate court held that the verbal agreement was enforceable and set aside the findings, the sentence, and dismissed the charges.[24]

When YN2 Richard, after 16 hours of interviews and interrogation, continued to assert her innocence, Government agents tried a new tactic to coerce incriminating statements. Specifically, the agents tried to lower YN2 Richard's defenses by assuring her that she was not going to jail or prison. Government agents made the following statements to YN2 Richard during her interrogation:

[redacted]

The number of times the agents made comments about jail or prison indicates this was a strategy intended to coerce or induce YN2 Richard to make a statement against her interest. They induced her to agree with their assertion that she was responsible for the death of [redacted] The number of times the agents discussed jail also increases the likelihood that YN2 Richard's reliance on the promises was reasonable. It is noteworthy that YN2 Richard never asks the agents about jail or prison. The agents' promises of leniency were a unilateral psychological attack against a vulnerable, grieving [redacted] in severe distress from losing [redacted]

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suspected of espionage enforced on grounds of due process);

[21] *United States v. Spence*, 29 M.J. 630 (A.F.C.M.R. 1989)

[22] *Id.*

[23] *Id.*

[24] *Id.*

Here, the promise of no jail or prison served as an inducement by a Government agent to convince YN2 Richard to acquiesce to the CGIS Agents' pressure to make a statement. YN2 Richard, to her own detriment, reasonably relied on the assertion that she was not going to jail or prison when she provided the agents with a comment that she "might have" done what the Government agents accused her of doing.

b. Investigating CGIS Agents Were Agents of the State and had Apparent Authority to Make a Promise to YN2 Richard.

"Prosecutors routinely enter into agreements with defendants – and make representations to the court – that exceed their minimum obligations under the law. Whether they do so strategically or for reasons of convenience is of no moment. Once prosecutors undertake such commitments, they are bound to honor them."[25] In agency law, actual authority exists when the principal's manifestations establish such authority.[26] There is no requirement for an "expressed contract" between principal and agent to prove the agency relationship through actual authority.[27] Apparent authority focuses on what the Government allows an accused to believe with regard to state investigating agents. It is generally accepted that, "[t]he ostensible agent is one where the principal has intentionally or inadvertently induced third person to believe that such a person was its agent although no actual or express authority was conferred on him as agent."[28]

An agency relationship exists between prosecutorial agencies and state investigating agencies. When there is "common strategy or assistance with prosecution", an agency relationship exists between government entities.[29] In this case, Trial Counsel relied upon and endorses the CGIS agents' reports to determine whether to pursue criminal charges against YN2 Richard. In fact, Trial

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[25] *United States v. Liburd*, 607 F.3d 339, 343, (3d Cir. 2010)); *See*, e.g., *United States v. McKinney*, 758 F.2d 1036, 1046 (5th Cir.1985) ("[A]greements between the Government and a defendant to forego the presentation of otherwise admissible evidence are enforceable."); *United States v. Jackson*, 621 F.2d 216, 220 (5th Cir.1980) (stating that "when the government and a defendant enter into a pretrial agreement both parties are entitled to rely upon that agreement in preparing their respective cases").

[26] RESTATEMENT OF AGENCY (THIRD) at § 2.01.

[27] *Id.*

[28] *Gulf Ins. Co. v. Grisham*, 126 Ariz. 123, 126, 613 P.2d 283, 286 (1980), quoting *Canyon State Canners v. Hooks*, 74 Ariz. 70, 73, 243 P.2d 1023, 1025 (1952).

[29] *See Brown v. Arizona Dept. of Real Estate*, 181 Ariz. 320, 326, 890 P.2d 615, 621 (App. 1995).

Counsel submitted the work of the CGIS agents to the Preliminary Hearing Officer in order to establish probable cause in this case. The relationship between the CGIS agents and Trial Counsel is so intertwined that YN2 Richard's Defense Counsel must go through Trial Counsel to seek information in the possession of CGIS agents. The CGIS agents sit side-by-side as they interview witnesses in preparation for trial. If additional investigation is required, Trial Counsel will direct the CGIS agents to pursue additional evidence. In preparation for, and in conducting the trial, the CGIS agents will work hand-in-glove with Trial Counsel to prosecute YN2 Richard. The CGIS agents are merely an arm of the prosecutor – one is the agent for the other.

Here, the CGIS agents told YN2 Richard that they would be having a conversation with the prosecutors about the resolution of this case; thereby creating a reasonable belief that the CGIS agents were acting as agents of the "prosecutors."[30] It is common knowledge in the Coast Guard that CGIS is the investigating arm of the prosecutor for the Government. Whether the CGIS agents intentionally or inadvertently induced YN2 Richard to believe they were acting on behalf of the prosecutor (Trial Counsel) is immaterial – the message was clear – CGIS investigators were agents of the prosecutor.

5. Relief Requested.

For all of the reasons stated above, YN2 Richard asks for the following relief:

a. Regardless of the outcome at trial, YN2 Richard will not face incarceration;

b. A findings and jury instruction be provided to the members that informs the panel that they cannot adjudge confinement due to promises made by Government agents;

c. A findings instruction be provided to members that states CGIS's promises of leniency to YN2 Richard were improper inducements intended to coerce YN2 Richard to waive her constitutional rights;

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[30] CGIS Agent [redacted] tells YN2 Richard, "[redacted]" Defense Appellate Exhibit Q, page 33, lines 829-831.

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d. A findings instruction be provided to the members that states the comments made by the CGIS agents are, as a matter of law, improper inducement for YN2 Richard to waive her constitutional rights; and/or

e. A findings instruction be provided to the members that states any statements made by YN2 Richard following CGIS's promises are not to be considered for the purposes of determining guilt or innocence.

5. Evidence.

The defense offers the following evidence as Defense Appellate Exhibits to support this motion.

Defense Appellate Exhibit Q: Interrogation Transcripts of YN2 Richard, dated 19 June 2020.

Defense Appellate Exhibit R: Interview Transcripts of BM2 [redacted] dated 25 June 2020.

6. Oral Argument.

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 20th day of July 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

[redacted]
C. O. SPENCE
LT, JAGC, USN
Detailed Defense Counsel

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APPELLATE EXHIBIT 25
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I certify that I caused a copy of this document to be served on the Court and opposing counsel this 20th day of July 2021.

Dated this 20th day of July 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

APPELLATE EXHIBIT 25
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	EMERGENCY MOTION FOR APPROPRIATE RELIEF: DETERMINE THE EXTENT OF MONITORING PRIVILEGED LEGAL CONVERSATIONS MOTION TO ABATE THE PROCEEDINGS IN ORDER TO RESOLVE THE ISSUE OF CGIS INVESTIGATING LEGAL CONVERSATIONS MOTION FOR PROTECTIVE ORDER TO PRECLUDE CGIS FROM ONGOING IMPROPER EXTRAJUDICIAL STATEMENTS 18 August 2021

1. **Nature of the Motion**. Defense Counsel requests relief in the form of a protective order to preclude the Coast Guard Investigative Service ("CGIS") investigators from attempting to discover the content of legal discussions between YN2 Richard and her attorneys; and to immediately cease the ongoing intimidation and malicious prosecution. Defense Counsel requests that the Court abate the proceedings to determine the extent of CGIS investigators seeking to obtain privileged communications between YN2 Richard and her attorneys.

2. **Burden of Proof**. As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

3. **Relevant Factual Background**.

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. CGIS investigators have generated over 60,000 pages of investigative documentation to determine what happened to [redacted] when she died on April 18, 2020.

c. The investigation that started on April 18, 2020, continues to this day.

d. CGIS investigators traveled from Kodiak, Alaska to [redacted] to interview the Accused's childhood friends, family members, intermediate school swim coaches, YMCA swim team coach, Fire Department personnel where YN2 Richard volunteered as a firefighter. In short, CGIS traveled to YN2 Richard's hometown to tell anyone and everyone that YN2 Richard is accused of killing an infant. None of these people were present when [redacted] passed away and many of the "witnesses" had not spoken to the Accused in several years. Nevertheless, CGIS investigators felt the need to tell them that YN2 Richard has been accused of killing [redacted]

e. During the interviews of YN2 Richard's childhood friends, CGIS investigators identified themselves as working for "DHS." One of YN2 Richard's friends, a schoolteacher, initially believed that the CGIS investigators were working on behalf of a child welfare agency and were inquiring into something about her school children. This friend finally determined that the investigators were actually working for the Coast Guard and were investigating YN2 Richard; at which time she terminated the conversation.

f. YN2 Richard requested to travel to [redacted] to meet with her attorneys and conduct a defense investigation (Defense Appellate Exhibit E, previously submitted to the Court). This request was denied (Defense Appellate Exhibit F, previously submitted to the Court).

g. YN2 Richard was transferred from her workplace in Kodiak, Alaska to a new workplace in Anchorage, Alaska. CGIS investigators have now conducted interviews of all of her current coworkers. None of these "witnesses" were present or even knew YN2 Richard when [redacted] passed away on April 18, 2020.

h. During the interviews of her current coworkers, the co-workers were asked if YN2 Richard made any legal calls or used her computer to communicate with her legal team. CGIS investigators were inquiring into the content of any legal conversations that the co-workers

might have overheard. Notably, none of this information was included in the CGIS reports of interviews of YN2 Richard's co-workers (Defense Appellate Exhibit JJ).

4. **Law and Argument**.

a. **Attorney-Client Communications**. The "integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel." *Weatherford v. Bursey*, 429 U.S. 545, 562 (1977) (Marshall, J., dissenting). "Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful…In order for the adversary system to function properly any advice received as a result of the defendant's disclosure to counsel must be insulated from the government." *United States v. Levy*, 577 F.2d 200, 209 (1978). "One threat to the effective assistance of counsel posed by government interception of attorney-client communication lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard." *Weatherford* at 554-55 n.4. Any attempt to discover privileged communication between Defense Counsel and the Accused is a violation of the Accused's right to the effective assistance of counsel and fundamentally infringes upon counsel's professional duties to their client. *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

In the case at bar, Government investigators have attempted to gather attorney-client communications. YN2 Richard requested and was denied the ability to travel to meet privately with her attorneys (Defense Appellate Exhibits E and F). With the discovery of the Government's efforts to monitor her attorney-client communications, neither the client, nor the attorneys feel safe communicating with each other. This issue is further compounded by the fact that YN2 Richard is not co-located with any of her attorneys; therefore, the only way to have attorney-client conversations is via telephone, email, or some other virtual form of communication. Because of the actions of the CGIS agents, YN2 Richard has been denied her ability to have a free-exchange of communication with her attorneys. Thus, the client has been denied effective assistance of counsel.

There has been ongoing suspicious behavior in YN2 Richard's work area. After work hours and on weekends, YN2 Richard's computer settings have been modified to allow monitoring of the video camera on her computer. In the past, YN2 Richard could turn off the video camera, she is now not permitted to disable the camera. Items on her desk have been moved and drywall dust has been found on her desk and chair. Put into context of all of the other investigative overreach, YN2 Richard no longer feels safe in her work environment. And, with the investigation into her attorney-client communication, YN2 Richard has reason to feel unsafe.

b. **Improper Extrajudicial Statements**. Rule 3.8(f) of the American Bar Association ("ABA") Special Responsibilities of a Prosecutor states that "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, *refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation* of the accused and exercise reasonable care to prevent investigators…from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule." (emphasis added).

In this case, Government investigators have contacted anyone YN2 Richard has known since childhood. The investigators continue to hound YN2 Richard by going to her new workplace and "interviewing" her new co-workers. The behavior of the investigators goes way beyond any reasonable investigative purpose. What would a YMCA swim coach in [redacted] who knew YN2 Richard as a child, know about an alleged crime in Kodiak, Alaska in 2020? By contacting all of her friends, employers, teachers, and co-workers, CGIS investigators set out on a mission to assassinate the character of YN2 Richard.[1] This is an unconscionable abuse of power, abuse of process, and malicious prosecution. Not only is the Government

[1] CGIS investigators required many witnesses to sign "nondisclosure agreements" after they were interviewed. Ironically, after CGIS has witnesses sign these "nondisclosure agreements," they travel the country telling everyone their version of the facts in this case. In fact, CGIS attempted to use their "facts" to get an exculpatory witness ([redacted]) to change her story to fit with the CGIS theory of guilt.

proceeding to trial on charges that are not supported by probable cause, the Government investigators are sharing these charges as if they are true. Regardless of the outcome of this case, there will be a cloud of suspicion over YN2 Richard for the rest of her life. CGIS investigators have destroyed the life of YN2 Richard for no legitimate purpose.

c. **Consciousness of Guilt**. CGIS investigators knew they were doing something improper and there is evidence of their consciousness of guilt. CGIS investigators attempted to obtain information regarding attorney-client conversations from ET1 [redacted] (Defense Appellate Exhibit JJ). This conversation was not video or audio recorded. When explaining why CGIS was using audio/video equipment to record an interview, CGIS investigator [redacted] explained that "everything has to be recorded…it is a CGIS policy." (Defense Appellate Exhibit KK, lines 1-3). Additional evidence showing a consciousness of guilt is the fact that the questions about attorney-client conversations were not included in the CGIS report of investigation. (Defense Appellate Exhibit JJ). Hiding or concealing information shows a consciousness of guilt.

5. **Relief Requested.**

For all of the reasons stated above, the defense respectfully requests the Court for the following relief:

a. Require the Government to produce any and all information relating to attorney-client communications.

b. Require the Government investigators to explain why they were inquiring into attorney-client communications with witnesses.

c. Require the Government to send YN2 Richard to temporary duty where she can participate in confidential attorney-client communications. Ideally, the location for YN2 Richard to be sent for temporary duty is Washington, DC (where attorney LCDR Luce is stationed) or Missouri (where attorney Billy Little resides).

d. Issue a protective order to prevent Government investigators from making any further statements about this case to any persons not already involved in this case.

5. Evidence.

The defense offers the following evidence as enclosures to support this motion.

Defense Appellate Exhibit E: YN2 Kathleen Richard TDY Travel Request Worksheet dated May 10, 2021.

Defense Appellate Exhibit F: Email exchange between Defense Counsel (Billy Little), YN2's Commanding Officer (CAPT [redacted], and USCG Legal Services Command SJA (LCDR [redacted].

Defense Appellate Exhibit JJ: CGIS report dated May 14, 2021.

Defense Appellate Exhibit KK: Transcript of Interview, dated June 25, 2020.

6. Oral Argument.

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 18th day of August, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ J. L. Luce
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

[redacted]
C. O. SPENCE
LT, JAGC, USN
Detailed Defense Counsel

****

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

Dated this 18th day of August, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF; MOTION TO ABATE PROCEEDINGS 27 AUG 2021

RELIEF SOUGHT

The United States files this motion in response to the Defense motion for appropriate relief and abate the proceedings. The United States respectfully requests that this Court deny this frivolous defense motion. The Defense has failed to meet its burden.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of proof and persuasion, which must be met by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c).

FACTS

The facts relevant to the issues raised in this motion are as follows:

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder), one specification of Article 119 (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice), UCMJ.

2. On 18 April 2020, [redacted] of Coast Guard active duty members YN2 Kathleen Richard and BM2 [redacted] was found "blue and unresponsive," face-down and swaddled in her crib at [redacted] located in Coast Guard Base Kodiak housing. The last individual to observe [redacted] alive was [redacted] the Accused, approximately three hours earlier.

3. Coast Guard Investigative Services (hereinafter: "CGIS") initiated an investigation into the death of [redacted] During the investigation, CGIS conducted witness interviews, reviewed an autopsy, and gathered physical and medical evidence. Initially, both the Accused and [redacted] were treated as potential suspects. Though YN2 Richard has been charged, the investigation is ongoing. CGIS continues to respond to leads and gather evidence.

4. In April 2021, CGIS visited [redacted] the Accused's hometown, to interview family, friends, acquaintances, and outcry witnesses based on leads and as part of its comprehensive investigation. Agents would have completed this sooner but COVID-19 limited travel through much of 2020.

5. Defense Counsel filed this motion on 18 August 2020, five days after the filing deadline for motions to be argued during the 2-3 September session. Though the Defense was late in filing, the Government offers this response in the interest in judicial economy.

LEGAL AUTHORITY AND ARGUMENT

The Defense's motion is baseless; they have not met their burden.

The Defense posits its motion on the false premise that (1) CGIS attempted to discover the content of privileged communications between YN2 Richard and her attorneys; and (2) CGIS exceeded its investigative limits by interviewing former associates and current colleagues of the Accused, YN2 Richard. The Defense characterizes this as prosecutorial misconduct. Both of

these notions are absurd. CGIS has not acted improperly or overreached in its investigation.

Prosecutorial misconduct occurs when trial counsel "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornbeck*, 73 M.J. 155, 159 (C.A.A.F. 2014); *Berger v. United States*, 295 U.S. 78, 84 (1935). Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable ethics canon." *United States v. Meeks*, 44 M.J. 1, 5 (C.A.A.F. 1996). It is a high standard. Likewise, investigative overreach requires "governmental conduct so outrageous so as to offend against due process." *United States v. Simmons*, 14 M.J. 624, 626 (A.F.C.M.R. 1982); *see also United States v. Harms*, 14 M.J. 677 (A.F.C.M.R. 1982).

First, without offering any evidentiary support, the Defense asserts that CGIS attempted to discover the content of privileged attorney-client communications by asking unknown current coworkers if "YN2 Richard made any legal calls or used her computer to communicate with her legal team." This is patently false. CGIS specifically does not ask interviewees about attorney-client communications and did not do so in this case. The Government has no attorney-client privileged communications in its possession. Furthermore, even if coworkers overheard these alleged calls in the workplace, it would constitute waiver on the part of the Accused of the attorney-client privilege. She has a responsibility to seek privacy when speaking to her lawyers if she wants to maintain the privilege. Communications within earshot of others is disclosure. There is also no expectation of privacy in the workplace, especially in common areas.

The Defense attempts to burden-shift by arguing in its motion that CGIS displayed "consciousness of guilt" by not recording its interview with ET1 [redacted] however it is not

CGIS policy to use audio/video equipment to record interviews. In fact, it is only CGIS policy to record title subjects and victims. Until BM2 [redacted] was cleared as a title subject in this investigation – which he has now been – his interviews were recorded. Recordings with ET1 [redacted] would not be.

Second, the Defense attempts to argue that the investigative work of CGIS crossed the line into malicious prosecution. Once again, the Defense fails to produce any evidence to meet its burden, or show any semblance of egregious conduct on the part of CGIS. Instead, the Defense concedes the relevance of conducting an investigation in [redacted] See Defense Motion at 2, line 16-17. Indeed, the Defense wanted to meet there too. CGIS investigators rightly interviewed the Accused's family, friends, outcry witnesses, and associates to uncover inculpatory and exculpatory evidence, and gain a better understanding of her background, motivations, etc. This evidence has been disclosed to Defense. This investigative strategy is commonplace in serious investigations involving intent-based crimes.

In addition, it should be noted that four of the associates of YN2 Richard from [redacted] have been listed on the Defense's witness list, including two former swim coaches. To say that the Government investigators' travels to [redacted] were nothing more than an "unconscionable abuse of power" by law enforcement meant to "hound" and "assassinate [the Accused's] character" is hyperbolic and disingenuous to the agency's truth-seeking function. There is also no issue with CGIS interviewing her current coworkers, considering that the Accused has continued to make inconsistent statements regarding the cause and manner of [redacted] death. As these statements are incredibly relevant to the presentation of evidence for both Government and Defense, any statements made by the Accused to her coworkers or others must be explored.

Finally, it is worth emphasizing that not only does the Defense's motion lack merit, but the remedies requested by Defense are grossly inappropriate. The Government is still under an ongoing obligation to disclose inculpatory and exculpatory evidence to the Defense. A gag order – as Defense have requested – to limit the scope of witnesses involved in this case runs afoul of this ongoing obligation. The Government is not in possession of any privileged material at this time. It has done nothing to hinder her ability to seek effective assistance of counsel. The Accused elected to choose attorneys outside of her geographic area, with full knowledge that Mr. Little resided in Missouri and LCDR Luce in Washington, D.C. Because there is no merit to the Defense's motion, the relief requested should be denied.

WITNESSES/EVIDENCE

The Government incorporates by reference the exhibits in the Defense's motion. The Government does not intend to present any witnesses.

CONCLUSION

The United States respectfully requests that this Court DENY the Defense's motion for appropriate relief and motion to abate the proceedings. The Defense's burden has not been met.

[redacted]

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 27 Aug 2021.

[redacted]

Allison B. Murray
LCDR, USCG
Trial Counsel

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF EVIDENCE 27 AUG 2021

RELIEF SOUGHT

The United States files this response in opposition to the Defense's Motion to Compel Production and asks that this Court deny the Defense's motion because the Government has either provided or is in the process of providing Defense Counsel with all responsive documents and evidence relevant to their request, or the Defense has not met its burden regarding the discovery or production of the requested material.

HEARING

A hearing is requested to present oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the burden of persuasion and the burden of proof are on the Defense. Rule for Courts-Martial (R.C.M.) 905(c)(2). The burden of proof for any contested factual issues related to this motion is a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder), one specification of Article 119 (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice).

2. The Government provided Defense Counsel with all investigative records obtained from

Coast Guard Investigative Services, Alaska State Troopers, and State of Alaska Medical Examiners' Office within its possession, custody or control. The Government has continued to supplement its disclosures to Defense as trial preparation and witness interviews continue.

3. The Government responded to Defense Counsel's discovery memoranda on 9 August 2021. In its response, Trial Counsel indicated which records were not within the possession, custody or control of military authorities.

4. On 13 August 2021, Defense Counsel filed a motion to compel production of discovery.

5. The Government has made a good-faith and diligent effort to respond to the Defense's discovery requests and disclose requested information. At present, the Government has provided over 22,753 documents and exhibits to Defense. A.E. I – K.

WITNESSES AND EVIDENCE

The Government incorporates the discovery requests and responses attached to the Defense's motion. In addition, the Government adds:

- **A.E. I – K**: Government Discovery Disclosure Memoranda

LEGAL AUTHORITY

The United States acknowledges that discovery is an important right provided to an accused. The particular discovery items before this Court, however, are outside the scope of discovery and/or fail to meet the standards that govern and control discovery and production.

R.C.M. 701(a)(2) is the discovery standard, and is limited to items that are within the control of military authorities. To meet the R.C.M. 701 standard, the Defense must show that the item(s) exist, and that they are relevant to the Defense's preparation for trial. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." M.R.E. 401.

R.C.M. 703 is the production standard, for all other evidence not within the control of military authorities. Under R.C.M. 703, the Defense must show that the item(s) exist, and that they are relevant and necessary to their theory of the case at trial. "Relevant evidence is 'necessary' when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); R.C.M. 703(e)-(f). The concepts of discovery and production are the lens through which the Prosecution evaluated the Defense's requests.

C.A.A.F. has held that trial counsel's obligation under Article 46, UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999). However, discovery is not a tool for a broad "fishing expedition."

The discovery standards under R.C.M. 701 and the production standards under R.C.M. 703 place the burden on the Defense to show that the requested material actually exists. *United States v. Waldrup*, 30 M.J. 1126, 1129 (N.M.C.M.R. 1989) ("in both R.C.M. 701(a)(2) and 703(f), MCM, 1984, it is incumbent upon the defense to show that the requested material actually exists.") Discovery is not an opportunity for the Defense to turn the trial counsel into their investigators. It is also not an opportunity for the Defense to sit back and force the trial counsel to engage in an exhaustive canvass search on their behalf just to ascertain whether documents or things might exist.

R.C.M. 701 and 703 empowers and requires the trial counsel to evaluate Defense discovery requests against the discovery and production standards. When the requests do not meet the standards, denial is proper. Denial of discovery largely occurs when the Defense

chooses—as largely done here—to merely list items (or categories of items) without articulating the relevance to their preparation. Often there is not inherent relevance in the item(s) requested. Additionally, as noted below, of the hundreds of items requested by the Defense, in numerous instances the Defense does not even know whether the documents or materials actually exist. This is not cognizable under discovery rules.

It is well settled that the government generally need not produce evidence held in the possession, custody, or control of a separate state or local government agency. See *United States v. Stellato*, 74 M.J. 473, 484; *United States v. Poulin*, 592 F. Supp. 2d. 137, 142-143 (D. Me. 2008); *United States v. Libby*, 429 F. Supp. 3, 6 (D.D.C. 2006); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998).

In very limited circumstances, the Court should apply the RCM 701 discovery standard to evidence which is not directly under the custody or control of the military. This is uniquely for a situation where the evidence is not in the possession or control of the military but is still legally deemed to be within "within its possession, custody, or control." *Stellato* at 484-485. Instances in which this applies include when: (1) the prosecution has both knowledge of and access to the [evidence]; (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 local sheriff's office and the [evidence] remains in the possession of the local law enforcement. *Id.* at 485.

Under R.C.M. 703(f), "[e]ach party is entitled to the production of evidence which is relevant and necessary. The parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. *Williams*

at 441. In practice, the defense request for production of evidence not under the control of the Government "shall list the items of evidence to be produced and shall include a description of each item sufficient to shows its relevance and necessary, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence. R.C.M. 703(f).

ARGUMENT

The Government asks that this Court deny the motion to compel production, as the Defense has either been supplied the requested discovery by the Prosecution, or the Defense has not met its burden of establishing that all items requested are relevant and necessary, reasonable, and not cumulative.

1. Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication between law enforcement and a member of the Accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation;

This request should be denied. All information within the Government's possession, custody or control related to the CGIS investigation and referral decision by the Convening Authority has previously been provided to Defense Counsel.

2. The names of all government investigators who have participated, or are presently participating, in the investigation of this case, as well as their accreditation, any previous law-enforcement or investigative jobs held, and a statement as to their length of service in such jobs.

This request exceeds the scope of R.C.M. 701; the Defense can already access the information requested, or could through due diligence. The names of investigators involved in this case have been previously provided to Defense Counsel through discovery. Likewise, the Government provided the Defense its initial witness list on 12 August 2021, which lists contact information and email addresses for investigators.

Discovery is not a tool for the Defense to turn trial counsel into their own private investigators or paralegals. The Defense is still required to conduct its own pretrial preparation of witnesses, including Government witnesses. The Defense is free to call or email any of the investigators assigned to this case and inquire as to their previous law enforcement or investigative experience, and their length of service.

3. Evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal investigations, or adverse administrative actions.

The Government is not currently aware of any evidence adversely affecting the credibility of any prosecution witness named on its initial witness list. Trial Counsel will abide by its ongoing discovery obligations and disclose any adverse information about potential witnesses.

The Government has not granted immunity or promised leniency to any witness in this case.

4. Any other evidence from unit personnel files demonstrating any disciplinary actions against a potential government witness.

The Government is not currently aware of any such evidence adversely affecting the credibility of any prosecution witness not already disclosed to Defense Counsel. Trial Counsel will abide by its ongoing discovery obligations.

5. All personnel records for law enforcement and military witnesses for evidence of adverse performance, bias, or any evidence that would constitute grounds for impeachment.

The Prosecution is not currently aware of any information or evidence adversely affecting the credibility of any prosecution witness not already disclosed to Defense Counsel.

The Defense request moves to compel Trial Counsel to disclose all personnel records for law enforcement. This request is without basis and contrary to how *Henthorn* requests for law enforcement are handled in the Coast Guard and in all other military/law enforcement departments. It is unclear why the Defense in this case believes that it is entitled to a different practice from how these requests have been handled by the Coast Guard and all other services in every other case.

Defense Counsel is in possession of contact information for law enforcement and military witnesses. Discovery is not a replacement for the trial preparation and due diligence of Defense Counsel.

6. With respect to BM2 [redacted] Defense Counsel requests discovery of and information relating to prosecution, punishment, a decision not to punish, a promise of leniency, or the final disciplinary resolution for:

    (1) Manslaughter;
    (2) Adultery;
    (3) Child endangerment, or any other offense relating to his assertion that he failed to check on [redacted] prior to her being found unresponsive in her crib;
    (4) Child endangerment, or any other offense relating to his assertion that he was taking shots of tequila while he was alone and responsible for overseeing [redacted] on the day she died;
    (5) Aiding, abetting, or facilitating illegal entry into the United States for himself or immediate family members;
    (6) possible misconduct; or
    (7) Any other misconduct allegations against BM2 [redacted] while he has been a member of the USCG.

Trial Counsel have reviewed the personnel file and service record book of BM2 [redacted] The Prosecution is not in possession, custody, or control of material responsive to this

request that has not already been disclosed to Defense Counsel. Even so, the Defense has not met its burden under R.C.M. 701.

Addressing the first portion of this category, the Defense cannot meet its burden because this is quite clearly an exploratory search for information that the Defense has no basis or evidence to believe exists. It is nothing more than a shrouded request for interviews/investigative efforts. For that reason alone, this request should be denied.

Secondly, it is a gross stretch of the truth to state that BM2 [redacted] and YN3 [redacted] were ever involved in [redacted] or even romantically involved prior to [redacted] death (contrary to Defense Counsel's footnote on page 9). The only evidence of a romantic event between BM2 [redacted] and YN3 [redacted] occurred months after [redacted] death, and only after YN2 Richard admitted to BM2 [redacted] that she killed [redacted] and after he had requested [redacted] from YN2 Richard. Defense Counsel's claim of motive in its motion on the part of BM2 [redacted] is pure fantasy.

There is also absolutely no evidence, besides Defense Counsel's bald assertion, that "some of BM2 [redacted] immediate family members entered and possibly remain unlawfully in the United States." Not only is there no basis to believe this information exists, but that information is immaterial to the case at hand, impermissible argument, a masked attempt at witness intimidation, and not a cognizable discovery purpose.

7. With respect to YN3 [redacted] Defense Counsel requests discovery of the following:

   (1) Any reprimand, counseling, punishment, or promises of leniency with respect to YN3 [redacted] for lying to Government investigators about her [redacted] with BM2 [redacted] (see Bates 017622). This request includes any discussion between Government agents, Trial Counsel, or her chain of command regarding punishment, lack of punishment, or promises of leniency.

(2) Any reprimand, counseling, punishment, or promises of leniency with respect to YN3 [redacted] for having [redacted] with BM2 [redacted] (see Bates 017622). This request includes any discussion between Government agents, Trial Counsel, or her chain of command regarding punishment, lack of punishment, or promises of leniency.

Trial Counsel have reviewed the personnel file and service record book of YN3 [redacted] information responsive to this request does not exist. There are no grants of immunity or leniency in this case.

8. Request disclosure of the picture referred to by BM2 [redacted] during his June 25, 2020 interview with CGIS. BM2 [redacted] says that he showed CGIS a picture of [redacted] on the morning she passed away (29:30 of the recorded interview).

   This evidence has already been provided to the Defense.

9. In June, 2020 (two months after the death of [redacted], USCG Base Kodiak sent a "NOTICE" referencing elevated lead levels in the water at Base Kodiak (see Enclosure to this Discovery Request). The NOTICE stated that "Lead can cause serious health problems, especially for pregnant women and young children." With respect to lead in the water at USCG Base Kodiak, Defense Counsel requests the following discovery:

   (1) All information relating to lead in the water at USCG Base Kodiak.
   (2) Copies of all notices regarding lead in the water at USCG for the past five years.
   (3) The dates and results of any lead testing on USCG Base Kodiak.
   (4) All known side effects from the lead poisoning in infants and pregnant mothers.
   (5) A list of names of any other persons suffering from the effects of lead in the water consumed on USCG Base Kodiak.
   (6) Whether or not lead exposure has been placed in any servicemember's records at Base Kodiak. Regardless of whether or not this has been placed in a servicemember's records, all records relating to this topic from any medical or any person in a leadership position at USCG Base Kodiak.
   (7) All documentation that led the Government to specifically identify pregnant women and children as it relates to elevated levels of lead on USCG Base Kodiak.
   (8) A list of any other pregnant women or children who have suffered the effects of lead in the water and who were also stationed at USCG Base Kodiak.

(9) All notifications and correspondence, including but not limited to emails, memos, notices, regarding lead levels at Base Kodiak.

(10) The dates/times where persons at USCG Base Kodiak personnel were told not to consume the water, and/or there was a boil water, or any other warning about lead in the water,

(11) Whether blood samples from YN2 Richard and/or the deceased [redacted] were tested for lead in their blood.

i. If their blood was not tested, any discussion, documentation or correspondence relating to the decision not to test the blood. ii. Whether blood samples were retained for independent testing of lead in the blood of the deceased, [redacted] If no samples were retained, any discussion, documentation or correspondence relating to the decision not to preserve blood samples for later testing.

This request exceeds the scope of R.C.M. 701 and is irrelevant to Defense preparation. The Defense has not provided sufficient evidence to meet their burden under *Waldrup* to establish that such materials actually exist. Even if such materials did or do exist, most if not all of the purported requests are not actually discovery. Many of these requests are requests for investigative actions, interviews of people, etc.

Further, the Defense has failed to meet its burden to demonstrate how these items would be relevant to their preparation. An autopsy was conducted of [redacted] by the State of Alaska Medical Examiner with toxicological testing. There was no evidence of lead contamination in her body. Moreover, the Base Kodiak notice regarding lead in drinking water predates the accused's time on Base. The notice stated that "Base Kodiak found elevated levels ... in some homes and building on March 31, 2016." As a result, a corrosion control system was installed in June 2017 in the Waste Treatment Plant and immediate measures were taken. Regular testing was conducted and no signs of elevated levels of lead (EPA action level) were discovered in the drinking water for the time period that the accused and [redacted] lived on board Base Kodiak (July 2019 to April 2020).

10. Any and all information, conversations, communications (written or verbal) regarding why the remains of [redacted] were released for cremation during a homicide investigation.

Information related to this request does not exist with the possession, custody or control of military authorities. As for production, the Defense has failed to meet the standards outlined in R.C.M. 703; the Defense motion fails to prove that this evidence exists or explain why it is relevant and necessary for admission at trial.

11. Name and contact information for any and all NCIS, CGIS, or other Government agents involved in the 2018 interview of YN2 Richard. Specifically, but not limited to the Government agent who, during a recorded on December 3, 2018, interview, told YN2 Richard, that it was "completely understandable" that people delete messages on their phone. Additionally, request discovery of the names and contact information for any other Government agents who have advised any person involved in this case that deleting information from cell phones and computers is a normal activity.

The name of the investigator who interviewed the accused in 2018 has already been provided in discovery.

12. The font on the pages of the CGIS reports changes in mid-paragraph on some of the previously disclosed information. Defense Counsel requests the original version of CGIS reports; particularly where the information and font were changed mid-paragraph.

The Defense has already been provided the finalized version of the CGIS report. To the extent that this is a request for draft reports or other documents, such materials are not relevant to the Defense's preparation, and thus this request should be denied.

13. The Accused filed a complaint of workplace discrimination prior to the death of [redacted] With respect to the discrimination complaint, Defense Counsel requests the following:

    a. The names and contact information for any persons who reviewed the complaint.

The Government has no record of a formal EEO/EO workplace discrimination complaint filed by YN2 Richard. Any records or information concerning YN2 Richard's informal

allegation of workplace discrimination to her Command have previously been disclosed to Defense Counsel.

14. All information, communication or correspondence (relating to the discrimination complaint) involving the Accused's chain of command or any person interviewed by Government agents in this case.

    (1) The requested discovery includes, but is not limited to, information, communication or correspondence involving the Accused's Commanding Officer and/or the Convening Authority.
    (2) Any and all communication to or from CWO [redacted] regarding the discrimination complaint.
    (3) Any and all communication regarding the status or resolution of the discrimination complaint.
    (4) The intent of the discovery request, in part, is to investigate UCI in this case or retaliation by any person in the Accused's chain of command for the filing of a workplace discrimination complaint. With this in mind, if there is additional information that would support either UCI or retaliation, Defense Counsel requests the Government find and provide this information.

Responsive materials have been previously disclosed to Defense Counsel. As explained, the Government has no record of a formal EEO/EO workplace discrimination complaint filed by YN2 Richard. Any records or information concerning YN2 Richard's informal allegation of workplace discrimination to CDR [redacted] and the preliminary and non-finalized internal report by CWO2 [redacted] have previously been disclosed to Defense Counsel. It was not routed through her Chain of Command.

This is yet another example of a broad request for information that the Defense has no proof actually exists.

15. Personnel and training records for any Government agents involved in this case, specifically, but not limited to, the following:

    a. Training records for interview and interrogation techniques. This includes formal training, as well as follow-on, and "on the job training." Also, the test scores, reviews,

and supervisor notes relating to the training received, as well as any recommendations or measures to correct or improve the agents interview and/or interrogation methods and techniques.

This request exceeds the scope of R.C.M. 701 and should be denied. This material is not relevant to the Defense's preparation. Even assuming it was, the Defense has equal has access to these potential witnesses and can ascertain this information through due diligence and pretrial preparation.

16. Any instructions or guidance Government agents receive as to how long, or how many times, a person should be interviewed and/or interrogated.

This request exceeds the scope of R.C.M. 701 and should be denied. Additionally, the Defense already has access to the contact information of the Government investigators who conducted interviews of YN2 Richard and can ascertain information related to their interview training and experience through pretrial preparation.

17. With respect to any Government agents or participants involved in this case, including supervisors and reviewing agents:

    a. The case names, dates, and level of participation the Government agents had in any homicide cases. These cases should specifically identify any infanticide cases and cases involving the alleged homicide of a person under 10 years of age.

This request is not relevant to Defense preparation, exceeds the scope of R.C.M. 701, and should be denied. The Defense already has access to the contact information of the Government investigators involved in this case and can ascertain information related to their training and experience through due diligence and pretrial preparation.

18. Any and all medical training of Government investigators.

This request is not relevant to Defense preparation, exceeds the scope of R.C.M. 701, and should be denied. The Defense already has access to the contact information of the

Government investigators involved in this case and can ascertain information related to their training and experience through due diligence and pretrial preparation.

19. Any and all training relating to Sudden Infant Death Syndrome ("SIDS") or Sudden Unexplained Infant Death Syndrome ("SUID"), or Sudden Unexplained Infant Death Investigations ("SUIDI")

This request is not relevant to Defense preparation, exceeds the scope of R.C.M. 701, and should be denied. The Defense has access to the contact information of the Government investigators involved in this case and can ascertain information related to their training and experience through due diligence and pretrial preparation.

20. Discovery related to Dr. [redacted]

The Defense's discovery request for information connected to Dr. [redacted] grossly exceeds the scope of R.C.M. 701 and assumes, incorrectly, his involvement in the early stages of the investigation with CGIS. Dr. [redacted] in no way directed the investigation. Moreover, much of the Defense's request for information is either irrelevant or outside the possession, custody or control of military authorities. The Defense has failed to meet its burden under R.C.M. 703.

As of the Government's initial witness list promulgated on 12 August 2021, Dr. [redacted] is now listed as a named expert witness for the Government. The Defense has been provided his contact information and can conduct its own review of his report and query him accordingly regarding his expertise. It is incumbent on Defense to perform its own trial preparation and due diligence.

21. A copy of any CGIS manuals relating to the manner in which interviews and interrogations are to be conducted.

This requests the CGIS manual, a protected document that is not produced in discovery.

While it may contain guidance to special agents and best practices, it does not set the legal standards for legal versus illegal actions by investigators. For the Defense's purported purposes of examining interrogation techniques, the CGIS manual is not relevant to their preparation. This is because even if there were violations of the CGIS manual, they would be irrelevant because the legal standards are not set by the CGIS manual—they are set by the law. Finally, an M.R.E. 506 privilege is often claimed in relation to the CGIS manual.

22. Following the death of [redacted] USCG Base Kodiak conducted training on child death, specifically death from SIDS. With respect to this training, Defense Counsel requests discovery of the following:

    a. The names and contact information of all persons involved in preparing or conducting the training; as well as any persons directing that the training be conducted.

    b. Any attendance rosters maintained for this training.

    c. Whether this training was in response to the death of [redacted] If so, the names and contact information of any persons involved in the decision to conduct the training; as well as all information correspondence or communication relating to this training.

    d. Whether this training was reported to higher authority as a partial response to the death of [redacted] If so, the names and contact information for any person involved in this reporting as well as any recipient of the report.

    e. Copies of all presentations and reference materials used in this training.

This request lacks specificity, fails to show that this evidence even exists, is irrelevant, and exceeds the scope of R.C.M. 701. This is not cognizable under discovery rules and should be denied. Furthermore, in its motion, the Defense fails to make any showing of why this evidence is relevant to its case in chief – stating only that any training following the death of [redacted] is "appropriate" for the defense to review. Discovery solely for the purpose of fulfilling curiosity is unsupported by case law and an improper reason for requiring disclosure.

23. The written list of questions, notes, and reference material discussed by CGIS Agents [redacted] and [redacted] during their interview of [redacted] on May 7, 2020. These notes/lists are referenced on page 99, of the transcribed interview provided by the Government to Defense Counsel. Although referenced in the transcript, this discovery request is not limited to those notes, but includes any and all notes and lists of questions used during the investigation of this case.

This request should be denied as all responsive documents and information currently known to the Government and within the possession, custody, or control of military authorities were previously provided to Defense Counsel.

24. A complete list of names of the people "at the highest level of headquarters" who were briefed or involved in this case. This reference can be found on page 134 of the May 7, 2020 transcribed interview of [redacted] This transcript was provided by the Government to the defense.

This request is overbroad, irrelevant to Defense preparation, and exceeds the cognizable scope of R.C.M. 701 and should be denied. This request is not actually a request for discovery, but rather a veiled request for investigation, interview, and disclosure of results. The initial Government witness list includes the names and contact information for the key investigators involved in this case. The Defense was provided all information related to the CGIS investigation and referral decision by the Convening Authority. Ascertaining the names of who was briefed as of May 7, 2020, is neither relevant to the ultimate results of trial nor documentary evidence that can be discovered.

CONCLUSION

Based on the above, the Government requests that this Court deny the Defense motion to compel production of evidence.

[redacted] MURRAY.ALLISON.BLAIR [redacted] Digitally signed by MURRAY.ALLISON.BLAIR [redacted] Date: 2021.08.27 14:41:59 -07'00'

Allison B. Murray [redacted]
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 27 August 2021.

[redacted]
Allison B. Murray
LCDR, USCG
Trial Counsel

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES** **13 AUGUST 2021**

MOTION

Pursuant to Rule for Court-Martial (R.C.M.) 906(b)(7), the Defense respectfully moves this Court to compel the Government to produce the following relevant and necessary witnesses requested by the Defense:

1. S/A [redacted]
2. LCDR [redacted]
3. CWO2 [redacted]
4. YN2 [redacted]
5. S/A [redacted]
6. [redacted]
7. S/A [redacted]
8. [redacted]
9. [redacted]
10. [redacted]
11. [redacted]

FACTS

1. On April 18, 2020, [redacted] BM2 [redacted] and YN2 Kathleen Richard (formerly "Kathleen Flores Guerra")) was found non-responsive in her crib at Kodiak, Alaska base housing.

2. On the morning of April 18, 2020, YN2 Richard, BM2 [redacted] and [redacted] traveled from [redacted] at base housing on Kodiak, Alaska to the home of FN [redacted] and [redacted]. The [redacted] live in base housing but outside of the security gate perimeter (this area is referred to as "[redacted]").

3. After having breakfast, FN [redacted] and BM2 [redacted] left [redacted] with YN2 Richard and Ms. [redacted] to go wash their cars.

4. YN2 Richard, Ms. [redacted] and [redacted] remained at the [redacted] residence without transportation for several hours. Because [redacted] was having difficulty sleeping at the

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[redacted] house. YN2 Richard and Ms. [redacted] asked [redacted] to come back so that they could take [redacted] to her home to sleep in her own crib.

5. BM2 [redacted] shuttled drove YN2 Richard, Ms. [redacted] and [redacted] to the [redacted] The distance is less than five minutes by car. BM2 [redacted] first took YN2 Richard and [redacted] and then brought Ms. [redacted] to the [redacted]

6. When Ms. [redacted] arrived at the [redacted] was in her room with the door closed and YN2 Richard was on the couch folding clothes. Ms. [redacted] sat on the couch with YN2 Richard and watched television.

7. While seated on the couch, Ms. [redacted] heard [redacted] cooing (baby talk) for a minute or two. Ms. [redacted] asked YN2 Richard if she could hear [redacted] talking; YN2 Richard confirmed that [redacted] was in her crib cooing. After this cooing, YN2 Richard was never alone again with [redacted] before she was found unresponsive well over an hour later.

8. When BM2 [redacted] and FN [redacted] returned to the [redacted] BM2 [redacted] asked YN2 Richard and Ms. [redacted] to go to the coffee shop approximately 15 minutes away (Harborside Coffee).

9. FN [redacted] also leaves to get food at the base bowling alley. At this point, BM2 [redacted] alone with [redacted]

10. During the time when BM2 [redacted] alone with [redacted] he was allegedly "Facetiming" with his family in celebration of [redacted] birthday. Each time someone would say "Happy Birthday" BM2 [redacted] would take a shot of tequila.

11. BM2 [redacted] family asked to see [redacted] but he refused their request. BM2 [redacted] indicated that he would ordinarily show his family [redacted] but not this time.

12. When Ms. [redacted] and YN2 Richard returned from Harborside Coffee, BM2 [redacted] alone with [redacted] YN2 Richard went to check on [redacted] According to BM2 [redacted] he had not checked on her the entire time he was alone with [redacted]

13. YN2 Richard found [redacted] in her crib discolored and nonresponsive. YN2 Richard began screaming for BM2 [redacted] to come help. BM2 [redacted] picked up [redacted] and was told by Ms. [redacted] to start CPR and take her to the hospital.

14. YN2 Richard, BM2 [redacted] and [redacted] drove to the Providence Kodiak Island Medical Center. Upon arrival, YN2 Richard and BM2 [redacted] rushed into the Medical Center with [redacted] The hospital video shows [redacted] in a state of distress. YN2 Richard ran into the Medical Center with no shoes, no purse, and the car's engine running in the parking lot.

15. The medical staff was unable to revive [redacted] and she passed away on April 18, 2020. The doctor's note indicates that [redacted] likely died of "SIDS" and [redacted] were "understandably distraught."

16. [redacted] was sent to the Alaska Medical Examiner's Office for an autopsy. An autopsy was performed on April 21, 2021. A Coast Guard Investigative Services ("CGIS") agent was present during the autopsy. The Alaska Medical Examiner found that [redacted] death was "Probable Asphyxia" due to "Prone position of swaddled infant in bedding (blankets in infant crib)." The Medical Examiner's report states, "the manner of death is classified as undetermined."

17. The CGIS spent thousands of hours investigating this case; interviewing over 50 persons of interest; produced over 50,000 pages of discovery.

[redacted]

Violation of UCMJ, Article 131b (Obstructing Justice). "…delete electronic data…from her personal phone…laptop…and Apple iCloud account…with intent to influence, impede and obstruct the due administration of justice.[1] Enclosure DD.

22. When LCDR [redacted] provided the charge sheet to YN2 Richard, she observed YN2 Richard's skin on her neck become red and blotchy. Enclosure DD.

23. CWO2 [redacted] was the Preliminary Inquiry Officer assigned to conduct an investigation into YN2 Richard's allegation of discrimination by members of her chain of command. He completed his investigation and corresponding report on 22 April 2020. Enclosure EE.

24. S/A [redacted] conducted reviews of digital evidence in this case. On 24 April 2020, he contacted Merkury Innovations LLC to inquire about the ability to obtain videos from YN2 Richard and BM2 [redacted] home camera. Enclosure II.

25. As part of his investigation, S/A [redacted] also conducted a review of YN2 Richard's CGOne data, which included her Skype conversations. Enclosure II.

26. During her interrogation on 28 May 2020, YN2 Richard admitted to CGIS that she deleted web searches pertaining to Sudden Infant Death Syndrome and Asphyxia as well as text messages from her iPhone. She volunteered this information to CGIS during her interrogation. On 21 October 2018, YN2 Richard was interviewed by S/A [redacted] and S/A [redacted] regarding her allegation of a [redacted] On 3 December 2018 interviewed again by CGIS S/A [redacted] specifically regarding relevant text messages for the investigation. When YN2 Richard told S/A [redacted] that she deleted the text messages, he responded by telling YN2 Richard that "it happens" and "people want to delete everything." S/A [redacted] also told YN2 Richard that it was understandable to delete text messages. Enclosure FF.

27. The Defense submitted a witness production request to the Government on 5 August 2021. The Defense requested the above witnesses as well as four pre-sentencing witnesses: (1) Ms. [redacted] (2) [redacted] (3) [redacted] and (4) [redacted] Enclosure GG.

28. Ms. [redacted] is YN2 Richard's [redacted] She was a [redacted] in YN2 Richard's life and raised her when her [redacted] were deficient. She has known YN2 Richard since she was about three years old and has watched her grow up. She will testify regarding YN2 Richard's childhood, enduring positive character traits, and her desire to be a good mother. Ms. [redacted] unconditionally supports YN2 Richard, regardless of the outcome of the legal proceedings.

[1] When the charges were referred to this court-martial, an additional charge, violation of Article 119 (Manslaughter) was added to the charge sheet.

29. Ms. [redacted] was YN2 Richard's [redacted] for four years in high school. She would testify regarding her observations of YN2 Richard as a team member and eventually as team captain. She can testify regarding YN2 Richard's work ethic, her mentorship and care for others, and compassion.

30. Ms. [redacted] is a secondary [redacted] to YN2 Richard. When YN2 Richard was not at Ms. [redacted] home, she was at Ms. [redacted] home. She regards YN2 Richard as a loving, kind, and generous person that cares for others. Ms. [redacted] is aware of YN2 Richard's [redacted] upbringing and her desire to be successful in life. She can testify regarding YN2 Richard's dreams of becoming a mother and being married. She can testify about the shattering impact of [redacted] passing upon YN2 Richard.

31. Ms. [redacted] was a [redacted] of YN2 Richard and her [redacted] She [redacted] her in middle school and high school and has known her since YN2 Richard was nine years old. She observed YN2 Richard over several years and consistently believed that YN2 Richard was kind, motivated, and one of the sweetest people she knew. Based on her positive impressions of YN2 Richard, she [redacted] her as a lifeguard to coach and provide swimming lessons to 1-2 year old children.

32. The Government responded to the Defense's request on 9 August 2021, denying the production of twelve requested witnesses. In the government's response, they neglected to provide a basis for denying the requested witnesses. Instead, the government simply wrote, "DENIED." Enclosure HH.

33. On 12 August 2021, the government provided a list of 52 witnesses they intend to call in the case-in-chief or sentencing. Included in that list are: YN2 [redacted] and LCDR [redacted] which are two witnesses the government denied for the defense. Enclosure Z.

BURDEN

The burden of proof and persuasion rests with the Defense as the moving party. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

LAW

Parties to a Court-Martial "shall have equal access to obtain witnesses and other evidence[.]" 10 U.S.C. § 846. "Each 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." Rule for Courts-Martial ("R.C.M.") 701(b)(1). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

"Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *See* R.C.M. 703 Discussion. "The trial counsel is responsible for the administrative aspects of the production of witnesses. *The trial counsel stands in a position similar to civilian clerk of court for this purpose.*" *See* R.C.M. 703 Analysis, Appendix 21 (2016 ed.) (Emphasis added.). "Just as an accused has the right to confront the prosecutions witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense; this right is a fundamental element of due process of law." *United States v. McAllister*, 65 M.J. 248, 249 (C.A.A.F. 2007).

"Issues of witness credibility and motive are matters for members to decide." *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2010). "Through cross-examination, an accused can expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2008). "The process of impeachment by prior inconsistent statement is a tool to attack the credibility and/or recollection of a witness; by showing self-contradiction, the witness can be discredited as a person capable of error." *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007). "M.R.E. 613(d) provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same. If the inconsistency is admitted, extrinsic evidence is generally not admissible." *Id.*

As on the merits, each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f). *See Manos*, 17 U.S.C.M.A. at 279 (highlighting the right of the accused to secure the attendance of character witnesses). There are several factors for the military judge to consider when deciding whether a witness shall be produced to testify during presentencing proceedings. R.C.M. 1001(f)(1). A witness shall be produced to testify in person when: (1) their testimony is necessary for consideration of a matter of substantial significance to the determination of an appropriate sentence; (2) the weight or credibility of their testimony is substantially significant to determining an appropriate sentence; (3) other forms of evidence would be insufficient substitutes for the witness's testimony; and (4) the significance of the personal appearance of the witness to the determination of appropriate sentence, when balanced against practical difficulties of producing the witness, favors production of the witness. *See* R.C.M. 1001(f)(2)(A)-(E). Practical difficulties to consider include cost of production, timing of request for production, potential delay in presentencing proceeding, and likelihood of significant interference with military operational deployment, mission accomplishment, or essential training. R.C.M. 1001(f)(2)(E).

To assist the court-martial in determining an appropriate sentence, the Defense may present evidence in rebuttal of material presented by the prosecution and the crime victim, and present matters in extenuation and mitigation. R.C.M. 1001(d)(1). "Favorable character evidence is a relevant factor in evaluating an appropriate sentence." *United States v. Tangpuz*, 5 M.J. 426, 429 (1978). The court-martial should consider, among other things: (1) the history and characteristics of the accused, (2) impact upon any victim of the offense, (3) the need to protect others from further crimes by the accused, and (4) the need to rehabilitate the accused. R.C.M.

1002(f)(2)(A); R.C.M. 1002(f)(3)(E)-(F). The court-martial may consider any evidence admitted by the military judge during the findings proceeding. R.C.M 1002(g).

If trial counsel denies a request for the production of a witness, the matter may be submitted to the military judge. R.C.M. 703(c)(2)(D). In determining whether to grant a motion to compel production of a witness, military courts assess whether the witness' testimony is material to the case. *United States v. Fisher*, 24 M.J. 358, 631 (C.M.A. 1987). Testimony is 'material' if it negates the government's evidence or supports the theory of defense. *United States v. Jefferson*, 13 M.J. 1, 3 (C.M.A. 1982). Testimony is 'necessary' if it is not cumulative and "would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)(quoting *United States v. Breeding*, 44 M.J. 345, 350 (C.A.A.F. 1996).

ARGUMENT

I. The in-person testimony of S/A [redacted] LCDR [redacted] CWO2 [redacted] YN2 [redacted] S/A [redacted] Mrs. [redacted] and S/A [redacted] is relevant and necessary to establish the defense theory and challenge the credibility of the government's witnesses.

a. S/A [redacted] is both relevant and necessary on the merits.

Special Agent [redacted] testimony is both relevant and necessary on the merits to present impeachment evidence at trial. S/A [redacted] conducted multiple witness interviews, including interviews of Ms. [redacted] and [redacted] who are all members of BM2 [redacted] family. The defense intends to call [redacted] and [redacted] at trial to discuss their respective observations of YN2 Richard's interactions with [redacted] According to her CGIS interview, Ms. [redacted] stated that based on her observations of YN2 Richard with [redacted] there was nothing that alarmed her. S/A [redacted] is relevant and necessary to provide impeachment evidence if Ms. [redacted] denies her statements to CGIS. Additionally, S/A [redacted] interviewed [redacted] The government agreed to produce [redacted] at trial. Therefore, S/A [redacted] is also needed to provide potential impeachment evidence if [redacted] denies her statements to CGIS at trial. Perhaps even more critical is the fact that S/A [redacted] asked no questions to [redacted] about BM2 [redacted] drinking tequila at the time [redacted] lay dying in her crib. The investigators knew this fact but they chose to focus solely on finding bad facts about YN2 Richard rather than investigate BM2 [redacted] – the last person with [redacted] while she was alive.

b. LCDR [redacted] is both relevant and necessary on the merits.

LCDR [redacted] testimony is both relevant and necessary on the merits because she will testify to YN2 Richard's reaction when she was notified of the charges in this case. CGIS thought it was relevant to investigate YN2 Richard's reaction to being served with the charges in this case. CGIS wanted to know every little detail – including whether YN2 Richard's skin

became blotchy. LCDR [redacted] described how YN2 Richard's skin became red and blotchy immediately after being notified of the charges. This testimony is relevant at trial to show the investigation and to show YN2 Richard's reaction to being served. If this was relevant to the investigation, it is surely relevant to the defense at trial to show investigative incompetence, investigators focus solely on YN2 Richard, and the level of vengeance and bias against YN2 Richard. Lastly, the government indicated that they intend to call LCDR [redacted] in their case-in-chief; thereby conceding that she is both relevant and necessary.

c. CWO2 [redacted] is both relevant and necessary on the merits.

CWO2 [redacted] testimony is both relevant and necessary because he will testify regarding the discrimination allegation YN2 Richard made against members of her command and the results of his investigation immediately prior to [redacted] death. CWO2 [redacted] was involved in the discrimination complaint and will show the investigative and command bias against YN2 Richard. He was directly involved in receiving and forwarding of the discrimination complaint and will be able to show the ongoing maltreatment of YN2 Richard – including the investigation and charging of YN2 Richard. This is relevant to show the treatment of YN2 Richard and the command's perception of her immediately before and during the investigation into the death of [redacted] Specifically, the fact that YN2 Richard had accused members of the command of discrimination colored their opinion of her during what was ultimately a biased investigation. In addition, CWO2 [redacted] also witnessed YN2 Richard's skin become red and blotchy when he approached her to inform her of the results of his investigation. The investigators, for some reason, seemed to focus on YN2 Richard's skin reaction in this case. Exploration of why this was important to the investigation is clearly relevant at trial.

d. YN2 [redacted] is both relevant and necessary on the merits.

YN2 [redacted] testimony is both relevant and necessary on the merits for the defense to present a theory of defense. The government alleges YN2 Richard killed [redacted] on 18 April 2021. However, one potential defense theory is that BM2 [redacted] was the person actually responsible for [redacted] death. Evidence suggests that YN2 [redacted] and BM2 [redacted] engaged in [redacted] in the months leading up to the unfortunate death of [redacted] This fact creates a potential motive for BM2 [redacted] to kill [redacted] in order to no longer have any ties to YN2 Richard. In addition, the fact that both BM2 [redacted] and YN2 [redacted] were engaged in misconduct that is a violation of the Uniform Code of Military Justice and no legal action has been taken against either also cuts against their credibility as government witnesses. Lastly, although the government denied the defense request to produce YN2 [redacted] the government has included her on their witness list. Therefore, the government has conceded that her testimony at trial is relevant and necessary.

e. S/A [redacted] is both relevant and necessary on the merits

S/A [redacted] testimony is both relevant and necessary on the merits for the defense to present a theory of defense. S/A [redacted] participated in the recovery and review of electronic data in this case, including the attempted recovery of YN2 Richard and BM2 [redacted] home camera and YN2 Richard's Skype conversations. He also prepared investigative

reports during his investigation. The government is alleging that YN2 Richard committed some type of malfeasance with respect to her electronic data. S/A [redacted] obtained and reviewed exculpatory information regarding both the charges relating to destruction of electronic data, as well as exculpatory information relating to [redacted][2]

f. [redacted] is both relevant and necessary on the merits

Ms. [redacted] testimony is both relevant and necessary on the merits because she will testify about her observations of YN2 Richard with [redacted] in the months leading up to [redacted] death and she will testify about the nature of her interview with CGIS. Ms. [redacted] is BM2 [redacted] She will testify that she had the opportunity to observe YN2 Richard with [redacted] when YN2 Richard, BM2 [redacted] and [redacted] traveled to [redacted] to visit her. During this time, Ms. [redacted] observed YN2 Richard care for [redacted] and at no point was she ever concerned about the care and treatment YN2 Richard provided.

Ms. [redacted] will also testify about the nature of her interview with CGIS. Specifically, she will testify about the tone and nature of the questions the CGIS agents asked her. This is relevant and necessary to present evidence of the biased CGIS investigation that was conducted in this case.

g. S/A [redacted] is both relevant and necessary on the merits

S/A [redacted] testimony is relevant and necessary for the defense to present a theory of innocence as it pertains to the Article 134, Obstruction of Justice charge. Specifically, the government appears to be alleging that YN2 Richard intentionally deleted evidence from her phone in order to impede the investigation in this case. However, S/A [redacted] will testify that he has told her in a prior and completely unrelated investigation that it is "understandable" for people to delete text messages from their phones. This evidence is extremely relevant to explain to the members and alternate explanation for why YN2 Richard's phone did not contain text messages the government believes were relevant to this investigation.

II. The in-person testimony of Ms. [redacted] Ms. [redacted] Ms. [redacted] and Ms. [redacted] is substantially significant, unsubstitutable evidence for the panel's determination of an appropriate sentence for YN2 Richard.

Factors to be considered in whether in-person production is necessary are whether the testimony, and its weight and credibility, is necessary for consideration of a matter of substantial significance to determining an appropriate sentence. R.C.M. 1001(f)(1)-(2). The court should also consider whether other forms of evidence would be insufficient substitutes for the witnesses testimony. R.C.M. 1001(f)(2)(C)-(D). Taking into account the lens through which the panel

[2] The government has yet to provide any particulars with respect to their theory at trial. Thus, Defense is required to make assumptions about what inculpatory information they will use at trial. It is presumed that the government will present some sort of [redacted] – which therefore makes S/A [redacted] information relevant and necessary.

members will likely view YN2 Richard should she be convicted of causing the death of [redacted] the witnesses requested are critical to the Defense's presentation of matters in extenuation, mitigation, and rebuttal. Given that the Government has approved the Defense's request to produce these witnesses telephonically, they have determined that each are relevant and necessary witnesses. R.C.M. 703. Each of the witnesses has known YN2 Richard in different capacities for many years. Ms. [redacted] and Ms. [redacted] have acted as [redacted] to YN2 Richard. Ms. [redacted] met YN2 Richard as her [redacted] and became an employer. Ms. [redacted] knew YN2 Richard in her capacity as her [redacted] In these different capacities at various points in her life, they have formed positive and comprehensive opinions about YN2 Richard's character.

The requested witnesses' testimony goes directly to factors the panel members must consider before determining a sentence. Specifically, this type of character testimony is relevant to YN2 Richard's history and character, the lack of a need to protect others from further crimes by YN2 Richard, and her strong rehabilitative potential. R.C.M. 1002. Their in-person testimony is also necessary to rebut what the Defense predicts will be an emotionally intense victim impact statement by BM2 [redacted] and/or the appointed victim representative. The Defense's only hope to effectively present evidence in mitigation is through in-person testimony from those that know her best. *See Manos*, 17 U.S.C.M.A. at 279 ("The accused's only hope in the trial is to mitigate his punishment by reference to his former good record and service. This can be done most effectively . . . by the appearance and testimony of his superiors."). Telephonic testimony, where the panel members cannot see the witness, is not a substitute to in person testimony in this case. The ability of the panel members to physically see the character witnesses testify in person is critical to assess their credibility and assign weight to their testimony. "Demeanor evidence is one of those 'elusive and intangible imponderables' which, although hard to isolate and to quantify scientifically, form the base of our legal system. To determine credibility, the finder of fact takes into account such factors as how a witness sits or stands, whether the witness is inordinately nervous, . . . whether the witness avoids eye contact, the degree to which counsel must prompt the witness, tears on the witness's face, whether pain is apparent, the modulation or pace of the witness's speech, and other nonverbal communication." Neil Fox, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due?*, 1984 U. Ill. L. Rev. 445, 449 (1984); *see also Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977).

In the Government's response to the Defense witness request, they did not state the rationale for approving only telephonic testimony for all Defense sentencing witnesses. However, the practical difficulties to be considered by the court per R.C.M. 1001(f)(2)(E), are substantially outweighed by the significance of the personal appearance of the requested witnesses. As all of the requested witnesses are civilians, there is no likelihood of any interference with military operations or training. See R.C.M. 1001(f)(2)(E). The timing of the request for production is timely, and five months prior to the scheduled start of trial. As such, there are no anticipated delays in the presentencing proceeding should the court compel in-person production. Finally, despite the cost of production, the substantial punitive exposure that YN2 Richard faces if she is convicted substantially outweighs those costs. If the court does not compel in person production of the requested witnesses, the Defense will have a sentencing case solely comprised of telephonic witnesses at a general court-martial focused primarily on the

murder of a child. The panel members may infer that no one feels strongly enough about YN2 Richard's character to come and support her in person. That negative inference would inure to the detriment of YN2 Richard due to a Government decision over which she had no control. Should the panel convict YN2 Richard for causing the death of [redacted] this prospect defies logic and the principles of "fundamental fairness essential to the very concept of justice." *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S. Ct. 3440, 3449 (1982) ("Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice'").

RELIEF REQUESTED

The Defense respectfully requests that this Court compel the Government to produce the following witnesses for testimony on the merits:

1. S/A [redacted]
2. LCDR [redacted]
3. CWO2 [redacted]
4. YN2 [redacted]
5. S/A [redacted]
6. [redacted]
7. S/A [redacted]

The Defense respectfully requests that this Court compel the Government to produce the following witnesses for testimony for sentencing:

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]

EVIDENCE

The Defense requests an Article 39(a), U.C.M.J., hearing to present additional evidence and argument on this motion. The Defense also provides the attached documentary evidence in support of this motion:

Enclosure Z: Government Initial Witness List
Enclosure AA: CGIS Interview of YN2 [redacted]
Enclosure BB: CGIS interview of Ms. [redacted]
Enclosure CC: CGIS interview of Ms. [redacted]
Enclosure DD: CGIS interview of LCDR [redacted] USCG
Enclosure EE: CWO2 [redacted] Preliminary Inquiry into YN2 Richard Discrimination allegation

Enclosure FF: CGIS Interview of YN2 Richard in December 2018
Enclosure GG: Defense Request for Witnesses ICO YN2 Richard
Enclosure HH: Government Response to Defense Request for Witnesses ICO YN2 Richard
Enclosure II: S/A [redacted] Investigative Actions

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

[redacted]
C. O. SPENCE
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Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 13 August 2021.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

APPELLATE EXHIBIT 38
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MOTION TO COMPEL**
	)	**PRODUCTION OF WITNESSES**
	)	
	)	
	)	
KATHLEEN RICHARD	)	27 August 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to compel the production of witnesses. The United States respectfully requests that the court deny the defense motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

The Facts relevant to the resolution of this motion to compel production of witnesses are within the argument below.

LEGAL AUTHORITY AND ARGUMENT

The Burden of proof and persuasion rests with the Defense as the moving party. Specifically, the Defense must prove based on their synopsis of their expected testimony that each witness requested for production is relevant and necessary. R.C.M. 703(c)(2). The analysis for in-person production differs for witnesses whose testimony is requested on the merits versus

sentencing. The in-person production of witnesses for sentencing is judged via the standards for production in R.C.M. 1001(f).

It is well established that a military judge can properly exclude defense evidence, to include the production of witnesses, if the evidence serves no legitimate purpose or if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *United States v. Hennis*, 79 M.J. 370, 382 (C.A.A.F. 2020) (other citations omitted). In the same manner, the Court will correctly deny a motion to produce witnesses when the witnesses' testimony would be irrelevant or otherwise inadmissible. *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000).

Similarly, the Defense is also not entitled, via due process or Article 46, to the production of witnesses whose testimony would be cumulative to that of other witnesses. *United States v. Williams*, 3 M.J. 239, 242 (C.M.A. 1977). Corroboration is allowed for issues central to a defense, but even the presentation of exculpatory evidence has been properly limited to only three witnesses. *Id.* (citing *United States v. Romano*, 482 F.2d 1183, 1195 (5th Cir. 1973)); see also *United States v. Harmon*, 40 M.J. 107 (C.M.A. 1994) (upholding judge's ruling to limit testimony to three witnesses on cumulative grounds during presentencing). For other, non-exculpatory issues, it is not an abuse of discretion for the Court to properly limit testimony to two witnesses to avoid cumulativeness. *United States v. Brown*, 77 M.J. 638, 650-51 (A.C.C.A. 2018). When the Court denies production of witnesses solely on cumulative grounds the Defense is allowed to choose which of the available witnesses that they desire to have produced. *Harmon*, 40 M.J. at 108; *Williams*, 3 M.J. at 243 n. 9.

The factors that are to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case, the importance of the requested witness to

those issues, whether the witness is desired on the merits or sentencing, whether the witness would be merely cumulative, and the availability of alternatives to testimony. *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978).

A military judge's ruling on the production of witnesses is reviewed under an abuse of discretion standard, and denial of witnesses will not be set aside unless an appellate court has a definite and firm conviction that the trial court made a clear error of judgment. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). The Court's decision will only be reversed if, on the whole, denial of the defense witness was improper. *United States v. Ruth*, 46 M.J. 1, 3 (CAAF 1997).

Finally, providing proof of the witnesses' expected testimony, to include a sufficient proffer of their expected testimony is a burden placed solely on the Defense. R.C.M. 703(c). The proffer of expected testimony must be sufficient to show its relevance and necessity. *Id.* To meet the R.C.M. 703(c) requirement, the synopsis of expected testimony cannot simply be listing the subject matters to be addressed, rather it must actually articulate what the witness will say about those subjects. *United States v. Rockwood*, 52 M.J. 98, 105 (C.A.A.F. 1998).

Merits Witnesses

I. S/A [redacted]

The Defense theory here is that this witness *might* be serve as a potential impeachment witness in the hypothetical event that a witness she interviewed *might* change their story from what they said to CGIS. This is not a sufficient basis to compel the production of a witness. First, it is entirely hypothetical in nature. Second, and perhaps most important, the Defense already has the ability to utilize impeachment by a prior inconsistent statement for these issues. There are

only limited circumstances in which the rules of evidence would allow the Defense to utilize extrinsic evidence, via calling an additional witness, in this manner. As such, production is not required.

II. LCDR [redacted]

The Defense requests LCDR [redacted] production to testify about YN2 Richard's physical reaction to being served with the charges in this case. Such testimony would be legally irrelevant via M.R.E. 401 and largely boil over into impermissible opinion and speculative testimony. Additionally, such testimony would also be prohibited by M.R.E. 403 as a confusion of the issues and waste of time. As such, production is not required.

III. CWO2 [redacted]

The Defense requests CWO2 [redacted] to testify at trial about an entirely unrelated discrimination allegation made by YN2 Richard. The discrimination allegation was made by YN2 Richard before [redacted] was killed and is entirely unrelated. Anything related to this discrimination claim has no relevance to this court-martial, and would likewise be excluded by MRE 403 as confusing the issues and wasting time. As such, production is not required.

IV. YN2 [redacted]

Will be produced.

V. S/A [redacted]

The Defense says, in complete generality, that S/A [redacted] participated in the review of electronic data in this case and that he attempted to review YN2 Richard and BM2 [redacted] camera and Skype conversation. This general statement is not a sufficient proffer of expected testimony to meet the *Rockwood* standard. As such, production is not required.

VI. [redacted]

The Defense proffers Mrs. [redacted] to testify about her observations of YN2 Richard with [redacted] and the nature of her CGIS interview. Both are largely irrelevant and cumulative. As to Mrs. [redacted] observations of YN2 Richard with [redacted] there would be literally hundreds of people who could testify similarly. There is no proffer that Mrs. [redacted] observations or opinions on the matter are so unique that warrants her production solely for this reason. As to the second area, the tone and nature of questions asked by CGIS to Mrs. [redacted] is largely irrelevant. The Defense's proffer of this line of questioning is also insufficient to ascertain what bias, improper tone, and improper questions that they are asserting. Additionally, the Defense only states in generality the subject matter that they would inquire with Mrs. [redacted] but does not actually proffer what Mrs. [redacted] would be expected to say. Therefore, the proffer fails the *Rockwood* standard. As such, production is not required.

VII. S/A [redacted]

The Defense proffers that they want S/A [redacted] produced to testify that he told YN2 Richard, years earlier, in an unrelated CGIS investigation that it was "understandable" for people to delete text messages from their phones. This testimony does not meet the necessity standard, and such testimony would also be prohibited by M.R.E. 403. If the Defense's argument is that S/A [redacted] is simply stating the general concept that people sometimes delete things from their phones for non-nefarious reasons, then his production is unnecessary because no witness needs to be called to establish this common sense statement. Further, it is not a witnesses' purpose to testify about general human nature, especially a lay witness who is not applying any specialized knowledge. Such a lay opinion also violates M.R.E. 701 because it is not clearly helpful to

determining a fact at issue. Secondly, if the Defense's actual purpose in calling S/A [redacted] would be to argue or imply that CGIS, years earlier, had given YN2 Richard some type of implicit authorization to delete evidence that testimony would be barred by M.R.E. 403 because it would only serve to mislead the finders of fact and confuse the issues. Therefore, S/A [redacted] production should be denied.

Sentencing Witnesses

As noted above, the in-person production of sentencing witnesses is analyzed via R.C.M. 1001(f)(1). "In general, 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." *Id.* A witness may be produced for sentencing via travel orders and subpoena only if (1) the testimony is necessary for a matter of substantial significance to determining an appropriate sentence, (2) the weight or credibility is of substantial significance to determining an appropriate sentence, (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness would testify, (4) other forms of testimony or testimony by remote means would be insufficient, and (5) the personal appearance outweighs the difficulties, costs, timing, and potential delay of personal production. *Id.* at 1001(f)(2)(A-E). All elements in (A)-(E) must be resolved in favor of the Defense before the Court orders the in person production of a sentencing witness.

The Defense requests this Court to compel the production of four witnesses solely for purposes of sentencing. These witnesses are [redacted] The Defense, however, cannot satisfy the five elements above for the Court to compel the in-person production of these four witnesses.

Each of these four witnesses fail element (1), as their in-person testimony is not a matter of substantial significance to determine an appropriate sentence. These witnesses are collectively the Accused's [redacted] Each can potentially give admissible testimony about their opinions of YN2 Richard's pertinent traits of character. None of these matters, however, is of such substantial significance that it must be provided in-person versus alternative means of testimony.

Each of these four witnesses fail element (2). These are all essentially character witnesses, each with an obvious and admitted personal connection to YN2 Richard which would be motivating their opinions of her. As such, the weight to be given to their opinions will not be controlled by their personal appearance versus remote appearance, rather it will be controlled by the substance of their testimony. Any credibility concerns which are connected to these character witnesses' opinion testimony is not affected by whether they testify in person or remotely.

Each of these four witnesses fail element (3). The Government has not been requested to enter into stipulations for these witnesses. The Government would agree to enter into accurate stipulations of fact for any factual matters which these witnesses could testify about.

Each of these four witnesses fail element (4). The Defense's only argument to address why testimony by remote means would be insufficient is that the panel members would not be able to physically see the character witness. Def. Mot. at 10. This is easily remedied by agreement from the Government. The Government has no objection to these witnesses testifying via remote means which include video capability. This is often accomplished via DCS, Teams, or other VTC. This would assuage the Defense's concerns and additionally mean that they cannot satisfy the fourth required elements for this Court to grant production.

Each of these four witnesses fail element (5). The burden for success on this motion rests upon the Defense. The Defense concedes as much in their filing. Def. Motion at 5. Here, the Defense simply has not provided sufficient evidence for the Court to make a factual finding in the Defense's favor regarding element (5). The Defense has provided no evidence regarding the cost, difficulty, or other practical difficulties in obtaining the in person presence of these witnesses. Additionally, the factors in R.C.M. 1001(f)(2)(E) have not been, and cannot be, balanced against the significance of their potential testimony because the Defense has not presented any evidence. Therefore, the Defense fails to meet the fifth element.

Overall, the Defense fails each of the required elements for this Court to compel production because sufficient evidence has not been presented to prove all of the required elements. The Defense attempts to have this Court grant their motion by resorting to grandiose notions about what should and should not be required in a homicide case. This is not a capital case. YN2 Richard does not face the death penalty. R.C.M. 1001(f) does not contain special caveats which sway the required 2(A)-(E) factors depending on the nature of the charged offenses. The Defense also argues that the panel members may infer that no one feels strongly enough about YN2 Richard's character to come and support her in person. This is a particularly interesting argument because the Defense is asking the Government to produce these witnesses, meaning that the Government would coordinate and provide funding for these witnesses' travel to attend the hearing. If any of these witnesses "feels strongly" that they should come support YN2 Richard in person, than they are certainly able to do so without Government production. The Defense's argument, therefore, is a misnomer. As such, the Defense's motion should be denied.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion to compel.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

APPELLATE EXHIBIT 39
PAGE 9 OF 9 PAGE (S)

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

CERTIFICATION OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 29 October 2021.

[redacted]
C.B. SIMPSON
LT, USCG
Defense Counsel

COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Kathleen E. RICHARD** **YN2/E-5** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE** **6 October 2021**

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 307(c)(3) and R.C.M. 907(b)(2)(E), the Defense respectfully moves this Court to dismiss Charge I, Specifications 1 and 2, violation of Article 118, UCMJ and the Additional Charge, Violation of Article 119, UCMJ (Manslaughter) for failure to state an offense.

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

FACTS

a. YN2 Richard is charged with violating Article 118, UCMJ. Specifically, YN2 Richard is charged with unpremeditated murder and murder while engaging in an act inherently dangerous to another.

b. Charge I, Specification 1 states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia.

c. Charge I, Specification 2 states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: by asphyxia.

d. YN2 Richard is also charged with involuntary manslaughter in violation of Article 119, UCMJ. The sole specification of the Additional Charge states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, by culpable negligence, unlawfully kill [redacted] a child under the age of 16 years, by asphyxia.

e. YN2 Richard is also charged with obstruction of justice in violation of Article 131b, UCMJ.

LAW

a. To State an Offense a Specification Must Allege Every Element of the Offense and Inform the Accused of the Charged Conduct

"The Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation' against him. *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting U.S. Const. amend. VI.) Further, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," and no person shall be "subject for the same offence to be twice put in jeopardy." U.S. Const. amend V. "Thus, when an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, either expressly or by necessary implication, every element of the offense, so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." *Turner*, 79 M.J. at 403. (Internal quotation marks omitted).

The question of whether a specification states an offense is a question of law. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Pursuant to R.C.M. 307(c)(3), a specification states an offense when it alleges "every element of the charged offense expressly or by necessary implication," so as to give the accused notice of the charged conduct and protection against double jeopardy. *Id.* at 212. Although a court may find that a specification states an offense where an element is "necessarily implied" rather than "expressly" stated in the specification, "interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored." *United States v. Shields*, 77 M.J. 621, 625-26 (N-M Ct. Crim. App. 2018).

Even though a specification does not fail to state an offense merely because "it could have been made more definite and certain," or is "susceptible to multiple meanings," "the specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy." *Crafter*, 64 M.J. at 211-12 (explaining that in order to state an offense a specification must "apprise[] the defendant of what he must be prepared to meet" at trial); see also Manual for Courts-Martial, United States, Part II, Rule 307(c)(3) Discussion (2019 Edition); *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (examining whether a specification for an alleged attempted killing necessarily implied the killing was "unlawful" in order to evaluate whether the "appellant would have been aware of the nature of the…offense").

b. To Determine Whether a Specification Alleges Every Element of the Offense and Informs the Accused of the Charged Conduct, Courts Apply Traditional Statutory Construction Techniques

To determine whether a specification alleges every element of an offense expressly or by necessary implication and whether it provides enough specificity to inform the accused of the nature of the alleged conduct, courts use traditional statutory construction techniques. In reviewing whether a specification addresses every statutory element of an offense, "the plain language of a statute will control unless it leads to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). Likewise, courts interpret the language in a specification by relying on the plain meaning of the terms in the specification. See *Crafter*, 64 M.J. at 211. In addition to relying on the plain meaning of statutes and terms in a specification to determine whether the specification alleges all elements of an offense, courts may refer to dictionary, statutory, or regulatory definitions of terms used in a specification to eliminate ambiguity. *Id.* at 211-12 (relying on dictionary definitions and a provision from the Joint Ethics Regulation cited in the specification at issue); *United States v. King*, 71 M.J. 50, 51 (C.A.A.F. 2012) (referencing the UCMJ definition of "indecent conduct"); *United States v. Baas*, 2019 WL 1601912 at *13-14 (N-M Ct. Crim. App. 2019) (drawing on the definition of "sexual act" from the UCMJ); *United States v. Guin*, 75 M.J. 588, 592-93 (N-M Ct. Crim. App. 2016) (interpreting a specification that used the statutorily-defined term "bodily harm"). Courts also use the same "well-established principles of statutory construction to construe provisions in the Manual for Courts–Martial" that are relevant to interpretation of a specification. *Lewis*, 65 M.J. at 88.

c. Courts Narrowly Interpret Specifications When an Accused Challenges a Specification for Failure to State an Offense Prior to Adjournment of a Court-Martial

Courts narrowly interpret specifications when an accused challenges a specification for failure to state an offense prior to adjournment of the court-martial. See *Turner*, 79 M.J. at 405 ("A flawed specification first challenged after trial...is viewed with greater tolerance than one which was attacked before findings and sentence. Although failure of a specification to state an offense is a fundamental defect which can be raised at any time, we...liberally construe specifications in favor of validity when they are challenged for the first time on appeal."); *Shields*, 77 M.J. at 625-26 ("[W]hen the charge and specification are first challenged at trial...[courts] read the wording [of the specification] more *narrowly* and will only adopt interpretations that *hew closely to the plain text*." (emphasis added)). Courts' practice of narrowly interpreting specifications challenged before or during trial arises from R.C.M. 907's mandate that "a charge or specification *shall* be dismissed upon motion made by the accused before the final adjournment of the court-martial" "if...the specification fails to state an offense." See Manual for Courts-Martial, United States, Part II, Rule 907(b)(2)(E) (2019 Edition) (emphasis added). Although a specification challenged for the first time on appeal is generally sufficient so long as "the necessary facts appear in any form or by fair construction can be found within the terms of the specification," courts demand greater specificity and clarity when an accused challenges a specification before or during trial. See *Crafter*, 64 M.J. at 211; see also *United States v. Leal*, 76 M.J. 862, 863 (C.G. Ct. Crim. App. 2017).

d. Courts Closely Scrutinize Specifications that Fail to Adhere to the Model Specifications for UCMJ Offenses

Although failure to conform a charged specification to a model specification in the Manual for Courts-Martial or the Military Judge's Benchbook does not automatically render a specification deficient so long as the specification alleges every element of the charged offense and adequately apprises the accused of the nature of the charged offense, courts nonetheless have recognized that trial counsel should "meticulously follow the language contained in the UCMJ sample specifications" when crafting UCMJ charges and that failure to do so may call a specification's sufficiency into question. See *Turner*, 79 M.J. at 404, 404 n.2 (observing that the United States Court of Appeals for the Fourth Circuit has described it as "beyond...understanding" that a trial counsel would draft a specification without close attention to the statutory elements of the offense or "be so careless as to omit allegations meeting the statutory definition of one of the essential elements of the crime" (citing *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988))).

e. Article 118(2) Prohibits Murder with Intent to Kill or Inflict Great Bodily Harm

Article 118, UCMJ makes it unlawful for a person to "without justification or excuse, unlawfully kill a human being, when he intends to kill or inflict great bodily harm." Murder with the intent to kill or inflict great bodily harm has the following elements:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the *act or omission of the accused*;
- (c) That the killing was unlawful; and
- (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person."

See Manual for Courts-Martial, United States, Part IV, Para. 56(b)(2)(b) (2019 Edition) (emphasis added).

The sample specification contained in Part IV for Article 118(2) states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____ by means of (shooting (him) (her) with a rifle) (_____)." This mirrors what is also included in the Military Judges Benchbook.

f. Article 118(3) Prohibits Murder resulting from an Act Inherently Dangerous to Another

Article 118, UCMJ also makes it unlawful for a person to "without justification or excuse, unlawfully kill a human being, when he is *engaged in an act* which is inherently dangerous to another and evinces a wanton disregard of human life." Murder that occurs when the accused is engaged in an act inherently dangerous to another has the following elements:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the *intentional act* of the accused;
- (c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

- (d) That the accused knew that death or great bodily harm was a probable consequence of the act; and
- (e) That the killing was unlawful."

See Manual for Courts-Martial, United States, Part IV, Para. 56(b)(3) (2019 Edition) (emphasis added).

The sample specification contained in Part IV for Article 118(3) is identical to Article 118(2) above. It states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____ by means of (shooting (him) (her) with a rifle) (_____)." This mirrors what is also included in the Military Judges Benchbook.

g. Article 119 Prohibits Involuntary Manslaughter

Article 119, UCMJ makes it unlawful to "without an intent to kill or inflict great bodily harm, unlawfully kill a human being by culpable negligence." Involuntary Manslaughter has the following elements:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the *act or omission of the accused*;
- (c) That the killing was unlawful; and
- (d) That this act or omission of the accused constituted culpable negligence."

See Manual for Courts-Martial, United States, Part IV, Para. 57(b)(2) (2019 Edition) (emphasis added).

The sample specification contained in Part IV, Para. 57(e)(1) states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, willfully and unlawfully kill _____, (a child under 16 years of age) by _____ (him) (her) (in) (on) the _____ with a _____." This mirrors what is also included in the Military Judges Benchbook.

ARGUMENT

a. Charge I, Specification 1 Fails to State an Offense under Article 118, UCMJ

Charge I, Specification 1 fails to state an offense under Article 118, UCMJ, because the specification fails to allege the "*act or omission of the accused*," that resulted in the death of [redacted] This is an essential element of the offense of Murder with Intent to Kill or Inflict Great Bodily Harm. See Manual for Courts-Martial, United States, Part IV, Para. 56(b)(2)(b) (2019 Edition).

Black's Law Dictionary defines "act" to mean "something *done or performed*," or "the process of *doing or performing*; an occurrence that results from a person's will being exerted on the external world." Black's Law Dictionary (11th ed. 2019). Similarly, the Model Penal Code

defines "act" to mean "a *bodily movement* whether voluntary or involuntary." Model Penal Code § 1.13. Thus, in order to state an offense under Article 118, UCMJ for Murder with Intent to Kill or Inflict Great Bodily Harm, the specification must allege that YN2 Richard caused the death of [redacted] *by doing something*, either expressly or by necessary implication.

Specification 1 fails to allege expressly any act or omission of YN2 Richard because instead of alleging that the death of [redacted] resulted from an act or omission of YN2 Richard, Specification 1 merely states that the death of [redacted] was caused "by asphyxia." "Asphyxia" is not defined in Black's Law Dictionary. The term refers to "a life-threatening lack of oxygen," a medical condition that can have various causes such as "drowning, choking, or an obstruction of the airways." See Medical Dictionary of Health Terms, Harvard Health Publishing, Harvard Medical School, https://www.health.harvard.edu/a-through-c; see also Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/asphyxia (defining "asphyxia" to mean "a lack of oxygen or excess of carbon dioxide in the body that results in unconsciousness and often death and is usually caused by interruption of breathing or inadequate oxygen supply"). Several of the possible causes of asphyxia—e.g., obstruction of the airways—clearly may result from a wide array of actions or circumstances that may or may not involve another person. Because asphyxia is a medical condition or state rather than an action in itself, Specification 1 does not expressly allege any act or omission of the accused because it entirely fails to allege what YN2 Richard *did* or *failed to do* that resulted in [redacted] death.

Specification 1 also does not necessarily imply any act or omission of the accused, because Specification 1's allegation that YN2 Richard murdered [redacted] "by asphyxia" does not *necessarily* imply any act or omission of the accused. As the definitions above make clear, asphyxia is a medical condition that may result from a variety of circumstances many of which do not even require action by another person (e.g., a person may asphyxiate as a result of choking on, or having their airways obstructed by, an object). A specification *necessarily implies* an act or omission *only* if it *must* be read to include an act or omission. Specification 1's statement that [redacted] died "by asphyxia" does not imply any act or omission by YN2 Richard, because asphyxia may have resulted from circumstances that did *not* include action or an omission by YN2 Richard. Specification 1 therefore fails to allege, by necessary implication, the essential element "that the death resulted from the *act or omission of the accused*." See Manual for Courts-Martial, United States, Part IV, Para. 56(b)(2)(b) (2019 Edition).

In *United States v. Leal*, a servicemember was charged with abusive sexual contact for pulling down the shorts and underwear of another person. 76 M.J. 862, 863 (C.G. Ct. Crim. App. 2017). Relying on the U.S. Court of Appeals for the Armed Forces' decisions in *Crafter* and *Fosler*, the Coast Guard Court of Criminal Appeals held that the specification failed to state an offense of abusive sexual contact because it "fail[ed] to allege a touching," reasoning that "to say that pulling down the shorts and underwear of a person can be fairly construed as or necessarily implies touching a body part of that person stretches too far." *Id.* The Court construed the specification "narrowly" because the appellant had challenged the specification for failure to state an offense at trial. *Id.* In *United States v. Shields*, the Navy-Marine Corps Court of

Criminal Appeals confronted a similar specification (which had been challenged at trial) and fact pattern but held the specification stated an offense. 77 M.J. at 626-27. The specification alleged a "grabbing" of another person's "belt buckle and pulling [of the other person's] body" but failed to "specifically list the body parts the belt touched." *Id.* The *Shields* court reasoned that "the clear implication of grabbing someone by the belt and pulling them is that the belt *necessarily* made contact with the waist, hips, or back." *Id.* (emphasis added). Although arguably in some tension, *Leal* and *Shields* make clear that when courts review a specification narrowly after it is challenged at or before trial, courts decline to imply all but the most clear and obvious facts. If, as the Coast Guard Court of Criminal Appeals' decision in *Leal* makes clear, the act of pulling down a person's shorts and underwear does *not* necessarily imply even a physical touching of that person, Specification 1's allegation that [redacted] died "by asphyxia" certainly cannot be read to necessarily imply action by YN2 Richard causing that asphyxia when several alternative causes of asphyxia are plausible. And even in *Shields*, the Navy-Marine Corps Court of Criminal Appeals took pains to emphasize the obvious fact that the belt "necessarily" touched the waist, hips, or back of the person wearing the belt. *Id.*

Although a specification does not fail to state an offense merely because it does not adhere to the model specifications in the Manual for Courts-Martial or the Military Judge's Benchbook, the fact that Specification 1 fails to align with the model specification in either of those publications is a reflection of the fact that "asphyxia" neither expressly includes nor necessarily implies an act performed by the accused.

In addition to the model specifications' use of the example of "shooting," the Manual for Courts-Martial's explanation of Article 118, UCMJ, provides additional insight into what may constitute an "act or omission" by providing examples of acts inherently dangerous to others. See Manual for Courts-Martial, United States, Part IV, Para. 56(c)(4)(a) (2019 Edition) (listing as examples "*throwing* a live grenade toward another" and "*flying* an aircraft very low over one or more persons to cause alarm" (emphasis added)). Likewise, The Manual for Courts-Martial's explanation in the immediately following paragraph for Article 119, UCMJ, provides examples of acts that may constitute culpable negligence. See Manual for Courts-Martial, United States, Part IV, Para. 57(c)(2)(a)(i) (2019 Edition) (listing as examples "*conducting* target practice," "*pointing* a pistol...at another," and "*pulling* the trigger [of a gun]" (emphasis added)). *All* of these examples—unlike "asphyxia"—are things that are "done or performed" by a person. Black's Law Dictionary (11th ed. 2019).

b. Charge I, Specification 2 Fails to State an Offense under Article 118, UCMJ

Charge I, Specification 2 fails to state an offense under Article 118, UCMJ, for the same reasons Charge I, Specification 1 fails to state an offense. Specification 2 fails to allege that [redacted] death "resulted from the *intentional act* of the accused," an essential element of the offense of Murder resulting from an Act Inherently Dangerous to Another. See Manual for Courts-Martial, United States, Part IV, Para. 56(b)(3) (2019 Edition). Like Specification 1 of Charge I, Specification 2 fails to allege that YN2 Richard committed an act and instead states that [redacted] died while YN2 Richard was "engaging in...asphyxia." As discussed above, definitions of "asphyxia" make clear that the term

"asphyxia" refers to a medical condition or state that is marked by deprivation of oxygen and can result from many possible causes, actions, or circumstances. Like Specification 1 of Charge I, Specification 2 also fails to adhere to the model specifications contained in the Manual for Courts-Martial and the Military Judge's Benchbook, in part by ignoring the numerous examples of *actions* that may serve as bases for an alleged violation of Article 118, UCMJ. See Manual for Courts-Martial, United States, Part IV, Para. 56(c)(4)(a) (2019 Edition).

Specification 2's lack of clarity is compounded by the fact that another essential element of the offense Specification 2 attempts to allege is that "asphyxia" "was *inherently dangerous* to another and showed a wanton disregard for human life." Because "asphyxia" is *defined* as a medical condition that involves "*a life-threatening* lack of oxygen," substituting "asphyxia" for an act or omission in Specification 2 *eliminates* an essential element of the offense and relieves the Government of its burden of establishing that the accused's act or omission "was inherently dangerous to another and showed a wanton disregard for human life." See Medical Dictionary of Health Terms, Harvard Health Publishing, Harvard Medical School, https://www.health.harvard.edu/a-through-c.

c. The sole specification of the Additional Charge Fails to State an Offense under Article 119, UCMJ

The sole specification of the Additional Charge fails to state an offense under Article 119, UCMJ, for the same reasons each specification of Charge I fails to state an offense. The sole specification of the Additional Charge fails to allege that the death of [redacted] "resulted from the *act or omission* of the accused," an essential element of the offense of Involuntary Manslaughter. Like both specifications of Charge I, the sole specification of the Additional Charge fails to align with the model specifications, in part by ignoring the sample action in the specifications and examples of actions contained in the Manual for Courts-Martial that may serve as bases for an alleged violation of Article 119, UCMJ. See Manual for Courts-Martial, United States, Part IV, Para. 57(c)(2)(a)(i) (2019 Edition).

RELIEF REQUESTED

The Defense respectfully requests this Court dismiss Charge I and the Additional Charge because all three specifications fail to state an offense.

ORAL ARGUMENT

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session to present oral argument.

Respectfully submitted,

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/s/ J. L. Luce
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CERTIFICATE OF SERVICE

I certify that I have served a true copy, via e-mail, of the above on the Court and Government Counsel on 6 October 2021.

/s/ J. L. Luce
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UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES V. KATHLEEN E. RICHARD YN2/E-5 U.S. COAST GUARD	GOVERNMENT REPLY TO DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE 29 October 2021

RELIEF SOUGHT

The Government respectfully requests the military judge deny the Defense's motion requesting dismissal of Charge I and the Additional Charge.

HEARING

Because the Government opposes the Defense's motion, the Government will be prepared to provide oral argument at the next Article 39(a), UCMJ, hearing.

BURDEN OF PERSUASION AND BURDEN OF PROOF

"Failure to state an offense is a legal conclusion; it is not an [factual] error." *United States v. Hackler*, 70 M.J. 624, 627 (N.-M. Ct. Crim. App. 2011) (Reismeier, C.J., concurring). A specification fails to state an offense if it does not allege every element of the charged offense expressly or by necessary implication. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011).

RESPONSE

The crux of the Defense's argument is that the phrase "by asphyxia" found in both specifications of Charge I and the specification of the Additional Charge is not an act. Grammatically, "by asphyxia" is a prepositional phrase that modifies the simple past tense verbs "did...murder" and "did…unlawfully kill." Despite the Defense's protestations, that simple part

of speech is the linchpin for the specifications to allege an offense under the Code: that Petty Officer Richard did *murder* or *unlawfully kill* [redacted] by asphyxia, *i.e.*, by interruption of breathing leading to a lack of oxygen. *See United States v. Turner*, 79 M.J. 401, 408-09 (C.A.A.F. 2020) (Maggs, J., dissenting) (explaining how the Government must specifically allege either "murder" or "unlawfully kill" in a specification for attempted murder).

The Defense complains that "[b]ecause asphyxia is a medical condition or state rather than an action in itself," none of the specifications which use "asphyxia" properly allege an act or omission of the accused. Instead, the Defense seems to claim that the Government had needed to allege the mechanics of how Petty Officer Richard asphyxiated [redacted] However, this claim only has merit if one considers "by asphyxia" not to be a verb modifier of the *actus reus* elements ("murder" and "unlawfully kill"). If it's not, what else could it be? *See also State v. Ford*, 499 P.2d 699, 704 (Ariz. 1972) (denying a defense request for a bill of particulars where the cause of death was alleged as "by asphyxia"). To claim that the specification as written could mean that "asphyxia may have resulted from circumstances that did not include action or an omission by YN2 Richard" is to read out the rest of the verbs in the specifications, namely "did...murder" and "did...unlawfully kill." While the Government agrees with the Defense that "[s]everal of the possible causes of asphyxia...clearly may result from a wide array of actions or circumstances that may or may not involve another person," here, the Government has clearly alleged that [redacted] death by asphyxia did involve another person and directly so. Therefore, the Government has expressly alleged the causation element of both offenses.

Turning to the claim that specification does not necessarily imply an action or omission of the accused, the Defense's analogy to *Leal* falls flat. Although the Defense is correct that the specification in *Leal* could not be saved by finding all of the elements of abusive sexual contact

were necessarily implied, that was due to the unique nature and contours of the version of abusive sexual contact in effect at the time of the offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES, A22-2, A22-7 (2019). Under that version of Article 120, UCMJ, the government needed to allege the *actus reus* element of touching the body of the victim – either on a specific body part or as a general allegation of touching the body with a specific intent. As recounted by the appellate court, the peculiarity of the specification's language rendered the conviction unsalvageable. Notwithstanding *Leal*, though, no deficiency in the specifications exists here because they all allege expressly the elements of the offenses. As such, an analysis of whether the specification necessarily implies an action by the accused is unnecessary.

CONCLUSION

Because the charges and specifications expressly allege all of the statutory elements in such a way as to inform the accused of the charge against which she must defend and enable her to plead an acquittal or conviction in bar of future prosecutions for the same offense, the Government respectfully requests the military judge deny the Defense's requested relief.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] Date: 2021.10.29 13:37:09 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 29 Oct 2021.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] Date: 2021.10.29 13:37:23 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

Appellate Exhibit 63
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	**DEFENSE MOTION TO DISMISS CHARGE I, SPECIFICATIONS 1 & 2 FOR MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES** 5 October 2021

1. Nature of the Motion

The Defense moves pursuant to Rule for Court-Martial (R.C.M.) 906(b)(12) to dismiss Charge I Specifications 1 and 2 (intent to kill or inflict great bodily harm on [redacted] and causing the death of [redacted] while engaging in an act which is inherently dangerous and evinces a wanton disregard of human life).

2. Burden of Proof

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. Summary of Facts

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. Charges were referred against YN2 Richard for allegedly killing [redacted] intentionally, while engaging in an act inherently dangerous to another, and through culpable negligence. See Defense Appellate Exhibit C. Each of the charges in this case refer solely to "asphyxia" with no other information.

c. On July 12, 2021, Defense Counsel requested a bill of particulars from Trial Counsel. No bill of particulars was provided. See Defense Appellate Exhibit S.

d. On August 13, 2021, Defense Counsel filed a motion for the Court to order Trial Counsel to provide a bill of particulars.

e. On August 27, 2021, Trial Counsel filed a response to Defense Counsel's motion for a bill of particulars.

f. As of the date of this filing, no bill of particulars has been provided by Trial Counsel. The sole cause of death alleged by the Government for all of the charges in this case state "asphyxia."

4. Law and Argument.

a. <u>Charge 1, Specifications 1 and 2, and Additional Charge I are multiplicious and violate YN2 Richard's Constitutional right against Double Jeopardy.</u>

"The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments 'for the same offense.'" *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (citing U.S. Const. amend. V; Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2012) ("No person may, without his consent, be tried a second time for the same offense.")). "The Double Jeopardy Clause prohibits 'multiplicious prosecutions . . . . [i.e.,] when the government charges a defendant twice for what is essentially a single crime.'" *Id.* (quoting *United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012)). "Offenses are multiplicious if one is a lesser-included offense of the other." CAAF in *United States v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004), states, "The Fifth Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense." *See* Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2000); *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). Charges reflecting both an offense and a lesser-included offense are impermissibly multiplicious. *Hudson*, 59 M.J. at 358; *See also Brown v. Ohio*, 432 U.S. 161, 165-66 (1977)(noting that offenses charged are multiplicious when they stand in the relationship of greater and lesser offenses); *United States v. Leak*, 61 M.J. 234, 248 (C.A.A.F. 2005) (citing *United States v. Palagar*, 56 M.J. 296 (C.A.A.F.

2002)). On these grounds, "A specification may be dismissed upon timely motion by the accused." *Hudson*, 59 M.J. at 358 (quoting Rule for Courts-Martial 907(b)(3)(B)).

Multiplicious specifications should be dismissed in the interest of justice. See R.C.M. 907(b)(3). Multiplicity occurs if a court, "contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993).

Charge 1, Specifications 1 and 2 are for the same act charged in Additional Charge I. The only difference between the charges is the statute the crime is being charged under. The act alleged by the Government is death by "asphyxia." There is only one act. These multiplicious charges are being imposed contrary to Congress' intent. The *Blockburger*[1] rule is used to discern congressional intent in double jeopardy cases. *United States v. Teters*, 37 M.J. 370, 377 (C.A.A.F. 1993). The test to determine whether Congress intends for there to be two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Id.* If not, the offenses are multiplicious. *Id.* Charge I, Specifications 1 and 2 and the Additional Charge all rely on the same evidence and same facts from the government. They all state the manner in which YN2 Richard is alleged to have killed [redacted]s by asphyxia. Therefore, there isn't any additional facts the government would need to prove for each offense.

In addition, involuntary manslaughter is a lesser included offense of unpremeditated murder. A lesser included offense is defined as an offense that is necessarily included in the offense charged. Article 79, U.C.M.J. An offense is "necessarily included" when all elements are "included and necessary" parts of the greater offense, but the mental element is a subset by being legally less serious. M.C.M. Part IV para. 3(b)(2). Additional Charge I (Involuntary Manslaughter) is a lesser included offense of Charge I, Specification 1 (Unpremeditated Murder). *See United States v. Dalton*, 72 M.J. 446, 447 (C.A.A.F. 2013) (Involuntary manslaughter under Article 119(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 919(b)(1) (2006), is a lesser included offense of unpremeditated murder under Article 118(2), UCMJ, 10 U.S.C. 918(2)

[1] *Blockburger v. United States*, 284 U.S. 299 (1932).

(2006)). As the *Leak* Court explained, *supra*, offenses are multiplicious if one is a lesser included offense of the other. 61 M.J. at 248.

b. Charge I, Specifications 1 and 2, should be dismissed because they involve the same facts and transaction as Additional Charge I; therefore they constitute the unreasonable multiplication of charges.

Unreasonable multiplication of charges is a distinct, but related, concept to multiplicity. Even if offenses are not multiplicious as a matter of law with respect to Double Jeopardy concerns, the prohibition against unreasonable multiplication of charges allows courts-martial and reviewing authorities to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). "While multiplicity is a constitutional doctrine, the prohibition against unreasonable multiplication of charges is designed to address prosecutorial overreaching." *Id.* (citing *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)). Rather than applying the strict elements test, questions of unreasonable multiplication focus on whether a single transaction has been improperly charged in multiple specifications. R.C.M. 307(c)(4). The Court of Appeals for the Armed Forces in *Quiroz* endorsed the test by which courts may determine whether unreasonable multiplication of charges exists. 55 M.J. at 338-39.

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) whether each charge and specification is aimed at distinctly separate criminal acts; (2) whether the number of charges and specifications misrepresents or exaggerates the criminality; (3) whether the punitive exposure of the accused is unreasonably increased; and (4) whether there is any evidence of prosecutorial abuse in the drafting of the charges. *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012). In its analysis, a court must give fair consideration to each prong and determine a remedy on a case-by-case basis. *Id.*; *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Even if all factors have

not been met, one or more factors may be sufficiently compelling to warrant a ruling of unreasonable multiplication of charges. *United States v. Campbell*, 71 M.J. at 23. "Ultimately, *Quiroz* reflects reasonableness determination." *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017).

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 *Quiroz*, 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)(where 18 U.S.C. § 842 criminalizes the unlawful distribution and transportation of explosive materials). Later, in *United States v. Roderick*, the Court of Appeals for the Armed Forces reiterated that dismissal is an available and appropriate remedy for unreasonable multiplication. 62 M.J. 425, 433-34 (C.A.A.F. 2006). The *Roderick* court dismissed indecent liberties convictions that arose from the same criminal acts—taking photographs of underage girls—as the appellant's child pornography convictions under 18 U.S.C. § 2251(a). *Id.*[2]

Finally, when convictions result from specifications that were charged for exigencies of proof, a military judge must "'consolidate or dismiss [the contingent] specification[s],' not merely merge then for sentencing purposes. *Thomas*, 74 M.J. at 568 (quoting *United States v. Elespuru*,

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

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).

Most, if not all, of the *Quiroz* factors are present in the case at bar. First, each charge and specification is not aimed at distinctly separate acts. Trial Counsel has elected to charge this case in the vaguest possible manner. Each of the charges relating to the death of [redacted] alleges "asphyxia" as the means of death with no clarification. As with the rule of lenity, vagueness in statutes, or charges based on statutes, are interpreted in a light most favorable to a defendant.[3] Thus, the allegation of "asphyxia" is interpreted as the same, singular act – whatever that might be.

Second, the number of charges and specifications misrepresents or exaggerates the criminality. By including three separate specifications aimed at exactly the same act, it exaggerates YN2 Richards criminality in that it creates an appearance that YN2 Richard is three-times as culpable. This creates a significant risk for exaggeration or confusion by the panel members creating the perception that YN2 Richard's criminality is greater than reality. Allowing the government to move forward with all three charges on the charge sheet improperly inflates the charges and creates the risk that the members will incorrectly use the number of charges as evidence of guilt.

Third, the defense agrees that the maximum punishment is not increased by the inclusion of all three specifications solely because Charge I, Specifications 1 and 2 both has a punitive exposure of confinement for life without the possibility of parole. Therefore, the punitive exposure of YN2 Richard is not unreasonably increased by adding the Additional Charge. However, leaving Charge I, Specifications 1 and 2 on the chargesheet *after* the Preliminary

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[3] *United States v. Santos*, 553 U.S. 507, 510 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them.").

Hearing Officer concluded there was no probable cause to support these charges, does unfairly increase YN2 Richard's punitive exposure from 15 years confinement, the maximum punishment for Involuntary Manslaughter.

Finally, there is evidence of prosecutorial abuse in the charging. Let me be clear, I am not alleging any ethical misconduct. The term "abuse" is meant by the court in *Quiroz* to describe prosecutorial overreaching. 55 M.J. at 337. Here, the overreaching is in pursuing charges with a lack of specificity (as discussed in the motion for a bill of particulars) and lack of probable cause (as discussed in the PHO Report).

Even a single factor is sufficient for this Court to find that the charges are unreasonably multiplicious. In this case, arguably all of the factors in *Quiroz* are present. Because this is a "reasonableness" test, factors such as lack of probable cause and lack of clarity in the charging document should be considered in addition to the technical aspects of placing a lesser included offense on a charge sheet.

5. Relief Requested

For all of the reasons stated above, YN2 Richard respectfully requests the following relief:

a. Dismiss Charge I, Specifications 1 and 2.

b. Provide preliminary and final instructions to the panel instructing them that, if they find YN2 Richard guilty of being responsible for the death of [redacted] they are only permitted to find YN2 Richard guilty of one of the charges relating to her death.

6. Evidence

The defense offers no additional evidence at this time.

7. Oral Argument

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

Dated this 5th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 5th day of October 2021.

Dated this 5th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES V. KATHLEEN E. RICHARD YN2/E-5 U.S. COAST GUARD	GOVERNMENT REPLY TO DEFENSE MOTION TO DISMISS FOR CHARGE I, SPECIFICATIONS 1 & 2 FOR MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES 29 October 2021

RELIEF SOUGHT

The Government respectfully requests the military judge deny the Defense's motion requesting dismissal of Charge I.

HEARING

Because the Government opposes the Defense's motion, the Government will be prepared to provide oral argument at the next Article 39(a), UCMJ, hearing.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Whether charges and specifications are multiplicious or unreasonably multiplied are questions of law. Charges reflecting both an offense and a lesser included offense are impermissibly multiplicious. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004). An offense is a lesser included offense of another if all of the elements of the offense are also elements of another offense. *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010).

RESPONSE

The Government agrees with the Defense that it has alleged three separate offenses for one act. It did so because Article 118(3), UCMJ, is not a lesser included offense of Article 118(2), UCMJ, as each offense has different elements not shared by them, and because the

President did not designate involuntary manslaughter as a lesser included offense of intentional homicide.

To prove an intentional murder, the government must show that an accused had a specific intent to unlawfully kill another. To prove a killing by an inherently dangerous act, the government must show the accused unlawfully killed someone by engaging in an inherently dangerous act that showed a wanton disregard for human life and for which the accused knew that death was a probable consequence of the act. The former offense, intentional murder, does not wholly contain all the elements of the latter offense, murder by an inherently dangerous act, because the latter contains the additional element of proving the nature of the act as inherently dangerous. Thus, these allegations are different theories by which Petty Officer Richard could be found guilty. It is a proper exercise of prosecutorial discretion to present both theories to the factfinder with the expectation that the factfinder may only return one guilty finding. *Jones*, 68 M.J. at 472 (citations omitted).

Relatedly, involuntary manslaughter is also a different theory by which Petty Officer Richard could be found guilty. However, the President did not identify involuntary manslaughter as a lesser included offense in Executive Order No. 13825, and Appendix 12A of the *Manual for Courts-Martial* does not list involuntary manslaughter as a lesser included offense of intentional murder. That said, the preface to Appendix 12A states, "This is not an exhaustive list of lesser included offenses." And indeed, all of the elements of involuntary manslaughter are contained within the elements of intentional murder, where culpable negligence is a *mens rea* contained in specific intent. *See* UNIF. MODEL PENAL CODE § 2.02(5) (AM. L. INST. 2020). The Government also agrees with the Defense that *United States v. Dalton*, 72 M.J. 446 (C.A.A.F. 2013) is clear

precedent establishing involuntary manslaughter as a lesser included offense of intentional murder.

Therefore, the Government respectfully requests the military judge permit Specifications 1 and 2 of Charge II to remain on the charge sheet as alternate theories and to instruct the members that they may consider involuntary manslaughter as a lesser included offense to Specification 1 of Charge I if reasonably raised by the evidence.

CONCLUSION

Because the Government has permissibly charged alternate theories of criminal liability for one act, the Government respectfully requests the military judge deny the Defense's requested relief.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM[redacted]
Date: 2021.10.29 13:42:29 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 29 Oct 2021.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM[redacted]
Date: 2021.10.29 13:42:43 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

Appellate Exhibit 66
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR RECONSIDERATION – RULING ON MOTION TO COMPEL WITNESSES 7 Oct 2021

1. **Nature of Motion.**

Pursuant to R.C.M. 905(f), the Defense moves for reconsideration of the Court's Ruling of 1 October 2021, which denied, in part, the Defense Motion to Compel the Production of Witnesses. Specifically, Defense Counsel requests that the Court reconsider the denial of the request to produce CWO2 [redacted] at trial.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

A hearing was held on 30 August 2021 to discuss Defense Counsel's Motion to Compel the Production of Witnesses. CWO2 [redacted] among others, was requested to be produced at trial. The Court denied the request to produce CWO2 [redacted]

During the hearing on 30 August 2021, Defense Counsel informed the Court that CWO2 [redacted] testimony was exculpatory and necessary. The Defense offered to inform the court in an ex parte conference why the Defense believed his testimony to be necessary and exculpatory. Following the Defense offer to meet with the Court in an ex parte conference to explain the significance of CWO2 [redacted] testimony, Counsel for the Government agreed to produce CWO2 [redacted] at trial. At that point, Defense Counsel thanked Government Counsel and no further discussion was necessary.

4. **Argument.**

Defense Counsel relied on the assurance of Government Counsel that they would produce CWO2 [redacted] at trial and did not continue to argue the issue at the hearing. Defense Counsel has no reason to doubt the word of Government Counsel. However, without the Court reconsidering its ruling on production of CWO2 [redacted] Defense Counsel will have no recourse if CWO2 [redacted] is not produced at trial. Further, without a request to reconsider the ruling, the issue will be deemed to have been waived on appeal, if necessary.

If the Court is inclined to deny the motion to reconsider, Defense Counsel is requesting that he be allowed to further argue the issue before the Court. Defense Counsel will also request that, if the Court intends to deny the production of CWO2 [redacted] after oral argument, that Defense Counsel be permitted to file a separate motion, ex parte and under seal, explaining the Defense theory and why this witness is necessary.

Due Process requires an opportunity to be heard by the Court. Since argument was ceased based on the Government's assurance that the witness would be produced, Defense Counsel has not had the opportunity to be fully heard on the issue.

5. **Relief Requested.**

Defense Counsel requests the following relief:

a. That the Court reconsider its denial of CWO2 [redacted] and issue an order requiring the production of CWO2 [redacted] at trial.

b. If the Court denies the request to reconsider production of CWO2 [redacted] at trial, Defense Counsel requests to continue oral argument on this issue at a future hearing.

c. If the Court, after hearing additional oral argument, is still inclined to deny production of this witness at trial, Defense Counsel requests the opportunity to file a motion, ex parte and under seal, explaining to the Court why this witness is critical to a fair presentation of the evidence at trial.

6. **Enclosure.** There are no additional enclosures to this motion.

7. **Oral Argument.**

Unless conceded by the Government, or ordered by the Court based on pleadings alone, Defense Counsel requests oral argument on this matter.

Dated this 7th day of October, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 7th day of October 2021.

Dated this 7th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR RECONSIDERATION – RULING ON MOTION TO COMPEL FUNDING FOR A HOMICIDE INVESTIGATOR 11 Oct 2021

1. **Nature of Motion.**

Pursuant to R.C.M. 905(f), the Defense moves for reconsideration of the Court's Ruling of 27 September 2021, which denied, in part, the Defense Motion to Compel the Production of Expert Witness, homicide investigator [redacted] Defense Counsel requests that the Court reconsider this ruling for the reasons stated in this motion.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

A hearing was held on 30 August 2021 to discuss Defense Counsel's Motion to Compel the Government to provide the defense an expert witness in the area of homicide investigations. On 27 September 2021, the Court denied this request.

4. **Law and Argument**.

The Government has had access to unlimited investigators and funding for over a year. The defense has no investigator. Without access to a defense investigator with expertise in homicide investigations, Defense Counsel is precluded from offering meaningful evidence in support of a third party defense. If the panel is convinced that the child was a victim of homicide, then the issue becomes "who did it." If YN2 Richard did not do it, then who did? Depriving YN2 Richard of the opportunity to investigate and present evidence that BM2 [redacted]

[redacted] is responsible for the death of the child is denying YN2 Richard a meaningful opportunity to present a complete defense.

There is ample evidence to show that the Government investigators failed to investigate any other person other than YN2 Richard. In spite of the biased investigation, there is evidence that BM2[redacted] had the means, opportunity, motive, and predisposition to kill the child. By focusing solely on YN2 Richard as the perpetrator, they collected no evidence that would support a third-party defense.

One glaring example of investigative bias is that the investigators discovered that YN2 Richard gave away the baby car seat shortly after the death of the child. Government Counsel has offered this as evidence that YN2 Richard is responsible for the death of the child. If giving away a car seat following the death of child is an indication of guilt, then why, in the 100,000 pages of investigation, is it never mentioned that BM2[redacted] did exactly the same thing? The Government, with all of its power and resources, failed to fairly and fully investigate this case thereby denying YN2 Richard the opportunity to present a meaningful and complete defense.

The constitutional right to due process guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984). "Few rights are more fundamental than that of an accused to present witnesses [evidence] in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Failing to provide a qualified defense investigator to the Defense team is precluding YN2 Richard from her right to a fair trial.

5. **Relief Requested.**

Defense Counsel requests the following relief:

a. That the Court reconsider its denial of the defense request to compel funding for Mr.[redacted] and issue an order requiring the government fund 120 hours for Mr.[redacted] to conduct an independent investigation.

b. If the Court denies the request to reconsider this request for funding Mr. [redacted] Defense Counsel requests to continue oral argument on this issue at a future hearing.

6. **Enclosure.** There are no additional enclosures to this motion.

7. **Oral Argument.**

If this motion is opposed by Government Counsel, Defense Counsel requests oral argument on this matter.

Dated this 11th day of October, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 11th day of October 2021.

Dated this 11th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTIONS FOR RECONSIDERATION RULINGS ON MOTION TO COMPEL PRODUCTION OF WITNESSES; FUNDING FOR A HOMICIDE INVESTIGATOR 15 OCT 2021

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense's motions for reconsideration of your rulings on the Defense motion to compel the production of witnesses and expert assistance. Based on assurances provided during our 2 September 2021 Article 39(a) proceeding, the Government will produce CWO [redacted] for trial. The Government, however, renews its objection to Defense expert assistance in the field of homicide investigations.

HEARING

The Government does not request oral argument on this motion.

STATEMENT OF FACTS

On 2 September 2021, oral argument was conducted and recorded. At minute 2:51:00, the parties discussed production of CWO2 [redacted] Defense Counsel stated that CWO [redacted] was necessary to lay foundation for a photograph that was exculpatory. Trial Counsel replied, "if [redacted] was a foundational witness for a picture, that wasn't in the motion and the proffer, but we will accept that and have no objection with granting [redacted] if he's a foundational witness for a piece of evidence." The Military Judge confirmed that the Government would produce CWO [redacted] at minute 2:52:30.

LEGAL AUTHORITY AND ARGUMENT

Legal argument relevant to this motion is incorporated in the Government's responses to the Defense motions to compel production of witnesses and expert assistance.

The Government will produce CWO [redacted] at trial for the limited purpose of laying foundation for exculpatory evidence. However, the Government reiterates its position that CWO [redacted] testimony is irrelevant if related to an entirely unrelated discrimination allegation made by YN2 Richard before [redacted] was killed. Anything related to her discrimination claim has no relevance to this court-martial, and should be excluded by M.R.E. 403 as confusing the issues and wasting time.

The Defense's motion for reconsideration on your ruling regarding expert assistance in the field of homicide investigations raises no additional legal arguments that have not already been considered by this Court. As of result, the Government renews its objection to his compelled funding and production.

EVIDENCE

The Government offers the following evidence as an enclosure to this motion.

- **A.E. II – R:** Audio of US v RICHARD PART 2-2 SEP 2021

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motions in part.

[redacted] MURRAY.ALLISON.BLAIR[redacted]

Allison B. Murray[redacted]
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 15 October 2021.

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION TO DISMISS FOR *BRADY* VIOLATION 2 Nov 2021

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial (R.C.M.) 307(c)(3) and R.C.M. 907(b)(2)(E), the Defense respectfully moves this Court to dismiss Charge I, Specifications 1 and 2, violation of Article 118 (Murder), UCMJ and Additional Charge I, violation of Article 119, UCMJ (Manslaughter) for violating YN2 Richard's Fifth and Fourteenth Amendments due process rights, her Sixth Amendment right to counsel, as well as violating the rules provided by the U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On July 8, 2021, Defense Counsel sent Trial Counsel the first discovery request. Defense Appellate Exhibit T.

c. On August 9, 2021, Trial Counsel responded to all three of Defense Counsel's requests for discovery. Defense Appellate Exhibit V.

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d. On August 13, 2021, Defense Counsel filed a Motion to Compel Discovery.

e. August 27, 2021, Trial Counsel filed a Response to the Defense Motion to Compel Production of Evidence.

f. On August 30, 2021, an Article 39(a) session was held to hear argument on the Motion to Compel Discovery.

g. During the August 30, 2021 Article 39(a) session, Trial Counsel informed the Court that Trial Counsel would be providing "an affidavit from Dr. [redacted] regarding his involvement in the case, specifically stating that he did not direct CGIS investigatory efforts in this case…" This statement was memorialized in paragraph one of the Court's October 6, 2021 Ruling on Defense Motion to Compel Discovery. To date, Trial Counsel has provided no such affidavit.

h. On September 15, 2021, Trial Counsel disclosed bates pages 22937 to 22939. Defense Appellate Exhibit OOO. These pages contain briefing slides relating to the death of [redacted] and the slides are dated May 12, 2020. The names of the persons producing the brief were not disclosed, nor were the names of the persons being briefed.

i. Bates page 22939 states that (as of May 12, 2020, less than a month after the death of [redacted], "Third ME brought into investigation."

j. On November 1, 2021, Trial Counsel disclosed the names of the three medical examiners used by the Government in this case. Defense Appellate Exhibit PPP. Trial Counsel states that the three listed medical examiners ([redacted]) "were consulted at varying times during the investigation, not necessarily prior to 12 May 2020. This is the first time Dr. [redacted] has been disclosed as a medical examiner in this case.

4. **Law and Argument.**

a. <u>The Government has made a concerted effort to conceal medical evidence in this case.</u> The Government's disclosure is replete with vague references to multiple medical examiners. But no record of discussions with these medical examiners has been provided. Listed below are a few examples of CGIS discussing multiple, unnamed medical examiners in this case.

(1) On June 25, 2020, when discussing the case with BM2 [redacted] CGIS Agent [redacted] explained to [redacted] that. "When we talked to the medical examiner that we told you about, **he's** specializes on this child or children that – ***he*** looked at every, and ***he's*** like, 'all right, this is what you guys have. This is what happened here.' And ***he*** explained everything to us." Defense Appellate Exhibit KK, page 28 (emphasis added). At that point, the only Medical Examiner mentioned in the discovery at that time was Dr. [redacted] a female. There is no mention of the Government's hired expert, Dr. [redacted] (a male), until his report was submitted on March 8, 2021, nine months later. Defense Appellate Exhibit QQQ.

(2) On May 26, 2020, Alaska State Trooper [redacted] and CGIS Agent [redacted] tell BM2 [redacted] that "***multiple*** medical examiners" are involved in this case. Defense Appellate Exhibit KKK, page 85 (emphasis added). At this point, there is only one medical examiner mentioned in discovery (Alaska State Medical Examiner Dr. [redacted]. The first mention of an additional Medical Examiner in this case is ten months later on March 8, 2021 (bates page 17327) when Dr. [redacted] submits his report.

(3) During the May 26, 2020 interview with BM2 [redacted] Alaska State Trooper and CGIS Agent [redacted] tell [redacted] that the medical examiner has a "**secondary theory**." Defense Appellate Exhibit KKK, page 86 (emphasis added). To date, this secondary theory has not been disclosed to Defense Counsel. The investigators further explain that, "***it's not just one medical examiner***." Defense Appellate Exhibit KKK, page 86 (emphasis added). Again, at that point only one medical examiner, Dr. [redacted] is listed in the Government's disclosure.

(4) On May 7, 2020, CGIS re-interviews [redacted] about hearing [redacted] cooing in her crib on the day she died. CGIS tells [redacted] that "there's something that just is not right with your recollection." CGIS goes on to tell [redacted] that they know "***scientifically***" that she could not have heard [redacted] cooing. Defense Appellate Exhibit XX, pages 142-144 (emphasis added).

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(5) On September 15, 2021, Trial Counsel provided Defense Counsel with briefing slides from May 12, 2020. Defense Appellate Exhibit OOO. These briefing slides mention ***three*** medical examiners assisting with the investigation. In May, 2020, the only medical examiner listed in discovery is Dr. [redacted] Ten months later, in March of 2021, Dr. [redacted] is first mentioned in discovery. There is no mention of any discussions with medical examiners other than Dr. [redacted] prior to March, 2021 when Dr. [redacted] is first mentioned.

On November 1, 2021, following a Defense discovery request, Trial Counsel disclosed, for the first time, the names of three medical examiners in this case. This is the very first time Defense Counsel has been made aware of the existence of a third medical examiner (Dr. [redacted]. Defense Appellate Exhibit PPP. It is shocking that Dr. [redacted] was not disclosed until the Government was confronted with a 12 May 2020 briefing slide that Trial Counsel also attempted to prevent Defense Counsel from discovering.

Further proof of the Government's attempt to conceal evidence occurred during the August 30, 2021 39(a) session in this case. During the hearing, Trial Counsel informed the Court that Dr. [redacted] was not involved in the investigation of this case. Trial Counsel further informed the Court that Dr. [redacted] would submit an affidavit to show that he was not involved in the investigation of this case. To date, no affidavit has been provided.

Trial Counsel attempted to conceal any communications with Dr. [redacted] as a "confidential consultant." Since Dr. [redacted] had not been previously disclosed, there has been no such assertion. However, based on past practices, it is anticipated that Trial Counsel will attempt to make the same argument. Trial Counsel concedes in their November 1, 2021 response to Defense Counsel's Discovery Request that the medical examiners were consulted "during the investigation." In other words, they were involved in the investigation and yet, there is not a single mention of any discussion with Dr. [redacted] or Dr. [redacted] in the Government's disclosure. In fact, there is no mention of Dr. [redacted] at all.

At least one of the medical examiners provided and opinion that the death in this case was "'asphyxiation by overlay,' suggesting weight was applied to infant's back." Defense Appellate Exhibit OOO, bates page 22939. This opinion is contrary to Dr. [redacted] opinion that [redacted] was suffocated by forcing her face into the mattress. Thus, the information is exculpatory. However, Trial Counsel has not revealed who made this initial opinion, nor has any documentation been provided to Defense Counsel to permit investigation of this alternative theory. What doctor gave that opinion? Where is the paper trail for this discussion? Is this Dr. [redacted] opinion, Dr. [redacted] opinion, or someone else who has yet to be disclosed?

In their November 1, 2021 response, Trial Counsel was quick to clarify that these three named medical examiners were "not necessarily [consulted] prior to 12 May 2020." In other words, there may be additional medical examiners involved in this case prior to 12 May 2020, but Trial Counsel prefers not to provide any clarification. Either they were or were not a part of this investigation prior to May 12, 2020. Again, the Trial Counsel is playing fast and loose with the evidence and YN2 Richard's right to a fair trial.

Since Trial Counsel has not disclosed the existence of Dr. [redacted] prior to November 1, 2021, it is safe to assume that his information was not favorable to the Government's case. Put another way, Dr. [redacted] is exculpatory. Further evidence that Dr. [redacted] opinion is exculpatory is the comment on bates page 22939 that "Third ME brought into investigation. Initial opinion based on photos was 'asphyxiation by overlay,' suggesting weight was applied to infant's back."

Thus far, there have been at least four medical opinions offered by the Government's evidence: (1) SIDS (ER doctor, Dr. [redacted]; (2) probable asphyxia, cause undetermined (Alaska State Medical Examiner, Dr. [redacted]; (3) asphyxiation by overlay, weight applied to infant's back (Trial Counsel has not disclosed which doctor made this statement, but it is presumably the newly disclosed Dr. [redacted]; and (4) suffocation by forcing [redacted] face into the mattress (Dr. [redacted]. The progression of doctor shopping until the Government got their desired answer is obvious.

Trial Counsel successfully hid the existence of Dr. [redacted] until they got caught. There is no mention of Dr. [redacted] in any of the 100,000 pages of discovery. The Government was doctor shopping and, when Dr. [redacted] didn't give them what they wanted, they turned to another, more prosecution friendly doctor. Hiding the existence of Dr. [redacted] medical opinion is a *Brady* violation that warrants dismissal.

b. The failure of the Government to disclose exculpatory material violates a YN2 Richard's due process rights under the Fifth and Fourteenth Amendments.

Under *Brady v. Maryland*, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment..." 373 U.S. 83, 88 (1963) . The duty to disclose this type of information extends to any information that may tend to discredit a witness' testimony. *Giglio v. United States*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959). A *Brady* violation requires relief under the following circumstances: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The remedy for a *Brady* violation is ordinarily a new trial since the non-disclosed evidence is in most cases discovered after conviction and raised in appeal or PCR proceedings. *See, State v. Dumaine*, 162 Ariz. 392, 405-06, 783 P.2d 1184 (1989). In a case of extreme prejudice, however, due process mandates a more stringent remedy including dismissal. *See, State v. Jones*, 120 Ariz. 556, 560, 587 P.2d 742 (1978). Because of the extreme efforts to hide Dr. [redacted] this *Brady* violation requires dismissal.

c. The Government's conduct violated YN2 Richard's rights under the Fifth, Sixth, and Fourteenth Amendments.

Trial Counsel's conduct in this case violated YN2 Richard's right to present a meaningful defense, and to confront and cross examine adverse witnesses Dr. [redacted] and Dr. [redacted] Due Process guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Implicit within this guarantee is the right to

offer testimony of witnesses and elicit evidence through the cross examination of the government's witnesses. *Washington v. Texas*, 388U.S. 14, 19 (1967). Moreover, the Sixth Amendment's right to confrontation guarantees a criminal defendant the right to meaningful cross examination and impeachment of the government's witnesses on issues affecting their credibility. *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). Because of the late disclosure, attempts to hide evidence, and the ongoing attempts to prevent Defense Counsel from obtaining information, Defense Counsel will be ill prepared to conduct interviews and cross examination of the Government's medical examiners.

Even if discovery violation does not rise to the level of a *Brady* violation, it may still violate a service member's rights under Article 46 of the UCMJ. *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim App. 2002). "Discovery in the military justice system, which is broader than in the federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2019 "to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case[…]." In the case at hand, Trial Counsel violated the equal access requirement of Article 46, and participated in the "gamesmanship" that the rule is designed to prevent. As such, dismissal is warranted.

5. **Relief Requested.**

a. Dismissal of Charge I, Specifications 1 and 2, violation of Article 118, UCMJ (Murder) and Additional Charge I, violation of Article 119, UCMJ (Manslaughter).

b. Preclude the testimony of Dr. [redacted]

c. Provide immediate disclosure of the following evidence:

(1) When were Dr. [redacted] and Dr. [redacted] first contacted regarding this case? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

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(2) Who was involved in making the decision to involve Dr. [redacted] and Dr. [redacted]? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

(3) Why were Dr. [redacted] and Dr. [redacted] chosen? Were any other doctors considered? If so, a complete list of other doctors considered. If other doctors were considered, why was Dr. [redacted] specifically chosen to participate in this case to the exclusion of the other doctors? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this decision-making process.

(4) A copy of all contracts with Dr. [redacted] and Dr. [redacted] relating to this case.

(5) A complete list of any and all advice or consultation provided by Dr. [redacted] and Dr. [redacted] to Government Agents in this case. This includes, but is not limited to, information Dr. [redacted] or Dr. [redacted] instructed Government agents to investigate and/or request during interviews of persons involved in this case. This includes the date and time of any advice or consultation provided by Dr. [redacted] and Dr. [redacted] in this case.

(6) Any comments Dr. [redacted] or Dr. [redacted] provided to the Alaska Medical Examiner and/or the Alaska Medical Examiner's Office.

(7) Any draft documents or reports provided to the Government in this case by Dr. [redacted] or Dr. [redacted]

(8) list of any and all contacts with Dr. [redacted] and Dr. [redacted] including, but not limited to, phone calls, teleconferences, personal meeting, emails, and written correspondence.

(9) As it relates to this case, all written or recorded correspondence referencing Dr. [redacted] or Dr. [redacted] This includes, but is not limited to notes taken by Government personnel, including handwritten notes, with respect to Dr. [redacted] (or provided by Dr. [redacted] or Dr. [redacted].

(10) Any comments, correspondence, advice or any other information either to or from Dr. [redacted] or Dr. [redacted] regarding [redacted] (specifically relating to her

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statement that she and YN2 Richard heard [redacted] cooing/talking on the day she died).

(11) The names, dates, and locations of all child death cases where Dr. [redacted] has not concluded that the death was caused by homicide.

(12) Any records or information relating to whether Dr. [redacted] is a certified police officer, carries a badge, or has conducted police work (whether volunteer or paid).

6. **Evidence.**

The defense offers the following evidence as enclosures to support this motion.

a. Defense Appellate Exhibit T: July 8, 2021 Defense Discovery Request (previously provided to the Court).

b. Defense Appellate Exhibit V: August 9, 2021 Government Response to Defense Discovery Request (previously provided to the Court).

c. Defense Appellate Exhibit KK: June 25, 2020 CGIS interview with BM2 [redacted] (previously provided to the Court).

d. Defense Appellate Exhibit XX: May 7, 2020 CGIS Interview with [redacted] (previously provided to the Court).

e. Defense Appellate Exhibit KKK: May 26, 2020 CGIS and Alaska State Trooper Interview with BM2 [redacted] (previously provided to the Court).

f. Defense Appellate Exhibit OOO: bates pages 22937-22939, Government briefing slides.

g. Defense Appellate Exhibit PPP: November 1, 2021 Government disclosure of three medical examiners.

h. Defense Appellate Exhibit QQQ: Dr. [redacted] March 8, 2021 medical report, bates pages 17327-17368.

7. **Oral Argument.**

Defense Counsel requests oral argument on this motion, if opposed by the Government.

Dated this 2nd day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 2nd day of November 2021.

Dated this 2nd day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**ALLEGED *BRADY* VIOLATION**
	)	
	)	
	)	
KATHLEEN RICHARD	)	12 November 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to dismiss due to alleged discovery violation under *Brady*. The Defense's motion misstates the facts and is not supported by law. Therefore, it should be denied in its entirety.

HEARING

The Government does not request oral argument on this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of proof and persuasion, which must be met by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c).

STATEMENT OF FACTS

The Government proffers the following facts based on speaking with Special Agents [redacted]

During the early stages of the investigation, CGIS had a few informal phone conversations with friends and colleagues from other law enforcement agencies. Discussing potential strategies, goals, and techniques is common and considered good law enforcement

practice. These conversations were informal, designed to educate agents on best practices, and used to bounce ideas off of agents from other agencies who could potentially offer some advice. These conversations were not recorded.

During one such conversation, a colleague from the Federal Bureau of Investigations offered to have a physician look at the autopsy report and photographs. Dr. [redacted] reviewed the autopsy report and photographs and relayed to CGIS in June 2020 that, in his opinion, the autopsy findings indicated a homicide. He did not offer any exculpatory information. Prior to Dr. [redacted] review, the nature of CGIS' investigation had already shifted from a routine probe into a sudden unattended child death to a homicide investigation[1]. Dr. [redacted] did not communicate or consult with the Alaska State Medical Examiner's Office. Dr. [redacted] was not formally retained as an expert or consultant, and was not available to be formally retained. He did not create a report for CGIS.

In addition, U.S. Coast Guard Reserve CGIS Special Agent [redacted] had one informal call with Dr. [redacted] in late April 2020.[3] S/A [redacted] considers Dr. [redacted] a close professional colleague, having worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department. Along with speaking with other law enforcement agents, investigators often informally educate themselves by having discussions with colleagues with medical or other specialized knowledge; this is especially true with homicide investigations. This too is considered good law enforcement practice. Dr. [redacted] did not communicate or confer with the Alaska State Medical Examiner's Office in this case. Besides this one call with S/A

[1] This shift occurred following the State of Alaska Medical Examiner's Office autopsy examination on 21 April 2020 where Dr. [redacted] observed injury to decedent's body and found examination consistent with asphyxiation.
[2] Special Agent [redacted] was activated for two weeks on TDY Orders to assist in Alaska from 26 April 2020 to 10 May 2020; he had no further involvement in the case after his TDY concluded.
[3] Trial Counsel learned about S/A [redacted] informal call when counsel spoke to him on 8 November 2021.

[redacted] Dr. [redacted] had no further involvement with CGIS until after he was retained on contract in July 2020. Contrary to Defense Counsel's assertion, Dr. [redacted] did not direct the investigation. The Defense has been provided copies of Dr. [redacted] contract. As of March 2021, the Defense received a copy of Dr. [redacted] formal report, which includes his opinion that the autopsy indicated a homicide. In addition to other findings, Dr. [redacted] report discusses "asphyxiation by overlay." (Bates 017335; 017337).

The contact information for Dr. [redacted] and Dr. [redacted] have been provided to the Defense. The Defense is at liberty to interview either pathologist.

The CGIS agents are also available to the Defense to discuss their investigative efforts.

LEGAL AUTHORITY AND ARGUMENT

I. The Discovery Portion of This Motion Is Not Actually a Request for Discovery

The Defense's motion seems to allude to some legal requirement for investigators to formally document every conversation, piece of advice, and/or consultation that they undertake during the course of an investigation. Such a requirement, however, does not exist.

Similarly, discovery in a criminal case under the rules for courts-martial does not allow the interrogatory style discovery requests that the Defense is attempting to use in this case. The Defense's requested relief, section (c), is quite clearly a list of interrogatories. That is not discovery. Discovery in a criminal case is by definition for "documents, tangible objects, and reports." R.C.M. 701(a)(2). The Defense is also entitled to inspect "books, papers, documents, data, photographs, tangible objects, buildings, or places." *Id.*

Military discovery rights, though fairly broad, by definition do not include a requirement that the Government answer interrogatories proposed by the Defense. It also does not require

disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives. R.C.M. 701(f). Any document or tangible object that is specifically requested by the Defense will be provided in accordance with the rules, but the United States will not answer interrogatories or provide attorney work product.

II. There was No *Brady* Violation in This Case

To prove a *Brady* violation, the movant must establish three elements: that (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the government, either willfully or inadvertently; and (3) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To satisfy the prejudice component, the defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *United States v. Sitzmann*, 893 F.3d 811, 826 (D.C. Cir. 2018); *Behenna*, 71 M.J. 228 (C.A.A.F. 2012). The defendant bears this burden, which it has not met, and indeed it cannot meet because the test is retrospective, not prospective. However, even were one to excuse the showing of prejudice at this stage, the Defense has failed to articulate how the evidence could conceivably be favorable.

a) No Exculpatory Evidence Was Suppressed

First, the Government has no burden to disclose something that does not exist. All investigative efforts and statements of fact witnesses are documented in CGIS' investigative notes which have been provided to the Defense. The Government is not concealing the fact that CGIS consulted with Dr. [redacted] as a preliminary step. The Defense is unfettered from interviewing Dr. [redacted] Dr. [redacted] or any CGIS agent to ask any follow-up questions about

these early conversations. As no detailed report or notes were created, the Government has no discovery obligation to disclose something that does not exist.

The Government also did not have a duty to preserve a record of these conversations in the first place, since no exculpatory evidence was provided. There "is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey,* 429 U.S. 545, 559 (1977). Rather, constitutional discovery is usually delineated by the contours of the seminal case of *Brady. United States v. Blackburn*, 2019 CCA LEXIS 336 at *25 (A. F. Ct. Crim. App. 2019). In federal practice, these early conversations by agents in connection with investigating the case are neither *Brady*, nor subject to disclosure to defense counsel. *See Stano v. Dugger*, 883 F.2d 900, 905 (11th Cir. 1989) *reh'g granted and opinion vacated* (Oct. 31, 1989), *on reh'g*, 901 F.2d 898 (11th Cir. 1990) (citing *Moore v. Illinois*, 408 U.S. 786, 795 (1972) and finding no constitutional obligation to reveal "preliminary policy investigatory work" such as communications among detectives). Moreover, Federal Rule of Criminal Procedure 16(a)(2) explicitly protects against the disclosure of this type of information to defense. It thus cannot be said that the contours of *Brady* or any other constitutional provision envision disclosure of this information out of hand.

Likewise, the duty to preserve evidence under military law would not apply to the current situation. Our superior Court has explained that the "duty to preserve evidence" includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute, *see United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015); (2) evidence that is of such central importance to the defense that is essential to a fair trial; and (3) statements of witnesses testifying at trial, *see United States v. Muwwakkil*, 74 M.J. 187 (C.A.A.F. 2015). *United States v. Stellato*, 74 M.J. 473, 483 (C.A.A.F. 2015). None of these conditions apply to the informal conversations between law enforcement agents investigating this case. It cannot be said that the

opinion provided by Dr. [redacted] in June 2020 was exculpatory; evidence of such importance to the defense that it is essential to a fair trial; or a statement of a witness slated to testify at trial.

b) There Was No Brady Violation

Even if these records existed – which they do not – under *Brady*, "the Government has no duty to disclose evidence that is neutral, speculative, or inculpatory, or evidence that is available to the defense from other sources." *United States v. Pendleton*, 832 F.3d 934, 940 (8th Cir. 2016); *cf. United States v. Martinez*, 764 F. Supp. 2d 166, 169 (D.D.C. 2011) (a "defendant only has a right to receive from the government exculpatory information, not inculpatory information"). Preliminary impressions by other law enforcement agents or persons with specialized knowledge are speculative at best. There is thus no requirement that CGIS document these impressions so that they may subsequently be disclosed. Correspondingly, Trial Counsel is only required to disclose the existence of known evidence favorable to the defense. R.C.M. 701(a)(6).

c) Evidence Was Not Favorable to Accused

Assuming *arguendo* that the Government has a discovery obligation to recreate interview notes that did not originally exist, such material is neither *Brady* nor warrants the drastic relief the Defense is seeking. The Defense's allegation of a *Brady* violation rests solely on their unsupported and inaccurate assertion that the Government was "doctor shopping" and "when Dr. [redacted] didn't give them what they wanted, they turned to another, more prosecution friendly doctor." Def. Mot. at 5. Alleging a *Brady* violation and requesting a dismissal of charges is a serious allegation. It is, essentially, an allegation of professional misconduct. In this case, the

allegation is not even really shrouded, rather it is overtly made. Defense alleges, "Trial Counsel successfully hid the existence of Dr. [redacted] until they got caught." Def. Mot. at 6.

The Defense's contention is unsupported, particularly given that proving such an allegation is the Defense's burden. The Defense's "mere speculation about the exculpatory nature or impeachment quality of evidence" does not trigger an obligation to disclose under *Brady* or *Giglio*. *United States v. Kister*, 1998 WL 982887, at *4 (D.Kan. Aug 7, 1998). The reason the Defense has no evidentiary support for their motion is because Dr. [redacted] did not provide the investigators an opinion that was favorable to the Defense. Dr. [redacted] like Dr. [redacted] firmly believed that the autopsy indicated a homicide.

To make matters worse, not only is the Defense's accusatory motion incorrect about the facts, their citations of relevant case law are non-existent. While the Defense makes general recitations of *Brady*, *Giglio*, and a few other cases, these are cited only for general principles and they offer no actual legal support because they do not involve an even comparable discovery scenario.

There are cases, however, which offer legal conclusions and rulings that are actually helpful in analyzing this situation. Naturally, this issue only arises when the undisclosed expert's opinion was actually helpful to the defense. *United States v. Gowen*, 32 F.3d 1466, 1470 (10th Cir. 1994) (holding that it is well established that *Brady* does not apply to evidence which is inculpatory or unfavorable to the accused.)

There are different types of experts. First, there are situations where a fact witness is qualified as an expert but they are testifying because they have personal knowledge and took personal actions during an investigation. Common examples are a SANE nurse who did the

exam is qualified as an expert, or a pathologist who did the autopsy is qualified as an expert, etc. In these situations if a fact witness has an exculpatory opinion, some courts have held that it is required to be disclosed to the Defense. One example arose in state court when the investigating detective was qualified as an expert in arson and the source of fires. *People v. Jackson*, 593 N.Y.S2d 410 (Sup.Ct. Kings Co. 1992). In *Jackson*, the prosecution failed to disclose the detective's opinion that the fire could have been an accidental electrical fire vice arson, and the Court found a discovery violation. *Id.* at 419-20. In different factual scenarios, however, some courts have not imposed a discovery requirement on differing expert opinions, even if the expert was a fact witness. *See United States v. Thomas*, 306 F.Supp 3d 813, 821 (N.D. Indiana 2019).

Contrast this situation, however, with situations where the expert is not a fact witness and does not have personal, observational knowledge of any facts in the case. This later situation is the common consulting, forensic expert who simply reviews the files given to him and offers an opinion. These are often in the form of confidential consultants. But, even if they are not formally retained as confidential consultants these expert opinions do not generate a discovery obligation. Each side has the opportunity to retain consulting forensic experts, as such their expert opinions are not *Brady* evidence. *See Brim v. United States*, 2015 WL 1646411 (C.D. Cal. 2015) (holding no *Brady* violation because the government does not have a duty to inform the defense about the existence of an expert opinion with which other experts could disagree); *see also Thomas*, 396 F.Supp.3d at 821 ("the Court cannot conclude that *Brady*'s disclosure obligations extend to evidence of a mere disagreement between experts").

Pursuant to *Brady*, the Government violates an accused's "right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (quoting *Smith v.*

Cain, 132 S. Ct. 627, 630 (2012). Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case. *Behanna*, 71 M.J. at 238 (citing *United States v. Orena*, 145 F.3d 551, 557 (2nd Cir. 1998) (internal citations omitted)). That is not the case here.

In *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986), the Court of Military Appeals held that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). In addition, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), established that the Defense must prove bad faith by the government to establish a violation of the Due Process Clause when potentially useful evidence has not been preserved. *See also United States v. Simmermacher*, 74 M.J. 196, 198 (C.A.A.F. 2015). Here, evidence was neither lost nor destroyed; it simply never existed. Moreover, the Defense is at liberty to obtain the substance of Dr. [redacted] opinion by simply interviewing him or CGIS. The Defense is similarly at liberty to discuss the case with Dr. [redacted]

While "[m]ilitary law has long been more liberal than its civilian counterparts in disclosing the Government's case to the accused and in granting discovery rights," it does not place stricter requirements on the Government to preserve evidence which is not "apparently" exculpatory than is required of the states under the Fourteenth Amendment to the Constitution. *Kern*, 22 M.J. at 51 (quoting *United States v. Killebrew*, 9 M.J. 154, 159 (C.MA. 1980)); *Simmeracher*, 74 M.J. at 200. The *Kern* Court goes on to say "[t]he Government has a duty to

use good faith and due diligence to preserve and protect evidence and make it available to an accused. However, where the evidence is not "apparently" exculpatory, the burden is upon an accused to show that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed and also be of a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* To require the Government to prove that the lost evidence was not exculpatory would be an insurmountable burden as the peculiar value of the otherwise apparently inculpatory evidence would be solely within the knowledge of the accused. It is the fact that the value of the evidence is not apparent which gives rise to the problem." *Id.* at 51-52.

Defense's proffer of a *Brady* violation is nothing more than speculative wishful thinking. First, nothing was lost or destroyed that would trigger a discovery violation as no such evidence is in the possession of the Government. It never existed. Second, the Government has not suppressed any exculpatory evidence so there can be no *Brady* violation. While it is understandable that an Accused may presume that the Government was "doctor shopping" and the only explanation for not hiring a particular expert is because the expert has an exculpatory opinion, that is demonstrably untrue. The Defense has unfettered access to Dr. [redacted] and once they do their due diligence in interviewing him, they will see that Dr. [redacted] holds no exculpatory opinion and as such, there no basis for alleging a *Brady* violation. It also cannot be said that the opinion of "'asphyxiation by overlay,' suggesting weight was applied to infant's back" is exculpatory, an "alternative theory", or one that it had not been previously revealed to Defense – as the defense motion alleges. (Def. Mot. at 5). This information can be found within Dr. [redacted] report, which the Defense has had since March 2021. Though it may be "news" to Defense Counsel at this stage, it is certainly not new or exculpatory.

d) No Prejudice to Accused

Finally, the Defense has failed to show any prejudice to the Accused by the Government's non-disclosure of non-existent documents. The Defense has nearly two months to prepare its case for trial; that is plenty of time to complete an interview of Dr. [redacted] Dr. [redacted] or any other witness they may choose. The Defense's request for remedy is inappropriate and unwarranted.

Having failed to satisfy any of the requirements to prove a *Brady* violation, the Defense's request should be denied in its entirety.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion.

Respectfully Submitted,

[redacted] MURRAY.ALLISON.BLAIR [redacted]

Allison B. Murray, LCDR
Trial Counsel

Appellate Exhibit 73
Page 11 of 18

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	MOTION TO EXCLUDE TESTIMONY OF DR. [redacted] COL [redacted] M.D. DR. [redacted] 15 Oct 2021

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial (R.C.M.) 703(d), Mil. R. Evid. 104, 401, 402, 403, 702, and 703, and the holdings of *Daubert v. Merrell Dow Parmaceuticals, Inc.* 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), and *United States v. Houser,* 36 M.J. 392 (C.M.A. 1993), the defense in the above captioned case respectfully moves this court to preclude the testimony of the following government experts:

1. Dr [redacted] pathologist.
2. [redacted] M.D., Colonel, USAF, [redacted]
3. Dr. [redacted] psychiatrist.

In the alternative, the defense respectfully requests that the Court conduct a *Daubert* hearing to examine the admissibility of these witness' testimony.

2. **Burden of Persuasion and Burden of Proof.**

As proponent of the expert testimony, the Government has the foundational burden of proving that the methods, opinions and conclusions are reliable, will be helpful to the members, and that the probative value of the testimony does not substantially outweigh the risk of prejudice. The defense, as the moving party to this motion, bears the burden of proof on any factual issue necessary to decide this motion.

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference.

b. On 8 Oct 2021, Government Counsel provided Defense Counsel with the expected testimony for each of the aforementioned experts. (Defense Appellate Exhibit LLL).

4. **Law.**

Mil. R. Evid 702 is a reflection of two decades of military jurisprudence. The military judge's gate-keeping function under Mil. R. Evid. 104(a) requires a judge consider a number of factors when determining whether expert testimony is admissible. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *United States v. Griffin,* 50 M.J. 278 (1999); *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993). The Court of Military Appeals echoed the Supreme Court in 1993 when they held that, for expert testimony to be admissible, certain factors must be established:

a. the qualifications of the expert, Mil. R. Evid. 702;

b. the subject matter of the expert testimony, Mil. R. Evid. 702;

c. the basis for the expert testimony, Mil. R. Evid. 703;

d. the legal relevance of the evidence, Mil. R. Evid. 401 and 402;

e. the reliability of the evidence, *United States v. Gipson*, 24 M.J. 246 (CMA 1987), and Mil. R. Evid. 401; and

f. whether the "probative value" of the testimony outweighs other considerations, Mil. R. Evid. 403.

The burden is on the proponent to establish each of these factors. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993); *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993). The analysis for expert testimony, then, is one of qualifications, reliability, relevance, and balance.

Expert witnesses must, like any other witnesses to a court-martial, be relevant to the controversy at issue. Mil. R. Evid. 401 requires that "relevant evidence" must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." In a court-martial, a duly qualified expert my render an opinion if:

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b. the testimony is based on sufficient facts or data;

c. the testimony is the product of reliable principles and methods; and

d. the expert has reliably applied the principles and methods to the facts of the case. Mil. R. Evid. 702.

Unless and until the Government can satisfy all of the aforementioned factors, the proposed experts should be precluded from testifying at trial.

5. **Relief Requested.**

The defense respectfully requests that the court deem (1) Dr. [redacted] (2) Col [redacted] and (3) Dr. [redacted] proffered testimony inadmissible during trial on the merits. In the alternative, the defense respectfully requests that the Court conduct a *Daubert* hearing to examine the admissibility of each potential expert's testimony.

In order to facilitate preparation for the hearing, the defense respectfully requests that the Court order the Government to provide the following to the defense no later than one week prior to the hearing:

a. A summary of the subject of each expert's testimony;

b. Copies of any publications (articles, training slides, papers, etc.) authored by or in part by each expert that pertain to the subject of their testimony;

c. Copies of the studies, paper, and articles upon which each expert bases their expert opinions, otherwise intends to reference, or upon which they intend to rely.

6. **Enclosures.**

a. Defense Appellate Exhibit LLL. Government notice of expected witness testimony.

7. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 15th day of October, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of October 2021.

Dated this 15th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES OF AMERICA **v.** **Kathleen Richard** **YN2/E-5, U.S. Coast Guard**	**GOVERNMENT MOTION FOR DAUBERT HEARING RE: DEFENSE EXPERT WITNESSES** **19 November 2021**

Relief Sought

Pursuant to Rule for Courts-Martial (R.C.M.) 703(d), M.R.E. 104, 401, 402, 403, 702, and 703, *Daubert v. Merrell Dow Parmaceuticals, Inc.* 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), and *United States v. Houser,* 36 M.J.392 (C.M.A. 1993), the Government respectfully moves this Court to conduct a *Daubert* hearing and preclude the testimony of any of the following Defense experts which do not meet the standards established by the above referenced authorities:

1. Dr. [redacted] coercive interrogation expert.
2. Dr. [redacted] pathologist.
3. Dr. [redacted] pathologist.
4. Dr. [redacted] psychologist.

Hearing

The Government requests a hearing to take the testimony of the above witnesses and to make oral argument on the motion.

Appellate Exhibit 81
Page 1 of 5

Burden of Persuasion and Burden of Proof

As the proponent of this expert testimony, the Defense bears the burden of establishing its admissibility, including but not limited to, that the methods, opinions and conclusions are reliable, will be helpful to the members, and that the evidence passes the M.R.E. 403 balancing test.

Facts

The Government has not yet received a sufficient proffer of this expected testimony to make any factual assertions as to these experts or their opinions.

On 8 October 2021, the Defense provided a notice of potential expert testimony for the individuals listed above. This proffer provided no specific factual information about the substance of their testimony or their ultimate opinions.

The Defense recently submitted requests for additional funding for their experts, requesting funding for each expert's in person presence at trial, and including an assertion to the convening authority that each expert is intended as either an expert witness or potential expert witness at trial.

This case is an unusual court-martial in that it is extremely complex, anticipated to be 3 weeks or longer in duration, and will involve as many as 5-6 defense expert witnesses.

Legal Authority and Argument

M.R.E. 702, along with applicable case law, reflect the current status of the Court's role in regulating expert testimony. The Court provides a gate-keeping function under M.R.E. 104(a) and is required to consider factors when determining whether expert testimony is admissible.[1] The

[1] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *United States v. Griffin*, 50 M.J. 278 (1999); *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).

C.M.A. echoed the Supreme Court in 1993 when they held that, for expert testimony to be admissible, certain factors must be established:

a. the qualifications of the expert, M.R.E. 702;

b. the subject matter of the expert testimony, M.R.E. 702;

c. the basis for the expert testimony, M.R.E. 703;

d. the legal relevance of the evidence, M.R.E. 401 and 402;

e. the reliability of the evidence, *United States v. Gipson*, 24 M.J. 246 (CMA 1987), and M.R.E. 401; and

f. whether the "probative value" of the testimony outweighs other considerations, M.R.E. 403.

The burden is on the proponent to establish each of these factors. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993); *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993). The analysis for expert testimony is qualifications, reliability, relevance, and balance. Expert witnesses must, like any other witnesses to a court-martial, be relevant to the controversy at issue. M.R.E. 401 requires that "relevant evidence" must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." An expert my render an opinion if:

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b. the testimony is based on sufficient facts or data;

c. the testimony is the product of reliable principles and methods; and

d. the expert has reliably applied the principles and methods to the facts of the case.

M.R.E. 702. Unless and until the Defense can satisfy all of the aforementioned factors, the proposed experts should be precluded from testifying at trial.

Finally, the United States urges the Court to conduct this *Daubert* hearing during the next scheduled Article 39(a) session, and not allow the Defense to conduct tactical gamesmanship by continuing to provide no disclosures about their experts until the middle of trial. This case is too lengthy, too complex, and contains too many experts to allow that tactical advantage to occur. Additionally, it is highly likely that the substance of any of their expert's testimony may require the Government to gather additional materials, and have the Government's experts review these materials. This could create an unnecessary delay during the midst of trial in a case which is already anticipated to be lengthy. Finally, requiring the Defense to make full pre-trial disclosures of their intentions with their experts is consistent with Federal Criminal Practice as stated in Federal Rules of Criminal Procedure 16(a)(1)(G) and 16(b)(1)(C).

Relief Requested

The Government respectfully requests the Court conduct a *Daubert* hearing to examine the admissibility of each potential expert's testimony. In order to facilitate preparation for the hearing, the Government respectfully requests that the Court order the Defense to provide the following no later than one week prior to the hearing:

a. An actual summary and proffer of the subject of each expert's testimony, including any date relief upon;

b. Copies of any publications (articles, training slides, papers, etc.) authored by or in part by each expert that pertain to the subject of their testimony;

c. Notice of any studies, papers, or articles upon which each expert bases their expert opinions, otherwise intends to reference, or upon which they intend to rely.

Enclosures

a. Defense notice of expected expert witnesses

b. Defense requests for trial funding (enclosed elsewhere by Defense)

Respectfully Submitted,

[redacted]

R.W. Canoy, LCDR
Trial Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE RESPONSE TO GOVERNMENT MOTION FOR DAUBERT HEARING RE: DEFENSE EXPERT WITNESSES 2 Dec 2021

1. **Nature of Motion.**

The government's request for a Daubert hearing regarding Defense expert witnesses is premature. The defense requests this court deny the government's request to conduct a Daubert hearing of the defense experts at the Article 39(a) hearing on 9-10 December 2021.

2. **Burden of Persuasion and Burden of Proof.**

If the Defense calls any experts to testify at trial, the Defense has the foundational burden of proving that the methods, opinions and conclusions are reliable, will be helpful to the members, and that the probative value of the testimony does not substantially outweigh the risk of prejudice. The Government, as the moving party to their motion, bears the burden of proof on any factual issue necessary to decide their motion.

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference.

b. On 8 October 2021, the government provided to the defense their "Initial Proffer of Expected Testimony UCI US v. YN2 Kathleen Richard, USCG." Enclosure JJJJJ.

c. In their initial proffer, the government identified four expert witnesses: Dr. [redacted] Dr. [redacted] Mr. [redacted] and Dr. [redacted] Enclosure JJJJJ.

d. The government's proffer, with the exception of Dr. [redacted] provides minimal information as it relates to the expert opinions these individuals will issue at trial. It is unclear what Dr. [redacted] Dr. [redacted] or Mr. [redacted] will say at trial.

e. On 15 Oct 2021, Defense Counsel filed a Motion to Exclude the Testimony of the Government's expert witness. In that motion, Defense Counsel requested the Court to conduct a *Daubert* hearing.

f. On 29 Oct 2021, The Government filed a Response to Defense Counsel's Motion to Exclude the testimony of the Government's expert witnesses. In their response, the Government objected to holding a *Daubert* hearing for their expert witnesses.

g. On 4 November 2021, an Article 39(a) hearing was held. During this hearing, the government indicated Dr. [redacted] and Dr. [redacted] would be available to participate in a Daubert hearing on 9 December 2021. The government also stated Dr. [redacted] was a rebuttal witness to the defense case and therefore did not intend to present testimony from him at the Daubert hearing.

h. On 4 November 2021, the government requested an opportunity to speak with the defense experts in advance of trial. The defense assured the government that they could talk to the defense experts; however, the government has not requested any meeting with the defense experts as of this filing.

i. On 19 Nov 2021, the Government filed a Motion for Daubert Hearing re: Defense Expert Witnesses, including Dr. [redacted] Dr. [redacted] Dr. [redacted] and Dr. [redacted]

j. Dr [redacted] will testify at the Article 39(a) hearing on 10 December 2021 in support of the defense motion to suppress YN2 Richard's 19 June 2020 interrogation. During his testimony, the defense intends to lay the foundation for Dr. [redacted] qualifications, the concept of voluntariness when it comes to interrogations, and the basis for his opinions.

4. **Law and Argument**.

The law permits a *Daubert* type hearing to be conducted when one party offers expert testimony and the opposing side requests a *Daubert* foundational hearing. This is true for both

prosecution and defense. The Government has requested a *Daubert* hearing for Defense expert witnesses who may testify at trial. The Government is entitled to challenge the foundation of the Defense expert witnesses. However, it is too early to conduct such a hearing because the defense is not certain if these witnesses will testify at trial. The Defense experts will observe the testimony of the Government's experts and lay witnesses at trial. The testimony of Defense experts will depend on what evidence and issues are raised at trial. Because there is no specificity in the charging (e.g., "asphyxia by asphyxia"), and because the Government has said they will argue in the alternative at trial, it is not possible to know what evidence will need to be rebutted by the defense at trial.

Dr. [redacted] will testify at the Article 39(a) hearing on 10 December 2021 in support of the defense's motion to suppress YN2 Richard's 19 June 2020 interrogation. Dr. [redacted] will identify specific interrogation techniques and practices present in YN2 Richard's interrogation, why they are significant in light of the social science research, and how and why they may increase the risk of eliciting unreliable statements during police interrogation. The government is free to cross-examine Dr. [redacted] at this time. However, the scope of his testimony at trial is largely dependent upon the court's ruling on the defense motion to suppress.

Dr. [redacted] if called to testify, will rebut the opinions of Dr. [redacted] Although the government has provided the defense with Dr. [redacted] report, the defense has not determined if Dr. [redacted] will testify and will not know if Dr. [redacted] will testify until after Dr. [redacted] testifies at trial.

Dr. [redacted] if called to testify, will rebut the opinions and testimony of Dr. [redacted] the government's medical examiner. Dr. [redacted] will have reviewed all relevant documentary discovery in this case by 9 December 2021, but he has not had the opportunity to review the tissue slides as of the date of this filing, therefore, it is premature to conduct a *Daubert* hearing for him because he has not reviewed all of the evidence and the defense is not certain Dr. [redacted] will testify at trial.

Dr [redacted] like the government's forensic psychologist, will listen to all of the evidence presented at trial before a decision is made on whether she will testify. Therefore, it is premature to conduct a *Daubert* hearing for her at the 9 December 2021 Article 39(a) hearing. In addition, she is testifying in another trial on that date and is unavailable.

The defense continues to extend the offer to the government to schedule a time to interview the defense experts prior to trial as it is not the intent of the defense to "conduct tactical gamesmanship." The defense has provided a detailed description of why each expert is needed in its request for funding at trial. Enclosures RRRR and TTTT. However, it is impractical to conduct a *Daubert* hearing for these experts at this time. The Government is free to exercise their right to a *Daubert* hearing but, at this point, the hearing would consist of establishing each expert's qualifications and what discovery they have read thus far. It seems like a hearing discussing expert qualifications would not satisfy the intent of *Daubert* and could easily be done by conducting a brief voir dire of the witness at trial.

5. **Relief Requested.**

The defense respectfully requests the following:

a. That this Court deny the government's request for a *Daubert* hearing at this point because the matter is not ripe.

b. If the Court grants the government's request for a *Daubert* hearing on 9 December 2021, that the Court order the Government to pay the time and travel expenses for the experts to provide testimony.

6. **Evidence.**

The defense offers the following for the court's consideration:

- Enclosure JJJJJ: Government Initial Proffer of Expected Expert Testimony

Dated this 2nd day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 2nd day of December 2021.

Dated this 2nd day of December 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE MOTION TO DISMISS – IMPROPER REFERRAL** **19 NOVEMBER 2021**

MOTION

Pursuant to Rule for Court-Martial (R.C.M.) 905(b)(1) and R.C.M. 907, the defense requests this court dismiss all charges and specification for improper referral. Specifically, based on the evidence the defense has at the time of this motion, the charges in this case were referred to this court-martial by an incompetent authority in violation of R.C.M. 601.

BURDEN

The burden of proof and persuasion rests with the defense as the proponent of the evidence. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

STATEMENT OF FACTS

1. Charges in this case were preferred on 1 February 2021. On the original preferred charge sheet, YN2 Richard was charged with two violation of Article 118, UCMJ, and violation of Article 131b, UCMJ.

2. A preliminary Hearing was held in this case on 5 May 2021. Enclosure B.

3. The charges were forwarded to RADM Melvin Bouboulis, CG Director of Operational Logistics on 2 June 2021 for disposition as the officer exercising general court-martial jurisdiction. Enclosure HHHHH.

4. The charges were referred to a general court-martial convened by Director of Operational Logistics Convening Order No. 01-19 dated 28 February 2019 on 25 June 2021. However, RADM Bouboulis did not sign the referral block. CAPT [redacted] referred the charges as the "Acting Convening Authority."

5. On 16 November 2021, the defense submitted a discovery request to the government asking for the documentation that gave CAPT [redacted] the authority to refer the charges in this case. Enclosure FFFF.

6. On 16 November 2021, the government responded to the defense discovery request stating, "The Government is in the process of locating material responsive to this request and will send separately via DoD Safe if/when materials are located." Enclosure VVVV.

7. As of the date of this motion, the defense has not received any documentation indicating CAPT [redacted] had the authority to refer the charges in this case.

LAW AND ARGUMENT

Article 22(a), UCMJ, provides who may convene a general court-martial. Article 22(a)(8) provides that "any commanding officer designated by the Secretary concern" may be a general court-martial convening authority.

R.C.M. 504(b)(1) implements Article 22(a). It states, "Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President." The discussion from this rule provides additional direction. "The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions." R.C.M. 504(b)(4) states, "The power to convene courts-martial may not be delegated."

R.C.M. 601(a) states, "Referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial." R.C.M. 601(b) provides who may refer charges to a court-martial. It states, "Any convening authority may refer charges to a court-martial by that convening authority or predecessor, unless the power to do so has been withheld by superior competent authority."

According to Chapter 5 of the Coast Guard Military Justice Manual (COMDTINST M5810.1H, The Director of Operational Logistics (DOL) has been designated as a general court-martial convening authority.

RADM Bouboulis, Director of Operational Logistics, received the charges in this case in June 2021 as the general court-martial convening authority to make a disposition decision. Enclosure HHHHH. However, 23 days later, CAPT [redacted] the Deputy Director of Director of Operational Logistics signed the referral block of the charge sheet in this case. There is no indication that RADM Bouboulis made a disposition decision in this case or that he even received the Article 34 advice in this case. Enclosure D. In addition, there is no evidence that CAPT [redacted] was given the authority to act as the general court-martial convening authority. As

such, the charges in this case were improperly referred to this court-martial because CAPT [redacted] did not have the authority to refer these charges.

RELIEF REQUESTED

The Defense respectfully requests that this Court dismiss all charges in this case as they are not properly referred to this court-martial by the proper authority.

EVIDENCE

The Defense provides the attached documentary evidence in support of this motion:

- Enclosure B – PHO Report
- Enclosure D – Article 34 Advice
- Enclosure FFFF – Defense Ninth Discovery Request
- Enclosure VVVV – Government Response to Discovery Requests 5-9
- Enclosure HHHHH – Forwarding Letter

ORAL ARGUMENT

The defense requests oral argument.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
A. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/
C. B. SIMPSON
LT, USCG
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 19 November 2021.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MTD IMPROPER**
	)	**REFERRAL**
	)	
	)	
	)	
KATHLEEN RICHARD	)	2 December 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to dismiss for improper referral. The United States respectfully requests that the court deny the defense motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

This case was referred to court-martial on 25 June 2021. It was referred by the decision of the Convening Authority and personally signed by the Acting Convening Authority on that day.

On this day, RDML Hickey was on leave and had previously appointed CAPT [redacted] as the acting Director of Operational Logistics (DOL).[1]

[1] Email dated 6/18/2021 from RDML Hickey, Exhibit JJJ.

Appellate Exhibit 88
Page 1 of 3

LEGAL AUTHORITY AND ARGUMENT

The Defense's motions misstates the legal requirements relating to convening courts-martial and referring cases to courts-martial. The Court must begin by considering the long-standing legal principle that "the exercise of the convening authority's discretion in referral of charges enjoys a presumption of regularity." *United States v. Lewis*, 34 M.J. 745, 748 (N.M.C.C.A. 1991) (citing *United States v. Asfeld*, 30 M.J. 917, 928 (A.C.M.R. 1990)). Evidence must actually be presented to establish that a convening authority abused their "broad discretion in referring the charges to trial." *Id.*

A previous General Court-Martial Convening Authority (GCMCA) convened General-Court Martial 01-19 on 28 February 2019. That convening order was personally signed by the Director of Operational Logistics (DOL) and was a standing court capable of trying any GCMs referred to it.

On 25 June 2021, *United States v. YN2 Richard* was referred to 01-19 by signature of CAPT [redacted] R.C.M. 601(b) states that any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor. In this case, 01-19 was properly convened by a previous DOL, RADM Heinz.

R.C.M. 601(e), discussion, states that referral is ordinarily evidenced by signature on the charge sheet, and that such signature can be made by a person *acting* by the order or direction of the convening authority. In such a case, the signature elements must reflect the signer's authority.

In this case, the signature element clearly indicates that CAPT [redacted] was Acting as the Convening Authority at this time, as he was the Acting Director of Operational Logistics on this date as established by RDML Hickey's direction on 18 June 2021.

An improper referral is not a jurisdictional defect. *United States v. Shakur*, 77 M.J. 758, 761 (A.C.C.A. 2018) (citing *United States v. Blaylock*, 15 M.J. 190, 192-93 (C.M.A. 1983)). While a referral order is a jurisdictional prerequisite, the form of the order is not jurisdictional. *United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990). CAAF has further held that a convening authority merely showing an intent to refer a particular charge to trial is sufficient to satisfy the jurisdictional requirements of the RCMs. *United States v. Ballan*, 71 M.J. 28, 30 (C.A.A.F. 2012).

As conceded by the Defense in their filing, a motion to dismiss for improper referral contains no burden shift to the Government and it rests upon the Defense's to prove an improper referral by a preponderance of the evidence. The Defense has presented no evidence, only naked accusations. The Defense cannot present any evidence that this case was improperly referred especially given that RDML Hickey had appointed CAPT [redacted] as acting DOL for the period of 19 June 2021 through 25 June 2021.

EVIDENCE

(1) Exhibit, JJJ. RDML Hickey Email Dated 18 June 2021.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION TO DISMISS FOR DUE PROCESS VIOLATION 15 Nov 2021

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial (R.C.M.) 307(c)(3), 906, and 907(b)(3)(A), the Defense respectfully moves this Court to dismiss Charge I, Specifications 1 and 2, violation of Article 118 (Murder), UCMJ and Additional Charge I, violation of Article 119, UCMJ (Manslaughter) for violating YN2 Richard's Fifth Amendments due process rights and her Sixth Amendment right to counsel. In the alternative, Defense Counsel requests that the Court instruct the members that the Government has charged YN2 Richard with "asphyxiation by means of asphyxiation." Further, that the Government is limited to presentation of evidence is limited to evidence that is relevant to "asphyxiation by means of asphyxiation."

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On September 1, 2021, an Article 39(a) hearing was held to hear oral argument on the defense request for a bill of particulars. Specifically, the defense was seeking more specificity as to the means in which the government alleged YN2 Richard killed [redacted]

c. On October 7, 2021, the Court denied the defense motion for a bill of particulars stating that the government did not need to provide any specify as to the overt act because [r]equiring additional notice regarding the nature of the alleged asphyxiation would accomplish nothing more than impose the type of inappropriate discovery and proof limitations warned against in the discussion to R.C.M. 906(b)(6)." The Court's ruling fails to consider the Charges in this case are not drafted consistent with the model specifications.

d. On November 4, 2021, an Article 39(a) hearing was held to determine whether or not the Government had failed to state an offense in the charging document. During the hearing, the Government stated they drafted the specifications under Charge I and the Additional Charge using the model language in the Manual for Courts-Martial. However, the government conceded to the court that the specifications in this case did not mirror the model specification because they did not include the phrase, "by means of" for Specifications 1 and 2 of Charge I[1]. The government's position during oral argument was that their drafted specifications were a "distinction without a difference."

e. The Government agreed with the Court and Defense that YN2 Richard is accused of asphyxiating [redacted] by means of asphyxiation. During oral argument, the Government conceded that instructing the members that death due to asphyxiation, caused by asphyxiation sounds strange, but it is an accurate reflection of how this case is charged. The government stated during their oral argument that the members could return a "general verdict" and convict YN2 Richard based on any means they desire.

4. **Law and Argument.**

a. **The Charging Document Violates the Due Process Notice Requirement.**

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[1] The fact that the Additional Charge was also missing key language from the model specification, "In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, by culpable negligence, unlawfully kill _____ (a child under 16 years of age) ***by*** _____ ***(him) (her) (in) (on) the*** _____ ***with a*** _____." (emphasis added)

"The Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation' against him. U.S. Const. amend. VI. Further, the Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' and no person shall be 'subject for the same offence to be twice put in jeopardy.'" *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting U.S. Const. amend V.) "Thus, when an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, 'either expressly or by necessary implication,' 'every element' of the offense, 'so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy.'" *Id.* (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) and Rule for Courts-Martial (R.C.M.) 307(c)(3))).

"The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)). When lack of notice results in prejudice to the accused, dismissal of the charges is proper. *United States v. Riggins*, 75 M.J. 78 (U.S.C.A. 2016); *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012) (quoting *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012)).

R.C.M. 307(c)(3) provides requirements for a specification. It states, "A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charge offense expressly or by necessary implication; however, specifications under Article 134 must expressly alleged the terminal element." The Discussion under this rule provides further guidance on the requirement for specificity. It states, "The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy."

"A general jury verdict was valid so long as it was legally supportable on one of the submitted grounds." *Griffin v. United States*, 502 U.S. 46, 49, 112 S. Ct. 466, 469 (1991). "It also applied to the analogous situation at issue here: a general jury verdict under a single count

charging the commission of an offense by two or more means. *Id.* (internal citations omitted). This occurred generally when prosecutors would include *multiple means* in which a crime was committed in a single charge.

Charge I, Specifications 1 and 2 and the Additional Charge all allege the means in which YN2 Richard allegedly killed [redacted] was by "asphyxia." When applying the language in the specifications to the elements the military judge must instruct on, it essentially requires the military judge to state the alleged death was "asphyxiation by asphyxiation" (as alleged by the Government). This is vague enough to encompass any death caused by a lack of oxygen. The vague charging language has resulted in a lack of notice to YN2 Richard and creates a risk that she is not protected from Double Jeopardy. In addition, this has prejudiced YN2 Richard due to Defense Counsel's inability to adequately prepare an adequate defense to the overbroad charges.

Furthermore, despite the trial counsel's assertions at the Article 39(a) in November 2021, the concept of a general verdict does not remedy this issue. The case law states that a general verdict is appropriate *if one* specification was charged appropriately. However, in the present case, none of the charges that relate to the alleged murder or involuntary manslaughter properly allege an offense with sufficient specificity to place YN2 Richard on notice.

b. **Any Change to the Language of the Charges Represents an Unlawful Variance.**

Pursuant to R.C.M. 603(b), "A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged." "After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew." R.C.M. 603(d)(1). A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). "Exceptions and substitutions may not be used to substantially change the nature of the offense…" R.C.M. 918(a)(1). If an accused is prejudiced by a difference in the

specifications and the findings, the charges and findings must be dismissed. *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975). An accused is prejudiced if a variance misled the accused to the extent that she was unable to adequately prepare for trial, or the variance changes the nature or identity of the offense and the accused has been denied the opportunity to defend against the charge. *Id.*

The Government expressly stated that death due to asphyxiation, caused by asphyxiation is the proper way to instruct the jury. Allowing the government to add "by means of …" to Specifications 1 or 2 in Charge 1 or "by _____ (him) (her) (in) (on) the _____ with a _____" for the Additional Charge would be a significant change to the charges. Thus, no variance to the language or charges should be permitted in this case.

5. **Relief Requested.**

a. Dismissal of Charge I, Specifications 1 and 2, violation of Article 118, UCMJ (Murder) and Additional Charge I, violation of Article 119, UCMJ (Manslaughter).

If the Court does not dismiss the charges, the alternative relief requested is:

b. Instruct the jury that the cause of death is asphyxiation and the manner of death is asphyxiation.

c. Limit the Government's presentation of evidence to that which is relevant to death caused from asphyxiation by asphyxiation.

6. **Oral Argument.**

Defense Counsel requests oral argument on this motion, if opposed by the Government.

Dated this 15th day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG

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Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

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UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES V. KATHLEEN E. RICHARD YN2/E-5 U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR DUE PROCESS VIOLATION 3 Dec 2021

RELIEF SOUGHT

The Government respectfully requests the military judge deny the Defense's motion requesting dismissal of Charge I and the Additional Charge and the alternative requested relief for a panel instruction and restriction on the Government's presentation of evidence.

HEARING

Because the Government opposes the Defense's motion, the Government will be prepared to provide oral argument at the next Article 39(a), UCMJ, hearing.

RESPONSE

The specifications do not deprive YN2 Richard of her Fifth Amendment rights.

The Defense's overly formalistic argument on the language of the specifications in Charge I fails every time they raise it. The Defense essentially argues (once again) that because the specifications do not contain the phrase "by means of ____," they are deficient. The only words missing in the specifications that are from the model specification are "means of." In no conceivable way can the absence of these two words violate YN2 Richard's due process right to know of what she stands accused.

The Defense also resurrects the complaint that the Government has charged YN2 Richard with asphyxiating [redacted] by asphyxiating her. This is not what the Government has charged.

The Government has charged YN2 Richard with *murdering* [redacted] by asphyxia, which is synonymous with asphyxiation. *State v. Cobb*, 743 A.2d 1, 22 n.12 (Conn. 1999). There is no confusion created by the Government regarding what YN2 Richard stands accused.

The Defense's argument is similar as the appellant's in *State v. Cobb*. There, the appellant was found guilty of intentional murder by causing the death of his victim by asphyxia and sentenced to death. 743 A.2d at 62. Upon being found guilty, the appellant asked for essentially special findings, demanding to know whether the jury "found that the victim died as a result of a facial gag or died as a result of drowning or died as a result of strangulation." *Id.* at 60. The jury refused to answer. *Id.* On appeal, the appellant claimed he was entitled to know how the victim died by asphyxia, and if the jury could not decide, a new trial should be ordered. *Id.* The Supreme Court of Connecticut disagreed. The Court said,

> On the murder count, the information and bill of particulars charged that the defendant had murdered the victim in that, with the intent to cause her death, he had done so by asphyxia. The panel stated in its verdict that the defendant, "with the intent to cause the death of the victim, did cause her death by asphyxia." Thus, it found that the defendant had engaged in the specific criminal conduct proscribed by the particular statute involved, as specified in the information and bill of particulars. No more was required of the panel…Furthermore, the panel's refusal to make its findings more specific has not impaired our ability to review the panel's verdict with respect to the murder count and, accordingly, the capital felony counts that rely on that conviction.

Id. at 62. *Cf. Moulton v. State*, 395 S.W.3d 804 (Tex. Crim. App. 2013) (finding no error in jury instruction that asphyxia was committed "by manner and means unknown.")

The Defense also complains that YN2 Richard is at risk of being put in jeopardy twice for the same offense. This is not true. The general verdict doctrine protects YN2 Richard from double jeopardy. "A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the

means beyond reasonable doubt." *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (citing *Griffin v. United States*, 502 U.S. 46, 49-51 (1991); *Schad v. Arizona*, 501 U.S. 624, 631 (1991)). Thus, if YN2 Richard is found not guilty of all charges and specifications, the Government may not charge YN2 Richard again with any homicide offense no matter the mechanism of death.

The Government does not seek to add language to the specifications.

The Government in no such manner "expressly stated that death due to asphyxiation, caused by asphyxiation is the proper way to instruct the jury." Def. Motion at 5. Trial counsel reviewed the audio recording from the 4 November 2021 Article 39(a), UCMJ, hearing. The parties had no discussion of panel instructions while arguing whether the specifications fail to state an offense.

Regardless, the instruction offered by the Defense alongside the proposed restriction on the Government would be improper. Consistent with the Military Judge's Benchbook, the members may be instructed that [redacted] death resulted from asphyxiation caused by YN2 Richard and that all admissible evidence relevant to the charged offenses may be considered in determining whether the Government proved the asphyxiation resulted from the actions of YN2 Richard.

CONCLUSION

Because the specifications provide YN2 Richard with sufficient notice under the Due Process Clause and protect her against double jeopardy, the Defense's requested relief of dismissal should be denied. Likewise, because there is no reason why a variance would occur, the Defense's requested instruction and restriction on the Government should also be denied.

Respectfully submitted,

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] Date: 2021.12.03 17:15:19 -08'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] Date: 2021.12.03 17:15:33 -08'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

Appellate Exhibit 91
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE 15 Nov 2021

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial (R.C.M.) 307(c)(3), 703(e)(2), 914, and 907 the Defense respectfully moves this Court to dismiss all charges and specifications. Alternatively, Defense Counsel requests that the proceedings in this case be abated pursuant to R.C.M. 703(e)(2). Also in the alternative, Defense Counsel requests that the Court instruct the jury that the failure of the Government to preserve evidence, including the spoilage of testimonial evidence, is, in itself, sufficient to find reasonable doubt.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On August 30, 2021, an Article 39(a) session was held to hear argument on the Defense Motion to Compel Discovery as well as other filings.

c. During the August 30, 2021 Article 39(a) session, Trial Counsel informed the Court that Trial Counsel would be providing "an affidavit from Dr. [redacted] regarding his

involvement in the case, specifically stating that he did not direct CGIS investigatory efforts in this case…" This statement was memorialized in paragraph one of the Court's October 6, 2021 Ruling on Defense Motion to Compel Discovery. To date, Trial Counsel has provided no such affidavit.

d. On September 15, 2021, Trial Counsel disclosed bates pages 22937 to 22939. Defense Appellate Exhibit OOO. These pages contain briefing slides relating to the death of [redacted] and the slides are dated May 12, 2020. The names of the persons giving the brief were not disclosed, nor were the names of the persons being briefed.

e. Bates page 22939 states that (as of May 12, 2020, less than a month after the death of [redacted], "Third ME brought into investigation."

f. On November 1, 2021, Trial Counsel disclosed the names of the three medical examiners used by the Government in this case. Defense Appellate Exhibit PPP. Trial Counsel states that the three listed medical examiners ([redacted]) "were consulted at varying times during the investigation, not necessarily prior to 12 May 2020. This is the first time Dr. [redacted] has been disclosed as a medical examiner in this case.

g. On November 8, 2021, Trial Counsel disclosed the contact information for Dr. [redacted]

h. On November 9, 2021, Defense Counsel contacted Dr. [redacted] to determine his involvement in this case.

i. On November 9, 2021, Dr. [redacted] informed Defense Counsel that he has no recollection of this case, nor does he have any record of consultation on this case. See Dr. [redacted] November 9, 2021 email to Defense Counsel. Defense Appellate Exhibit RRR.

4. **Law and Argument.**

The "Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to the accused." *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986); *See also United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (criticizing government's failure to seek preservation of evidence outside of government control). The duty to preserve

evidence includes evidence that is of such central importance to the defense that it is essential to a fair trial and statements of witnesses testifying at trial. *Id.*

"[M]ilitary justice is rooted in inherent fair play and justice." *United States v. Manuel*, 43 M.J. 282, 286 (C.A.A.F. 1995). When the Government, by its own negligence or lack of foresight, denies an accused access to crucial evidence, it exceeds the boundaries of fair play and exposes the accused to injustice. The President recognized this danger when he promulgated R.C.M. 703(e)(2)—a safeguard that goes beyond the minimum protections of the Constitution with respect to access to evidence.

When evidence is lost or destroyed, there are generally three safeguards in the military justice system that may protect the accused's right to a fair trial. The first is the line of Supreme Court cases that lay out the constitutional guarantees of access to evidence. To obtain relief under these cases, an accused must generally show either (1) that the lost evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed, or, if the evidence was not apparently exculpatory, that (2) there was bad faith on the part of the Government in failing to preserve it. *California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

The second safeguard is Article 46, UCMJ, which states, in pertinent part: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846. In *United States v. Kern*, the Court held that Article 46, UCMJ, imposes no additional burden on the Government to protect evidence that is not "apparently exculpatory" to the accused than does the Constitution. 22 M.J. 49, 51-52 (1986). The test for analyzing lost or destroyed evidence under Article 46, UCMJ, is therefore the same as the constitutional due process test. *Id.*

The third safeguard—unique to the military justice system—is R.C.M. 703(e)(2). *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995); *See also United States v. Seton*, 2014 CCA LEXIS 103 (A.F. Ct. Crim. App. Feb. 24, 2014); *United States v.* Ellis, 57 M.J. 375, 391 (C.A.A.F. 2002);

United States v. Ellis, 54 M.J. 958, 974 (N-M Ct. Crim. App. 2001). In R.C.M. 703, there is no requirement that the requested evidence be exculpatory or that there be bad-faith on behalf of the spoliating party. All that is required is: 1) the evidence be destroyed, lost, or otherwise not subject to compulsory process; 2) the evidence be of central importance to an issue that is essential to a fair trial; and 3) there be no adequate substitute. R.C.M. 703(e)(2), Manual for Courts-Martial (2019). Of note, there is no discussion of the quality of evidence (inculpatory or exculpatory) or the origin of its loss. All the rule concerns itself with is that the evidence be central to the court-martial such that its loss impacts a fair trial.

In *United States v. Simmermacher*, the Court of Appeals for the Armed Forces ("CAAF") recently reviewed the scope and impact of R.C.M. 703(f)(2) (now R.C.M. 703(e)(2)). 74 M.J. 196 (2015). In doing so, CAAF reaffirmed the proposition that "R.C.M. 703(f)(2) is an additional protection [beyond Constitutional due process rights] the President granted to servicemembers whose lost or destroyed evidence falls within the rule's criteria." *Simmermacher*, 74 M.J. at 201.

Finally, under R.C.M. 703(e)(2), the defense must demonstrate the accused was in no way responsible for the spoilation of the evidence.

a. The Government's failure to comply with their discovery obligations resulted in spoilation of testimonial evidence from Dr. [redacted]

On November 1, 2021, almost 19 months after the death of [redacted] the Government first provided notice to Defense Counsel that Dr. [redacted] was involved in this case prior to May 12, 2020. There was no mention of Dr. [redacted] in any of the 100,000 pages of discovery provided to Defense Counsel. As soon as Defense Counsel was informed that Dr. [redacted] was involved in this case, he was contacted by Defense Counsel. Dr. [redacted] responded that he has no recollection of this case at all. Defense Appellate Exhibit RRR. Dr. [redacted] also stated that he has no written record of his involvement in this case. Finally, the Government has not produced any documentation whatsoever relating to Dr. [redacted] involvement. Thus, any evidence about Dr. [redacted] opinion that existed in May of 2020 is no longer available. Because the Government waited 19 months to disclose the existence of Dr.

[redacted] involvement in this case, the evidence is gone. The Government failed to preserve any record of his involvement in this case and failed to timely disclose that Dr. [redacted] had been consulted. Due to the 19 month delay in notifying Defense Counsel of Dr. [redacted] involvement in this case, his memory of his involvement has evaporated.

b. **Medical testimony relating to the cause and manner of death is a central issue in this case.**

The Government is alleging that [redacted] died from asphyxia and that the manner of death is homicide by asphyxia. Thus, the issue of central importance in this case is the cause and manner of death. In order to support its theory, the Government has hired a medical examiner, Dr. [redacted] to testify at trial. Prior to hiring Dr. [redacted] the Government discussed this case with Dr. [redacted] Furthermore, this Court has ruled that "the autopsy, and the findings of Dr. [redacted] and Dr. [redacted] represent the 'linchpin' of the Government's case against the accused." Ruling on Defense Motion to Compel Expert Assistance (Dr. [redacted]. Therefore, the Court has already determined that the medical evidence in this case is of central importance. An opinion by another experienced medical examiner that reviewed the photographs in this case is equally important to the findings of Dr. [redacted] Dr. [redacted] Dr. [redacted] and Dr. [redacted]

c. **There is no adequate substitute for Dr. [redacted] medical opinion**

As discussed above, a medical examiner's opinion in this case is the central issue in this case. Thus, it is essential to a fair trial. Since the entirety of Dr. [redacted] involvement exists in his memory, there can be no adequate substitute for his memory. Per the Government's Response to the Defense Motion to Dismiss for a *Brady* violation, the government proffered that Dr. [redacted] reviewed the autopsy report and photographs in this case and "relayed to CGIS in June 2020 that, in his opinion, the autopsy findings indicated a homicide." This was provided as a proffer from the trial counsel in their motion with no evidence to support this proffer. In addition, the defense has requested all CGIS notes and reports, and there was no mention of this very critical conversation CGIS had with a medical examiner. Lastly, the defense has submitted a discovery request to review the actual CGIS case file to include the hard copy file and the electronic file in

order to determine if this conversation was documented anywhere. To date, the government has not responded to the defense request. Therefore, there is no adequate substitute for the testimonial evidence that is now missing.

d. **The defense did not contribute to the loss of this evidence.**

In this regard, there should be no dispute that the defense did not contribute, in any way, to the spoilation of the evidence. The defense was not aware of Dr. [redacted] until over one year after CGIS allegedly spoke with him. When the defense contacted Dr. [redacted] the defense simply requested information based on his memory of the case.

e. **All Charges and Specifications should be dismissed.**

Consistent with *Simmermacher* and R.C.M. 703(e), the defense has met the criteria for lost or destroyed evidence and as such, all charges and specifications should be dismissed. The government failed to take any steps to preserve evidence that is of central importance to the case and there is no alternate way to obtain this evidence because it is lost due Dr. [redacted] lack of memory. Forcing the defense to rely on the proffers of the trial counsel and the CGIS agents would violate YN2 Richard's right to a fair and just trial.

f. **In the alternative, the appropriate remedy is to abate these proceedings.**

When "evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or **shall** abate the proceedings…" R.C.M. 703(e)(2) (emphasis added). A continuance is of no use in this instance because the memory of this case has evaporated from the mind of Dr. [redacted] Defense Appellate Exhibit RRR.

g. **Lost Evidence Instruction.**

If the court denies the defense request to dismiss the charges or abate the proceedings, the defense requests that Court provide to the members the following spoilation of evidence instruction:

There has been evidence presented by the defense in this case that the government lost or destroyed certain evidence, that is, the results of a consultation Dr. [redacted] a professional medical examiner in the months following [redacted] death and his professional opinion in this case. Additionally, delays in prosecuting this case attributable to the government have resulted in the inability to obtain this information directly from Dr. [redacted] If you find that the government lost this evidence and/or the ability to obtain this testimonial evidence directly from Dr. [redacted] and the government knew at the time they consulted with Dr. [redacted] that there was a potential for prosecution, then you may infer that the testimonial evidence from Dr. [redacted] would have been unfavorable to the government. You may, but are not required to, determine that this lost evidence amounts to reasonable doubt.

5. **Evidence.**

The defense requests the Court consider the following evidence:

- Defense Appellate Exhibit OOO: Infant Death Brief dated 12 May 2020
- Defense Appellate Exhibit PPP: Govt Response to Defense Fourth Discovery Request
- Defense Appellate Exhibit RRR: Dr. [redacted] email dated November 9, 2021.

6. **Relief Requested.**

a. Dismissal all Charges and Specifications;

b. Abate the proceedings; or

c. Instruct the jury that the loss, destruction or spoilation of Dr. [redacted] testimonial evidence is sufficient, in itself, to find reasonable doubt.

7. **Oral Argument.**

Defense Counsel requests oral argument on this motion, if opposed by the Government.

Dated this 15th day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of November 2021.

Dated this 15th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES OF AMERICA **v.** **Kathleen Richard** **YN2/E-5, U.S. Coast Guard**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE** **3 December 2021**

RELIEF SOUGHT

The Government requests the Court deny the Defense motion to dismiss because the Defense has failed to articulate a violation of R.C.M. 702(e)(2) or a spoliation of evidence.

HEARING

The Government requests a hearing for oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense bears the burden of persuasion and the burden of proof for any facts necessary to decide the motion by a preponderance of the evidence. R.C.M. 905.

FACTS

1. The Defense in Defense Appellate Exhibit RRR only includes Dr. [redacted] response and omits the Defense Counsel's outgoing message.

2. Dr. [redacted] informs Defense Counsel that he may recall the specific case if more details and case material are shared with him.

3. Dr. [redacted] s affiliated with the FBI as a consultant in forensic pathology. In that capacity, he reviews thousands of autopsies every year.

4. Dr. [redacted] provided a preliminary opinion to CGIS in June 2020. Dr. [redacted]

did not generate a report, nor was he hired as a consultant for the Government. This consultation was disclosed to the Defense through discovery.

5. As of 9 November 2021, Dr. [redacted] told Defense Counsel that he does not recall the exact opinion he previously rendered.

6. Dr. [redacted] is not a Government witness.

7. The Defense is free to contact Dr. [redacted] and request that he render another opinion.

LEGAL AUTHORITY AND ARGUMENT

I. The Defense fails to establish a violation of Article 46.

In order to establish a violation of Article 46, UCMJ, the defense must satisfy the test announced in *California v. Trombetta*, 467 U.S. 479 (1986), and further refined in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *See United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). Where the evidence is not apparently exculpatory, ***the burden is on the defense*** to show that the evidence possessed exculpatory value that was or should have been apparent to the Government before it was lost or destroyed and that there is no comparable evidence. *Id.* at 51-52 (emphasis added). Furthermore, the defense must establish that there was bad faith by the Government in failing to preserve it. *Youngblood*, 488 U.S. at 58. Here, the defense merely cites to the legal standard but makes no argument in support of their position. Previously, on this same issue involving Dr. [redacted] the defense haphazardly alleged a *Brady* violation by incorrectly assuming that the doctor's opinion was exculpatory. Now again, the Defense raises spoliation with no actual showing of proof. They offer no facts, let alone argument, on how the government acted in bad faith by not requesting a report from Dr. [redacted] The Court must not be swayed by Defense's empty reference to the Constitution, Article 46, and spoliation when the principles do not apply to our case. *See United States v. Killain* 368 U.S. 231 (1961) (holding

that no constitutional due process violation when F.B.I. agents who prepared the investigatory report destroyed the preliminary notes they had made while interviewing witnesses); *see also Trombetta*, 467 U.S. 479 (finding destruction of raw breath sample data was not a due process violation when the evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples).

II. The Defense's argument fails R.C.M. 703(e)(2).

Initially, the Defense confuses destroyed "evidence" as contemplated by spoliation cases with the opinion of a consulting expert. While testimony at trial is evidence, the legal principle of spoliation does not extend to this scenario or a mere expert's opinion. To create such a legal standard would lead to absurd results. It is quite common for experts in a given field to disagree about the significance of an injury, the medical source of an issue, or any other medical or scientific opinion. The Defense has hired their own expert pathologists – two, in fact – presumably because they interpret the autopsy results differently than the government's expert Dr. [redacted] The Defense provides zero legal support for their contention that a consultant's lack of memory amounts to a spoliation of evidence.

Further on this point, federal case law does not support the idea that there is even a discovery obligation surrounding a consulting expert's opinion. *Brim v. United States*, 2015 WL 1646411 (C.D. Cal 2015) (the government does not have a duty to inform the defense about an expert opinion with which other experts could disagree); *United States v. Thomas*, 306 F.Supp. 3d 813, 821 (N.D. Indiana 2019) (disclosure obligations do not extend to a mere disagreement between experts). Ultimately, it is the Defense's burden and the Defense fails to cite even a single legal authority which applied a spoliation analysis to a consultant's opinion.

This issue, however, is even simpler and does not require this Court to decide whether spoliation applies to a consultant's opinion because there was no exculpatory opinion from Dr.

[redacted] Because Dr. [redacted] opinion was not exculpatory the defense's constitutional and R.C.M. 703 arguments have no factual support. The defense's efforts and focus on Dr. [redacted] are misplaced and are nothing more than a desperate response to the overwhelming evidence of guilt that exists.

To be entitled to relief under R.C.M 703(e)(2), the defense must show: (1) the evidence is relevant and necessary; (2) the evidence has been destroyed, lost, or otherwise not subject to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) the accused is not at fault or could not have prevented the unavailability of the evidence. *United States v. Yarber*, 2014 CCA LEXIS 114, *9 (A. F. Ct. Crim. App 2014).

The Defense argues that because Dr. [redacted] no longer recalls the opinion he provided CGIS in the government's preliminary investigation, relief is warranted. Such an argument is fraught with logical fallacies and a misunderstanding of R.C.M 703 and its intended protection. First, Dr. [redacted] original opinion of the autopsy report is not the lost evidence. Nor is Dr. [redacted] *memory* of his opinion. In the context the Defense alleges injustice, Dr. [redacted] himself serves as the evidence the Defense claims is lost. Dr. [redacted] is responsive to the Defense. Additionally, the Government is not calling Dr. [redacted] as a witness and as such, no testimonial evidence or potential impeachment material is lost.

Moreover, no such evidence ever existed because Dr. [redacted] never generated a report because the informal consultation with Dr. [redacted] occurred when the investigation was in its infancy. The original source of what the defense seeks still exists; namely, Dr. [redacted] opinion. Though Dr. [redacted] may not recall exactly what he had told CGIS a year ago due to the volume of cases he routinely sees, he is still available and competent to provide another opinion after reviewing the same autopsy report. Defense's emphasis on Dr. [redacted] prior

opinion is erroneous because the Government had no obligation to capture and disclose that prior opinion. Granting the defense motion would necessarily mean that in every case where a preliminary discussion between an investigator and expert is not reduced to a report, such cases must be dismissed.

On the other hand, even if Dr. [redacted] original opinion was favorable to the defense – which it was not – the defense suffers no prejudice or injustice in this scenario. The existence of the initial consultation with Dr. [redacted] has been fully disclosed to the defense. The Government is not calling Dr. [redacted] as a witness so the defense is not at a disadvantage without a prior report to impeach Dr. [redacted][1] If the original opinion was favorable to the defense, the defense could request Dr. [redacted] as a defense witness.[2]

Furthermore, Dr. [redacted] lack of memory of his prior opinion does not suggest it might have been exculpatory. Despite the defense's best argument, the memory itself is not the lost or destroyed evidence. There is no obligation for the Government to attempt to preserve a witness's memory. Ultimately, it is physically impossible to do so. Witnesses' memories, both favorable to the Defense and unfavorable, fade and change over time. This occurs in every trial and there is nothing either the Prosecution or the Defense can do to prevent it. Taken to its logical end, the Defense's argument would include a legal requirement that every consultant and potential witness who was spoken to in the investigation must provide a signed statement so that the signed statement could be utilized in the event the person later has a memory issue. Obviously, no such requirement exists.

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[1] Even if the Government called Dr. [redacted] to testify about the manner and cause of death, the Defense can cross-examine Dr. [redacted] as to why he never reduced his earlier opinion to writing.

[2] This request, however, would largely be duplicative with the Defense's own retained expert pathologists who have reviewed the same and additional case materials than those provided to Dr. [redacted]

Finally, there was no legal requirement that Dr. [redacted] produce a written report or a written statement. If Dr. [redacted] had conducted scientific testing and produced written report with his findings that were exculpatory and that the government destroyed his report, the defense might have a colorable argument. But, evidence which never existed cannot be lost.

CONCLUSION

Having failed to meet its burden, the Defense motion should be denied.

YAO.IRIS.14[redacted] Digitally signed by YAO.IRIS[redacted] Date: 2021.12.03 09:47:07 -05'00'

Iris Yao
MAJ, U.S. Army
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

YAO.IRIS.[redacted] Digitally signed by YAO.IRIS[redacted] Date: 2021.12.03 09:47:22 -05'00'

Iris Yao
MAJ, U.S. Army
Assistant Trial Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	MOTION FOR APPROPRIATE RELIEF: COURTROOM SEATING 10 Nov 2021

1. **Nature of the Motion.** Defense Counsel respectfully requests this Court permit Defense Counsel to be seated at the counsel table closest to the panel members. Alternatively, Defense Counsel requests that both Trial Counsel and Defense Counsel be seated equidistant from the panel members. If these remedies are not possible due to the physical layout of the current courtroom, Defense Counsel requests a change of venue to a courtroom that has more appropriate seating. See R.C.M. 906(a)(11).

2. **Burden of Proof.**

As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

3. **Relevant Factual Background.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. In each of the Article 39(a) sessions, Trial Counsel has been seated at a table that is next to the members' box where the panel members will be seated at trial. With this seating arrangement, Defense Counsel is obstructed from viewing the testifying witness as well as the panel members.

4. **Law and Argument.**

An accused has a right to a trial that is objectively fair. *United States v. Boyce*, 76 M.J. 242 (2017). "Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S. Ct. 3440, 3449, 73 L.Ed.2d 1193 (1981). Permitting the Government to be seated closer to the panel than Defense Counsel prejudices the panel against YN2 Richard and prevents her from receiving a fair trial.

Lawyers with the closest proximity to the jury box are rated more favorably than lawyers farther away.[1] Closer proximity to the jury resulted in a belief that the closer attorneys were more in control, more powerful, and had better communication and rapport with the jurors.[2] The Supreme Court recognized the prejudicial effect of an accused's appearance at trial when they banned the practice of wearing prison garb to court. *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

When Defense Counsel requests a particular type of seating at trial, "a trial judge may deem it appropriate to make the choice by some more neutral way than tradition or a race to the 'best' seat." *United States v. Barta*, 888 F.2d 1220, 1226 n.4 (8th Cir. 1989); *see also Mahon v. Prunty*, No. 96-55411 U.S. App. LEXI 2122, at *6 (9th Cir. Feb. 6, 1997). In the case at bar, YN2 Richard represents no danger to the panel members and her right to a fair trial represents adequate justification to be seated at least as close to the panel as Government Counsel.

Pursuant to R.C.M. 801(a)(3), the Military Judge is the presiding officer in a court-martial and shall "exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual." The Discussion below this rule goes on to say, "The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality." This permits the military judge to take action that will ensure both sides do not have an unfair advantage simply based on the location of the counsel table. A simply fix to adjust the arrangement of the courtroom

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[1] "The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance," Pepperdine Law Review, Volume 21, Issue 3, Article 2, dated April 15, 1994.
[2] *Id.*

or move the trial to a different courtroom that is more fairly situated would help ensure YN2 Richard receives a fair trial.

R.C.M. 906(a)(11) states, "the place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby." The Discussion of this rule goes on to state, "A change of the place of trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over an essential witness." The defense could accept the rearrangement of the current courtroom to either place the defense counsel at the table closest to the members box or place the counsel tables equidistant from the members. In the alternative, a change of venue is the appropriate remedy to a courtroom that is situated to ensure YN2 Richard receives a fair trial. The primary courtroom onboard Naval Station Norfolk or the Washington Navy Yard would alleviate the defense counsel's concerns.

5. **Relief Requested.**

For all of the reasons stated above, YN2 Richard asks for the following relief:

a. Permit Defense Counsel and YN2 Richard to be seated at a counsel table that is closest to the panel members, alternatively;

b. Arrange the courtroom seating to make both Trial Counsel and Defense Counsel tables equidistant to the panel members, alternatively;

c. If these remedies are not possible due to the physical layout of the current courtroom, Defense Counsel requests a change of venue to a courtroom that has more appropriate seating.

5. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 10th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 10th day of November 2021.

Dated this 10th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MOTION RE: COUNSEL**
	)	**TABLES**
	)	
	)	
	)	
KATHLEEN RICHARD	)	2 December 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion for appropriate relief. The United States respectfully requests that the court deny the defense motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

This motion raises a legal question.

LEGAL AUTHORITY AND ARGUMENT

The Defense's novel motion cites no authority entitling the Defense to the requested relief. The Defense cites no military cases and only few federal court opinions, but importantly fails to note that in each of their cited cases the federal appellate courts ruled against the relief the Defense is requesting. The Defense's only argument is based upon a law review article

suggesting that lawyers with the closest proximity to the jury are rated more favorably.[1] Def. Mot. at 2. The Pepperdine Law Review article is interesting, but nearly irrelevant as support for the Defense's argument. This article memorializes the results from an experiment conducted during law student mock trials. In this experiment, students were assigned quadrants within a courtroom and were required to conduct 80% of their advocacy from their assigned quadrant during the mock trial. After the mock trials, the students were rated by the judges, the volunteer jurors, and the student attorneys themselves. The experiment entirely concerned where the students positioned themselves in the courtroom during advocacy portions of the trial—not the tables at which the students sat. In this case, Defense counsel are free to position themselves as close to the members as the Court allows during *voir dire*, opening statements, the questioning of witnesses, etc.

Ultimately, even if there was factual support for the Defense's theory—which there is not—the Defense's motion itself concedes that its purpose is solely to gain tactical advantage. Neither the rules, nor the constitution, guarantee the Defense an accommodation for every request that they believe will provide a tactical advantage. There is probably social science data that concludes that the party who speaks to a jury first is viewed more favorably, or that the party who speaks to the jury the most is viewed more favorably. The Defense could argue that they should be entitled to give their opening statement first or that the prosecution should not be entitled to give a rebuttal closing so that the Defense can have "the last word" before the members decide the case. These accommodations, and similar others, would surely also give the Defense tactical advantage. The Defense, however, is not entitled to these creative requests.

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[1] Interestingly, the article expressly concedes that the available body of knowledge on this subject is "largely subjective and dependent upon individual interpretations of trial experiences." THE EFFECT OF LOCATION IN THE COURTROOM ON JURY PERCEPTION OF LAWYER PERFORMANCE, Pepperdine Law Review, Volume 21, Issue 3, pp. 732.

These examples are purely for the sake of argument and the prosecution does not concur with the defense's assertion that counsel tables have any effect on the outcome of the case. But even if they did, this case is not just about the Defense. The people of the United States, the surviving victims, and the Defense are all entitled to justice and a fair trial.

There are several long-standing rationales underlying why the prosecution sits closest to the members and the Defense sits further away. Those rationales are (1) the trial counsel is responsible for all administrative tasks such as assembling members folders, members name plates, members questionnaires, etc.; (2) the prosecution carries the burden of proof; (3) a criminal defendant sits further away from the jury as a safety precaution so that more response time is available in the event of an outburst towards the jury; and (4) an accused and counsel need to be able to confidentially communicate during the trial without the jury overhearing their conversations. The Defense presents no evidence or arguments which overcome the traditional rationales controlling seating arrangements in the courtroom. If the rules for court-martial or the constitution intended for the Defense to have the right to choose which table they get to sit at in the courtroom then there would be a provision stating as much. The Defense counsel makes allegations of prejudice but does not successfully articulate what specific prejudice is controlled by seating arrangements.

Finally, the Defense suggests that the courtroom should be rearranged to make both tables equidistant from the member's box and requests that the trial be moved to Naval Station Norfolk or the Washington Navy Yard. This request undercuts itself as both Navy courtrooms suggested by the Defense are also set up in the traditional manner with the prosecution occupying a table which is closer to the members. Many high profile cases have been litigated in

the Navy courtrooms mentioned by the Defense, including homicide cases, and those courtrooms were not rearranged in the manner requested by the Defense.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion for appropriate relief.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION IN LIMINE (Unanimous Verdict Instruction) 10 Nov 2021

1. **Nature of Motion.**

Pursuant to the Fifth and the Sixth Amendments and Rule for Courts-Martial (R.C.M) 907(b)(3)(B), the Defense moves that the members panel be instructed that they must reach a unanimous verdict in order to convict YN2 Richard.

2. **Burden of Persuasion and Burden of Proof.**

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

3. **Summary of Facts.** An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included in the Law and Argument section below.

LAW

4. **The Sixth Amendment Requires a Unanimous Verdict to Convict**

The Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" in "all criminal prosecutions." The Fifth Amendment provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

In *Ramos v. Louisiana*, 590 U.S. ____, No. 18-5924 (2020), the Supreme Court held that the Sixth Amendment jury trial right carries with it a requirement that verdicts for "serious" offenses be rendered by unanimous vote. Slip. Op. at 3-5. The Court reached this conclusion on the basis of the historical practice during the founding era, and found that the Framers would have understood the phrase "impartial jury" as used in the Sixth Amendment to mean one that could only render a conviction upon reaching a unanimous verdict. *Id.* at 4-7. The Court also pointed out that it has long recognized a distinction between the constitutionally required composition of a jury (e.g. allowing women and people of color to sit on juries), and whether or not the constitution required that jury render a unanimous verdict, however constituted. *Id.* at 15, fn.47.

By contrast, the Supreme Court has long held that the Sixth Amendment right to trial by jury does not apply to courts-martial. *See, e.g., Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *Welchel v. McDonald*, 340 U.S. 122, 127 (1950); *Reid v. Covert*, 354 U.S. 1, 21 (1957); *O'Callahan v. Parker*, 395 U.S. 258, 261-62 (1969). However, the Supreme Court has not elaborated on why precisely this is, nor has the Court specified whether this declaration applies to all facets of the jury trial right, or just some of them.

The decision in *Milligan* concerned the rights of a civilian tried by military commission during the Civil War. The Court based its conclusion about the Sixth Amendment on the Framer's exclusion of "cases arising in the land and naval forces" from the grand jury requirement of the Fifth. 71 U.S. at 122-30. All subsequent cases reiterated this dicta without criticism, though never in the context of unanimity. *Quirin* dealt with the jurisdiction of military commissions to try violations of the laws of war by enemy combatants. 317 U.S. at 39-45. In *Welchel*, the Court upheld the all-officer composition of the members' panel against a Sixth Amendment challenge. 340 U.S. at 126-27. In *Covert*, the Court rejected military jurisdiction over crimes committed by military dependents. 354 U.S. at 20-41. The Court in *O'Callahan* enunciated the "service connection" requirement of court-martial jurisdiction, holding that a service member was entitled

to the full panoply of Sixth Amendment protections for crimes wholly unconnected to his military service. 395 U.S. at 272-74 (overruled on that point by *Solorio v. United States*, 483 U.S. 435, 436.)

The Court of Appeals for the Armed Forces has adopted this conclusion without comment or elaboration. *See, e.g., United States v. Witham*, 47 M.J. 297, 300-301 (holding that the *Batson* rule applies to peremptory challenges in courts-martial despite the inapplicability of the Sixth Amendment jury trial right). Yet the C.A.A.F., like the U.S. Supreme Court, has never addressed a unanimity requirement.

It is worth noting that the Supreme Court has recently confirmed that courts-martial "decide criminal 'cases' as that term is generally understood . . . in strict accordance with a body of federal law (of course including the Constitution)" and that the "procedural protections afforded to a service member are 'virtually the same' as those given a civilian criminal proceeding, whether state or federal." *Ortiz v. United States,* 138 S.Ct. 2165, 2174 (2018) (citation omitted). The Court went on to note that while court-martial "jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. [Citations]. As a result, the jurisdiction of those tribunals overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 2174-75 (citing *Solorio*, 483 U.S. at 438-41).

5. **Due Process in the Military**

The Constitution gives Congress the power to "make rules for the government and regulation of the land and naval forces." U.S. CONST, art I, § 8, cl. 14. The Supreme Court has held that the composition, organization, and administration of courts-martial are matters "appropriate for congressional action." *Welchel*, 340 U.S. at 127 (upholding an all-officer panel's conviction of an enlisted man). When Congress is acting pursuant to this power, its decisions are owed great deference. *Solorio*, 483 U.S. at 447-48 (doing away with the service connection requirement for court-martial jurisdiction). The High Court has further found that military tribunals "probably never can be constituted in such a way that they can have the same kind of

qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Covert*, 354 U.S. at 39. This is owing in large part to the different demands of the military, as against the civilian sector. *Id.* at 35-39 (noting the consolidation of legislative and judicial powers in the executive branch under the military justice system); *see also Curry v. Secretary of Army*, 595 F.2d 873, 880 (1979) (finding that the needs of the military "mandate[] an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence").

Nevertheless, Congress' power to act in the arena of military justice is not absolute. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176 (1994). In arguing that the Due Process Clause mandates a right not provided for by Congress, the standard is "whether the factors militating in favor of" that right "are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177 (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) [rejecting a Due Process right to counsel at summary courts-martial]). This test is one that must consider the role that military law plays in "maintaining good order and discipline in the armed forces," the promotion of "efficiency and effectiveness in the military establishment," and in "strengthen[ing] the national security of the United States." *Sanford v. United States*, 586 F.3d 28, 36 (D.C. Cir. 2009) (internal quotation marks omitted). However, these considerations are underpinned by the principle that "a fair trial in a fair tribunal is a basic requirement of due process." *Weiss*, 510 U.S. at 178 (internal quotation marks omitted).

In *Weiss*, the Court rejected the accused's argument that military judges needed to serve for fixed terms. 510 U.S. at 181. With respect to the Due Process argument, the Court found that "the historical fact that military judges have never had tenure is a factor that must be weighed" in assessing Congress' balance of rights. *Id.* at 179. The Court went on to hold that other provisions of the UCMJ—Article 26, Article 37, Article 98, Article 41, and appellate review by the Court of

Military Appeals—all worked to preserve judicial independence and impartiality sufficient to satisfy the Due Process Clause. *Id.* at 179-81.

In *United States v. Mitchell*, the C.A.A.F. rejected the accused's assertion that the roles played by the Judge Advocate General and Assistant Judge Advocate General of the Navy in preparing fitness reports for appellate military judges created a constitutionally impermissible appearance of impropriety and lack of independence by tempting those judges to shape their opinions in an effort to curry favor. 39 M.J. 131, 135-42 (C.M.A. 1994). Relying on *Weiss*, the court held that (a) the accused had not carried his burden to show the invalidity of this practice, and (b) the legal premises of his argument were inadequate. *Id.* at 136-142. To the latter point, the court found that the arguments (1) misapprehended the role and independence of the JAG and AJAG, (2) failed to adduce any evidence that supported a perception that these officials were biased in favor of the government, (3) failed to show that the JAG or AJAG disregarded laws prohibiting them from attempting to influence findings and sentencing decisions through fitness reports, (4) failed to show that the judges in question actually believed their fitness reports evaluated their decisions, and (5) failed to show that the proposed "reasonable man" perception created a constitutionally impermissible risk of unfairness. *Ibid.*

The C.A.A.F. applied this standard again in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013). There, the accused challenged procedures under UCMJ Article 29 which, after a member was excused from his trial following the bulk of the government's case in chief, allowed the new members to be read a verbatim transcript of all witness testimony up to that point. *Id.* at 15-16. The court held that the accused failed to carry his burden under *Weiss*, noting that Article 29 "represents Congress' view of what 'process is due' in the event a panel falls below quorum," and that the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair." *Id.* at 19-20.

In *Sanford*, the Circuit Court of Appeals rejected a challenge to the panel size of a special court-martial which convicted the accused. The accused argued that *Ballew v. Georgia*, 435 U.S. 223 (1978)—holding that the Sixth Amendment requires a minimum of six people to sit on a jury

for trial of non-petty offenses—rendered his four-person special court-martial invalid. *Sanford*, 586 F.23d at 29. The court began by acknowledging that court-martial members are selected "on the basis of who is best qualified for the position." *Id.* at 33-34. The court went on to find that the accused had failed to apply the *Weiss* balancing test to his claim, and therefore failed to show that the "same concerns underlying the *Ballew* decision also undermine 'a fair trial in a fair tribunal,' which is 'a basic requirement of due process.'" and thereby establish the constitutional invalidity of the practice. *Id.* at 35-37. Specifically, the court contended that the accused had not addressed the role military law plays in the maintenance of good order and discipline, military effectiveness, or the rules governing member qualifications and de novo appellate review. *Id.* at 36.

ARGUMENT

6. **The Sixth Amendment Unanimity Requirement Extends to Courts-Martial, Especially as Applied to the Coast Guard and the Charges in This Case.**

In the case at bar, the Coast Guard investigators acted more like a civilian law enforcement agency, than a military service. Thus, YN2 Richard should be afforded all of the Constitutional protections afforded any other United States citizen. 14 U.S.C. § 102 authorizes the Coast Guard to enforce U.S. federal laws. This authority is further defined in 14 U.S.C. §522, which gives law enforcement powers to all Coast Guard commissioned officers, warrant officers, and petty officers. Unlike the other branches of the United States Armed Forces, which are prevented from acting in a law enforcement capacity by 18 U.S.C. §1385, The Posse Comitatus Act, and Department of Defense policy, the Coast Guard is exempt from and not subject to the restrictions of the Posse Comitatus Act. Thus, the Coast Guard is unique compared to the other military branches as it functions as a federal law enforcement agency. As such, the Coast Guard's adherence to the Sixth Amendment unanimity requirement is inappropriate considering the Coast Guard operates under federal criminal law as part of its statutory functions and duties.

Such an interpretation also aligns with how the Founders initially contemplated the court-martial system to be implemented. Specifically, the Founders likely never considered that the court-martial system would be so extensively applied as it is today for the simple reason that they

did not intend to provide a standing military. Thus, it is far more plausible that they expected most crimes to be tried through the civilian criminal justice system with all of its attendant protections, while courts-martial would be applied only in times of actual national conflict.

Moreover, the actual scope of court-martial jurisdiction in the Founding Era was limited. Indeed, if a military member was accused of committing a crime "punishable by the known laws of the land," the service member's commander was charged with delivering "such accused person or persons to the civil magistrate" for trial.[1] AMERICAN ARTICLES OF WAR OF 1776, § X, art. 1 (hereinafter AW 1776). Once again, this trial would presumably be conducted with the full spectrum of constitutional rights afforded to an accused.

Today, by contrast, Congress has established a system that is essentially "judicial" in character, and which exercises comprehensive jurisdiction over service members wherever they are and whatever crimes they may have committed. *See Ortiz*, 138 S.Ct. at 2174. As such, the sweeping declaration of *Milligan* is at odds with *Ortiz*'s implicit recognition that many courts-martial today are "criminal prosecutions," and for that reason should now fall under the purview of the Sixth Amendment. Indeed, the Court in *Ramos* recognized that it is improper to subject the guarantee of the Sixth Amendment to a "functionalist assessment." Slip Op. at 15. In short, because the dicta in *Milligan* lacks a foundation for its application to the modern system with regard to unanimity, this facet of the Sixth Amendment should be incorporated to the court-martial, even if those other facets (e.g. venire) are not.

As a final matter, there is no merit to a slippery slope argument that such a holding would have the effect of requiring grand jury indictments in courts-martial. The Supreme Court long ago recognized that a trial—even for a capital offense—can be conducted in accordance with due process even if done so without an indictment. See *Hurtado v. California*, 110 U.S. 516, 537

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[1] The Majority in *Solorio* noted some dispute over the precise reach of courts-martial in practice—citing the "general article" of AW 1776, section XVIII—but ultimately deemed resolution of that question irrelevant to its conclusion that fears of Executive overreach were satisfied by placing the authority to define jurisdiction with Congress. *Solorio*, 483 U.S. at 444-46. But see *Covert*, 354 U.S. at 23-26 & nn.42, 44 (noting that civilian jurisdiction over crimes committed by service members was the rule in peacetime at least through the end of the 19th century).

(1884). This same logic can be extended to courts-martial without doing violence to the language of the Fifth or Sixth Amendments. *See, e.g., Curry v. Secretary of Army*, 595 F.2d 873, 876-77 (upholding the convening authority's role in the referral of charges as consistent with due process).

7. **The Fifth Amendment Due Process Clause Requires Unanimous Findings**

a. **Historical development of court-martial voting**

For nearly 150 years, courts-martial reached their findings by majority vote. *See* Hearings before the Senate Committee on Military Affairs, Appendix I to S.Rep. 130, 64th Cong., 1st Sess., 64 (statement of Brig. Gen. Enoch Crowder). Indeed, it was not until 1920 that the requisite percentage was raised to two-thirds in non-capital cases. AMERICAN ARTICLES OF WAR OF 1920, § 43. This change was met with some dissent, with one general noting that the old system "makes for justice most of the time," and arguing that because military law has as its "primary object . . . the paramount necessity of safeguarding the whole force," the risk that the guilty go free poses a much greater danger to the military establishment than it does to civilian society, and justifies less emphasis on individual protections and rights. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919 (OCLC No. 276296627).

In 1946, the War Department directed a study of the military justice system, and an advisory committee received and complied answers to forty-five different questions. It received responses from 81 general officers, 66 active and former judge advocates, and 46 enlisted men. Report of War Department Advisory Committee on Military Justice (hereinafter Vanderbilt Report) (OCLC No. 318813448). When asked specifically whether unanimous votes should be required to convict, the majority of all three categories of respondent answered in the negative. Each group stated that "hung juries" were not desirable in times of war. *Id.* at pp. 54-55. Among the judge advocates, however, "the suggestion was made that unanimity be required when the charged offense is the equivalent to a felony in civilian jurisprudence." *Id.* at p. 55.

Two-thirds vote was the rule for non-capital cases until 2019, when the Military Justice Act of 2016 became effective. See 10 U.S.C. § 852. That law raises the required number of votes to three-fourths of the members. This change came about after a working group noted the wide

variance in actual percentages required for a conviction under the previous system—ranging from 67% to 80% depending on the number of members present. REPORT OF THE MILITARY JUSTICE REVIEW GROUP 2015, pp.458-59. Notably, this report cited to the Oregon and Louisiana statutes which were ruled unconstitutional by *Ramos* in its discussion of civilian practice. *Id.* at p.459, n.6. The House and Senate adopted this change without substantive comment. H.Rep. 114-840, 114th Cong., 2d. Sess., p.1521; S.Rep. 114-255, 114th Cong., 2d Sess., p.604.

b. **A unanimous finding is required for proof beyond a reasonable doubt.**

The Supreme Court in *Ramos* ultimately concluded that, in order to give content to the phrase "impartial jury," the verdict needed to be unanimous. 590 U.S. ____, No. 18-5924 Slip. Op. at 4-5, 12. The Sixth Circuit held almost 70 years ago that "unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof, for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms." *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). That court went on to hold that unanimity "is of the very essence of our traditional concept of due process in criminal cases." *Id.*; *accord Ramos*, 590 U.S. ____, No. 18-5924, Sotomayor, J., concurring at 2. And, as the Court held in *Ortiz*, "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution)." *Ortiz*, 138 S.Ct. at 2174.

The UCMJ currently mandates that members be instructed that an accused "must be presumed innocent until his guilt is established beyond a reasonable doubt," and that "if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted." 10 U.S.C. § 851(c)(1)-(2). The Supreme Court has stated that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error," and that it "provides concrete substance for the presumption of innocence." *In re Winship*, 397 U.S. 358, 363 (1970). The Court went on to find that a lower standard would place an accused at "a disadvantage amounting of a lack of fundamental fairness" under the Due Process

Clause. *Id.* at 363-64. In support of its conclusion, the Court noted that there is always a margin of error in litigation, and where an accused has an interest at stake which is protected by the Due Process Clause—namely, his liberty—that risk is mitigated by requiring the government to carry its burden beyond a reasonable doubt. *Id.* at 364.

In our system of military justice, members are not selected at random from the service at large. Rather, members are specifically nominated by the convening authority as those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2); *see also Sanford*, 586 F.23d at 33-34. As such, it is impossible to understand how doubts held by members selected for these qualities could be considered "unreasonable." Yet this is precisely what the current arrangement allows. The government is required to prove its case beyond a reasonable doubt, yet the law implies that the doubts of 25% of members deciding the case are not reasonable doubts and can be disregarded for the purpose of carrying that burden and thereby depriving an accused of a protected interest. This is an inherent conflict that cannot be resolved except through the requirement of unanimity.

To the extent that concerns expressed by the dissenting General on the Special War Department Board—the risk of having criminals go free to rejoin the ranks—is a consideration relevant to the desirability of this facet of the military justice system, it reflects a pre-judgment of an accused that runs directly counter to the presumption of innocence. Moreover, it entirely disregards the concomitant risk that an innocent person gets convicted.

This is not a case like *Mitchell*, wherein the accused only offered speculation as to how he was harmed by a mere perception of potential unfairness in the preparation of fitness reports for judges. 39 M.J. 136-142. Nor is it like *Vazquez* where the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair" when brought up to speed by transcripts rather than live testimony. 72 M.J. at 19-20. Rather, the risk of unfairness in the present case is tangible and calculable. The government need not carry its burden with respect to 25% of the members to secure a conviction, thus truncating the presumption of innocence and shifting the risk of factual error or insufficiency onto the accused. Due Process requires a "fair

trial in a fair tribunal." *Weiss*, 510 U.S. at 178, and by failing to hold the government to its burden, the law allowing for less than unanimous findings creates a constitutionally impermissible risk of unfairness, *see Winship*, 397 U.S. at 363-64.

c. **The attendant effects of a court-martial conviction mandate unanimous findings**

Following conviction at a general or special court-martial, a service member then becomes subject to a host of federal laws and regulations. First and foremost, a finding of guilt is counted as a "prior sentence" under the Federal Sentencing Guidelines. U.S.S.G. § 4A1.2(g). It becomes unlawful for that person—if convicted of any crime punishable for more than one year in confinement—to possess a firearm. 18 U.S.C. § 922(g)(1). That person can then be convicted for violating the that law, even if their court-martial conviction was for military-specific offenses. *United States v. MacDonald*, 922 F.2d 967 (9th Cir. 1993) (upholding a conviction for felon-in-possession where the defendant had been court-martialed forty years prior for fraudulent enlistment, failure to obey a lawful order, and sale of a liberty pass). The court in *MacDonald* specifically held that courts-martial are "courts" and convictions rendered therein are "crimes" for civilian federal law purposes. *Id.* at 970. Additionally, individuals convicted of sex crimes in violation of the UCMJ are required to register as sex offenders under the Sex Offender Registration and Notification Act. 18 U.S.C. § 2250; 34 U.S.C. §§ 20911, 20913. Even persons convicted of misdemeanor crimes involving domestic violence will lose their rights to possess firearms. 18 U.S.C. § 921(a)(33); 18 U.S.C. § 922(g)(9). Further, those individuals will have a criminal record in a federal data base that will then follow them throughout their lives long after their sentence has been served and their military service has ended.

These laws apply equally to civilians, but a key difference is that, following *Ramos*, every civilian will have the benefit of the requirement of a unanimous jury verdict, while service members can be made to suffer these effects on the basis of a mere two-thirds or three-fourths concurrence of court-martial members. In effect, those serving in the military are prone to lose a host of rights more easily by virtue of their military service. This loss is a substantial factor in

evaluating the balance struck by Congress in delineating the rights due an accused in military courts, for it increases the impact on his liberty without increasing the scope of protections.

d. **The scope of the modern court-martial favors unanimous findings.**

The jurisdiction and scope of the court-martial has expended greatly since the founding era. Aside from the enactment of a comprehensive criminal code, modern precedent has authorized military jurisdiction over service members regardless of where they commit crimes and regardless of whether those crimes are related to military service. *See Solorio*, 483 U.S. at 436 (overruling the "service connection" requirement for court-martial jurisdiction). This certainly was not always the case. In the decades following the founding of the United States, "the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded." *Covert*, 354 U.S. at 23. Certainly by 1916, the jurisdiction of courts-martial had been extended to give them "concurrent jurisdiction with the civil courts to try noncapital crimes of person subject to military law at all times and wherever..." Statement of Brig. Gen. Enoch Crowder, p.32. Even so, there was some dispute as to whether these enactments granted jurisdiction on the basis of "status," or whether there needed to be some connection to military service to bring offenses within the cognizance of military courts. *Compare Solorio*, 483 U.S. at 439, 444-45 (noting the ostensibly broad reach of the "general article") *with id.* at 458-60, Marshall, J., dissenting (arguing that military law traditionally only covered "offenses committed by members of the armed forces that had some connection with their military service"). The majority in *Solorio* declined to resolve this dispute, finding instead that fears about Executive overreach in the use of courts-martial to enforce his will were dealt with by giving Congress the authority to define that jurisdiction. *Id.* at 446.

In any event, it was not at all clear that those practicing military law around the time the UCMJ was first adopted considered it to function as an equivalent to a civilian criminal code. As recorded by the Vanderbilt Report, at least some experienced judge advocates believed unanimity was advisable "when the charged offense is the equivalent to a felony in civilian jurisprudence." Vanderbilt Report at p.55. This indicates that at least some practitioners were of the understanding that courts-martial were not vehicles to enforce civilian laws. When asked whether military and

non-military offenses should be treated differently, both generals and enlisted men suggested that it might be best to turn over civilian offenses to civilian authorities, at least during peacetime. *Id.* at pp.17-18. A number of enlisted men also suggested that civilian offenses should be handled "consistent with Federal laws and procedures." *Id.* at p.18. Yet today courts-martial have become all-encompassing bodies for the plenary enforcement of law. Military members may now be prosecuted for any number of crimes which are the equivalent to civilian felonies, whether committed on or off base, on duty or on leave, and whether they detract from military efficiency and readiness or not. Given the historical concerns about abuses of military justice, *see Covert*, 354 U.S. at 23-29, Congress cannot expand the reach of military law without also expanding the protections due to those subject to that law.

e. **No military concerns underpinning the court-martial system justify non-unanimous findings.**

There are a number of concerns unique to the military environment that have been advanced to justify a court-martial system that would not stand up to constitutional muster if applied to civilians. None of them, however, favor non-unanimous convictions.

It is true that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 743-44 (1974), citing *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955) and *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (internal quotation marks omitted). The D.C. Circuit in *Sanford* identified the maintenance of good order and discipline, the promotion of efficiency and effectiveness in the military establishment, and the strengthening of national security as relevant considerations. 586 F.3d at 36 (citing the Preamble to the Manual for Courts-Martial [MCM]).[2] In *Curry*, the court noted that military law "must be equally applicable in time of war and national emergency," and that the "need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of

[2] Conspicuously absent from the court's elucidation is the first stated purpose of military law, which is to "promote justice." MCM 2019 ed., I-1, Preamble.

civilian jurisprudence." 595 U.S. at 878, 880. The court also suggested that "the deterrent effect of immediate punishment may be crucial to the maintenance of discipline in crisis situations." *Id.* at 879.

Brigadier General Crowder voiced the position that "The object of militaries is to govern armies composed of strong men so as to be capable of exercising the largest measure of force at the will of the Nation." Statement of Brig. Gen. Crowder, p.34 (internal quotation marks omitted). He goes on to say that "An army is a collection of armed men obliged to obey one man. Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence." *Id.* (internal quotation marks omitted.) He cites these principles as support for his position that the military cannot have "the vexatious delays and failures of justice incident to the requirement of a unanimous verdict." *Id.* at p.35.

Levy, however, was a case deciding the scope of substantive rights due to a service member. 417 U.S. at 7454-49 (finding that military law may properly regulate "aspects of the conduct of members of the military which in the civilian sphere are left unregulated"). Nothing in the requirement for unanimous findings impacts the power of the military to curtail those rights to the benefit of good order and discipline, or to otherwise govern the conduct of Coastguardsmen to that end.

However, these military readiness and discipline concerns contemplated by courts in assessing the disparities in courts-martial compared to the civilian criminal justice system are mitigated in the case at hand. *Covert*, 354 U.S. at 39; see also *Curry v. Secretary of Army*, 595 F.2d 873, 880 (1979). Specifically, the charges in this case do not allege as an element that the conduct was prejudicial to good order and discipline or service discrediting. Additionally, the alleged victim in this case was not a military member and therefore, the nexus of the alleged misconduct to good order and discipline and military readiness concerns is less than would be present if the alleged misconduct was an offense unique to the military or one in which the Coast Guard or a military member was an alleged victim—i.e., Article 83 (malingering), Article 85 (desertion), Article 92 (failure to obey a lawful order), Article 108 (loss of military property). Put simply, the

charges and circumstances at issue are equivalent to those traditionally handled in the civilian criminal justice system compared to courts-martial.

Similarly, there is no indication that YN2 Richard or her unit were directly involved in a national defense mission or engaging in the type of military mission typically triggering concerns about undue delay caused by a unanimity requirement. While 14 U.S.C. § 101 and 10 U.S.C. 101(a)(1) make clear that the Coast Guard is an armed force, the Coast Guard differs from the other armed forces enumerated in 10 U.S.C. § 101(a)(1) in that it also performs numerous non-military missions and functions, many of which are akin to those performed by other federal agencies. *See* 14 U.S.C. § 102; 14 U.S.C. § 521; 14 U.S.C. § 541; 14 U.S.C. § 561. Here, the mission portfolio of Coast Guard District 17, Base Kodiak, and AIRSTA Kodiak consists primarily of the Coast Guard's federal law enforcement missions, humanitarian mission, search and rescue mission, fisheries mission, and aids to navigation mission. *Id.* Thus, concerns about delay caused by the unanimity requirement in times of war or on the military's national defense function are inapplicable here.

Likewise, concerns about the efficiency of the military justice process and the military establishment as a whole are inapposite to a requirement that members render findings unanimously. Findings are the last step in a court-martial, aside from sentencing. The procedures for obtaining and producing witnesses and evidence, for detailing counsel, and all other aspects of the actual preparation for and conduct of the trial are not impacted by this requirement. This satisfies the concern in *Curry*, that the precepts of civilian jurisprudence which are "deliberately cumbersome" not undermine the effectiveness of the military—unanimity is no such burden. *See* 595 U.S. at 880. And to the extent *Curry* found "immediate punishment" to be a major factor in discipline, this position is undermined by failing to consider the parallel role of justice.

The Vanderbilt Report recorded a number of important thoughts on this topic. Among the generals queried, the vast majority indicated the purpose of military justice was a combination of justice and discipline. Specifically, one noted that "an unjust application will result in loss of morale and of combat strength." Another noted that discipline does not hinge on punitive

potential, but rather is "maintained by effective, responsible leadership through command, and indoctrination of all intelligent individuals with principles of personal responsibility for self-discipline and conduct." Vanderbilt Report, at p.1. Likewise, the enlisted men argued that "strict discipline results from justice," that discipline "is maintained by administration of justice," remarking that discipline "is not always punishment." Similarly, discipline "must be tempered with justice, if for no other reason than to maintain high morale and esprit de corps." *Id.* at p.2. The upshot is that the maintenance of discipline does not—and indeed should not—turn on the relative certitude of punishment. For if Coastguardsmen are convinced that they will not face a fair trial, their morale will suffer and the whole combat effort will be diminished. To this end, unanimity in fact *promotes* discipline, rather than impedes it.

Any lingering concerns that unanimity will result in delay and "hung juries" are rendered moot by the current framework. As it now stands, if the members cannot reach a quorum for a finding of guilt, the accused is acquitted. 10 U.S.C. § 852; R.C.M. 921(c)(2). In any event, concerns over hung juries and attendant delay in proceedings are not concerns which justify lightening the government's burden and shifting it to the accused.

Lastly, there is the stated need for the military justice system to be equally effective in wartime as in peacetime. Yet, as with the concerns over the efficiency of the military establishment, it is not at all clear what impact a unanimity requirement would have on the overall efficacy in a deployed environment. It would seem there is none. Moreover, it is today sufficiently easy to convene courts-martial in a garrison setting, such that the need for full-blown trials on the front lines is greatly reduced. Finally, in the event that the procedures attendant to traditional courts-martial—to which unanimity would be but a minor modification—are still too cumbersome, the UCMJ preserves the right to try certain offenses which are deleterious to the war effort by military commission rather than court-martial. *See, e.g.*, 10 U.S.C. § 81 (conspiracy); § 103 (spies); § 103b (aiding the enemy). Congress is free to expand this list as the needs of the military evolve, but whether it does or not, unanimity has no impact on the *conduct* of courts-martial.

In short, while all of these identified concerns are legitimate ones for Congress to consider, the factors which favor a unanimous panel outweigh their impact in this regard. As such, Due Process demands that an accused be convicted only by the unanimous vote of all members.

8. **Relief Requested.**

For the reasons stated above. Defense Counsel requests that the members be instructed as follows:

"The concurrence of all members present when the vote is taken is required for any finding of guilty. Since we have (8) members, that means all (8) members must concur in any finding of guilty. If one or more members do not agree that the government has proved a charge or specification beyond a reasonable doubt, then you must return a finding of not guilty as to that charge or specification."

9. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 10th day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
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/s/ C.B. Simpson
LT, USCG
Defense Counsel

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I certify that I caused a copy of this document to be served on the Court and opposing counsel this 10th day of November, 2021.

Dated this 10th day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES V. KATHLEEN E. RICHARD YN2/E-5 U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE (Unanimous Verdict Instruction) 3 Dec 2021

RELIEF SOUGHT

The Government respectfully requests the military judge deny the Defense's motion requesting its proposed panel instruction.

HEARING

Because the Government opposes the Defense's motion, the Government will be prepared to provide oral argument at the next Article 39(a), UCMJ, hearing.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Sixth Amendment's Impartial Jury Clause provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall be previously ascertained by law....

The question, then, is whether for purposes of the Sixth Amendment a court-martial is a "criminal prosecution." *Middendorf v. Henry*, 425 U.S. 25, 34 (1976).

The Fifth Amendment's Due Process Clause states, "No person shall be ... deprived of life, liberty, or property, without due process of law...." In determining what process is due at a court-martial, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const. Art. 1, § 8." *Middendorf*, 425 U.S. at 43 (1976). Whether a certain process must be provided at a court-martial under the

Due Process Clause, courts must ask "whether the factors militating in favor of [the process] are so extraordinarily weighty as to overcome the balance struck by Congress" where it did not provide for the certain process. *Id.* at 44.

RESPONSE

Although the Supreme Court interprets "impartial" to mean "unanimous", the Sixth Amendment's unanimous jury right does not apply to courts-martial.

"Although the Constitution, in accord with our English roots, guarantees a trial by jury in civilian criminal trials, this fundamental right is inapplicable to members of the armed forces." 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-11.00 (Matthew Bender & Co. 3rd ed. 2006); *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2002) ("Accused servicemembers are tried by a panel of their superiors, not be a jury of their peers.")[1] As *Ramos* only addressed unanimity in the context of the Sixth Amendment impartial jury trial right, and there is no jury trial right in courts-martial, then necessarily, there can be no right to a unanimous jury at a court-martial.[2] *United States v. Albarda*, No. ACM 39734 (f rev), 2021 WL 2843821, at*1, n.3 (A.F. Ct. Crim. App. July 7, 2021) *petition for review filed*, No.22-006/AF (Oct. 12, 2021); *United States v. Brown*, No. ACM 39728, 2021 WL 3626397 (A.F. Ct. Crim. App. Aug. 16, 2021) *petition for review filed*, No. 22-0018/AF (Nov. 9, 2021).

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[1] Section 523 of the National Defense Authorization Act for Fiscal Year 2022 will amend Article 25, UCMJ, to permit the randomized selection of qualified personnel available to the convening authority for detail as members. However, the bill provides that the randomized selection process created by the President "may include parameter controls that… allow for controls based on military rank." H.R. 4350, 117th Cong. (2021), https://congress.gov/bill/117th-congress/house-bill/4350/text

[2] Service members are entitled to an impartial panel; however, the Court of Appeals for Armed Forces, has grounded that right "as a matter of due process," *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994), not the Sixth Amendment.

None of the Defense's justifications for applying the Sixth Amendment unanimous jury trial right to courts-martial, and specifically courts-martial for U.S. Coast Guard members, have any sway.

First, the Defense points out that the Coast Guard is unique among the Armed Forces in that it is authorized to enforce federal law. Def. Mot. at 6. However, this is a *non sequitur*. Under the UCMJ, the term "military" refers to any or all of the armed forces. 10 U.S.C. § 1(2). "The Coast Guard, established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. § 101. Members of a regular component of the Coast Guard are thus subject to the UCMJ. 10 U.S.C. § 802(a)(1). The specific mission set of the Coast Guard, then, has no bearing on how courts-martial may or must be conducted in the Coast Guard.

Second, the Defense attempts to hinge a Sixth Amendment unanimous jury right under the Supreme Court's unsurprising recognition[3] of courts-martial as possessing a judicial character.[4] Def. Motion at 7 citing *Ortiz v. United States*. But here too, these concepts are unconnected. Questions of Article III jurisdiction, which was at issue in *Ortiz*, are of an altogether different nature than questions of fundamental rights. Those questions begin with an

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[3] "And just as important, the constitutional foundation of courts-martial—as judicial bodies responsible for "the trial and punishment" of service members—is not in the least insecure. The court-martial is in fact 'older than the Constitution'; the Federalist Papers discuss 'trials by courts-martial' under the Articles of Confederation." *Ortiz*, 138 S.Ct. at 2175 (internal citations omitted).

[4] The Defense rejects as a "slippery slope" that if the court-martial were to impose a unanimity requirement, it must also impose a grand jury requirement. Def. Mot. at 7. But this is a flawed argument based on needless cross-pollination of amendments. The true question is if a court-martial is a "criminal prosecution," and unanimity is required "in all criminal prosecutions," then why must not a court-martial, as a criminal prosecution, require a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law?" Yet this question has long been settled. *Ex parte Quirin*, 317 U.S. 1 (1942).

examination of whether the claimed right – in this case a right to a unanimous jury verdict in a criminal prosecution -- is "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 150, n.14 (1968), a claim which cannot seriously be made with respect to court-martial decisions. *See* Def. Mot. at 8-9. In short, the judicial nature of courts-martial does not and cannot tell us anything about whether the Sixth Amendment unanimous jury right applies to a court-martial. Thus, for purposes of the Sixth Amendment, a general court-martial is not a "criminal prosecution."

Regarding due process, the Defense has presented no facts that show the factors favoring unanimity in courts-martial panels are overwhelmingly weighty as to overcome the balance struck by Congress when it did not provide for unanimity in courts-martial.

The Defense claims that none of the "concerns unique to the military environment" favor non-unanimous verdicts. Def. Mot. at 13. However, this argument erroneously shifts the burden to the Government to justify the current congressional design. *Cf. Sanford v. United States*, 586 F.3d 28, 35 (D.C. Cir. 2009).

Where the Defense does offer factors, none, either separately or cumulatively, are convincing.[5] The Defense puts forward the following: (1) that unanimity is intricately tied to the "beyond a reasonable doubt standard" such that to permit a non-unanimous verdict renders the standard incoherent, Def. Mot. at 9; (2) that the many "attendant effects of a [non-unanimous] court-martial," Def. Mot. at 11, are largely identical to the attendant effects following conviction by state and federal unanimous juries such that service members are disadvantaged relative to their civilian counterparts when they lose their rights on less than unanimous convictions, *Id.*;

[5] Even if they were, the requested instruction is cynical. The Defense requests the panel be instructed that unanimity is required *only* to convict. If one member retains a reasonable doubt upon voting, the panel must return a verdict of not guilty. Def. Mot. at 17. This wholly novel formula is without precedent known to this nation and moreover is an instruction for which the military judge has no power to issue. R.C.M. 920(e).

and (3) that the expanded scope of court-martial jurisdiction for crimes with state and federal analogs is a type of overreach for which unanimous verdicts serve as a corrective. Def. Motion at 12.

But, as the Defense must concede, unanimity has never been required in any portion of a non-capital court-martial (nor for that matter is unanimity required to affirm a conviction on *de novo* appellate review. 10 U.S.C.§ 866) even as a court-martial has historically required the proof beyond a reasonable doubt standard. William Winthrop, *Military Law and Precedents* 316 (2nd ed. 1920), available at: https://www.loc.gov/rr/frd/Military-Law/pdf/ML_precedents.pdf). This historical fact is a factor that must be weighed in favor of the current framework. *See Weiss v. United States*, 510 U.S. 163, 179 (1994). Much like with respect to the lack of a fixed term of office for military judges, this history "suggests the absence of a fundamental fairness problem." *Id.* (quoting *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992)). Indeed, that Congress has not seen fit to include a unanimity requirement in the years subsequent to *Ramos* strongly suggests that Congress continues to regard the current framework as fair. *See* National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. (2021), https://congress.gov/bill/117th-congress/house-bill/4350/text.

For these reasons, the Government respectfully requests the Military Judge deny the Defense's request.

CONCLUSION

Because the Defense has not shown that the Sixth Amendment's Impartial Jury Clause applies to courts-martial and has not shown that under the Fifth Amendment's Due Process Clause the current framework is fundamentally unfair, the Defense's requested instruction should be denied.

Respectfully submitted,

ROBERTS.JASON.WILLIAM. Digitally signed by ROBERTS.JASON.WILLIAM. Date: 2021.12.03 17:11:28 -08'00'

Jason Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

ROBERTS.JASON.WILLIAM. Digitally signed by ROBERTS.JASON.WILLIAM. Date: 2021.12.03 17:11:43 -08'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

Appellate Exhibit 100
Page 6 of 6

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	MOTION FOR APPROPRIATE RELIEF: REASONABLE DOUBT INSTRUCTION 15 Nov 2021

1. Nature of the Motion. Pursuant to R.C.M. 906 and 920 YN2 Kathleen Richard moves the Court to provide a reasonable doubt instruction that complies with the language required by R.C.M. 920(e)(5)(B) and the Navy's standard "reasonable doubt" instruction.

2. Burden of Proof. As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

3. Relevant Factual Background. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference.

4. **Law and Argument.**

"The propriety of the instructions given by a military judge is reviewed de novo." *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001); *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006). When the erroneous instruction is of a constitutional dimension (undermines the fundamental trial structure), the test for prejudice is harmless beyond a reasonable doubt. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

The United States Court of Appeals for the Armed Forces has provided in *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995), that:

> The Due Process Clause of the Fifth Amendment to the Constitution requires the Government to prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970). But, 'the Constitution does not require

that any particular form of words be used in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994).

For the military, Congress, in Article 51, UCMJ, 10 U.S.C. § 851 (2012) requires the following instructions be charged to the members concerning the basis upon which they may render their verdict:

> Before a vote is taken on the findings, the military judge . . . shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them --
>
> > (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;
> >
> > (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;
> >
> > (3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
> >
> > (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

Further, in Article 36, UCMJ, 10 U.S.C. § 836 (2012), Congress directed the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law…generally recognized in the trial of criminal cases in the United States district courts." Pursuant to that rule-making power, the President promulgated the exact language prescribed by Congress in Article 51(c) (in gender-neutral terms) as RCM 920(e), and designated it a "required instruction." R.C.M. 920(e)(5)(B) requires the Court to instruct the panel as follows:

> **If there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted.**

The Navy incorporates the language into their standard reasonable doubt instruction. The Navy's standard instruction includes the following language:

> **If, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty.**

The Coast Guard's standard instruction lacks this required language. The Coast Guard's standard reasonable doubt instruction is as follows:

> A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

5. Relief Requested.

For all of the reasons stated above, Defense Counsel requests that the Court instruct the jury, with respect to reasonable doubt, as follows:

A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty. **If, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty. If there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted.**

7. Oral Argument.

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 15th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of November 2021.

Dated this 15th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES OF AMERICA **v.** **Kathleen Richard** **YN2/E-5, U.S. Coast Guard**	**GOVERNMENT REPONSE TO DEFENSE MOTION RE: REASONABLE DOUBT INSTRUCTION** **3 December 2021**

NATURE OF MOTION

The Government requests the Court deny the Defense motion for a novel reasonable doubt instruction.

HEARING

The Government requests a hearing for oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense bears the burden of persuasion and the burden of proof for any facts necessary to decide the motion by a preponderance of the evidence. R.C.M. 905.

FACTS

This motion raises a question of law.

LEGAL AUTHORITY AND ARGUMENT

While the Defense motion contends that the Defense is merely asking the Court to adopt the Navy's standard reasonable doubt instruction, that contention is inaccurate. The Defense is actually asking this Court to accept a novel hybrid instruction in which the Defense has cherry picked the best portions of the two services' instructions.

It is accurate that the Navy's instruction uses the phrase, "if, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty." Military Judge's Electronic Benchbook, 2-5-12. Instructions on findings, however, are not designed to be one sided, rather they are designed to be fair, promote justice, and contain an accurate recitation of the law and legal standards. To that end, while the Navy instruction utilizes the "real possibility" phrase, it is immediately preceded by a much stronger phrase about the members requirement to return a guilty verdict if supported by the evidence. Namely, the Navy instructs "you must find him/her guilty." This portion of the Navy's instruction was conveniently left out by the Defense's proposal in favor of the alternative language "you should find the accused guilty."

Here is the accurate, complete Navy instruction:

(NAVY/USMC) By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, **you must find him/her guilty**. If, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.

For comparison, here is the accurate, complete USCG instruction:

(ARMY/COAST GUARD) A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the

prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then **you should find the accused guilty**.

Even with the Coast Guard's model reasonable doubt instruction, the Coast Guard Court of Criminal Appeals (CGCCA) has held that it was not error for a Coast Guard military judge to instruct the members that they "must find the accused guilty" if convinced of each element. *United States v. Ramos*, 75 M.J. 936, 941-42 (C.G.C.C.A. 2016). A portion of the CGCCA's opinion was reversed by CAAF for an issue relating to Article 31 warnings, however, the portion of the CGCCA's opinion relating to the reasonable doubt instruction was affirmed. *United States v. Ramos*, 76 M.J. 372 (C.A.A.F. 2017). The CGCCA reasoned that a court-martial panel does not have the right of jury nullification, and therefore the military judge's instruction of "must" was proper. *Ramos*, 75 M.J. at 941-42 (citing *United States v. Hardy*, 46 M.J. 67, 75 (C.A.A.F. 1997)).

CAAF addressed the issue directly in *United States v. McClour*, ultimately holding that there was no plain error in instructing that members "must" find a person guilty if there is sufficient evidence. 76 M.J. 23, 26 (C.A.A.F. 2017). In reaching its decision in *McClour*, CAAF cited to the Federal Judiciary Center's Pattern Criminal Jury Instructions which also instruct jurors in federal court using the "must" language. *Id.* CAAF also found no plain error in the judge's use of the "must" language in the cases *United States v. Chikaka*, 76 M.J. 310, 313 (C.A.A.F. 2017) and *United States v. Rosario*, 76 M.J. 114, 118 (C.A.A.F. 2017). To date, the Air Force, Navy, and Marine Corps utilize the "must" language in their instruction while the Army and Coast Guard utilize the "should" language. Benchbook, 2-5-12.

The United States' ultimate position on this issue is simple: the reasonable doubt instruction is meant to contain an accurate statement of the law, but also to be fair, balanced, and

not be an exercise in the Court putting its thumb on the scale for one side or the other through instructions. The Defense's requested relief, via their suggested hybrid instruction would be just that, an exercise in the Court crafting an unnecessarily one-sided instruction. The United States has no objection to the Court utilizing the Navy instruction, but it should be the Navy instruction in its entirety, not a cherry-picked version.

RELIEF REQUESTED

This Court should either deny the Defense's requested relief and provide the standard USCG reasonable doubt instruction from the Benchbook, or should provide the Navy's standard reasonable doubt instruction in its entirety.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **KATHLEEN RICHARD** **YN2/E-5 USN**	**Defense Motion for Appropriate Relief – Supplemental Questionnaire** **15 NOVEMBER 2021**

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 906(a), 912(a), and 912(d), the defense respectfully requests the Court to furnish the attached the Navy and Marine Corps Trial Judiciary Member Questionnaire as well as the proposed supplemental member questionnaire to each member selected by the convening authority and provide the completed member questionnaires to all parties no later than 3 January 2022.

BURDEN

As the moving party, the defense has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

STATEMENT OF FACTS

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference.

b. On 10 August 2021, the defense received in discovery the Article 25 materials for this case. The court-martial member questionnaire used included 12 total questions for each member. Enclosure TTT contains a sample of one member questionnaire received.

c. The Navy and Marine Corps Trial Judiciary Uniform Rules of Practice references a standard member questionnaire that asks 52 questions[1]. Enclosure UUU.

LAW AND ARGUMENT

The right to an impartial member requires reasonable procedures designed to ensure the member is in fact impartial. *Ham v. South Carolina*, 409 U.S. 524 (1973). Of course, the proper exercise of challenges are the oldest and most important steps to ensure an impartial member. *Ham* at 532; *Swain v. Alabama*, 380 U.S. 202 (1965); *Johnson v. Louisiana*, 406 U.S. 356 (1972). The right to challenge a member is meaningless though if there has been no adequate opportunity to fully and adequately voir dire the potential member. The United States Supreme Court has long held that:

> [v]oir dire plays a critical function in ensuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule . . . .

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (internal citations omitted).

Therefore, it is vital that information about potential court members be accurate and thorough. The voir dire procedure must require more than the simple extraction of an affirmative response to a closed-end question. The inquiry must also be detailed enough to avoid mere assurances that the member will be equal to the task. A member's bland assurance that they will follow the law and evidence is not standing alone enough. *Murphy v. Florida*, 421 U.S. 794 (1975). The process must be detailed enough to uncover prejudice. *See, e.g., Turner v. Murray*,

[1] The defense counsel is aware of a USCG member questionnaire that is available on the CG LMJ (Office of Military Justice) portal site. Although this USCG member questionnaire asks for more detail than the one in Enclosure TTT, the NMCTJ member questionnaire is more thorough.

476 U.S. 28 (1986); *Jordan v. Lippman*, 763 F. 2d 1265 (11th Cir. 1985); *Coleman v. Kemp*, 778 F. 2d 1487 (11th Cir. 1985); *Wood v. Woodham*, 561 So.2d 224 (Ala. 1989).

Rule for Courts-Martial (R.C.M.) 912 authorizes the use of a detailed court-martial member questionnaire. As a result, the Navy and Marine Corps Trial Judiciary has developed a standard member questionnaire that requests substantial information from potential members. Enclosure UUU. R.C.M. 912 further permits the military judge to approve additional requested information from potential members. R.C.M. 912(a). As the Court of Appeals for the Armed Forces (C.A.A.F.) notes,

> Voir dire is a critical dimension of a criminal trial. Voir dire serves to protect an accused's right to impartial fact-finders by exposing possible biases, both known and unknown, on the part of the jurors. The effectiveness of voir dire depends upon each potential member's providing valid, relevant information so that both judge and counsel can evaluate the member's qualification and suitability for court-martial service. In this vein, this Court consistently has required member honesty during voir dire in order to permit a fair member selection process.

United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994) (internal citations omitted).

As the Discussion of R.C.M. 912 notes, questionnaires may "expedite voir dire and may permit more informed exercise of challenges." Discussion, R.C.M. 912. The use of the Navy and Marine Corps Trial Judiciary's member questionnaire as well as the proposed supplemental questionnaire would further reduce the possibility that members will be uncomfortable during the voir dire process and increase the likelihood that their information will be honest. Many questions will already be answered and the method will be much more private than open general voir dire.

Further, when a member is examined with a view to challenge, the member may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualification, implied bias, actual bias, or other matters which have some substantial and

direct bearing on an accused's right to an impartial court, are all proper subjects of inquiry. YN2 Richard should be allowed considerable latitude in examining members so as to be in a position to intelligently and wisely to exercise a challenge for cause or a peremptory challenge. Accordingly, when there is a fair doubt as to the propriety of any question, it is better to allow it be answered. While materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused. *United States v. Patrker*, 19 C.M.R. 400 (C.M.A. 1955).

The defense proposes the use of Navy and Marine Corps Trial Judiciary member questionnaire (Enclosure UUU) as well as the supplemental questionnaire in Enclosure SSS. These two additional member questionnaires will permit the potential members to answer important questions that are relevant to a challenge for cause. In addition, allowing the use of the proposed questionnaires will likely expedite the voir dire process by narrowing the questions that will be asked during group and individual voir dire.

RELIEF REQUESTED

The defense respectfully requests that the court order that both the Navy and Marine Corps Trial Judiciary Member Questionnaire and the proposed supplemental member questionnaire be provided to the members the convening authority selects prior to voir dire process. The defense requests that these completed questionnaires be provided to all parties no later than 3 January 2022 in order to allow everyone to prepare for voir dire.

ORAL ARGUMENT

The defense requests oral argument if opposed.

EVIDENCE

- Enclosure SSS – Proposed Supplemental Member Questionnaire
- Enclosure TTT – Sample of one USCG member questionnaire
- Enclosure UUU – Navy and Marine Corps Trial Judiciary Member Questionnaire

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT, USCG
Defense Counsel

CERTIFICATION OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 15 November 2021.

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MFAR RE: MEMBER**
	)	**QUESTIONNAIRES**
	)	
	)	
	)	
KATHLEEN RICHARD	)	3 December 2021
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion for appropriate relief. The United States opposes the motion in part but does not object to other aspects of this motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

The Defense requests that the Court order the Government to provide all potential members two additional written pretrial questionnaires. One requested questionnaire is the standard Navy-Marine Corps member's questionnaire, and the other is a novel questionnaire created by the Defense.

LEGAL AUTHORITY AND ARGUMENT

The Government agrees with the Defense that the Court has the ability, pursuant to R.C.M. 912, to designate a supplemental questionnaire(s) for a particular case. While a pretrial written questionnaire can have utility, its utility should not be overestimated because it also suffers from certain limitations. Initially, a robust questionnaire will never be a complete substitute for oral *voir dire* because a pretrial written questionnaire is not sworn. An important part of oral *voir dire* is that questions are answered after Court members are charged by the military judge and take the oath to answer all questions truthfully.

More importantly, however, is that a pretrial questionnaire cannot be used to ask questions which would be impermissible later during oral *voir dire*. There are numerous examples of impermissible tactics during *voir dire*. Neither side is entitled to seek a "commitment during voir dire about what the [the members] will ultimately do." *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000). It likewise error for counsel to use case-specific facts to seek a commitment from members on how they would view certain evidence. *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (concurring opinion). Similarly, counsel may not use *voir dire* to argue the case. R.C.M. 912, discussion. This includes express attempts to argue case points but also more tactically drafted implicit efforts. Such efforts would also include passive attempts to garner sympathy for the plight of the Accused.

Attempts to gain member's views in advance and questions which overly delve into the specific facts of the case are both considered shrouded attempts to achieve a commitment from the members. Questions asked of the *venire* must be designed to establish actual bias or implied bias. *See United States v. Hennis*, 79 M.J. 370, 384-85 (C.A.A.F. 2020) (discussing the standards for implied bias and actual bias). The C.M.A. has held that potential members are to be

examined with a view to challenge for disqualification based on statutory disqualifications, implied bias, actual bias, or other matters which have some substantial and direct bearing on an accused's right to an impartial court. *United States v. Parker*, 19 C.M.R. 400, 405 (C.M.A. 1955). Noticeably absent from this list is the right to question to secure the most sympathetic and defense friendly panel.

CAAF has stated that *voir dire* is subject to limitations and those limitations established by the military judge are given a very deferential standard of review on appeal, a "clear abuse of discretion." *Id.* at 383. *Voir Dire* is not so wide that is allows examination ranging through "fields as wide as the imagination of counsel." *United States v. Smith*, 27 M.J. 25, 28 (C.M.A. 1988). "Because bias and prejudice can be conjured up from many imaginary sources and because peremptory challenges are uncontrolled except as to number, the areas in which counsel seek to question must be subject to close supervision by the military judge." *Id.* The C.M.A. long ago rejected the idea that the broad scope of permissible peremptory challenges essentially justified unrestricted *voir dire*. *Parker*, 19 C.M.R. at 406 (rejecting broad *voir dire* due to peremptory challenges and rejecting a *per se* claim of relevance and materiality for *voir dire* questions simply due to a potential peremptory challenge).

To resolve this motion, the Court must assure that any proposed written questions would comply with the requirements for oral *voir dire*. To that end, the Government objects to Defense proposed questions 1, 9, and 10 of the Defense's proposed supplemental questionnaire. In addition, while the Government does not holistically object to using the additional Navy Standard Questionnaire, the Government requests that the Court modify it to comport with Coast Guard terminology as well as to eliminate all items which are duplicative with the standard Coast Guard questionnaire.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion for appropriate relief in part and otherwise order use of the supplemental questionnaires as outlined above.

Respectfully Submitted,

[redacted]
R.W. Canoy, LCDR
Trial Counsel

Appellate Exhibit 106
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE MOTION TO COMPEL DISCOVERY (SECOND MOTION)** **18 NOVEMBER 2021**

MOTION

Pursuant to R.C.M. 905(b)(4), the defense respectfully moves this court to compel the following discovery:

1. When was Dr. [redacted] first contacted regarding this case? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

2. Who was involved in making the decision to hire Dr. [redacted] Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

3. A complete list of any and all advice or consultation provided by Dr. [redacted] to Government Agents in this case. This includes, but is not limited to, information Dr. [redacted] instructed Government agents to investigate and/or request during interviews of persons involved in this case. This includes the date and time of any advice or consultation provided by Dr. [redacted] in this case.

4. A list of any and all contacts with Dr. [redacted] including, but not limited to, phone calls, teleconferences, personal meeting, emails, and written correspondence.

5. Defense ability to review the complete Coast Guard Investigative Services (CGIS) case file.

6. The following be provided as it relates to the forensic testing done in this case by the State of Alaska Department of Public Safety Scientific Crime Detection Laboratory Forensic Report contained in Bates Pages 22688 – 22689:

    a. A complete copy of the case file including:
        i. Chain of custody documentation;
        ii. All communications involving this case (phone logs, emails, etc.);
        iii. All bench notes, worksheets, and summary sheets created during the analysis of all evidence associated with this case;

iv. High quality copies of any evidence photographs taken;
v. Hard copy of DNA data (electropherograms);
vi. Mixture interpretation worksheets, if applicable;
vii. Statistical calculations, if applicable
viii. Case Report(s)

b. Electronic copy of all raw DNA data files (GeneScan/Genotyper, GeneMapperID, or similar).

c. All Probabilistic Genotyping raw data/output files (if applicable).

d. Standard Operating Procedures and Quality Assurance Manual (hard copy or electronic copy) in use at the time of the case completion.

e. A copy of the Unexplained Profile/Carryover/Contamination log and/or Corrective Action log covering a period of at least one year prior to the completion of the case and one year after the completion of the case (or to the present).

f. Curriculum Vitae from all technicians, analysts, and reviewers associated with this case.

g. Proficiency test records from all technicians, analysts, and reviewers associated with this case covering a period of at least one year prior to the completion of the case to one year after the completion of the case (or to the present).

h. Internal and external DNA audits reports, including any findings, from at a minimum two years preceding the completion of the case.

7. The names of any investigator, attorney, or any military member who had contact with Dr. [redacted] regarding this case.

8. Dates of all conversations (in-person, telephonic or through written correspondence) with Dr. [redacted] by any member of the Coast Guard.

9. The dates of destruction for any information relating to Dr. [redacted] involvement in this case. The names of the persons who destroyed the information, the names of the person/s who authorized the destruction of the information, and any documentation relating to the destruction of information relating to Dr. [redacted] involvement in this case.

10. The designation letter that appointed CAPT [redacted] USCG, as the Acting Convening Authority on 25 June 2021.

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

FACTS

1. The defense has filed nine discovery requests as of this motion.

2. The defense filed a motion to compel various requested items contained in discovery requests 1-3.

3. In this motion, the defense requested the court compel the government to provide "internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication between law enforcement and members of the accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation."

4. The court issued the following ruling on 7 October 2021: "The Government stated, both in their motion and at the Article 39(a) session that all responsive documents to this request have been provided to the Defense. Further, an affidavit from Dr. [redacted] regarding his involvement in this case, specifically stating that he did not direct CGIS investigatory efforts in this case, will be provided to the Defense. The Court finds the Government has satisfied this request."

5. The government did not provide an affidavit from Dr. [redacted] until 17 November 2021. Enclosure UUUU.

6. On 28 October 2021, the government provided the defense with one CGIS Kodiak Infant Death Brief dated 12 May 2020. Enclosure OOO. No other details or context was provided in the discovery.

7. On 31 October 2021, the defense submitted its fourth discovery request. Enclosure WWW. In this request, the defense sought the following:

> "[T]he names of all three Medical Examiners referenced on bates page number 22939. According to the discovery provided on bates pages 22937 to 22939, there were three Medical Examiners consulted prior to 12 May 2020."

8. The government responded to the discovery request with the following:

> The following Medical Examiners were consulted at varying times during the investigation, not necessarily prior to 12 May 2020.
>
> Dr. [redacted]

Dr. [redacted]
Dr. [redacted]

Enclosure PPP.

9. On 2 November 2021, the defense submitted a fifth discovery request asking for more detail regarding Dr. [redacted] involvement in the investigation because this was the first time the defense had heard this name. Enclosure XXX.

10. On 5 November 2021, the defense submitted a sixth and seventh discovery request. Enclosures CCCC and DDDD.

11. On 9 November 2021, the defense submitted an eighth discovery request. Enclosure EEEE.

12. On 16 November 2021, the defense submitted it's ninth discovery request seeking documentation that designated CAPT [redacted] as the "Acting Convening Authority" on 25 June 2021. Enclosure FFFF.

13. The government provided a response to the defense Fifth through ninth discovery requests on 16 November 2021. Enclosure VVVV.

LAW

"Discovery in the military justice system, which is broader than in the federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). In trials by court-martial, the accused and the Government are afforded adequate opportunity to prepare a case, and equal access to witnesses and evidence. *See* R.C.M. 701(e). The accused is entitled to inspect both exculpatory and inculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). Equal access is necessary "to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." *Roberts*, 59 M.J. at 325. "The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." *Id.*

A trial counsel cannot avoid discovery obligations by leaving relevant evidence in the hands of another agency. *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). "Article III courts 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." *Id* (internal citations omitted.).

The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2019 "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).

The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). The Military Rules of Evidence establish "a low threshold of relevance." *Id.* Relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id quoting* M.R.E. 401.

Evidence is material when there is a reasonable probability that its disclosure could engender a different result, creating reasonable doubt that did not otherwise exist. *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001). In applying the materiality test, military courts "give the benefit of any reasonable doubt to the military accused." *United States v. Green*, 37 M.J. 88, 90 (C.A.A.F. 1993).

Equal opportunity to obtain evidence under Article 46, of the Uniform Code of Military Justice, is equally important, and distinct from, the constitutional requirements of *Brady*. Article 46, UCMJ, as implemented by the President in the Rules for Court-Martial, is a "substantial right" of a military member accused within the meaning of Article 59(a) of the UCMJ, and independent of due process discovery rights provided by the Constitution. *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim App. 2002). Accordingly, even if a discovery violation does not amount to Constitutional error under *Brady* and its progeny, it may yet be violative of an individual service member's rights under Article 46, UCMJ, and must be subjected to analysis under the material prejudice standard of Article 59(a). *Id.* Under this standard, when a trial counsel fails to disclose information pursuant to a specific defense request, the evidence is considered material unless the government can show that failure to disclose the material was harmless beyond a reasonable doubt. *Id.; See also United States v. Kinney*, 56 M.J. 156 (holding that when the Government failed to produce NCIC records checks for two potential Government witnesses, Articles 36 and 46, UCMJ dictated the production of this evidence as a matter of parity of access to information).

We are therefore faced with dual standards for discovery. First, is the *Brady* constitutional due process analysis, which has been applied to military courts in a rather broad fashion. Essentially, if the requested material (1) passes the relatively low relevancy threshold, (2) is reasonably necessary to the defense of the accused, and (3) is not an unreasonable request,

then it is discoverable and must be produced. But even if it fails that test, it still must be produced under the second standard—material prejudice standard of Article 59(a)—whose "default setting" is that the evidence is material unless the Government can show failure to disclose it would be harmless beyond a reasonable doubt. In the case at bar there are several items that are relevant, necessary, and material to YN2 Richard's defense. Defense Counsel acknowledges that it is difficult to argue relevance, necessity, and materiality to charges where there has been no specificity. Because much of the requested material relates to defense strategy, Defense Counsel will, at the Court's request, provide written and oral supplemental information to the Court, *ex parte*. The Defense submits that, under any of the aforementioned standards, the evidence which the Government has not produced is discoverable.

ARGUMENT

I. When was Dr. [redacted] first contacted regarding this case? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

The government has denied the defense request for this information as an improper interrogatory and therefore not discoverable under R.C.M. 701. R.C.M. 701(a)(6) states, "Trial Counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; (C) Reduce the punishment; or (D) Adversely affect the credibility of any prosecution witness or evidence." These disclosure requirements are not limited to physical or tangible objects/documents. Rather it extends to information known by the government.

The information relevant to communication with Dr. [redacted] to any investigator, trial counsel, or any other individual involved in this case directly relates to the credibility of that person. First, multiple CGIS agents discuss findings from "multiple" medical examiners during the interrogations of YN2 Richard on 26 and 28 May 2020 as well as the interview of BM2 [redacted] on 28 May 2020. This is *before* the 10 June 2020 email from Dr. [redacted] asking questions about this case. Enclosure KKKK. In addition, based on the questions Dr. [redacted] asked and the purpose of asking those questions, the conversations Dr. [redacted] had with any member of the government team is likely evidence that would either negate YN2 Richard's guilt or reduce her degree of guilt. Enclosure LLLL.

Lastly, as the defense has pointed out in its supplemental *Brady* violation filing, the lead case agents are unwilling to speak with the defense counsel in advance of trial. Because they are unwilling to talk to defense, we are left with no choice but to ask these questions of the government via the trial counsel. R.C.M. 701(e) states, "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence." Here, the defense is being unreasonably impeded by the Government's incorrect and narrow interpretation of the rules for discovery as well as their resulting failure to disclose discoverable information.

II. Who was involved in making the decision to hire Dr. [redacted] Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

As stated above, R.C.M. 701(a)(6) imposes a duty on the trial counsel to disclose evidence to the defense that adversely affect the credibility of any prosecution witness or evidence. Nothing in this rule limits "evidence" to physical or tangible evidence. Any reading of this rule to limit it as such would be an improper reading of the rule.

The defense is in receipt of one email from Dr. [redacted] to an individual at the FBI. The defense is seeking information on the decision to consult with Dr. [redacted] and the decision not to hire him in this case. This information directly relates to the credibility of the CGIS agents in this case and it provides evidence that could negate YN2 Richard's guilt. In the government's response to the Defense Motion to Dismiss for a *Brady* violation, the trial counsel provided a proffer based on her conversation with the lead agents in this case that included, "[A] colleague from the Federal Bureau of Investigations offered to have a physician look at the autopsy report and photographs. Dr. [redacted] reviewed the autopsy report and photographs and relayed to CGIS in June 2020 that, in his opinion, the autopsy findings indicated a homicide. He did not offer any exculpatory information." The government has not provided any evidence that Dr. [redacted] was actually provided the autopsy report, nor has the government provided Dr. [redacted] formal opinion. To limit the defense to trial counsel proffers while the trial counsel has unfettered access to the lead case agents and the true details behind Dr. [redacted] involvement in this case denies YN2 Richard her right to equal access to witnesses and evidence, and ultimately denies her right to a fair trial.

III. A complete list of any and all advice or consultation provided by Dr. [redacted] to Government Agents in this case. This includes, but is not limited to, information Dr. [redacted] instructed Government agents to investigate and/or request during interviews of persons involved in this case. This includes the date and time of any advice or consultation provided by Dr. [redacted] in this case.

The government denied the "interrogatory" portion of this request and asserts that they have provided any documentary evidence responsive to this request to the defense. As stated above, because the defense does not have equal access to the lead agents in this case, the defense is left with no alternative but to request this information from the trial counsel. This information is discoverable under R.C.M. 701(a)(6) because it could negate YN2 Richard's guilt or her degree of guilt and it directly relates to the credibility of the government's lead CGIS agents in this case, both of which are listed on the government's witness list.

IV. A list of any and all contacts with Dr. [redacted] including, but not limited to, phone calls, teleconferences, personal meeting, emails, and written correspondence.

The government has denied this request as an improper interrogatory and the government asserts no document exist which is responsive to this request. Because the one email from Dr. [redacted] does not contain all of the information the government proffered regarding the information allegedly obtained from Dr. [redacted] the defense believes this information must

exist elsewhere. As stated above, the government's disclosure requirements are not limited to tangible evidence or documents, but extends to information that is known by the trial counsel that negates YN2 Richard's guilt or reduces the degree of her guilt or affects the credibility of a government witness.

The defense would prefer to talk directly to the CGIS agents in this case to obtain this information rather than receive the filtered response from the trial counsel. However, as noted above and in prior filings, the lead case agents, Special Agent [redacted] and [redacted] are unwilling to speak with the defense prior to trial. Therefore, the defense is left with no other option to obtain evidence in order to prepare for trial. To limit the defense to physical documents and then restrict access to government witnesses with this information would deny YN2 Richard her right to a fair trial.

V. Defense's ability to review the complete Coast Guard Investigative Services (CGIS) case file.

The government has denied this request stating the defense is already in possession of any documentary evidence responsive to this request that is currently known, or in the possession, custody, or control of military authorities. The government asserts the defense has already received a copy of the complete CGIS case file.

R.C.M. 701(a)(2), "the government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of those items, if the item is within the possession, custody, or control of military authorities and (i) the item is relevant to defense preparation; (ii) the government intends to use the item in the case-in-chief at trial; (iii) the government anticipates using the item in rebuttal; or (iv) the item was obtained from or belongs to the accused." R.C.M. 701(h) states, "As used in this rule 'inspect' includes the right to photograph and copy."

The defense is confident the trial counsel has provided to the defense everything CGIS has provided to them. However, given the recent disclosure of email communications involving a third medical examiner, a proffer from the trial counsel regarding Dr. [redacted] opinions that is not contained in the discovery provided, and Special Agents [redacted] and [redacted] unwillingness to be interviewed by the defense, we believe there is more information in the actual CGIS file and emails that have not been provided. To allow CGIS and/or trial counsel to determine what is "relevant" to turnover to defense is improper and the incorrect standard for discovery and does not ensure the defense has equal access to evidence in this case. As noted above, the Government's narrow and incorrect interpretation of their discovery obligations has already resulted in numerous pieces of discoverable material being withheld from the Defense or disclosed in an untimely fashion. The defense must be afforded a right to inspect the entire CGIS case file, which includes email communications.

VI. All requested materials related to the forensic testing done in this case.

The government has indicated they issued an investigative subpoena requesting materials responsive to this request. The defense requests the government provide to the defense a copy of

the investigative subpoena to ensure the government requested everything the defense requires to prepare for this case.

In addition, the defense is requesting the court issue an order to provide to the Alaska State Crime Detection Laboratory to provide the requested information by 15 December 2021. If the Court is willing to issue an order to provide this evidence by 1 December 2021, prior to the scheduled Article 39(a), that would allow the defense time to consult with our expert ahead of trial given the holiday season.

VII. The names of any investigator, attorney, or any military member who had contact with Dr. [redacted] regarding this case.

The government denied this request as an improper interrogatory. However, R.C.M. 701(e) states, "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence." As stated above, the defense must be afforded equal access to evidence and witnesses and the ability to conduct an independent investigation. The defense has no way to obtain this information other than to request the government provide it. To allow the government to withhold this information that is within the possession of military authorities and the trial counsel would deny YN2 Richard equal access to evidence and witnesses and would unfair impede defense counsel's ability to prepare for trial.

VIII. Dates of all conversations (in-person, telephonic or through written correspondence) with Dr. [redacted] by any member of the Coast Guard.

Like the request above, the government denied this request as an improper interrogatory. However, R.C.M. 701(e) states, "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence." As stated above, the defense must be afforded equal access to evidence and witnesses and the ability to conduct an independent investigation. The defense has no way to obtain this information other than to request the government provide it. To allow the government to withhold this information that is within the possession of military authorities and the trial counsel would deny YN2 Richard equal access to evidence and witnesses and would unfair impede defense counsel's ability to prepare for trial.

IX. The dates of destruction for any information relating to Dr. [redacted] involvement in this case. The names of the persons who destroyed the information, the names of the person/s who authorized the destruction of the information, and any documentation relating to the destruction of information relating to Dr. [redacted] involvement in this case.

The trial counsel asserts that they are not aware of any information being destroyed. However, that assertion is inconsistent with the discovery provided and the trial counsel's proffer in their response to the defense motion to dismiss for a *Brady* violation.

A brief was created on 12 May 2020 that suggests CGIS consulted with three medical examiners. The trial counsel identified those three medical examiners as Dr. [redacted] Dr. [redacted] and Dr. [redacted] However, all of the discovery the government has provided suggests Dr. [redacted] was not consulted until June 2020 and Dr. [redacted] was only informally consulted in late April 2020, but did not do any official reviews until June 2020. Therefore, it is reasonable to conclude that something exists documenting Dr. [redacted] involvement in this case prior to 12 May 2020. If it does not exist, it must have been destroyed or the result of spoilation.

The government also asserts that Dr. [redacted] reviewed the autopsy report and photographs. The government has not provided the defense with any evidence of this review, yet the government asserts that the defense is in possession of everything. Therefore, the only reasonable explanation is that this evidence was destroyed or the result of spoilation.

If the trial counsel is not aware of any destruction of evidence, the defense requests the government produce Special Agent [redacted] Special Agent [redacted] Special Agent [redacted] FBI Agent [redacted] and Dr. [redacted] at this Article 39(a) hearing in order to permit the defense to ask them about their interactions and communications with Dr. [redacted]

X. The designation letter that appointed CAPT [redacted] USCG, as the Acting Convening Authority on 25 June 2021.

The Government assets they are in the process of locating material responsive to this request and will send separately via DoD Safe if/when materials are located. The defense requests the court order the government to provide this evidence by 1 December 2021 in order to allow the defense to review it in advance of the last Article 39(a) hearing prior to trial.

RELIEF REQUESTED

The defense respectfully requests that this Court compel the government to disclose/produce the items requested above.

ORAL ARGUMENT

If opposed, the defense desires oral argument on this motion.

EVIDENCE

In support of this motion, the defense offers the following exhibits:

Enclosure OOO - Infant Death PPT Brief - 12 May 2020
Enclosure PPP – Govt Response to Defense Fourth Discovery Request
Enclosure WWW – Defense Fourth Discovery Request
Enclosure XXX – Defense Fifth Discovery Request
Enclosure CCCC – Defense Sixth Discovery Request
Enclosure DDDD – Defense Seventh Discovery Request
Enclosure EEEE – Defense Eighth Discovery Request
Enclosure FFFF – Defense Ninth Discovery Request

Enclosure UUUU – Dr. [redacted] Affidavit
Enclosure VVVV – Govt Response to Defense Discovery Request

Respectfully submitted,

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/
C.B. SIMPSON
LT, USCG
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 18 November 2021.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF EVIDENCE 3 DEC 2021

RELIEF SOUGHT

The United States files this response in opposition to the Defense's Motion to Compel Production and asks that this Court deny the Defense's motion because the Government has provided the Defense Counsel with all responsive documents and evidence relevant to their request, or the Defense has not met its burden regarding the discovery or production of the requested material.

HEARING

A hearing is requested to present oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the burden of persuasion and the burden of proof are on the Defense. Rule for Courts-Martial (R.C.M.) 905(c)(2). The burden of proof for any contested factual issues related to this motion is a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder) and one specification of Article 131b (Obstructing Justice).

2. The Government provided Defense Counsel with all investigative records obtained from Coast Guard Investigative Services and State of Alaska Crime Detection Laboratory within its

possession, custody or control. The Government has continued to supplement its disclosures to Defense as trial preparation and witness interviews continue.

3. The Government responded to Defense Counsel's discovery memoranda on 16 November 2021. In its response, Trial Counsel indicated which records were not within the possession, custody or control of military authorities. It also listed which items had been provided, would be located, or did not exist.

4. On 18 November 2021, Defense Counsel filed a motion to compel production of discovery.

5. The Government has made a good-faith and diligent effort to locate materials and respond to the Defense's discovery requests.

WITNESSES AND EVIDENCE

The Government incorporates the discovery requests and responses attached to the Defense's motion.

LEGAL AUTHORITY

The United States acknowledges that discovery is an important right provided to an accused. The particular discovery items before this Court, however, are outside the scope of discovery and/or fail to meet the standards that govern and control discovery and production.

R.C.M. 701(a)(2) is the discovery standard, and is limited to items that are within the control of military authorities. R.C.M. 701 does not allow for the interrogatory-style discovery requests that the Defense attempts to use in this case. R.C.M. 701 only applies to "books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of these items, which are within the possession, custody, or control of military authorities." R.C.M. 701

does not apply to information generally and does not create a duty to seek out information generally or create information that does not already exists.

To meet the R.C.M. 701 standard, the Defense must show that the item(s) exist, and that they are relevant to the Defense's preparation for trial. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." M.R.E. 401.

R.C.M. 703 is the production standard, for all other evidence not within the control of military authorities. Under R.C.M. 703, the Defense must show that the item(s) exist, and that they are relevant and necessary to their theory of the case at trial. "Relevant evidence is 'necessary' when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); R.C.M. 703(e)-(f). The concepts of discovery and production are the lens through which the Prosecution evaluated the Defense's requests.

C.A.A.F. has held that trial counsel's obligation under Article 46, UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999). However, discovery is not a tool for a broad "fishing expedition."

The discovery standards under R.C.M. 701 and the production standards under R.C.M. 703 place the burden on the Defense to show that the requested material actually exists. *United States v. Waldrup*, 30 M.J. 1126, 1129 (N.M.C.M.R. 1989) ("in both R.C.M. 701(a)(2) and 703(f), MCM, 1984, it is incumbent upon the defense to show that the requested material actually exists.") Discovery is not an opportunity for the Defense to turn the trial counsel into

their investigators. It is also not an opportunity for the Defense to sit back and force the trial counsel to engage in an exhaustive canvass search on their behalf just to ascertain whether documents or things might exist.

R.C.M. 701 and 703 empowers and requires the trial counsel to evaluate Defense discovery requests against the discovery and production standards. When the requests do not meet the standards, denial is proper. Denial of discovery largely occurs when the Defense chooses—as largely done here—to merely list items (or categories of items) without articulating the relevance to their preparation. Often there is not inherent relevance in the item(s) requested. Additionally, as noted below, of the hundreds of items requested by the Defense, in numerous instances the Defense does not even know whether the documents or materials actually exist. This is not cognizable under discovery rules.

It is well settled that the government generally need not produce evidence held in the possession, custody, or control of a separate state or local government agency. See *United States v. Stellato*, 74 M.J. 473, 484; *United States v. Poulin*, 592 F. Supp. 2d. 137, 142-143 (D. Me. 2008); *United States v. Libby*, 429 F. Supp. 3, 6 (D.D.C. 2006); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998).

In very limited circumstances, the Court should apply the RCM 701 discovery standard to evidence which is not directly under the custody or control of the military. This is uniquely for a situation where the evidence is not in the possession or control of the military but is still legally deemed to be within "within its possession, custody, or control." *Stellato* at 484-485. Instances in which this applies include when: (1) the prosecution has both knowledge of and access to the [evidence]; (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 local sheriff's office and the [evidence] remains in the possession of the local law enforcement. *Id.* at 485.

Under R.C.M. 703(f), "[e]ach party is entitled to the production of evidence which is relevant and necessary. The parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. *Williams* at 441. In practice, the defense request for production of evidence not under the control of the Government "shall list the items of evidence to be produced and shall include a description of each item sufficient to shows its relevance and necessary, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence. R.C.M. 703(f).

ARGUMENT

The Government asks that this Court deny the motion to compel production, as the Defense has either been supplied with the requested discovery by the Government, or the Defense has not met its burden of establishing that all items requested exist and are relevant to the Defense's preparation for trial pursuant to R.C.M. 701, or exist and are relevant and necessary to their theory of the case at trial under R.C.M. 703.

1. When was Dr. [redacted] first contacted regarding this case? Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

The interrogatory portion of this request exceeds the scope of R.C.M. 701 and should be denied. Requests for verbal communications not documented or recorded also exceeds the scope of the Rule.

As to the documentary portion of this request, all responsive documents currently known to the Government and within the possession, custody or control of military authorities have been previously disclosed to Defense Counsel separately via DoD Safe.

2. Who was involved in making the decision to hire Dr. [redacted] Please include any correspondence, notes, emails, letters, or verbal conversations involved in this process.

The interrogatory portion of this request exceeds the scope of R.C.M. 701 and should be denied. Requests for verbal communications not documented or recorded also exceed the scope of the Rule. That said, the Government is not aware of any evidence responsive to this request that is within the possession, custody or control of military authorities since Dr. [redacted] was not hired by the Coast Guard.

3. A complete list of any and all advice or consultation provided by Dr. [redacted] to Government Agents in this case. This includes, but is not limited to, information Dr. [redacted] instructed Government agents to investigate and/or request during interviews of persons involved in this case. This includes the date and time of any advice or consultation provided by Dr. [redacted] in this case.

This request exceeds the scope of R.C.M. 701 in that it asks the Government to create discovery that does not already exist. This request should be denied.

The Defense bear the burden to prove that requested discovery exists. *United States v. Waldrup*, 30 M.J. 1126, 1129 (N.M.C.M.R. 1989) ("in both R.C.M. 701(a)(2) and 703(f), MCM, 1984, it is incumbent upon the defense to show that the requested material actually exists.") They have not done so here. Furthermore, a detailed response explaining why no R.C.M. 706(a)(6) material has been withheld was provided to the Court in the Government's response to the Defense's motion to dismiss for alleged *Brady* violations.

4. A list of any and all contacts with Dr. [redacted] including, but not limited to, phone calls, teleconferences, personal meeting, emails, and written correspondence.

This request exceeds the scope of R.C.M. 701 in that it asks the Government to create discovery that does not already exist. It is the Defense's burden to show that discovery exists, which they have not done. As such, this should be denied. The Government does not possess a list responsive to this request.

5. Defense ability to review the complete Coast Guard Investigative Services (CGIS) case file.

First, it should be noted that the Government has not been untimely in responding to discovery requests. As Defense Counsel know, discovery obligations are ongoing. As Trial Counsel becomes aware of additional discoverable material, it is turned over to Defense Counsel as soon as practicable. Here, the Government has provided to Defense over 33,000 pages of material and data. Prior to its recent discovery requests, the Defense never requested information related to Dr. [redacted] it was not required to be turned over earlier because it is not exculpatory. Furthermore, the Government's position remains that this material is not relevant or material to Defense preparation, but simply a fishing expedition on the part of Defense.

Defense Counsel are already in possession of any documentary evidence responsive to this request that is currently known, or in the possession, custody or control of military authorities. The Government's discovery obligation under R.C.M. 701 has been fulfilled. The complete CGIS case file has already been discovered, copies of which have been furnished directly to Defense Counsel for review. It is Defense's obligation to prove that the requested material actually exists. A proffer from Defense that there *might* be information outstanding is not sufficient under R.C.M. 701.

As to email communications, there is no repository of email communications saved for every person who has even been remotely related to this case. It is Trial Counsel's responsibility to demand that individuals in the military produce records responsive to discovery requests. Trial

Counsel have done so repeatedly here. Defense Counsel are not entitled, nor do the rules require, that they have access to inspect individual email accounts/files – as they are requesting.

6. The following be provided as it relates to the forensic testing done in this case by the State of Alaska Department of Public Safety Scientific Crime Detection Laboratory Forensic Report contained in Bates Pages 22688 – 22689:

    a. A complete copy of the case file including:
        i. Chain of custody documentation;
        ii. All communications involving this case (phone logs, emails, etc.);
        iii. All bench notes, worksheets, and summary sheets created during the analysis of all evidence associated with this case;
        iv. High quality copies of any evidence photographs taken;
        v. Hard copy of DNA data (electropherograms);
        vi. Mixture interpretation worksheets, if applicable;
        vii. Statistical calculations, if applicable
        viii. Case Report(s)

    b. Electronic copy of all raw DNA data files (GeneScan/Genotyper, GeneMapperID, or similar).

    c. All Probabilistic Genotyping raw data/output files (if applicable).

    d. Standard Operating Procedures and Quality Assurance Manual (hard copy or electronic copy) in use at the time of the case completion.

    e. A copy of the Unexplained Profile/Carryover/Contamination log and/or Corrective Action log covering a period of at least one year prior to the completion of the case and one year after the completion of the case (or to the present).

    f. Curriculum Vitae from all technicians, analysts, and reviewers associated with this case.

    g. Proficiency test records from all technicians, analysts, and reviewers associated with this case covering a period of at least one year prior to the completion of the case to one year after the completion of the case (or to the present).

    h. Internal and external DNA audits reports, including any findings, from at a minimum two years preceding the completion of the case.

Trial Counsel have issued an investigative subpoena to the Alaska State Crime Detection Laboratory requesting materials responsive to this request. On 16 November, the Government

provided Defense Counsel a copy of the subpoena issued. Bates 033715-716. It lists all items requested by Defense. The Government provided Defense Counsel any responsive materials received as part of this subpoena as soon as received on 3 December 2021.

Since this material falls outside of military control, it remains the Defense's obligation to prove that the requested item(s) exist, and that they are relevant and necessary to their theory of the case at trial. "Relevant evidence is 'necessary' when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Though the Government issued a subpoena and the State Crime Laboratory responded with relevant records, the Government does not agree that each of the aforementioned items meet the requirements for R.C.M. 703 disclosure.

7. The names of any investigator, attorney, or any military member who had contact with Dr. [redacted] regarding this case.

Again, this request exceeds the scope of R.C.M. 701 and should be denied since it asks the Government to *create* discovery. In plain language, this is a request from Defense for general information, not actual discovery that already exists. The Government is not in possession of any documents responsive to this request that have not already been disclosed. The Defense's right to equal access to evidence and witnesses, and the ability to conduct an independent investigation, has not been impeded. The Defense is free to talk to Dr. [redacted] and ask him to name any "investigator, attorney, or military member" he had contact with regarding this case. Similarly, the Defense is free to talk to any witness involved in the investigation or any witness on the Government's list. Military discovery rules do not require Trial Counsel to do the Defense's investigatory work for them or create material that does not exist.

8. Dates of all conversations (in-person, telephonic or through written correspondence) with Dr. [redacted] by any member of the Coast Guard.

Like the above, this is an improper interrogatory and should be denied. The Defense's request asks Trial Counsel to create discovery. R.C.M. 701 does not require that the Government do so. Moreover, the Defense have failed to articulate why the dates of conversations with Dr. [redacted] – a witness not on the Government's list and one who provides no exculpatory information – are even relevant to Defense preparation.

9. The dates of destruction for any information relating to Dr. [redacted] involvement in this case. The names of the persons who destroyed the information, the names of the person/s who authorized the destruction of the information, and any documentation relating to the destruction of information relating to Dr. [redacted] involvement in this case.

Trial Counsel is unaware of any discoverable material being destroyed. As such, no responsive materials exist. The Government is similarly unaware of any consultation with Dr. [redacted] prior to June 2020. It appears that Defense Counsel are grasping at straws in their claim that materials have been destroyed that do not, nor have ever, existed.

As to the Defense request that the Government produce S/A [redacted] S/A [redacted] S/A [redacted] FBI Agent [redacted] and Dr. [redacted] at the Article 39(a) in order to permit the Defense to ask them about their interactions and communications with Dr. [redacted] this too should be denied. It is the threshold responsibility of Defense Counsel to present evidence that discovery exists – they have failed to do so here. Nothing is stopping Defense Counsel from speaking with any of the aforementioned personnel for the purposes of their own investigation. Access to these witnesses has not been impeded by the Government in any way.

10. The designation letter that appointed CAPT [redacted] USCG, as the Acting Convening Authority on 25 June 2021.

Material responsive to this request in the possession, custody or control of military authorities was provided to Defense Counsel on 29 November 2021.

CONCLUSION

Based on the above, the Government requests that this Court deny the Defense motion to compel production of evidence.

[redacted]MURRAY.ALLISON.[redacted] Digitally signed by MURRAY.ALLISON.BLAIR[redacted] Date: 2021.12.03 12:56:02 -08'00'

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

Allison B. Murray
LCDR, USCG
Trial Counsel

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF SENTENCING WITNESSES 3 DEC 2021

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to compel the production of witnesses. The United States respectfully requests that the court deny the defense motion.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

This Court previously compelled the Government to produce four witnesses for Defense sentencing: Ms. [redacted] Ms. [redacted] Ms. [redacted] and Ms. [redacted] Based on a shift in Defense Counsel and strategy, a new request for production of witnesses was submitted by Defense. The Defense Counsel's motion at 8 concedes that the production of the previously approved four presentencing witnesses would no longer be necessary. The Government, having no knowledge of this concession when it drafted its initial response on 16 November 2021 will respond to this motion assuming that each of the four previously requested witnesses are no longer necessary. The Government has previously approved the following witnesses for Defense in-person production at sentencing: Mr. [redacted] former Master Chief

[redacted] and [redacted] Ms. [redacted] was approved for telephonic testimony.

LEGAL AUTHORITY AND ARGUMENT

The burden of proof and persuasion rests with the Defense as the moving party. Specifically, the Defense must prove based on their synopsis of their expected testimony that each witness requested for production is relevant and necessary. R.C.M. 703(c)(2). The analysis for in-person production differs for witnesses whose testimony is requested on the merits versus sentencing. The in-person production of witnesses for sentencing is judged via the standards for production in R.C.M. 1001(f).

It is well established that a military judge can properly exclude defense evidence, to include the production of witnesses, if the evidence serves no legitimate purpose or if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *United States v. Hennis*, 79 M.J. 370, 382 (C.A.A.F. 2020) (other citations omitted). In the same manner, the Court will correctly deny a motion to produce witnesses when the witnesses' testimony would be irrelevant or otherwise inadmissible. *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000).

Similarly, the Defense is also not entitled, via due process or Article 46, to the production of witnesses whose testimony would be cumulative to that of other witnesses. *United States v. Williams*, 3 M.J. 239, 242 (C.M.A. 1977). Corroboration is allowed for issues central to a defense, but even the presentation of exculpatory evidence has been properly limited to only three witnesses. *Id.* (citing *United States v. Romano*, 482 F.2d 1183, 1195 (5th Cir. 1973)); see also *United States v. Harmon*, 40 M.J. 107 (C.M.A. 1994) (upholding judge's ruling to limit testimony to three witnesses on cumulative grounds during presentencing). For other, non-

exculpatory issues, it is not an abuse of discretion for the Court to properly limit testimony to two witnesses to avoid cumulativeness. *United States v. Brown*, 77 M.J. 638, 650-51 (A.C.C.A. 2018). When the Court denies production of witnesses solely on cumulative grounds the Defense is allowed to choose which of the available witnesses they desire to have produced. *Harmon*, 40 M.J. at 108; *Williams*, 3 M.J. at 243 n. 9.

The factors that are to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case, the importance of the requested witness to those issues, whether the witness is desired on the merits or sentencing, whether the witness would be merely cumulative, and the availability of alternatives to testimony. *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978).

A military judge's ruling on the production of witnesses is reviewed under an abuse of discretion standard, and denial of witnesses will not be set aside unless an appellate court has a definite and firm conviction that the trial court made a clear error of judgment. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). The Court's decision will only be reversed if, on the whole, denial of the defense witness was improper. *United States v. Ruth*, 46 M.J. 1, 3 (CAAF 1997).

Finally, providing proof of the witnesses' expected testimony, to include a sufficient proffer of their expected testimony is a burden placed solely on the Defense. R.C.M. 703(c). The proffer of expected testimony must be sufficient to show its relevance and necessity. *Id.* To meet the R.C.M. 703(c) requirement, the synopsis of expected testimony cannot simply be listing the subject matters to be addressed, rather it must actually articulate what the witness will say about those subjects. *United States v. Rockwood*, 52 M.J. 98, 105 (C.A.A.F. 1998).

Sentencing Witnesses

As noted above, the in-person production of sentencing witnesses is analyzed via R.C.M. 1001(f)(1). "In general, 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." *Id.* A witness may be produced for sentencing via travel orders and subpoena only if (1) the testimony is necessary for a matter of substantial significance to determining an appropriate sentence, (2) the weight or credibility is of substantial significance to determining an appropriate sentence, (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness would testify, (4) other forms of testimony or testimony by remote means would be insufficient, and (5) the personal appearance outweighs the difficulties, costs, timing, and potential delay of personal production. *Id.* at 1001(f)(2)(A-E). All elements in (A)-(E) must be resolved in favor of the Defense before the Court orders the in person production of a sentencing witness.

The Defense requests this Court compel the production of witnesses solely for purposes of sentencing. These witnesses are ME2 [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Mr. [redacted] Mr. [redacted] Mr. [redacted] ITC [redacted] and Mr. [redacted] The Defense has also requested that Mr. [redacted] approved by the Government for sentencing only, be produced for the entirety of trial as emotional support for YN2 Richard.

Overall, the Defense fails to articulate each of the required elements for this Court to compel production for these witnesses because sufficient evidence has not been presented to prove all of the required elements. In addition, many of these witnesses are cumulative relative to one another or to witnesses previously granted Government production. The Government has no

objection to these witnesses testifying via remote means which include video capability. The Government also has no objection to entering into stipulations of fact. The Government, however, objects to cumulative and unnecessary witness production.

a. ME2[redacted]

The Government will produce ME2[redacted] Based on his present location in the Norfolk/Chesapeake area, there is minimal cost, difficulty, or other practical difficulties in obtaining the in-person presence of this witness. Factor (5) weighs heavily in favor of his production.

b. Ms.[redacted]

Based on this Court's previous ruling with regard to Ms.[redacted] and assuming that Ms.[redacted] is no longer necessary, the Government will produce Ms.[redacted]

c. Ms.[redacted] and Ms.[redacted]

These witnesses are cumulative of one another, and to Ms.[redacted] They also fail each specification of R.C.M. 1001(f).

First, each of these witnesses fail element (1), as their in-person testimony is not a matter of substantial significance to determine an appropriate sentence. Having first met YN2 Richard in A-School five years ago, each can potentially give admissible testimony about their opinions of YN2 Richard's pertinent traits of character. They will speak to YN2 Richard's character, her "dream of being married and a mother," and her response to[redacted] death – all evidence that Ms.[redacted] can provide. None of these matters is of such substantial significance that it must be provided in-person versus alternative means of testimony, as prong (2) requires, and none is so central or exculpatory that it requires witness corroboration.

Third, these witnesses fail element (3). The Government has not been requested to enter

into stipulations for these witnesses. The Government would agree to enter into accurate stipulations of fact for any factual matters which these witnesses could testify about.

Factors (4) and (5) also do not favor the Defense. The Government has no objection to these witnesses testifying via remote means which include video capability. This is often accomplished via Microsoft Teams or other VTC. This would assuage the Defense's concerns and additionally mean that they cannot satisfy the fourth required elements for this Court to grant production. Moreover, any credibility concerns which are connected to these character witnesses' opinion testimony is not affected by whether they testify in person or remotely. It cannot be said that the Defense would have a sentencing case solely comprised almost entirely of telephonic witnesses. Indeed, the Government has granted three, with an additional witness testifying remotely. The Defense is not entitled to production of witnesses that are cumulative and not necessary. See *United States v. Harmon*, 40 M.J. 107 (C.M.A. 1994). If any of these witnesses "feels strongly" that they should come support YN2 Richard in person, then they are certainly able to do so without Government expense.

d. Mr. [redacted] Mr. [redacted] and Mr. [redacted]

Once again, each of these witnesses are cumulative of one another, and to Ms. [redacted] a previously approved witness for sentencing. The Defense is not entitled, via due process or Article 46, to the production of witnesses whose testimony would be cumulative to that of other witnesses. *United States v. Williams*, 3 M.J. 239, 242 (C.M.A. 1977). Mr. [redacted] Ms. [redacted] and Mr. [redacted] all knew YN2 Richard during the same time period, while receiving [redacted] All will speak to YN2 Richard's "generosity and empathy of others" [redacted] and what they perceived as YN2 Richard's apparent love for [redacted] This testimony will already be provided by Ms. [redacted] Compelled

production of witnesses from YN2 Richard's time at [redacted] is cumulative and unnecessary. Similar to above, if these witnesses feel strongly about being present in person to support YN2 Richard, they may do so on their own volition without Government funding.

e. ITC [redacted]

Here, the Defense has failed to articulate why ITC [redacted] production is relevant and necessary, considering the minimal substance of his testimony. ITC [redacted] has no oversight over YN2 Richard's actual work performance. He simply oversees her administrative movements at a satellite campus of Base Kodiak in Anchorage. YN2 Richard continues to receive her rate-specific work tasking from her current supervisor, CWO [redacted] at Base Admin in Kodiak – not from ITC [redacted] Accordingly, even if ITC [redacted] can attest to YN2 Richard's "perseverance and dedication to the mission following her arrival at Base Kodiak," the Defense has failed to show why this testimony is necessary in-person. The weight to be given to his opinion will not be controlled by his personal appearance versus remote appearance, rather it will be controlled by the substance of his testimony. Any credibility concerns which are connected to these character witnesses' opinion testimony is not affected by whether they testify in person or remotely. Furthermore, the Government has no objection to receiving this testimony by means or stipulation or through electronic means, a consideration that the Court must consider before granting production. Though the Defense have provided no evidence regarding the cost, difficulty, or other practical concerns in obtaining the in-person presence of this witnesses, it would require travel from Anchorage. Given ITC [redacted] limited knowledge of her actual work performance, the practical difficulties of obtaining this witness are not outweighed.

f. Mr. [redacted]

Mr. [redacted] is cumulative of Master Chief [redacted] a previously approved witness. Each were

members of YN2 Richard's chain of command while she was stationed in Cleveland and can speak to her performance and professionalism while stationed there. Compelled production of Mr. [redacted] is unnecessary.

Emotional Support Person

Put simply, the Government is under no obligation, nor should this Court require, the compelled production of an emotional support person for the accused in a court-martial for the duration of trial. To do so in this case, in contrast to the precedent set for all others accused of crimes in the military justice system, would be changing precedent and providing the Accused with favorable treatment relative to others. It does not matter the cost, it is unnecessary.

Mr. [redacted] as YN2 Richard's [redacted] has been granted production for sentencing only. There is no justification to produce him for the entirety of trial.

Though the Defense motion points to "other contexts" where individuals have been produced at trial to provide emotional and mental health support, such as for victims of sexual assault, this is not a case that warrants exception to the Joint Federal Travel Regulations. There is no Coast Guard policy that provides funding for an escort or emotional support person for an Accused. JTR 030706, Travel for Military Justice Proceedings. In contrast, the Joint Travel Regulations do permit funding for an attendant or escort for a *Sexual Assault victim* who is testifying or participating in a court-martial, hearing, pre-trial interview, or other hearing or panel, including Congressional. JTR 030704. The rules for compelled production of witnesses at under R.C.M. 703 do not apply. Moreover, the Accused at trial will have access to three attorneys, including Civilian and Individual Military Counsel, and all chaplaincy, medical, and CG SUPRT services. The Government will in no way prevent her from receiving any necessary medical or mental health treatment during that time. Providing Mr. [redacted] per diem benefits

would be a gratuitious expenditure of the Government not justified by policy or the law.

Finally, arguments that YN2 Richard will be apart from Mr. [redacted] for "almost an entire month" are not compelling. If Mr. [redacted] feels strongly that he should support [redacted] in person, then he can certainly do so without Government production or financial backing. Since this type of funding is absolutely not required for those accused of crimes in the civilian court system, any Defense claim of due process applying is similarly unpersuasive.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion to compel.

[redacted] MURRAY.ALLISON.BLAIR [redacted] Digitally signed by MURRAY.ALLISON.BLAIR [redacted] Date: 2021.12.03 13:50:45 -08'00'

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

[redacted]

Allison B. Murray
LCDR, USCG
Trial Counsel

Appellate Exhibit 112
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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	EMERGENCY MOTION TO ABATE THE PROCEEDINGS AND DETERMINE COUNSEL FOR YN2 RICHARD 2 December 2021

1. **Nature of the Motion**. Defense Counsel requests that the proceedings be immediately abated until the Court makes a determination as to whether any actual or potential conflict exists between attorney Billy Little and YN2 Richard. Based on discovery provided by the Government on 29 Nov 2021, as well as other information, it appears that Billy Little has been investigated by Government investigators. This creates a conflict between Billy Little and the client YN2 Richard.

2. **Burden of Proof**. As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

3. **Relevant Factual Background**.

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On 19 Apr 2021, CGIS Agent [redacted] submitted an affidavit in support of an investigative subpoena for the purpose of obtaining the Verizon phone records of YN2 Richard's [redacted] and YN2 Richard's childhood friend, [redacted] (Defense Appellate Exhibit KKKKK). In the subpoena, Agent [redacted] says the records are "material to the issue of obstructing justice" (Defense Appellate

Exhibit KKKKK, bates page 19441). The subpoena was signed by a military judge on 21 Apr 2021 and served on Verizon on 26 Apr 2021.

c. At some point prior to 8 Jul 2021, Verizon complied with the subpoena. Trial Counsel has not provided Defense Counsel with the information Verizon gave the Government.

d. On 29 Nov 2021, Trial Counsel provided Defense Counsel with CGIS Agent [redacted] notes regarding the information provided by Verizon (Defense Appellate Exhibit LLLLL). Only four of the text and phone calls were underlined in red – all four involved Billy Little and [redacted]

e. On 1 Dec 2021, Defense Counsel submitted a discovery request to Trial Counsel to determine if there has been any discussion or intention of investigating Billy Little by any government/law enforcement agency.

4. **Law and Argument**.

YN2 Richard has the right to conflict-free legal representation. *United States v. Akbar*, 74 M.J. 70 (2015). Incumbent in the Sixth Amendment right to counsel is the right to representation that is free from conflicts of interest. *United States v. Lee*, 66 M.J. 387 (2008); *United States v. McClain*, 50 M.J. 483 (1999). "Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel." R.C.M. Rule 901(d)(4), Discussion. When Defense counsel becomes aware of an actual or potential conflict, he should bring such matters to the attention of the military judge so an appropriate record can be made. *See* R.C.M. Rule 901(d)(4).

The conflict in this case stems from the CGIS investigation. As mentioned *supra*, CGIS obtained a search warrant for Verizon phone records. The affidavit in support of the subpoena says CGIS is investigating, among other things, obstruction of justice. After CGIS received the records from Verizon (records that have not been disclosed to Defense Counsel), CGIS typed out the dates/times/persons involved in the texts and phone calls. The only conversations underlined in red are the conversations between Billy Little and [redacted] The CGIS Agent who

created the notes and underlined the conversations has thus far refused to speak to Defense Counsel. However, red underlining usually indicates that the information has some special importance. If the red underlining indicates a concern about obstruction of justice regarding attorney Little, this creates a conflict between attorney Little and his client, YN2 Richard.

Attorney, Billy Little, is licensed by the Supreme Court of Arizona to practice law. The ethical rules published by the Supreme Court of Arizona prohibit representation of a client if "there is a significant risk that the representation of one or more clients will be materially limited by the...personal interest of the lawyer." Ariz. R. Sup. Ct. ER, Rule 1.7(a)(2). "If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained informed consent of the client..." *Id.* at Comment [4]. Put another way, the attorney must obtain a waiver of the conflict by the client before he can continue representation of the client. Attorney Little has discussed this matter with YN2 Richard and she desires to keep Attorney Little as her attorney, but will not sign a waiver of any potential conflict.

5. **Relief Requested.**

For all of the reasons stated above, the defense respectfully requests the Court for the following relief:

a. Order the Government to provide sworn affidavits from Trial Counsel and the CGIS agents that:

(1) No government agent or counsel discussed whether Mr. Little might have obstructed justice in this case;

(2) No government agent or counsel discussed the possibility of ethical or legal issues relating to his representation of YN2 Richard;

(3) There is no ongoing investigation involving Mr. Little involving any federal agency relating to his representation of YN2 Richard; and

(4) There is no intent to investigate Mr. Little or refer Mr. Little for investigation to any government entity, prosecutor, state bar, or law enforcement entity.

b. Appoint conflict-free counsel to advise YN2 Richard on this issue. This conflict-free counsel must come from outside of YN2 Richard's current legal team.

c. The Government should provide immediate and full disclosure of the information obtained from Verizon in this case.

d. CGIS Agent [redacted] should submit to a Defense interview to explain why the conversations between Billy Little and [redacted] were so significant in his mind.

5. Evidence.

The defense offers the following evidence as enclosures to support this motion.

Defense Appellate Exhibit KKKKK: Verizon Wireless search warrant.

Defense Appellate Exhibit LLLLL: CGIS Agent [redacted] notes.

6. Oral Argument.

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 2nd day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 2nd day of December, 2021.

Dated this 2nd day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

Appellate Exhibit 114
Page 4 of 4

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL FUNDING FOR TRIAL 3 DEC 2021

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense motion to compel funding for Dr. [redacted] Dr. [redacted] Ms. [redacted] Mr. [redacted] and Dr. [redacted] the defense expert consultants, to travel to Norfolk, VA for trial. This Court should deny the Defense motion as this issue is either moot or not yet ripe.

HEARING

The Government requests oral argument on this motion.

STATEMENT OF FACTS

On 10 November 2021, the defense submitted requests for additional funding for Dr. [redacted] Dr. [redacted] and Dr. [redacted] for trial. The Convening Authority approved these requests on 29 November 2021. Trial Counsel received copies of the signed approval for funding on 3 December 2021.

Defense Counsel submitted requests for additional funding for Ms. [redacted] and Mr. [redacted] on 17 November 2021. One day later, on 18 November 2021, the Defense filed this motion to compel. Trial Counsel have since routed these requests to the Convening Authority. They have not yet been reviewed for consideration; however, there is no indication that they will not be approved.

On 10 November 2021, the Defense submitted a request for a Spanish interpreter for trial

for Ms. [redacted] testimony and pre-trial interview translation. This request has been routed to the Convening Authority, along with a list of qualified translators in the Coast Guard to which the Convening Authority can select pursuant to Rule for Courts-Martial 502(e)(3)(a) and Coast Guard Military Justice Manual, COMDTINST M5810.1H, Chapter 13, E-1. The request recommends the Convening Authority appoint a member to serve as an interpreter for the Defense pre-trial and that a separate member competent in Spanish language proficiency be appointed as interpreter for the court-martial.

LEGAL AUTHORITY AND ARGUMENT

This issue is moot with regard to Dr. [redacted] Dr. [redacted] and Dr. [redacted] Funding for trial has been approved.

This issue is not yet ripe for the court to consider for Mr. [redacted] Ms. [redacted] and Spanish translation. No denials have been issued by the Convening Authority.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense motion.

[redacted] MURRAY.ALLISON.BLAIR.[redacted] Digitally signed by MURRAY.ALLISON.BLAIR.[redacted] Date: 2021.12.03 18:13:16 -08'00'

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT MOTION IN LIMINE PRELIMINARY RULING ON ADMISSIBILITY OF EVIDENCE 19 NOV 2021

RELIEF SOUGHT

Pursuant to Rule for Courts-Martial 906(b)(13), the Government respectfully requests that the Court issue a preliminary ruling on the admissibility of videos and photographs of the victim, autopsy photographs, and crime scene photographs in the attached enclosures.

HEARING

A hearing is requested only if the Defense opposes this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Government bears the burden of persuasion. R.C.M. 905(c)(2). MANUAL FOR COURTS-MARTIAL, UNITED STATES. The burden of proof for any contested factual issues related to this motion is a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder), one specification of Article 119 (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice), UCMJ.

2. On 18 April 2020, [redacted] Coast Guard active duty members YN2 Kathleen Richard and BM2 [redacted] was found

Appellate Exhibit 123
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"blue and unresponsive," face-down and swaddled by [redacted] in her crib at [redacted] located in Coast Guard Base Kodiak housing. The last individual to observe [redacted] alive was [redacted] the Accused, approximately three hours earlier.

3. After finding [redacted] unresponsive, YN2 Richard and BM2 [redacted] drove to Providence Kodiak Island Hospital. (Bates 000442; 000441; 000443). After resuscitative efforts failed, [redacted] was pronounced dead by Emergency Room physician Dr. [redacted] at approximately 1922 hours.

4. Kodiak Police, Alaska State Troopers, and Coast Guard Investigative Services responded to the hospital. (Bates 022248).

5. Kodiak Police Detective [redacted] took several photographs of [redacted] after her arrival to the hospital and after resuscitative efforts failed. (Bates 022248; 000600-000633).

6. Through the course of the investigation, CGIS obtained video surveillance footage from Kodiak Providence Island Hospital and body camera footage of responding Kodiak Police officers.

7. Alaska State Trooper [redacted] and CGIS Special Agent [redacted] visited [redacted] the evening of 18 April 2020 to examine the scene, including [redacted] crib. (Bates 000137-158). Trooper [redacted] took photographs. Additional photographs of the residence were taken by CGIS Special Agent [redacted] on 22 April 2020. (Bates 000011-84).

8. On 21 April 2020, State of Alaska Medical Examiner [redacted] performed an autopsy of [redacted] CGIS S/A [redacted] attended the autopsy where photographs were taken. (Bates 000220-287).

9. In the months leading up to [redacted] death, BM2 [redacted] observed [redacted] her growth and her abilities. Photographs and video were taken by the Accused and BM2 [redacted]

[redacted] These pictures depict [redacted] strong neck control and ability to keep her head steady from a prone position. In addition, the Accused took several pictures of [redacted] the morning of her death on 18 April 2020. These pictures show a happy, healthy baby with no signs of injury.

WITNESSES AND EVIDENCE

The Government offers the testimony of Det. [redacted] Trooper [redacted] S/A [redacted] S/A [redacted] Dr. [redacted] BM2 [redacted] and the enclosed documentary exhibits:

- Videos of [redacted] Alive – Enclosure A (7 Videos: OrigFile 1515, 1516, 1518, 1672, 1677, 1743, 1747)
- Photographs of [redacted] Alive – Enclosure B (14 Photos)
- Photographs of [redacted] at Kodiak Providence Hospital on 18 April 2020 – Enclosure C (34 Photos)
- Body Camera Footage of Kodiak Police on 18 April 2020 – Enclosure D (1 Video: OrigFile 611)
- Video Surveillance from Kodiak Providence Hospital on 18 April 2020 – Enclosure E (3 Videos: OrigFile 278, 279, 280)
- Photographs of [redacted] at Autopsy on 21 April 2020 – Enclosure F (42 Photos)
- Photographs of Crime Scene on 18 April 2020 – Enclosure G (18 Photos)
- Photograph of Crime Scene on 22 April 2020 – Enclosure H (22 Photos)

LEGAL AUTHORITY

R.C.M. 906(b)(13) recognizes a preliminary ruling on admissibility of evidence as a request which may be made by a motion for appropriate relief. A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the

general issue be resolved before they arise, outside the presence of the members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of the court members. Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge. Rule for Courts-Martial (R.C.M.) 906(b)(13), Discussion.

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends "to make the existence of any fact of that is of consequence to the determination of the action more or less probable than it would be without the evidence." M.R.E. 401. Under Military for of Evidence (M.R.E.) 402, all evidence that is relevant is admissible unless it is prohibited. Pursuant to M.R.E. 403, courts may exclude relevant evidence if the probative value of the evidence is substantially outweighed by unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Although evidence is generally admissible if relevant, the military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission."). The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Authentication. M.R.E. 901 requires "authenticating or identifying an item of evidence" by the proponent producing the evidence "sufficient to support a finding that the item is what the

proponent claims it is." Under M.R.E. 901, evidence authenticity serves a condition to admission. M.R.E. 901(a). It is highly unlikely that a challenge to authenticity can be made to any of the videos and photographs offered.

ARGUMENT

1. Videos of [redacted] Alive

Short videos of [redacted] before she died is highly probative that [redacted] death was non-accidental or caused by SIDS. These videos show that [redacted] in the weeks leading up to her death exhibited strong neck muscles, good head control, and prolific use of her legs. The videos range from 25 March 2020 to 17 April 2020, all of which show [redacted] capable of steady control of her head and awareness of her surroundings. This is highly probative to foreclose the theory that [redacted] died accidentally when she was swaddled and laid face down into the mattress because she was unable to lift her head to prevent her own asphyxiation. Though an infant's age is a general indicator of a child's neck muscle development, a video of [redacted] in the prone position shortly before she died is the best evidence to show *this child's* ability to lift her own head. The Government's medical experts will also refer to these videos in discussing the unlikelihood of SIDS or self-suffocation. The Government bears the burden to prove beyond a reasonable doubt that [redacted] death was not accidental or SIDS-related and this evidence is necessary for that purpose. The fact that [redacted] arms may have been swaddled at the time of her death goes to the weight of the proffered evidence.

This evidence satisfies the Military Rules of Evidence for admission: videos of [redacted] will be authenticated at trial by BM2 [redacted] are relevant, violate no privilege, and contain no hearsay.

2. Pictures of [redacted] Alive

Like above, the photos of [redacted] hours before she died are highly probative to show that the abrasion to her chin and petechiae on her neck were caused at the time of death and did not preexist her death. Specifically, photos taken on 17 April and 18 April, as late as 1337 hours the day she died, show a lack of injury to her face, chin, neck and back of her head. As the Government bears the burden to prove beyond a reasonable doubt that [redacted] was murdered, the lack of injury immediately before her death is probative to show that the injuries were inflicted on [redacted] when she was smothered to death by the Accused pressing [redacted] face into the mattress. The abrasions and petechiae are also probative of the time of the charged murder and the exact manner of death. This evidence also satisfies the rules of evidence. As with the videos, BM2 [redacted] will provide the necessary foundation for authentication.

3. Emergency Room Photographs, Video and Autopsy Photos

The ER footage sets the scene for the medical response by showing BM2 [redacted] exiting the vehicle with [redacted] in his arms before passing her to an attending nurse. This video shows what [redacted] is wearing when she arrives at the hospital and provides critical context to the timeline of events. The Government offers three videos from the ER, each showing a different angle, perspective, and timeline of when they arrived to the hospital.

The body cam video and autopsy photos show the injuries on [redacted] at the time of her death, which is probative to the time, cause and manner of death. Specifically, the photos show dried blood on [redacted] lips, pacifier imprints around her mouth, abrasions and bruises to her chin, marks to the back of her head, and livor mortis. The bruises did not form post-mortem. Bruising requires circulating blood, which of course, requires a beating heart. The Government's medical experts will also rely on these photographs in rendering an opinion as to the cause and manner of death. Thus, testimony alone will not be sufficient to establish this point, as the

photographs will be used to illustrate and explain the testimony for the fact-finder. The photos demonstrating livor mortis are also probative to the time of the death, which is critical for the Government to disprove anyone other than the Accused had access to the child. The manner in how the blood dried on the lips coupled with the imprint around the mouth is probative for a fact-finder to visualize how the pacifier was pressed into her mouth at the time of death.

The Government will be able to satisfy the rules of evidence by calling the appropriate witnesses to lay the foundation for these photos to be admitted. In this case, Det. [redacted] will lay the foundation for the photographs taken of [redacted] at Kodiak Providence Hospital and the body camera footage from Kodiak Police as the photographs of [redacted] were taken; Dr. [redacted] will provide the necessary foundation for photographs taken at autopsy; and either S/A [redacted] or BM2 [redacted] will lay the foundation to authenticate the hospital footage.

4. Crime Scene Photographs Taken on 18 and 22 April

Photos of the victim's bedroom, crib and pacifier are probative to understand how [redacted] was suffocated while placed face down in her crib. It also serves as corroboration of the Accused's statement on 19 June 2020 about how she swaddled [redacted] placed her face down with her pacifier, and "might have" pushed her face into the mattress. *See United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (crime scene photographs in a double homicide properly admitted because they provided the members with an additional sense of what occurred while corroborating the accused's confession). The Government intends to call Trooper [redacted] Special Agent [redacted] and/or Special Agent [redacted] to lay the foundation necessary for authenticating these photographs.

5. The Photographs and Videos Are Not Outweighed by Unfair Prejudice

The digital evidence poses a negligible risk of unfair prejudice. Though some are

disturbing, the graphic nature of the photographs stems from the graphic nature of the crime, not from any separate unfair prejudice. The Government is not seeking to gain an unfair advantage in trial by inflaming or shocking the consciousness of the fact-finder; each set of evidence has been carefully selected for a specific, permissible evidentiary purpose—to identify the victim, to demonstrate the force used and the cause of death; to provide a visual aid and context to the charged offenses, and to establish the trustworthiness of the Accused's confession pursuant to M.R.E. 304(c). *See Curtis*, 44 M.J. at 144; *see also United States v. Gray*, 37 M.J. 730, 739 (C.M.A. 1992) (finding that claims of unfair prejudice have "no merit" concerning a photograph of the victim's badly decayed face with a gunshot wound to the eye socket as "[p]hotographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or exact nature of wounds."); *United States v. Murphy*, 30 M.J. 1040, 1051 (C.M.A. 1990) ("The prosecution is not required to sanitize a brutal killing."); *United States v. Whitehead*, 30 M.J. 1066, 1070 (C.M.A. 1990) ("Whether [photographs] . . . were inflammatory is not a matter of importance" as "[t]hey served a legitimate purpose).

The videos and photographs will not be cumulative. While this motion lays out the complete set of photos (e.g. all autopsy photos), the photos offered at trial will only be a select portion of the complete set, each showing a unique perspective. The reason for including the complete set for the purposes of this motion is to obtain a preliminary ruling on admissibility for a particular type of digital evidence; namely, whether videos/photos of [redacted] alive, autopsy photos, residence photos, hospital footage and ER photos are relevant under M.R.E. 401 and admissible under M.R.E. 403. The Government will move to admit these particular images and photographs through witness testimony at trial.

CONCLUSION

Because the short videos and photographs are relevant and are not unfairly prejudicial within the meaning of M.R.E. 403, the Government requests that the Court find that the aforementioned videos and photographs are admissible into evidence.

YAO.IRIS [redacted] Digitally signed by YAO.IRIS [redacted]
[redacted]
Date: 2021.11.19 13:53:53 -05'00'

IRIS YAO
MAJ, U.S. Army
Assistant Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE RESPONSE TO GOVERNMENT MOTION IN LIMINE – ADMISSIBILITY OF EVIDENCE** **3 DECEMBER 2021**

MOTION

The Defense requests that the court deny the government's motion to admit videos of BM2 photographs of prior to her death, the photographs of at the Kodiak Providence Hospital, and the autopsy photographs. The defense also requests that the court prohibit the government from referring to the photographs of YN2 Richard's and BM2 residence as a "crime scene."

FACTS

1. was born on

2. resided with YN2 Kathleen Richard and BM2

3. YN2 Richard and BM2 shared

4. Both YN2 Richard and BM2 took photographs and videos of their interactions with using their respective iPhones.

5. On April 18, 2020, YN2 Richard came home to find discolored and non-responsive in her crib at Kodiak, Alaska base housing while BM2 was caring for her.

6. YN2 Richard began screaming for BM2 to come help. BM2 picked up and was told by Ms. to start CPR and take her to the hospital.

7. YN2 Richard, BM2 and drove to the Providence Kodiak Island Medical Center.

8. Upon arrival, YN2 Richard and BM2 rushed into the Medical Center with The hospital video shows in a state of distress. YN2 Richard ran into the Medical Center with no shoes, no purse, and the car's engine running in the parking lot.

9. The medical staff was unable to revive [redacted] and she passed away on April 18, 2020. The doctor's note indicates that [redacted] likely died of "SIDS" and [redacted] were "understandably distraught." Enclosure CCC.

10. [redacted] was sent to the Alaska Medical Examiner's Office for an autopsy. An autopsy was performed on April 21, 2020. A Coast Guard Investigative Services ("CGIS") agent was present during the autopsy. The Alaska Medical Examiner found that [redacted] death was "Probable Asphyxia" due to "Prone position of swaddled infant in bedding (blankets in infant crib)." The Medical Examiner's report states, "The manner of death is classified as undetermined." Enclosure W.

11. As part of the investigation, CGIS seized both YN2 Richard's and BM2 [redacted] iPhones and extracted all of the content from their iPhones. The extractions have been provided to the defense as part of the discovery process. Both extractions contain thousands of pages and include hundreds, if not thousands, of photographs and videos.

BURDEN

The burden of proof and persuasion rests with the Government as the moving party. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

LAW

The law establishes that the proponent of the evidences bears the burden to prove its admissibility and the Military Judge ultimately determines whether the evidence is admissible. M.R.E. 104; M.R.E. 401. M.R.E. 104(c) states that a military judge must conduct any hearing on a preliminary question so that the members cannot hear it if: (1) the hearing involves the admissibility of a statement of the accused under M.R.E. 301-306; (2) the accused is a witness and so requests; or (3) justice so requires.

M.R.E. 401, 402, and 403 control the admissibility of evidence. Per M.R.E. 401, "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Under M.R.E.402, "Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts-martial; (3) these rules; or (4) this Manual. Irrelevant evidence is not admissible." Per M.R.E. 403, "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."

If evidence does not help a member decide the case accurately, the evidence should be excluded because it is not relevant. Irrelevant evidence is never admissible because it does not assist the trier of fact in reaching an accurate and fair result. If the court determines the evidence is relevant, it still must pass an M.R.E. 403 balancing test. It is only when a factfinder might

react to the proffered evidence in a way (usually emotional) that it is not supposed to be part of the evaluative process that the reaction is considered unfairly prejudicial. *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force.")

ARGUMENT

I. Videos of [redacted] (Enclosure A)

Enclosure A includes seven videos of BM2[redacted] interacting with [redacted] There were hundreds, if not thousands, of pictures and videos of YN2 Richard interacting with [redacted] Yet, none of the videos the government is seeking to admit show YN2 Richard interacting with [redacted] The purpose of the Government introducing videos of BM2[redacted] with [redacted] to the exclusion of YN2 Richard is obvious. It is disingenuous, misleading, and prejudicial to YN2 Richard to show only videos of BM2[redacted] interacting with [redacted]

In viewing the properties of the video files, it is unclear when these videos were made. Thus, there is a foundational problem with admission of the Government's proposed evidence. Assuming *arguendo* that the government will be able to lay the foundation with BM2[redacted] the next hurdle will be for the government to establish the relevance of these videos.

Video 1515 is a video of BM2[redacted] playing with [redacted] while she is in her crib. [redacted] is laying on her back and is laughing and kicking her legs while BM2[redacted] tickles her stomach. The Government seems to suggest that these videos are being offered to "foreclose the theory that [redacted] died accidentally when she was "*swaddled and laid face down* into the mattress because she was unable to lift her head to prevent her own asphyxiation." This video does not show [redacted] on her stomach, it does not show her swaddled, and it does not show movement of her neck. All this video shows is BM2[redacted] playing with [redacted] This video makes no fact of consequence more or less probable; therefore, this video is not relevant under M.R.E. 401.

Video 1516 is a video of BM2[redacted] helping [redacted] walk across her bedroom by holding her hands and helping her move her legs forward. Like the previous video, the government is offering this video to foreclose an accident defense and to show the unlikelihood of SIDS. In their motion, the government states their medical experts will explain how this video, along with the others, demonstrate that SIDS is unlikely, but the motion does not provide any details. This video does not make any fact of consequence more or less probable. Whether BM2[redacted] helped [redacted] "walk" across the room by holding her hands and moving her feet forward does not relate to the cause of [redacted] death. Therefore, this video is not relevant under M.R.E. 401.

Video 1518 is very similar to Video 1515 in that BM2[redacted] is playing with [redacted] while she is in her crib. [redacted] is laying on her back and is laughing while BM2[redacted] moves [redacted] arm to wave "good morning." You cannot see [redacted] moving her arms, legs, or neck on her own in this video. Based on the stated purpose of these videos, it is unclear how this video would be relevant.

Video 1672 is a video of BM2 [redacted] walking into [redacted] room while [redacted] is laying on her stomach in her crib. [redacted] is awake with her head up, [redacted] is not swaddled, but there is a pink blanket bunched up underneath her. The defense does not object to this video, but the defense would like to offer another video in addition that also shows the same muscle movement of [redacted] but also includes YN2 Richard in the video[1]. Enclosure IIIII. The defense offered video shows the same muscle movement of [redacted] but includes YN2 Richard in the video. To present one [redacted] with the child, to the exclusion of the other [redacted] is dishonest and prejudicial to YN2 Richard.

Video 1677 is a video of [redacted] face down in her crib with her head turned to the side and her face against a pillow. The defense does not object to this video.

Video 1743 is an upside down video of BM2 [redacted] walking up to [redacted] in her crib. [redacted] is laying on her stomach with her head up. Immediately in front of [redacted] is a large, blue stuffed animal and there is a knit blanket over [redacted] This video is cumulative with Video 1672.

Video 1747 is a video of BM2 [redacted] walking into [redacted] bedroom while [redacted] is laying in her crib on her back surrounding by blankets and stuffed animals. The video shows [redacted] with her legs lifted and her right hand/arm moving. Like Video 1515, this video is not relevant to the provided purpose which is to foreclose an accident defense and SIDS as a possible cause of death. It does not make SIDS or an accidental death more or less probable; therefore, the video is not relevant under M.R.E. 401.

II. Photographs of [redacted] (Enclosure B)

Photograph of [redacted] from 17 April 2020. This photograph shows [redacted] on her back with her head on what appears to be pillows or cushions. The government states the purpose of this photograph along with the others is to show the abrasion on [redacted] chin was caused at the time of her death. This photograph shows [redacted] from the front with her chin down almost touching her chest. The spot on [redacted] chin that had the abrasion could only be seen by tilting [redacted] head back because it was seen in the crease of the skin on her neck. Therefore, this photograph does not reveal if [redacted] actually had the abrasion on her neck on 17 April 2020. Because it does not show [redacted] neck and chin where the abrasion was identified during the autopsy, it is not relevant under M.R.E. 401.

Further, the Government seeks to compare photographs taken at home with a cell phone with pictures taken for the purpose of an official law enforcement investigation. The settings on the cameras are clearly different and highlight different pigmentation on [redacted] skin. The metadata for each picture will reveal the camera settings for each picture. The Government has

[1] This video file is included in a grouping of files disclosed by the Government under bates number 8605. This single bates number includes almost 13,000 pages of discovery and almost 200 videos. This video file was also disclosed by the Government as "OrigFile-00000218" under bates number 8606. This single bates number includes over 45,000 pages of discovery and voluminous pictures and videos.

not disclosed the metadata for the pictures. Until we know the settings for each picture taken, the Government is comparing apples to oranges. Put another way, it is not an honest presentation of evidence if one, washed out photograph, is compared with another photograph taken by a professional investigator for the purpose of investigating a potential crime. Until the metadata can be examined, it would be dishonest and prejudicial to compare two photos taken at different times, with different cameras and settings, and taken for different purposes.

The photographs of [redacted] on 18 April 2020. The defense objects to the following photographs:

- Bates 8605-7793 – [redacted] sitting up in the corner of the couch
- Bates 8605-7819 – [redacted] with BM2 [redacted]
- Bates 8605-5731 – [redacted] with the [redacted]
- Bates 8605-7639 – [redacted] laying on [redacted] with her head up
- Bated 8605-7919 – [redacted] laying on [redacted]

The defense objects to these photographs because they are not relevant in that they do not make any fact of consequence more or less probable. The photographs do not show [redacted] chin at an angle that would determine if the abrasion identified during the autopsy was in existence prior to her death.

The defense does not object to the following photograph:

- Bates 8605-4571 – [redacted] laying on her stomach on couch

The government provided a third grouping of photographs that show [redacted] while she was "alive." Although it is unclear when these photographs were taken, it does not appear they were taken on 17 April 2020 or 18 April 2020. Photographs of [redacted] at various stages of her life prior to the alleged incident are not relevant because they do not make any fact of consequence more or less probable. There is no probative value of this evidence and the government is offering the photographs for no purpose other than to inflame the passions of the members. "Photographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or exact nature of wounds." *United States v. Gray*, 37 M.J. 730, 739 (A.C.M.R. 1992), *aff'd*, 51 M.J. 1 (CAAF 1999). "It is not a matter of whether the photographs were inflammatory, but whether they served a legitimate purpose." *Id.* (citing *United States v. Whitehead*, 30 M.J. 1066, 1070 (A.C.M.R. 1990); *United States v. Bartholomew*, 1 C.M.A. 307, 3 C.M. R. 41, 48 (C.M.A. 1952)).

If the purpose of the photographs is to show [redacted] ability to lift her head, the defense believes this is adequately demonstrated in Video 1672 making these seven additional photographs cumulative.

III. Photographs of [redacted] at Kodiak Providence Hospital (Enclosure C)

The government is seeking a ruling on the admissibility of all 34 photographs taken at the Kodiak Providence Hospital without identifying the specific photographs they will be offering at

trial. Although the defense concedes that it is possible some of the photographs are relevant, the majority of these photographs serve no legitimate purpose. The government must present how each of these photographs are relevant and the purpose for each photograph. The government's proffer in its motion is insufficient because they must demonstrate why these particular photographs are necessary to their case and what fact of consequence is more or less probable with the use of the photograph.

The court in *United States v. Mobley,* 28 M.J. 1024, 1031 (A.F.C.M.R. 1989) determined the probative value of the photographs of the victim's exposed skull was outweighed by the danger of unfair prejudice and were not necessary because "the photographs portrayed the results of trauma that could just as easily have been described and readily comprehended." The court concluded. "The photographs add very little, if anything, except the potential for shock value. Based on our review of the record we conclude that the M.R.E. 403 balance is this instance is struck strongly in favor of exclusion." *Id.* All 34 photographs are not needed to convey the exact nature of the alleged injuries to [redacted] *See United States v. Witt,* 73 M.J. 738 (A.F. C.C.A 2014). The government has not provided a legitimate purpose for each of these photographs therefore, the probative value of the photographs is outweighed by the danger of unfair prejudice to YN2 Richard.

IV. Body Camera Footage from Kodiak Police on 18 April 20 (Enclosure D)

The defense does not object to the admission of this video.

V. Video Surveillance from Kodiak Providence Hospital on 18 April 20 (Enclosure E)

The defense does not object to the admission of these three videos.

VI. Photographs of [redacted] from Autopsy (Enclosure F)

Similar to the argument above with the photographs at the Kodiak Providence Hospital, the defense concedes that it is possible some of these photographs are relevant, but the majority of these photographs serve no legitimate purpose. The government must present how each of these photographs are relevant and the purpose for each photograph. The government's proffer in its motion is insufficient because they must demonstrate why these particular photographs are necessary to their case and what fact of consequence is more or less probable with the use of the photograph.

VII. Photographs of Crime Scene on 18 April 2020 (Enclosure G)

Defense does not object to the admission of these photographs at trial. However, the defense objects to labeling or referring to these photographs as "crime scene." These are photographs of YN2 Richard's and BM2 [redacted] It is up to the trier of fact to determine if a crime occurred at [redacted]

VIII. Photographs of Crime Scene on 22 April 2020 (Enclosure H)

Defense does not object to the admission of these photographs at trial. However, the defense objects to labeling or referring to these photographs as "crime scene." These are photographs of YN2 Richard's and BM2[redacted] It is up to the trier of fact to determine if a crime occurred at[redacted]

RELIEF REQUESTED

The Defense respectfully requests that this Court exclude the following:

- Videos of BM2[redacted]
- Photographs of[redacted] prior to death
- Photographs of[redacted] at the Kodiak Providence Hospital
- Autopsy Photographs
- Prohibit the government from referring to the photographs of YN2 Richard's and BM2[redacted]

EVIDENCE

The defense offers the following for the court's consideration:

- Enclosure IIIII: Video of YN2 Richard with[redacted]

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 3 December 2021.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	EMERGENCY MOTION TO DISQUALIFY THE TRIAL JUDGE AND ABATE THE PROCEEDINGS 4 December 2021

1. **Nature of the Motion**. Pursuant to R.C.M. Rule 902, Defense Counsel requests that the proceedings be immediately abated, the current trial judge be disqualified, the prior rulings in this case be vacated and a new trial judge be appointed.

2. **Burden of Proof**. As the moving party, the burden of persuasion rests with the Defense, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

3. **Relevant Factual Background**.

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On 3 Nov 2021 an Article 39(a) hearing was held. During this hearing, Judge Casey disclosed that he had been negotiating federal employment as a judge for the Veterans' Administration. Judge Casey informed counsel that he had been offered employment and had accepted the position as a judge with the Veterans' Administration. Judge Casey further explained that he may or may not be the trial judge in this case.

c. Judge Casey issued several rulings on defense motions during the time he was negotiating employment with another federal agency as a judge.

d. On 2 Dec 2021, Defense Counsel submitted a discovery request to Trial Counsel for the purpose of obtaining information relating to Judge Casey's intent to seek employment

with another federal agency during the pendency of this case (Defense Appellate Exhibit MMMMM).

4. **Law and Argument**.

R.C.M. Rule 902(a) states that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."[1] In 2019, the United States Court of Appeals for the District of Columbia found that a military judge's "job application to the Justice Department created a disqualifying appearance of partiality" and vacated all orders issued by that judge after he applied for employment at the Justice Department. Defense Appellate Exhibit NNNNN. In the case at bar, the trial judge (Judge Casey) sought and obtained employment as a judge with a separate federal agency during the pendency of this case.

In November, 2021, Defense Counsel asked Judge Casey if the rumors about him retiring were true. At that time, Judge Casey informed the parties that he had accepted a position as a judge for the Department of Veterans' Affairs. Judge Casey also indicated that he was in the process of negotiating the start date for his new federal job and may or may not be the trial judge in this case.

Based on the ruling by the D.C. Court of Appeals in Defense Appellate Exhibit NNNNN, Defense Counsel requested disclosure from the Government regarding Judge Casey's application for federal employment (Defense Appellate Exhibit MMMMM). Defense Counsel has not yet received this disclosure from the Government. Until Defense Counsel is provided the requested discovery, it is not possible to fully litigate this issue. In order to preserve the record, this motion is being filed. Defense Counsel will supplement the record after discovery is received.

A 39(a) hearing is scheduled for 9-10 Dec 2021, and trial is scheduled to start on 10 Jan 2021. Therefore, this motion is being filed in order to object to the judge continuing to oversee and rule on any motions or the trial until this issue has been litigated.

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[1] *See also* 28 U.S.C. § 455(a); Code of Conduct for United States Judges, Canon 3C(1); American Bar Association, Model Code of Judicial Conduct, Rule 2.11

5. **Relief Requested.**

For all of the reasons stated above, the defense respectfully requests the Court for the following relief:

a. Abate the proceedings until this issue can be fully litigated.

b. Order the Government to disclose the information requested in Defense Appellate Exhibit MMMMM.

c. Immediately disqualify Judge Casey from presiding over this case.

d. Vacate any rulings made in this case by Judge Casey.

5. Evidence.

The defense offers the following evidence as enclosures to support this motion.

- Defense Appellate Exhibit MMMMM: Defense Discovery Request #10.
- Defense Appellate Exhibit NNNNN: In re: Adb Al-Rahim Hussein Muhammed Al-Nashiri, United States Court of Appeals for the District of Columbia Circuit, No. 18-1279 (2019).

6. Oral Argument.

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 4th day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 4th day of December, 2021.

Dated this 4th day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR APPROPRIATE RELIEF PRESERVE CLAIMS FOR FEDERAL REVIEW 17 Nov 2021

1. **Nature of Motion.**

Pursuant to R.C.M. 906, and M.R.E. 304, 305, 311, and 504, YN2 Kathleen Richard moves the Court to issue a ruling on the following matters.

a. Preclude BM2 [redacted] from testifying about YN2 Richard's statements made during [redacted]

b. Dismiss this case due to Articles 118, 119, and 131 being unconstitutionally vague.

c. Suppress the admission of electronic evidence provided by YN2 Richard to Government investigators.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2) with respect to the reasonable doubt instruction and dismissing this case due to unconstitutional vagueness. Pursuant to M.R.E. 304, 305, and 311, and as the proponent of the evidence at trial, the Government has the burden of persuasion relating to BM2 [redacted] testimony and the admission of evidence seized from YN2 Richard's electronic devices. The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. YN2 Richard is charged with one specification of Murder for intentionally killing [redacted] in violation of Article 118 of the Uniformed Code of Military Justice ("UCMJ").

c. YN2 Richard is charged with one specification of Murder for causing the death of [redacted] by engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, in violation of Article 118 of the UCMJ. This charge and specification alleges YN2 Richard did this "inherently dangerous" act with knowledge that death or great bodily harm was the probable consequence.

d. YN2 Richard is also charged with unlawfully killing [redacted] by "culpable negligence" in violation of Article 119 of the UCMJ.

e. YN2 Richard is charged with wrongfully deleting electronic data from her cell phone, laptop and Apple iCloud Account with the intent to influence, impede and obstruct the due administration of justice. It is also alleged in this charge that YN2 Richard did this while having a reason to believe that there were or would be criminal proceedings pending.

f. On 12 Jul 2021, Defense Counsel sent an email to Trial Counsel requesting specificity of the charges and specifications in this case.[1] To date, there has been no response.

g. On 19 Jul 2021, Defense Counsel forwarded to the Court the request sent to Trial Counsel for a bill of particulars.[2] As of the date of this filing, there has been no response from Trial Counsel.

h. On 26 May 2020, CGIS obtained "consent" to search from "Kate Flores Guerra" (now YN2 Richard) (Defense Appellate Exhibit YYY).

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[1] Defense Appellate Exhibit S.

[2] *Id.*

i. On 26 Jun 2020, YN2 Richard revoked consent to search her phone, laptop and Apple watch (Defense Appellate Exhibit ZZZ).

4. **Law and Argument.**

a. **Preclude BM2 [redacted] from testifying about YN2 Richard's statements made [redacted]** In this case, CGIS took YN2 Richard from Kodiak, Alaska to Anchorage, Alaska two months after the death of [redacted] and placed her [redacted] YN2 Richard was held there for two months. The [redacted] was over 400 miles away from where BM2 [redacted] was stationed in Kodiak, Alaska. The only way for BM2 [redacted] to get to [redacted] would have been by plane or boat. Thus, BM2 [redacted] and YN2 Richard were [redacted] within two months of the death of [redacted]

Prior to being [redacted] BM2 [redacted] was adamant that YN2 Richard had nothing to do with the death of [redacted] BM2 [redacted] was equally adamant that any incriminating statements made by YN2 Richard to CGIS were coerced.

After YN2 Richard was [redacted] CGIS was able to convince BM2 [redacted] that YN2 Richard had murdered [redacted] While [redacted] BM2 [redacted] also participated [redacted] with YN2 Richard's [redacted] YN2 [redacted] The Government has also listed YN2 [redacted] as a witness at trial. While YN2 Richard was at [redacted] BM2 [redacted] decided that he would [redacted] CGIS succeeded in [redacted] BM2 [redacted] and YN2 Richard. It would be against public policy to reward CGIS' behavior by precluding YN2 Richard from asserting her [redacted]

M.R.E. 504(c)(2)(A) provides an exception to the [redacted] when [redacted] is charged with a crime against [redacted] In this case, there would likely be no charges if CGIS had not been able to turn BM2 [redacted] YN2 Richard.

Thus, the exception to the [redacted] in this case has been bootstrapped by CGIS [redacted] in the first place. Thus, the bad behavior by CGIS has been compounded and used to prevent YN2 Richard from asserting a legal privilege that is rooted in hundreds of years of jurisprudence.

b. **Dismiss this case due to Articles 118, 119, and 131 being unconstitutionally overbroad and vague**.

Laws are void for vagueness if the statute does not provide sufficient definiteness to permit ordinary people to understand what conduct is prohibited. *Hoffman Estates v. Flipide, Hoffman Estates, Inc., supra; Smith v. Goguen,* 415 U. S. 566 (1974); *Grayned v. City of Rockford,* 408 U. S. 104 (1972); *Papachristou v. City of Jacksonville,* 405 U. S. 156 (1972); *Connally v. General Construction Co.,* 269 U. S. 385 (1926). The vagueness doctrine establishes guidelines to govern law enforcement. *Smith,* 415 U.S. at 415 U.S. 574. When a statute "vests virtually complete discretion in the hands of police to determine whether the suspect has satisfied the statute," it is unconstitutionally overbroad and vague. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

In this case, the Government has alleged that YN2 Richard violated Articles 118 and 119 of the UCMJ when she caused the death of [redacted] by "asphyxiation" resulting from "asphyxiation." Not only is the language redundant and confusing, it is vague to the point of failing to provide any specificity to any person charged with such an offense.

Further, Article 118 requires that the act being charged shows a "wanton disregard for human life." The Government has avowed that the "act" being charged is "asphyxiation." This allegation provides insufficient specificity and permits any number of "acts" from falling within this category. Even the Government's own medical examiner, Dr. [redacted] is confused by the specific act of "asphyxiation."

> There are several different types of asphyxiation to be considered in this case, including suffocation, choking, mechanical (traumatic/postural) asphyxiation, and Burking. Most of the evidence favors suffocation, however, other means of impeding respiration may have played a contributory role.

Defense Appellate Exhibit QQQ, bates page 17336.

Put another way, the allegation of "asphyxiation" is so vague that the Government's own medical examiner is unable to determine what specific "act" was done. If there is no specific "act" that can be identified, then it cannot be either inherently dangerous or show a wanton disregard for human life. Since Article 118 permits the Government the latitude to charge any act they perceive as unlawful, the law does nothing to narrow the class of people who could be charged with a crime. Thus, Article 118 is unconstitutionally vague as applied in this case and the charges must be dismissed.

Article 119 requires that a death be the result of "culpable negligence." For the same reasons described in the paragraphs above, this Article is unconstitutionally vague as applied in this case and the charges must be dismissed.

YN2 Richard has also been charged with violating UCMJ Article 131. This Article makes it unlawful to "wrongfully [do] a certain act." The language of "wrongfully" is not narrowed and could encompass anything the Government deems to be "wrong." Further, there is no definition of "certain act" that would narrow the class of people exposed to criminal punishment. Evidence that this Article, as applied in this case, is unconstitutionally vague, is the fact that the preliminary hearing officer found no probable cause for this offense, but the charge remains on the charge sheet for trial. Not only does the language of the statute encompass almost anything the Government decides is "wrong" but the Government doesn't even need probable cause to expose military members to prosecution. This Article is both unconstitutionally vague on its face and as applied in this case.

c. **Preclude the admission of electronic evidence provided by YN2 Richard to Government investigators**.

The Fourth Amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). When a motion has been made by the defense, 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 other exception applies. Mil. R. Evid. 311(d)(5). With respect to voluntariness, the Government must show by clear and convincing evidence that any

consent to search was voluntary. Mil. R. Evid. 314(e)(5). Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992); see *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (adopting the six-factor Murphy test from an Air Force court to determine voluntariness). A search warrant obtained using information obtained through violations of YN2 Richard's Fourth Amendment rights is invalid as the fruit of the poisonous tree. *Wong Sun et al. v. United States*, 371 U.S. 471, 484-487 (1963).

In this case, the Government investigators obtained consent to search through coercion[3] (Defense Appellate Exhibit YYY). This consent was withdrawn on 25 Jun 2020 (Defense Appellate Exhibit ZZZ). Any warrant obtained by CGIS following the withdrawal of consent is unlawful. Search warrants based on a prior Fourth Amendment violation should be suppressed as fruit of the poisonous tree. Further, the Government conducted a general download of information from YN2 Richard's computer and cell phone. This broad/general download of information exceeded the scope of consent and any legitimate purpose of a search warrant. YN2 Richard had no way of litigating this issue prior to the execution of the search warrants because the warrants were requested "under seal."

5. **Relief Requested.**

The Defense requests an order from the Court for the following relief:

[redacted]

b. Dismiss this case due to Articles 118, 119, and 131 being unconstitutionally vague.

c. Suppress the admission of electronic evidence provided by YN2 Richard to Government investigators.

6. **Enclosure.**

a. Defense Appellate Exhibit YYY, Consent to Search Form.

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[3] A separate motion has been filed regarding voluntariness of the alleged "confession." The same investigators used the same tactics to obtain consent to search.

b. Defense Appellate Exhibit ZZZ, Revocation of Consent to Search.

7. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 17th day of November, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 17th day of November 2021.

Dated this 17th day of November 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – PRESERVE CLAIMS FOR FEDERAL REVIEW 3 DEC 2021

RELIEF SOUGHT

The United States files this response in opposition to the Defense's motion for appropriate relief and asks that this Court deny the Defense's motion.

HEARING

A hearing is requested to present oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion to prove that Articles 118, 119, and 131(b) are void-for-vagueness. R.C.M. 905(c)(2).

As the proponent of the evidence, the Government bears the burden of persuasion to show that electronic evidence derived from YN2 Richard's devices and the testimony of BM2 [redacted] is admissible. R.C.M. 905(c)(2).

The burden of proof for any contested factual issues related to this motion is a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

The facts relevant to the issues raised in this motion are as follows:

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder) and one specification of Article 131b (Obstructing Justice). Based on this Court's ruling, the

Additional Charge of Article 119 (Involuntary Manslaughter) has been dismissed, without prejudice.

2. The Accused and BM2 [redacted] at the time of [redacted] death. [redacted] the Accused and BM2 [redacted] Bates No. 022600.

3. Pursuant to [redacted] in The Superior Court for the State of Alaska, [redacted] of the Accused and BM2 [redacted] Bates 001098-001103. Prior [redacted] the parties appeared telephonically with the presiding Superior Court to offer evidence in support of their request [redacted] It was noted that the [redacted]

4. Prior to the decision [redacted] YN2 Richard met with CGIS on 19 June 2020 for an interview. She made several notable admissions related to harming [redacted] See Government's 27 August 2021 Response to Defense Motion for Appropriate Relief CGIS Alleged Promises.

5. Subsequent to her admissions to CGIS, YN2 Richard separately told BM2 [redacted] on two occasions that she killed [redacted] These were private conversations. Specifically, the Accused told BM2 [redacted] that she swaddled [redacted] put her face-down in her crib, held [redacted] head down against the mattress until she stopped crying, and left the room. The first time YN2 Richard shared this information with BM2 [redacted] was on 19 June 2020. Bates 017567; Bates 019118. BM2 [redacted] had a hard time believing YN2 Richard at this moment. In his mind, "my thought process was, like, "Well, she's been here for like, seven, eight

hours. Like, of course, you know, you can break someone and make them believe anything." Bates 019118. In reality, CGIS' interview with YN2 Richard lasted no more than 1 hour and 40 minutes. YN2 Richard subsequently met with Coast Guard Medical providers and spent the afternoon getting tested for COVID-19. She chose not to communicate with BM2 [redacted] in the intervening time.

6. The second time YN2 Richard told [redacted] that she harmed [redacted] by pushing her head into the mattress was days later during a phone call from YN2 Richard to BM2 [redacted] BM2 [redacted] in disbelief that she could deny what she did to [redacted] for a month and a half and then say "this is what happened", questioned her twice. She reassured [redacted] stating "No, this is what happened." Bates 017567. YN2 Richard wanted BM2 [redacted] to be understanding and supportive of her.

7. BM2 [redacted] stated that YN2 Richard did not cry when she told him she had killed [redacted] He described her as "neutral" and showing no emotion while telling him what she had done to [redacted] Bates 017567.

8. The day of [redacted] death, YN2 Richard told BM2 [redacted] that she "might have swaddled [redacted] too tight." Bates 017567.

9. Later, YN2 Richard walked back her statements to [redacted] telling BM2 [redacted] on or around 21 June 2020 that "they kind of just, like, pressured me into, like, saying it." Bates 019111-12. At this point, BM2 [redacted] did not know what to believe.

10. On 22 June 2020, BM2 [redacted] was interviewed by CGIS. CGIS shared with BM2 [redacted] that "we know who did it because there was an admission." BM2 [redacted] was under the assumption that YN2 Richard had been interviewed by CGIS for "like seven hours" on 19 June 2020. Bates 019067. He reiterated this assumption on 25 June 2020, but CGIS

explained that she had not, that her interview lasted only one hour and 30 minutes. Bates 019114. BM2 [redacted] was asked if he thought he and YN2 Richard [redacted] BM2 [redacted] responded, "I have no idea. I mean if we do then kids are obviously out of the question." Bates 019088.

11. On 25 June 2020, BM2 [redacted] telephoned CGIS and asked to meet again. BM2 [redacted] desired greater clarity, and asked to see some medical evidence of [redacted] condition. Bates 019107. BM2 [redacted] desired some semblance of closure. Bates 019126. CGIS explained the medical examiner's report and showed him photographs of [redacted] Autopsy photographs DSCN0007, DSCN0011, and DSCN0012 were shown. Bates 000968-69. Prior to seeing the photographs or medical evidence, BM2 [redacted] stated that "I don't think I could be under the same roof as her." Bates 019127. After seeing the photographs and medical evidence, BM2 [redacted] told CGIS that he was going to speak with Master Chief [redacted] "right now". Bates 019164. BM2 [redacted] spoke to Master Chief [redacted] and told him that YN2 Richard admitted what she had done and that he was [redacted] Bates 017672.

12. On 26 May 2020, CGIS obtained consent from YN2 Richard to search her iPhone 11, phone number [redacted] for "preserved or deleted text messages, call logs, picture messages, video messages, photos, video, web data to include searches and cached data and email relating to the alleged offenses."

13. On 30 May 2020, Coast Guard Military Judge Jeffrey Barnum issued a search authorization for YN2 Richard's Apple iPhone, identified by phone number [redacted] This authorized Special Agent [redacted] or law enforcement agents acting on his behalf, to search the Apple iPhone identified by phone number [redacted] for "phone call history; call

logs; contacts; SMS/MMS messages; photos and videos (including any photos or videos wherever they are stored on the device); geolocation data; and application data for the following applications; Instagram, Facebook." Bates 000664.

14. An additional search authorization was issued by Military Judge Barnum on 30 May 2020 for YN2 Richard's silver/gray Apple MacBook laptop computer, Serial Number [redacted] Bates 000665-66.

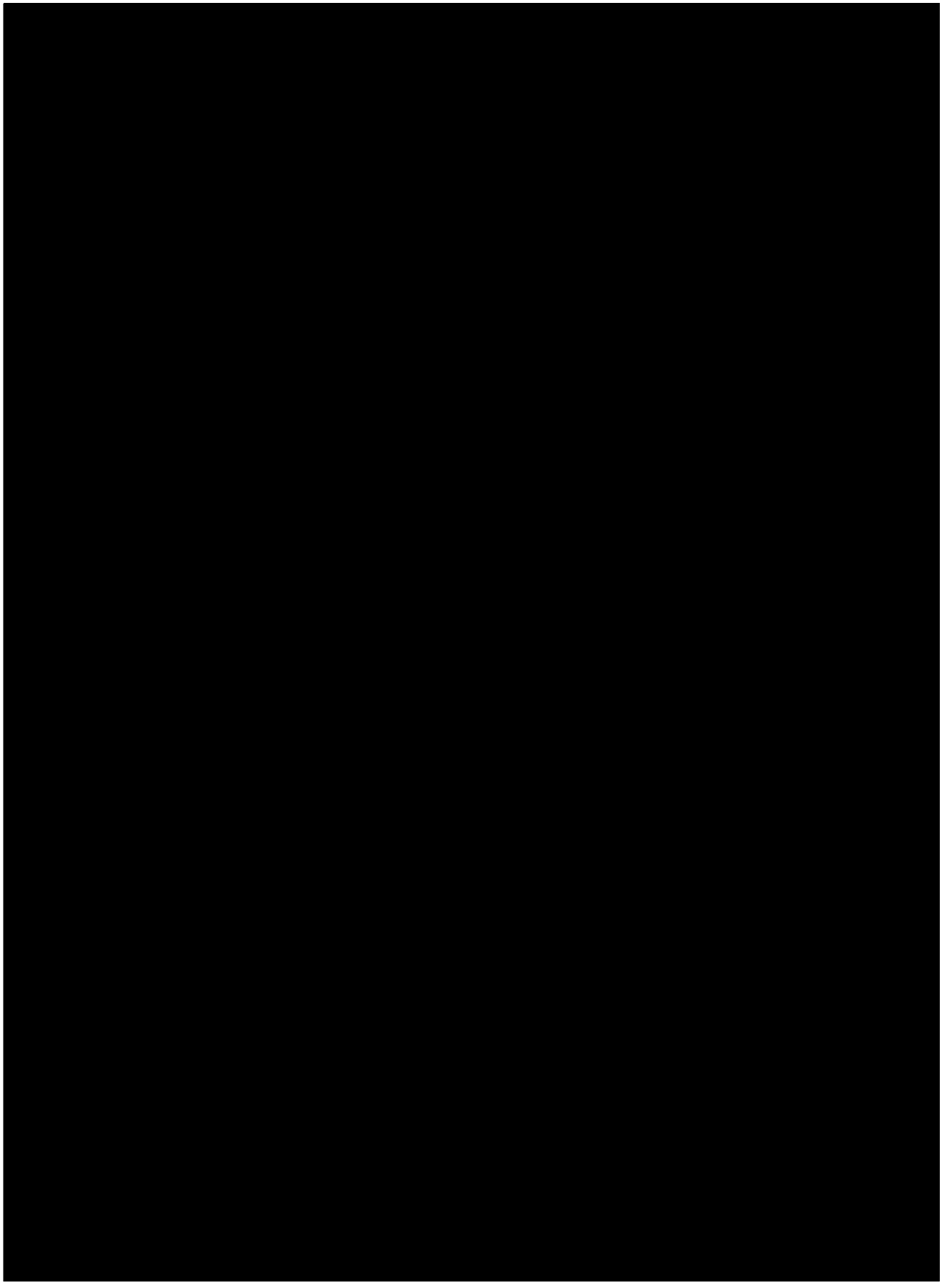
15. YN2 Richard's revocation of consent to search her phone on 25 June 2020 did not disrupt the search authorization previously issued on 30 May 2020.

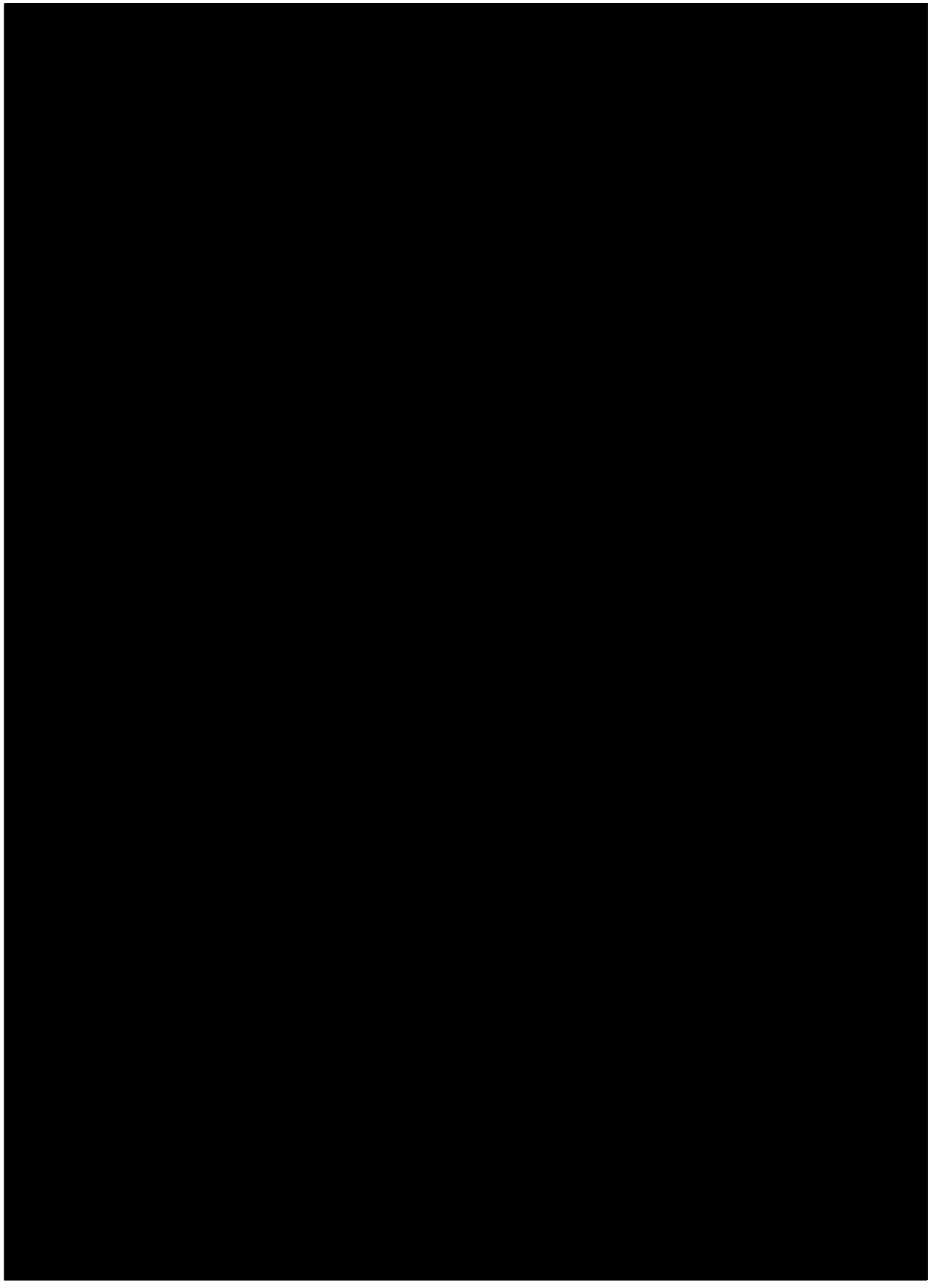
WITNESSES AND EVIDENCE

The Government does not intend to present any evidence or witnesses.

LEGAL AUTHORITY AND ARGUMENT

[redacted]





[redacted]

2. Not only is the Defense's argument meritless, but the Defense lacks standing to challenge Articles 118, 119 and Article 131b as being unconstitutionally vague.

Despite the fact that this issue has been litigated and re-litigated several times, the Defense continues to assert that the charges are void-for-vagueness. At issue here is the term "asphyxiation" in Articles 118 and 119, the legal standard of "culpable negligence" in Article 119, and the term "wrongful" in Article 131b. The Defense is making as-applied and facial vagueness challenges, claiming that these terms "do nothing to narrow the class of people who could be charged with a crime" and "could encompass anything the Government deems to be wrong." Defense Motion at 5.

The law is clear on this issue. In an as-applied vagueness challenge, a party who has notice of the criminality of his own conduct from the challenged statute may not attack it on grounds that the statute does not give fair warning to other conduct not at issue in the case. *Parker v. Levy,* 417 U.S. 733, 756 (1974). In other words, "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Id.*; *Woodis v. Westark Community College,* 160 F.3d 435, 438 (8th Cir. 1998). Since YN2 Richard is clearly a member of the Armed Forces and subject to the Uniform Code of Military Justice, the Defense lacks standing to challenge on void-for-vagueness grounds.

In a facial vagueness challenge, a court, generally speaking, "must uphold a facial challenge "only if enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 494–95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). However, laws that implicate constitutional rights receive a more stringent facial vagueness

test. *Id.* at 499, 102 S.Ct. 1186. In the First Amendment context, for example, facial invalidation is appropriate where the law reaches a substantial amount of protected conduct, even if the law is not vague in *all* its applications. *Id.*; *Levy,* 417 U.S. at 760, 94 S.Ct. 2547. This is certainly not the case here.

In the present case, YN2 Richard lacks standing to challenge for vagueness because she has notice of the criminality of her own conduct from the challenged statutes. This Court, in its ruling on 29 November, held that she did. The military is a notice pleading jurisdiction. *United States v. Sell*, 3 C.M.A. 202, 206 (1953). All that is required for a charge and specification to be sufficient is that they "first, contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defends, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The Government has met its burden. The Defense has more than adequate notice to inform her that she must defend herself against murder and obstruction, and enable a plea.

For the reasons which differentiate military society from civilian society, Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the military shall be governed than it is when prescribing rules for the civilian society. 10 U.S.C.A. §§ 933, 934. *Parker v. Levy*, 417 U.S. 733 (1974). The general articles of the Uniform Code of Military Justice are not subject to being condemned for specifying no standard of conduct at all, but are of the type of statute which by their terms or as authoritatively construed apply without question as to certain activities, but whose application to other behavior is uncertain. *Id.* Since YN2 Richard is clearly a member of the Armed Forces and subject to the Uniform Code of Military Justice, the Defense lacks standing to challenge on void-for-vagueness

grounds. Furthermore, challenges to "asphyxiation" in Article 118 and 119, the legal standard of "culpable negligence" in Article 119 and term "wrongful" in Article 131b are meritless.

3. **Valid search authorizations were issued for the Accused's cellular phone and laptop; subsequent revocation of consent to search her phone did not disrupt this authorization.**

Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization ... is admissible at trial when relevant and not otherwise inadmissible under these rules of the Constitution of the United States as applied to members of the Armed Forces." M.R.E. 315. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible. M.R.E. 311(a).

On 26 May 2020, CGIS obtained consent from YN2 Richard to search her iPhone 11, phone number [redacted] for "preserved or deleted text messages, call logs, picture messages, video messages, photos, video, web data to include searches and cached data and email relating to the alleged offenses." Her consent to search is documented; she chose to provide her phone to CGIS willingly.

On 30 May 2020, Coast Guard Military Judge Jeffrey Barnum issued a search authorization for YN2 Richard's Apple iPhone, identified by phone number [redacted] This authorized Special Agent [redacted] or law enforcement agents acting on his behalf, to search the Apple iPhone identified by phone number [redacted] for "phone call history; call logs; contacts; SMS/MMS messages; photos and videos (including any photos or videos wherever they are stored on the device); geolocation data; and application data for the following applications; Instagram, Facebook." Bates 000664. An additional search authorization was issued by Military Judge Barnum on 30 May 2020 for YN2 Richard's silver/gray Apple MacBook laptop computer, Serial Number [redacted] Bates 000665-66. YN2

Richard's revocation of consent to search her phone on 25 June 2020 did not disrupt the search authorization previously issued on 30 May 2020. The search authorizations issued previously remained in effect.

All evidence derived from the Accused's electronic data that the Government will seek to introduce at trial has been obtained lawfully pursuant to a valid search authorizations. Suppression is unjustified because there has not been an unlawful search or seizure.

EVIDENCE

The Government does not intend to introduce any witnesses; the following documentary exhibits are enclosed to this motion:

- **A.E. II – GGG**: [redacted]
- **A.E. II – HHH**: [redacted] of YN2 Richard and BM2 [redacted]
- **A.E. II – III**: Search Authorizations of YN2 Richard's Cellular Phone and Laptop

CONCLUSION

Based on the above, the Government requests that this Court deny the Defense motion in its entirety.

[redacted]
Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 December 2021.

[redacted]
Allison B. Murray
LCDR, USCG
Trial Counsel

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL FUNDING FOR EXPERT WITNESS AT TRIAL 30 December 2021

RELIEF SOUGHT

The Government respectfully requests the Military Judge deny the Defense's request to compel funding and production for Dr. [redacted] Ph.D.

HEARING

The Defense has forfeited its ability to file this motion. Rule for Courts-Martial 905(b)(4) requires motions for production of witnesses to be filed before a plea is entered. Although the Defense did not enter a plea at arraignment[1], that is only due to the trial management order issued by CDR Paul Casey, USCG, the original military judge, which itself was negotiated by the parties before submission to CDR Casey for his approval and authority to issue under Rule 801(a)(3). Under the trial management order then, the deadlines ordered by the military judge supersede the default deadlines provided in the Rules for Courts-Martial in the absence of such an order. *See, e.g.*, R.C.M. 903(a)(1). If this were not so, then the Defense would always be free to use the deferral of pleas "as a mechanism to allow defense counsel to ignore pretrial deadlines." *United States v. Criswell*, ARMY 20150530, 2017 WL 5157737, *5 (A. Ct. Crim. App. November 6, 2017). Given that the parties negotiated for three Article 39(a), UCMJ, hearings to litigate motions, and that the Defense contemplated using Dr. [redacted] as a witness by 8

[1] The plea was due 1 October 2021 per the trial management order, but the Defense did not provide the military judge YN2 Richard's plea. The military judge also did not enter a plea of not guilty for YN2 Richard.

October, the Defense had ample time to present this motion, at the latest, contemporaneously with their 19 November 2021 Motion to Suppress.

FACTS

On 9 July 2021, CDR Casey issued the trial management order. Before issuing, the Government and the Defense worked together to reach acceptable deadlines for discovery requests, responses, and witness requests including expert witness requests. Once the deadlines were acceptable to the parties, the Government sent to CDR Casey the management order for his approval.

The Defense agreed to a 29 July 2021 deadline to request from the convening authority production of expert witnesses. The Defense also agreed to a response deadline of 9 August 2021.

Three Article 39(a), UCMJ, proceedings were built into the management order. The first hearing was 2-3 September, the second hearing was 4 November[2], and the third hearing was 9-10 December. The order contained no requirement that motions to compel production of expert witnesses had to have been made before a certain hearing, except that the parties owed reciprocal proffers of expert testimony on 8 October in anticipation of a *Daubert* hearing to be held on the 4 November hearing.[3]

The Defense filed a motion to compel production of Dr. [redacted] on 8 July 2021 but as an expert consultant only. The parties litigated the motion at the 2-3 September Article 39(a), UCMJ, hearing. CDR Casey then ruled on 5 October that Dr. [redacted] was not necessary for the Defense's preparation.

[2] Changed from 3-4 November at the Defense's request on 15 July 2021.
[3] At the 4 November hearing, the military judge approved the Government's request to reschedule the *Daubert* hearing to the 9-10 December hearing.

However on 8 October, the Defense provided notice to the Government that Dr. [redacted] had been retained as an expert consultant and would, if called as a witness, testify about "the coercive nature of YN2 Richard's interrogation." Attachment NNN. Because Dr. [redacted] was a consultant, the Defense asked the Government not to contact Dr. [redacted] without first contacting the Defense.

Despite identifying Dr. [redacted] as a potential expert witness, the Defense never requested funding from the convening authority to secure Dr. [redacted] employment. Instead, on 28 October, the Defense sought funding from the Coast Guard through the Coast Guard's Office of Member Advocacy and Legal Assistance, a subsidiary of the Office of The Judge Advocate General. Attachment OOO. No funding was provided, nor did the Defense shift their request to the convening authority.

On 19 November, the Defense filed a motion to suppress a statement made by YN2 Richard. The Defense requested CDR Casey consider the testimony of Dr. [redacted] which would be presented at the 9-10 December hearing. However, having not received any proffer of Dr. [redacted] expected testimony, other than the generalized statement of potential subject matter testimony received on 8 October, the Government filed the same day a request for a *Daubert* hearing to be held at the 9-10 December hearing. The Defense replied by motion on 2 December, admitting that Dr. [redacted] would be available for cross-examination at the hearing vice telephonically. At the hearing, the Defense maintained Dr. [redacted] was still a consultant only.[4]

RESPONSE

Dr. [redacted] testimony is not necessary. The Defense claims Dr. [redacted] testimony is necessary "on the issue of voluntariness of YN2 Richard's statements to CGIS on 19 June 2020."

[4] Because Dr. [redacted] was still a consultant at personal expense to YN2 Richard, the Defense made Dr. [redacted] available to the Government for only fifteen minutes before his in-court testimony.

Def. Motion at 5. The voluntariness of YN2 Richard's statement, though, is not in issue, having been found by the military judge to have been made voluntarily.

As an additional justification, the Defense claims "[w]ithout Dr. [redacted] testimony at trial, the defense would be unable to put YN2 Richard's statements into psychological context or explain the effect on memory and biases from coercive interrogation techniques." *Id.* But this is outside the scope of Dr. [redacted] expertise. Dr. [redacted] is not a clinical psychologist nor a scholar of memory and bias.

Notwithstanding the insufficient justifications, and while not conceding that Dr. [redacted] testimony is necessary, the Defense's claim that "there is no adequate substitute for him" is unserious. *Id.* For one, the Government has no expert to rebut claims that so-called interrogation techniques used by law enforcement officers are coercive or that they even lead to false confessions, which cuts against their claim of reasonable comparability. Second, Dr. [redacted] is not a field researcher who conducts experiments using coercive interrogation techniques. He is a cataloguer and republisher of research findings. In that regard, the Defense would be adequately compensated with an Armed Forces psychologist who is aware of the same findings of coercive interrogation techniques as Dr. [redacted]

EVIDENCE

The Government adds the following attachments to its running Appellate Exhibit I:

NNN – 8 October 2021 Defense Notice of Expert Witness Testimony

OOO – Email chain showing Defense attempt to receive funding for Dr. [redacted]

CONCLUSION

Because the Defense has not shown good cause for their late filing, this issue ought to be held forfeited. As to the underlying merits of their request, the Defense's motion should be

denied because they have not demonstrated either the necessity of Dr. [redacted] presence or that a substitute would be inadequate.

Respectfully submitted,
ROBERTS.JASON.WILLI AM[redacted] Digitally signed by ROBERTS.JASON.WILLIAM[redacted] Date: 2021.12.30 13:28:19 -08'00'
Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 30 December 2021.

ROBERTS.JASON.WI LLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM[redacted] Date: 2021.12.30 13:28:36 -08'00'
Jason W. Roberts
LCDR, USCG
Trial Counsel

APPELLATE EXHIBIT 140
PAGE 5 OF 5 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. KATHLEEN RICHARD YN2 USCG	DEFENSE MOTION IN LIMINE – DEFENSE OPENING STATEMENT 29 DECEMBER 2021

MOTION

The Defense requests that the Court permit Defense Counsel to exceed 15 minutes. Defense Counsel further requests that Defense Counsel be permitted to show photographic evidence that both Defense Counsel and Trial Counsel have agreed will be admitted at trial.

FACTS

1. On April 18, 2020, YN2 Richard came home to find [redacted] discolored and non-responsive in her crib at Kodiak, Alaska base housing while BM2 [redacted] was caring for her. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

2. As part of the investigation, CGIS investigators obtained and reviewed security pictures and logs from the front gate security checkpoint for the day [redacted] died. CGIS Agent [redacted] provided a written report describing how the agents collected the information and verified the accuracy of the information.

3. On April 18, 2020, an Alaska State Trooper took photos at the hospital where [redacted] was treated and of the home where she was found.

4. On April 22, 2020, a CGIS agent took photos of the room where [redacted] was found unresponsive.

5. CGIS investigators obtained hospital security camera recordings for April 18, 2020, the day [redacted] died. The camera footage shows several vantage points of [redacted] being brought to the hospital for treatment.

6. On December 27, 2021, Defense Counsel and Trial Counsel agreed to the preadmission to some, but not all, of the photographs (Defense Appellate Exhibit UUUUUU). Trial Counsel has already sought preadmission of the hospital security surveillance camera recording; and Defense Counsel does not object.

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7. The former Trial Judge, CDR Casey, expressed to both Trial Counsel and Defense Counsel that he believed jeopardy attaches if he preadmits evidence. Thus, he was willing to make rulings on relevancy, but not admissibility.

BURDEN

The burden of proof and persuasion rests with the Defense as the moving party. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

LAW AND ARGUMENT

Rule 16 "Opening Statements" in the Coast Guard's "Court Rules of Practice and Procedure before Coast Guard Courts-Martial" states:

> Counsel may not show the members evidence that has not been admitted. Opening statements shall not exceed 15 minutes unless leave of the court is granted based upon good cause shown.

R.C.M. 906(b)(13) recognizes a preliminary ruling on admissibility of evidence as a request which may be made by a motion for appropriate relief.

Based on the prior Judge's belief, Defense Counsel has not moved to have any evidence preadmitted. However, both Trial Counsel and Defense Counsel agree that certain evidence is relevant and admissible. With respect to this evidence, Defense Counsel requests leave from this Court to show some, but not all, of the evidence to the panel members during opening statement. It is presumed that Trial Counsel will seek to do the same.

This case involves more than 100,000 pages of discovery. Some of the individual bates stamp numbers include thousands of pages of discovery. For example, bates number 8604 has 58,964 pages numbered 8604–1 through 8604–58,964. Based on the sheer volume of discovery, it is not possible to discuss the evidence with the panel members in 15 minutes during opening statement.

EVIDENCE

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

- Defense Appellate Exhibit UUUUUU: Email exchange between Defense Counsel and Trial Counsel dated December 27, 2021.

RELIEF REQUESTED

The Defense respectfully requests that this Court grant the following relief:

- Permit Defense Counsel to show some of the evidence that both Defense Counsel and Trial Counsel have agreed to admit at trial.
- Permit Defense Counsel to exceed the 15-minute time limit imposed by the Coast Guard's Rules of Practice and Procedure.

ORAL ARGUMENT

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 29th day of December, 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/Connor Simpson
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 29 December 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE MOTION TO COMPEL ADDITIONAL FUNDING FOR HOMICIDE INVESTIGATOR** **31 DECEMBER 2021**

MOTION

Pursuant to Rules for Courts-Martial ("R.C.M.") 906(b)(7) and 703(d), the defense moves this Court to compel additional funding for [redacted] the defense homicide investigator consultant and witness, to provide assistance to the defense at trial.

BURDEN

The burden of proof on any factual issue necessary to decide this motion is on the defense by a preponderance of the evidence. R.C.M. 905(c).

FACTS

1. On April 18, 2020, [redacted] BM2 [redacted] and YN2 Kathleen Richard (formerly "Kathleen Flores Guerra")) was found non-responsive in her crib at Kodiak, Alaska base housing. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

2. On May 19, 2021, Defense Counsel requested the assistance of a homicide investigator (Defense Appellate Exhibit G).

3. On June 18, 2021, the Convening Authority denied the defense' request for a homicide investigator (Defense Appellate Exhibit H).

4. On July 8, 2021, Defense Counsel filed a motion to compel the Government to provide funding for a defense homicide investigator.

5. On September 27, 2021, the Court denied the defense' motion to compel funding for a defense homicide investigator.

6. October 11, 2021, Defense Counsel filed a motion to reconsider the Court's ruling.

7. On November 18, 2021, the Court granted the defense' motion to reconsider and ordered the Government to fund 120 hours of work for [redacted] travel to and from Norfolk, Virginia, as well as funding for one day of testimony at trial.

8. On December 6, 2021, [redacted] was entered into the federal government's contracting system.

9. On December 28, 2021, a contract for [redacted] was approved through the federal government's contracting system (Defense Appellate Exhibit ZZZZZZ).

10. Trial will start on January 10, 2022. [redacted] must analyze 100,000 pages of discovery and provide expert advice to Defense Counsel in less than 14 days (December 28, 2021 to January 10, 2022).

11. On December 29, 2021, Defense Counsel requested funding from the Convening Authority for [redacted] to assist the defense at trial (Defense Appellate Exhibit AAAAAAA). As of the time of this filing, there has been no response

12. On December 31, 2021, Defense Counsel sent an email to Trial Counsel to determine whether or not a motion to compel funding would be necessary (Defense Appellate Exhibit BBBBBBB). As of the time of this filing, there has been no response.

LAW

"Compulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment, Article 46, U.C.M.J., 10 U.S.C. § 846 (2000) and Rule for Courts-Martial 703(d)." *United States v. Kreutzer*, 61 M.J. 293, 295 (C.A.A.F. 2005). Production of expert assistance is required if denial of that assistance would result in an unfair trial. *United States v. Allen*, 31 M.J. 572, 624 (NMCMR 1990, affirmed 33 M.J. 209 (CMA 1991)). Under Article 46, U.C.M.J., the defense may request experts who assist them in "evaluating, identifying, and developing evidence," as well as "test and challenge the Government's case." *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005). In the case at bar, the court has already determined that Chris [redacted] assistance is necessary as part of the defense' preparation for trial as well as providing testimony during the defense case at trial.

DISCUSSION

The Government has listed seven law enforcement personnel who will testify at trial. After substantial litigation, the defense has been granted the assistance of a single law enforcement professional to rebut the testimony of the seven Government witnesses. In order to assist Defense Counsel in preparation of cross-examination of the Government's witnesses, and to provide effective testimony, [redacted] will need to observe the Government's witnesses at trial. The Government will have assistance of law enforcement professionals throughout the trial and it would be fundamentally unfair to deny Defense Counsel similar assistance. The Court should compel necessary funding for [redacted] to serve as an

expert consultant to assist the defense in during the course of trial, and in preparation for his testimony in the defense case at trial.

RELIEF REQUESTED

The defense respectfully requests this Court to compel the convening authority to provide funding for [redacted] to be present in Norfolk, Virginia from January 10 through January 28, 2022.

ORAL ARGUMENT

Due to the fact that trial is less than two weeks away, oral argument is not requested.

EVIDENCE

Defense requests the Court consider the following evidence not already provided to the court:

- Defense Appellate Exhibit ZZZZZZ: Contract for [redacted] dated Dec 28, 2021
- Defense Appellate Exhibit AAAAAAA: Request for Convening Authority to fund [redacted] attendance at trial, dated Dec 29, 2021
- Defense Appellate Exhibit BBBBBBB: Email from Defense Counsel to Trial Counsel on Dec 31, 2021

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT, USCG
Defense Counsel

CERTIFICATION OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 31 December 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL ADDITIONAL FUNDING FOR HOMICIDE INVESTIGATOR 3 January 2022

RELIEF SOUGHT

The Government respectfully requests the Military Judge deny the Defense's request to compel additional funding for Mr. [redacted] the defense homicide investigator consultant and witness.

HEARING

The Government does not request oral argument on this motion.

LAW

Military due process entitles a service member to assistance from an expert "when necessary for the preparation of an adequate defense." *United States v. Garries*, 22 M.J. 291 (C.M.A. 1986). The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the Defense Counsel is unable to gather and present the evidence that the expert assistant would be able to develop. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). Necessity requires more than a mere possibility of assistance. *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010) (the defense's desire to "explore all possibilities" did not reach the "reasonable probability" threshold). The defense has the burden to show a reasonable probability that the expert would assist the defense and that denial of the expert would result in a fundamentally unfair trial. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

FACTS

On 9 July 2021, CDR Casey issued the trial management order. Before issuing, the Government and the Defense worked together to reach acceptable deadlines for discovery requests, responses, and witness requests including expert witness requests. Once the deadlines were acceptable to the parties, the Government sent CDR Casey the management order for his approval.

The Defense agreed to a 29 July 2021 deadline to request from the convening authority production of expert witnesses and consultants. The Defense also agreed to a response deadline of 9 August 2021.

Three Article 39(a), UCMJ, proceedings were built into the management order. The first hearing was 2-3 September, the second hearing was 4 November[1], and the third hearing was 9-10 December.

On 18 November 2021, CDR Casey, then military judge, found that the Defense had met its burden in establishing that a homicide investigator would be of assistance. CDR Casey ordered the Government to fund an expert homicide investigator for *no more than* 120 total hours for pretrial preparation and one day of testimony at trial, cited at his hourly rate of [redacted] The Court stated that funding "shall not exceed [redacted]" **A.E. II – UUU at 5**. This grant followed a motion for reconsideration by the Defense after the military judge previously ruled Mr. [redacted] assistance unnecessary. This issue was litigated at length during the Article 39(a) sessions on 2 September and 4 November 2021. During the 9-10 December Article 39(a) session, the Defense did not submit any new requests regarding Mr. [redacted] other than a request for the Government to expedite completion of his contract. Mr. [redacted] contract was awarded on 28 December 2021.

[1] Changed from 3-4 November at the Defense's request on 15 July 2021.

The Military Judge based his 18 November ruling on the following proffers by Defense regarding Mr. [redacted] **(A.E. II – UUU)**, as articulated in their requests, motions, and arguments in court:

Mr. [redacted] assistance would be used in (1) determining what investigative steps should be taken in preparation for trial; (2) identification of possible affirmative defense; (3) preparation for, and conducting, pretrial interviews; (4) identifying investigative leads to pursue prior to trial; (5) *preparing for cross-examination of the investigating agents*; (6) determining whether or not a defense theory is viable or whether an accused should attempt to negotiate a plea agreement; (7) *helping educate the panel in determining the credibility, impartiality, and professionalism of the CGIS investigation*; and (8) determining whether or not a defense theory is viable or whether an accused should attempt to negotiate a plea agreement. *Id.*

The Defense asked for 120 hours at Mr. [redacted] rate of [redacted] on at least three occasions. **A.E. II - QQQ at 1, RRR at 13, and TTT at 2.** At no point during the Article 39(a) sessions in September and November, or in any of the two motions submitted by the Defense on this issue, did the Defense articulate the need for Mr. [redacted] assistance for the entirety of trial, or funding beyond [redacted]

On 29 December 2021, after the contract had been awarded, defense counsel submitted its first request for additional funding for Mr. [redacted] including all days of trial from 10-28 January 2022. This request was filed before the defense had even the opportunity to expend any of the 120 hours provided. Though the military judge previously ordered funding for Mr. [redacted] presence for one day of testimony and 120 hours of pretrial preparation, the defense's new request included the same day of testimony already provided for and all other days at trial, from *voir dire* through potential sentencing.

Trial Counsel forwarded the defense request for additional funds to the Staff Judge Advocate for routing to the Convening Authority on 29 December 2021. On 3 January 2022, Trial Counsel received his reply denying the defense request for additional funds. **A.E. II – VVV**.

Defense Counsel filed his motion to compel additional funding on 31 December 2021 prior to the Convening Authority's denial.

RESPONSE

The Defense has forfeited its ability to file this motion. Rule for Courts-Martial 905(b)(4) requires motions for production of witnesses to be filed before a plea is entered. Although the Defense did not enter a plea at arraignment[2], that is only due to the trial management order issued by CDR Paul Casey, USCG, the original military judge, which itself was negotiated by the parties before submission to CDR Casey for his approval and authority to issue under Rule 801(a)(3). Under the trial management order then, the deadlines ordered by the military judge supersede the default deadlines provided in the Rules for Courts-Martial in the absence of such an order. *See, e.g.*, R.C.M. 903(a)(1). If this were not so, then the Defense would always be free to use the deferral of pleas "as a mechanism to allow defense counsel to ignore pretrial deadlines." *United States v. Criswell*, ARMY 20150530, 2017 WL 5157737, *5 (A. Ct. Crim. App. November 6, 2017). Given that the parties negotiated for three Article 39(a), UCMJ, hearings to litigate motions, and the Defense had ample time to present this motion, at the latest, contemporaneously with their motion to reconsider the court's ruling in October, the defense has forfeited its ability to file this eve-of-trial filing.

Moreover, the Defense has failed to show good cause for this late filing when it has known since it received the court's ruling on 18 November 2021 that funding was limited to 120

[2] The plea was due 1 October 2021 per the trial management order, but the Defense did not provide the military judge YN2 Richard's plea. The military judge also did not enter a plea of not guilty for YN2 Richard.

hours, one day of testimony, and no more than [redacted] There is absolutely no good reason – and the defense has not proffered one – why the defense waited until the contract had been awarded and nearly a week before trial to request additional funds. To ensure respect for court orders and discourage gamesmanship among parties, the Military Judge should not entertain the defense's request.

Finally, even if this court were to hear the defense's filing on the merits, the defense have failed to prove the necessity of this additional funding. Proving necessity is the defense's burden, which they have not met. The judge's prior ruling incorporates all uses for Mr. [redacted] as required by defense. The defense based this estimate on the same information that we know now – that the trial was scheduled for three weeks and that the government would call law enforcement fact witnesses. The defense repeated its request for 120 hours and a day of testimony at trial during subsequent motions and at least two Article 39(a) sessions. There has been no sudden change overnight to require more than double the funding originally asked for and funding for trial days outside the scope of Mr. [redacted] testimony. Nothing has changed. Indeed, the only cited need in the defense's new request – to "provide assistance to defense counsel in preparing cross-examination of … investigators" – was already provided for by the Government in the original contract. Based on necessity, the judge only granted 120 hours or [redacted] worth of funds. To expand this allotment based on the Court's earlier ruling would run counter to his holding.

It is also not true that the government "will be paying the expenses for seven law enforcement officers to travel to Norfolk, VA to assist Trial Counsel," such that denial of additional funding would result in fundamentally unfair trial. All of the government's law enforcement fact witnesses have been requested by defense for production as well. Many of these witnesses were interviewed by defense counsel pre-trial; the defense is well aware of what they will testify to at trial. The defense also has the complete CGIS Report of Investigation to

base their cross-examination questions. As stewards of taxpayer resources, trial counsel will only keep witnesses in Norfolk as necessary for their testimony and will return witnesses to their units as soon as released by the court. These witnesses will not be sitting at trial as spectators to assist counsel with cross-examination. Cross-examination is the job of the attorneys, which we intend to do ourselves. These fact witnesses are not consultants.

CDR Casey capped the defense team at 120 hours – the defense are required to use that time wisely. Government funding does not have an open spigot and corresponding case law does not support government funding of defense experts to sit around at trial in the event that they might be necessary. To argue that additional funding is "necessary" after six months of motions and oral arguments on this issue, where the defense at any point could have amended its 120 hour estimate but waited until after the contract had been awarded, before even an hour had been expended, without any new justification, and on the eve of trial, is simply unsubstantiated. For the foregoing reasons, this court should deny the defense request.

EVIDENCE

The Government adds the following attachments to its running Appellate Exhibit II:

- PPP – Defense Counsel Memo of 29 Dec 2021
- QQQ – DEF Initial Request for Funding of [redacted] of 19 May 2021
- RRR – DEF Motion to Compel Production of Expert Consultants of 8 July 2021
- SSS – Ruling on Defense Motion to Compel Expert Assistance of 27 Sep 2021
- TTT – DEF Motion for Reconsideration - Ruling on Motion to Compel Funding for a Homicide Investigator of 11 Oct 2021
- UUU – Ruling on Defense Motion for Reconsideration - Funding for Homicide Investigator of 18 Nov 2021
- VVV – Denial of Defense Expert Assistance ICO U.S. v. YN2 KATHLEEN RICHARD, USCG of 3 January 2022

CONCLUSION

Because the Defense has not shown good cause for their late filing, this issue ought to be held forfeited. As to the underlying merits of their request, the Defense's motion should be denied because they have not demonstrated the necessity of additional funding.

Respectfully submitted,

[redacted] MURRAY.ALLISON.BLAIR[redacted] Digitally signed by MURRAY.ALLISON.BLAIR[redacted] Date: 2022.01.03 14:26:45 -08'00'

Allison B. Murray[redacted]
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 3 January 2022.

[redacted]

Allison B. Murray[redacted]
LCDR, USCG
Trial Counsel

Appellate Exhibit 158
Page 7 of 7

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. KATHLEEN RICHARD YN2 USCG	DEFENSE MOTION IN LIMINE – EXCLUSION OF DIGITAL FORENSIC EXAMINATION DATA 31 DECEMBER 2021

MOTION

The Defense requests that the Court exclude all evidence from the hard drive provided to the Defense on December 21, 2021 pursuant to R.C.M. 701(f)(3)(C).

FACTS

1. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on July 8, 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

2. As part of the investigation in this case, CGIS conducted a digital forensic examination with the assistance of the FBI of three electronic devices—YN2 Richard's cellphone, BM2 [redacted] cellphone, and BM2 [redacted] laptop in May-June 2020.

3. On July 8, 2021, Defense Counsel sent Trial Counsel its initial discovery request.

4. On July 28, 2021, the Government contacted the Defense via email requesting an appropriate address to send the disks containing the digital forensic examination (DFE) files.

5. Defense received the DFE disks in early August, 2021.

6. On September 10, 2021, Defense's digital forensic expert, Mr. [redacted] received the DFE disks and identified that they contained 290 gigabytes (GB) of data.[1]

7. The data contained on these DFE disks consists of digital forensic reports in readable PDF format of the data contained on the examined devices.

[1] The approximate month delay in Mr. [redacted] ability to receive and review the DFE disks was due to the timing of when he was approved to begin working on this case.

8. During the Article 39a hearing on December 9–10, 2021, the Government stated that they requested that the FBI re-send the DFE files.

9. On December 17, 2021, the Government notified the Defense via email that a hard drive with the DFE files would be arriving in Alameda, CA on December 20, 2021.

10. On December 18, 2021, the Defense requested these DFE data be sent directly to Mr. [redacted] for his review.

11. On December 21, 2021, Mr. [redacted] received the additional DFE data via overnight delivery from the Government in the form of an internal hard drive which was initially inoperable.

12. On December 27, 2021, Mr. [redacted] was able to access the contents of the internal hard drive and determined that the hard drive consisted of 937 GBs of data.

13. On December 29, 2021, Mr. [redacted] determined that the internal hard drive contained 647 GBs of additional data than that originally received by the Defense and that this data constituted the "full forensic images" of the three devices reviewed during the DFE.

14. Mr. [redacted] informed the defense counsel that it would take a significant amount of time to review all of this new data.

15. For reference, 647 GBs of data can include approximately 438,666,000 pages of text files, or 64,700,000 pages of emails, or 42,055,000 pages of Microsoft word files, or 11,322,500 pages of Microsoft PowerPoint slides, or 10,028,500 images.

BURDEN

The burden of proof and persuasion rests with the Defense as the moving party. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

LAW

Discovery practice in military courts is much broader than in federal courts. Article 46, UMCJ, RCMs 701, 702, 703, and 914 all encourage maximum possible disclosure by both parties in order to promote bargaining and judicial economy and to reduce gamesmanship in the trial process. *See United States v. Stellato,* 74 M.J. 473, 481 (C.A.A.F. 2015). Each party is guaranteed equal access to witnesses and evidence. *See* Article 46, UCMJ. "Upon request of the defense, the Government *shall* permit the defense to inspect books, paper documents, data, photographs, tangible objects, buildings, or places, or copies of these if the item is within the possession, custody, or control of military authorities and the item is relevant to defense preparation." *See* R.C.M. 701(a)(2)(A)(i).

"In accordance with RCM 701(d), trial counsel have a continuing duty to disclose information that is favorable to the defense throughout the prosecution of the alleged offenses

against the accused. In general, trial counsel should exercise due diligence and good faith in learning about any evidence favorable to the defense known to others action on the Government's behalf in the case." *See* R.C.M. 701(a)(6) Discussion.

"Trial counsel cannot avoid R.C.M. 701(a)(2)(A) through the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Stellato* at 484. "Article III Courts 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 instances include: (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 local sheriff's office and the object remains in the possession of the local law enforcement." *Id.*

ARGUMENT

A. The late disclosure of complete forensic images from the digital devices collected in this case violates the Government's discovery obligations under R.C.M. 701.

Here, the internal hard drive with the complete forensic images (DFE data) provided to defense on 21 December 2021 was discoverable under R.C.M. 701(2)(A)(i) and was in the possession, custody, or control of the Government under *Stellato*. First, the Government had knowledge and access to the additional DFE data. As identified above, the digital forensic examination in this case was conducted in approximately May 2020. In conducting this examination the Coast Guard requested the assistance of the FBI in completing a comprehensive DFE of the three referenced devices. Since that DFE, the Government has provided the Defense portions of the DFE data—i.e., August 2021 discovery and shown an ability to obtain additional data—e.g., the Prosecution's statements following the December 10, 2021 Article 39a hearing about requesting the DFE disks from the FBI. As such, the Government had knowledge of and access to the additional DFE data. Second, the Government had the legal right to obtain the additional DFE data. Specifically, the Coast Guard was able to obtain the results of the DFE conducted by the FBI as evidenced by the Prosecution's disclosures of portions of the DFE data in August 2021 and in December 2021. Third, the additional DFE data was in the possession of the FBI as part of a joint investigation by the Coast Guard and FBI. While the DFE was conducted by the FBI and the data remained in the possession of the FBI, this was the result of the Coast Guard requesting the FBI's assistance in conducting the aforementioned DFE. Since the completion of the DFE, the Coast Guard—i.e., CGIS and the Prosecution, have been able to receive and review the results of the DFE conducted by the FBI and the underlying data obtained as part of that DFE. Fourth, the 647 GBs of additional DFE have remained in the possession of the FBI since the completion of the DFE of the three examined devices. As such, the additional DFE data was discoverable under R.C.M. 701(a)(2)(A)(i) as it was in the possession, control, and custody of the Coast Guard under *Stellato*.

B. Exclusion of the additional DFE data is the only appropriate remedy under R.C.M. 701(f)(3).

The delayed disclosure of the complete forensic images of each electronic device has prejudiced the Defense's preparation by placing the Defense in the position of having to review three times the amount of data initially received in the Government's initial disclosure approximately 20 days before trial. R.C.M. 701(f)(3) enumerates several remedies for violations of R.C.M. 701, the most appropriate and equitable in this case is that found under R.C.M. 701(f)(3)(C). R.C.M. 701(f)(3)(C) states that a failure to comply with one of the provisions under R.C.M. 701 can result in the military judge "prohibit[ing] the party from introducing evidence . . . not disclosed." Such a remedy is appropriate in this instance as it not only remedies the prejudice to the Defense of having to review the additional DFE data that was previously in the possession of the Government well before it was disclosed to the Defense on December 21, 2021, but protects YN2 Richard's speedy trial rights by avoiding a continuance. While R.C.M. 701(f)(3) permits the granting of a continuance as a possible remedy for violations of R.C.M. 701, such a remedy is inappropriate here. Specifically, the cause of the discovery violation is solely on the Government and their failure to obtain and disclose the additional DFE data despite having knowledge, access, and control over the data. Additionally, a continuance would usurp the accused's demand for a speedy trial and result in substantial administrative and financial costs due to the need to reschedule a three week long general court-martial. Such a scenario is inequitable to the accused and contrary to the interests of judicial efficiency or economy.

EVIDENCE

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

Enclosure XXXXXX: Email from Trial Counsel dated July 28, 2021 regarding discovery of DFE disks.

- Enclosure YYYYYY: Email from Trial Counsel dated December 17, 2021 regarding discovery of additional DFE disks.

RELIEF REQUESTED

The Defense respectfully requests that this Court exclude the admission of any of the digital forensic evidence contained on the internal hard drive discovered to the Defense on December 21, 2021 as untimely under R.C.M. 701.

ORAL ARGUMENT

Defense counsel requests oral argument on this motion, if opposed by the Government.

[redacted]
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

/s/
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 31 December 2021.

[redacted]
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES OF AMERICA **v.** **Kathleen Richard** **YN2/E-5, U.S. Coast Guard**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE DIGITAL EVIDENCE** **5 January 2022**

RELIEF SOUGHT

The Government requests the Court deny the Defense motion to exclude digital evidence because the Defense has failed to articulate a violation of R.C.M. 701.

HEARING

The Government requests a hearing for oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense bears the burden of persuasion and the burden of proof for any facts necessary to decide the motion by a preponderance of the evidence. R.C.M. 905.

FACTS

The Government agrees with the facts in paragraphs 2-10 of the Defense's motion and supplements with the following additional facts:

1. Shortly before the 9-10 December motions hearing, Mr. [redacted] the Government's digital forensic expert, notified trial counsel that the evidence sent from the FBI contained only UFED reports of the extractions, without raw data files containing forensic images of the three devices.
2. The Government promptly requested that the FBI provide forensic copies of all

devices, which were then immediately delivered to Mr. [redacted] and Mr. [redacted]

3. With the exception of YN2 Richard's laptop, the "additional" data are data that were previously disclosed to the Defense, just in a different format. Mr. [redacted] requested the forensic copies to verify if the FBI-generated reports were complete and reflected everything contained on the devices. Because the reports can be manipulated to exclude certain data, it was prudent to cross-reference the reports with the forensic images of the devices.
4. Accordingly, the "additional" data contains no new information; just raw data from which the previously-disclosed reports were derived from.[1]
5. The drive of additional data sent to the defense contained two folders: Processed Data (345 GB) and RAW Source Extraction (652 GB).
6. Processed data is the same data (reports) that was provided in the summer with the exception of YN2 Richard's MacBook.
7. RAW Source Extractions are the forensic images which were provided in a report form rather than the forensic image. It appears that all of the reports provided are complete.
8. Upon requesting forensic copies from the FBI, the Government also received for the first time, a forensic copy of the Accused's laptop. The Government and Defense received this around the time same. This is a single hard drive image from a single computer which is 292.78 GB in size. The normal time to review this amount of data is 20 to 25 hours for a full review.

[1] Indeed, the contents from the DFE were the subject of previous MRE 404(b) motions, which necessarily means the Defense had knowledge and possession of the substantive evidence contained in the DFE reports.

WITNESSES/EVIDENCE

The Government intends to call Mr. [redacted] as a witness.

LEGAL AUTHORITY AND ARGUMENT

I. The "additional" DFE data is not new evidence not previously disclosed.

The Government does not dispute that the Defense is entitled to forensic images of all digital devices collected by law enforcement. However, the Defense is seeking relief because they contend that the additional discovery is new evidence that requires more than 20 days to review. The Defense was provided all the substantive evidence related to the DFE of the three devices through UFED reports, which compiled the data into a readable, digestible, and searchable format. The forensic copies that were later provided only serves as verification that the UFED reports included all data from the DFE, and the user of the extraction software did not advertently or inadvertently omit any data. Accordingly, raw files from the forensic copies (which were disclosed later) is not new evidence when the substantive information from the DFE were all previously disclosed to the Defense in the form of UFED reports.

The Government only realized the missing forensic files when Mr. [redacted] first identified the issue. Moreover, Defense never raised the issue when challenging the first prong of the *Reynolds* test in its MRE 404(b) motion, nor specifically asked for it despite filing a dozen or so specific discovery requests. Although Mr. [redacted] has been retained by the Defense since August 2021, the Defense never requested inspection of the forensic files. Had Mr. [redacted] not notified trial counsel that the Government was also missing the forensic images, the Defense may have found an opportunity to attack Mr. [redacted] testimony by highlighting that he never reviewed the raw data files before coming to an opinion. Finally, three weeks is ample time for the Defense expert to compare the forensic copies with the UFED reports and perform additional analysis on

the laptop. Both parties have the same amount of time to review the content from YN2 Richard's laptop. Relief under RCM 701(g)(3) is not warranted when there has been no discovery violation.[2]

CONCLUSION

Having failed to meet its burden, the Defense motion should be denied.

YAO.IRIS.[redacted] Digitally signed by YAO.IRIS[redacted] Date: 2022.01.05 11:37:59 -05'00'

Iris Yao
MAJ, U.S. Army
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 5 January 2022.

YAO.IRIS.[redacted] Digitally signed by YAO.IRIS[redacted] Date: 2022.01.05 11:38:28 -05'00'

Iris Yao
MAJ, U.S. Army
Assistant Trial Counsel

[2] The Defense motion references RCM 701(f)(3). RCM 701(g)(3) enumerates remedies when there has been a violation of RCM 701.

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**DEFENSE MOTION IN LIMINE – ADMISSIBILITY OF EVIDENCE** **16 JANUARY 2022**

MOTION

The Defense requests that the court admit Defense Exhibit D – a photograph of YN2 Richard with red, blotchy skin.

FACTS

1. On 14 January 2022, BM2 [redacted] testified that he has personal knowledge of YN2 Richard's face, neck, and chest turning red and blotchy when she is nervous or stressed.

2. Defense Exhibit C is a photograph of YN2 Richard's face, neck and chest. This photograph shows her skin red and blotchy.

3. Government's theory is that YN2 Richard became frustrated and/or angry with [redacted] because she would not stop crying and she would not take a nap. The government's theory is that this frustration/anger is what caused YN2 Richard to murder [redacted] on 18 April 2020 by intentionally holding her head down into the mattress of her crib.

4. Ms. [redacted] will testify that when she arrived at the [redacted] on the afternoon of 18 April 2020, YN2 Richard was calmly folding clothes on the couch. She will also testify that YN2 Richard's skin was not red or blotchy.

BURDEN

The burden of proof and persuasion rests with the Defense as the moving party. The standard of proof as to any factual issue necessary to decide this motion is by a preponderance of the evidence. R.C.M. 905(c).

LAW AND ARGUMENT

The law establishes that the proponent of the evidences bears the burden to prove its admissibility and the Military Judge ultimately determines whether the evidence is admissible. M.R.E. 104; M.R.E. 401. M.R.E. 104(c) states that a military judge must conduct any hearing on

a preliminary question so that the members cannot hear it if: (1) the hearing involves the admissibility of a statement of the accused under M.R.E. 301-306; (2) the accused is a witness and so requests; or (3) justice so requires.

M.R.E. 401, 402, and 403 control the admissibility of evidence. Per M.R.E. 401, "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Under M.R.E.402, "Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts-martial; (3) these rules; or (4) this Manual. Irrelevant evidence is not admissible." Per M.R.E. 403, "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."

"Human lie detector testimony is inadmissible." *United States v. Carnio-Navarro*, No. ACM S32340, 2017 CCA LEXIS 90, at *5 (A.F. Ct. Crim. App. Feb. 9, 2017) (quoting *United States v. Whitney*, 55 M.J. 413, 415 (C.A.A.F. 2001)). "Human lie detector testimony is elicited when a witness provides 'an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case.'" *Id.* (quoting *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). "There is no litmus test for determining whether a witness has offered 'human lie detector' evidence." *Id.* (quoting *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005)). "If a witness does not expressly state that he believes a person's statements are truthful, we examine the testimony to determine if it is the "functional equivalent" of human lie detector testimony." *Id. See also United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007). "Testimony is the functional equivalent of human lie detector testimony when it invades the unique province of the court members to determine the credibility of witnesses, and the substance of the testimony leads the members to infer that the witness believes a person is truthful or deceitful with respect to an issue at trial." *Id. See also United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010).

In *United States v. Knapp*, 73 M.J. 33, 35 (C.A.A.F. 2014), the trial counsel asked the AFOSI agent about nonverbal cues the agent saw on the accused's face during his interrogation which prompted the agent to continue challenging the accused's denial of wrong doing. In response, the agent testified that "large red sun blotches" would appear on the accused's face when he spoke about the actual incident. The defense objected to this testimony as human lie detector testimony, but the military judge overruled the objection as long as the trial counsel agreed not to draw an inference from those responses. The CAAF concluded that the AFOSI agent ultimately went too far in his testimony when he said that he had been trained to divine a suspect's credibility from his physical reactions to the questioning. This testimony suggested that the AFOSI agent evaluated the accused's denial and determined the credibility of the denial impermissibly "usurp[ed] the [members'] exclusive function to weigh evidence and determine credibility." *Id.* 73 M.J. at 37 (internal quotations omitted).

Here, BM2 [redacted] testified that he has seen YN2 Richard get red, blotchy marks on her face when she is stressed or nervous. His testimony did not relate to YN2 Richard's

credibility and did not relate to her truthfulness. Rather, the evidence of YN2 Richard's red, blotchy skin is being offered to rebut the government's assertion that YN2 Richard was stressed, frustrated, angry, or nervous on 18 April 2020 during the time they allege she killed [redacted] and/or immediately after they allege she killed [redacted] Allowing the defense to present a photograph of these red, blotchy marks would not usurp the members' exclusive function to weigh evidence and determine credibility because it is not in any way offered for credibility purposes and is therefore not even the functional equivalent of human lie detector testimony.

RELIEF REQUESTED

The defense requests the Court permit the defense to admit Defense Exhibit D, a photograph of YN2 Richard's red, blotchy skin.

EVIDENCE

The defense does not have any additional evidence to present.

ORAL ARGUMENT

If opposed, the defense requests oral argument.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
M. LUCE
LCDR, JAGC, USN
Individual Military Counsel

C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on 16 January 2022.

[redacted]
[redacted]J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES V. YN2 KATHLEEN RICHARD	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE – ADMISSIBILITY OF EVIDENCE 17 JANUARY 2022

RESPONSE

Testimony regarding YN2 Richard's alleged blotchy skin as a physical response to stress is conceptually in the same category as human lie detector testimony under *Knapp.* It is conceptually the same because it is requesting a witness to testify about physical observations solely to gain an impermissible inference from the evidence. As such, this evidence is irrelevant, substantially more prejudicial than probative, substantially more misleading than probative, and is improper lay testimony. See M.R.E. 401, 403, 701.

Initially, this testimony and evidence is only relevant for the purpose of getting to the highly stretched inference that the Defense wants to make in this case: if YN2 Richard's skin was not blotchy during the afternoon of 18 April 2020, she must be innocent. Such a strained inference is not an allowable reasonable inference to make based upon the evidence in this case.

While parties can generally elicit physical appearance and demeanor evidence, arguing that a person's physical appearance is evidence of their culpability (or innocence) is not a reasonable inference. This evidence's only relevance is go get an inference which would only be permissible through expert testimony. M.R.E. 701(c). It is quite telling that the Defense does not seek to introduce this evidence through a medical expert, and does not intend to have any medical expert actually opine on the veracity and reliability of this theory. Without such expert testimony, the true reliability and credulity of this theory is entirely unknown. That creates a significant potential for misuse of this evidence by the members. It also makes this evidence substantially more misleading than it is probative.

The defense elicited from BM2 [redacted] during cross-examination that YN2 Richard's skin sometimes turns red and blotchy. Def. Mot. 1. The defense proffers that [redacted] will testify that she did not see YN2 Richard's skin red and blotchy on the afternoon of April 18, 2020. Ultimately, whether YN2 Richard's skin turns a shade of red and blotchy under stress does not make any fact of consequence more or less probable. Frustration and anger do not always go hand in hand with being stressed. One can be angry while being cool and calm. More problematic, however, is that without a medical expert to provide some credence to this theory it is improper lay testimony because of the impermissible inference that would result.

Even if YN2 Richard's skin coloration is not strictly speaking human lie detector testimony, it is not a stretch to believe that the members would potentially use it as such. Involuntary physical responses, like sweating or nervously laughing, for example, are subject to wild, unfair misinterpretations relating to credibility and truthfulness. Similarly, this testimony

would create a focus on YN2 Richard's physical appearance, sitting at the defense table throughout this trial. At every turn, members will want to focus on her reactions to see if she turns red or blotchy as a response to the evidence introduced. This evidence would only open the door to wild speculation about YN2 Richard's physical appearance at various times and what that physical response indicates. Such wild speculation does not forward the truth seeking function of this tribunal because it is not medically reliable.

Respectfully submitted,

[redacted]
R.W. Canby
LCDR, USCG
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **KATHLEEN RICHARD** **YN2 USCG**	**MOTION FOR APPROPRITE RELIEF – LIMIT ON EXPERT WITNESS TESTIMONY** **25 JANUARY 2022**

MOTION

The Defense requests that any expert testifying at this trial not be permitted to imply that YN2 Richard is guilty of any of the charged offenses.

FACTS

On January 24, 2022, Dr. [redacted] an expert in false and coerced confessions testified at this trial. A panel member asked a question of Dr. [redacted] as to why he becomes involved in cases. The Government did not object to the question. Dr. [redacted] responded that he often becomes involved in a case when he believes the person is innocent. After his testimony, Trial Counsel requested that an instruction be given to the panel to disregard Dr. [redacted] opinion because his opinion about why he might become involved in other cases could be construed to mean that he believes YN2 Richard is also innocent. The Court agreed with Trial Counsel and, over the objection of Defense Counsel, gave an instruction to the members to disregard Dr. [redacted] testimony. The instruction given was a broad instruction and could reasonably be viewed by the panel members to disregard all of Dr. [redacted] testimony.

ARGUMENT

Dr. [redacted] was qualified as an expert in the field of false and coerced confessions. In response to a panel member's question, Dr. [redacted] stated that he has, in the past, testified on behalf of defendant's if he genuinely believed in their innocence. Based on this testimony, the Court provided the panel with an instruction to disregard Dr. [redacted] testimony. The rationale for the instruction was that the Court believed that the panel members could imply that Dr. [redacted] believed YN2 Richard was innocent. In spite of the fact that Dr. [redacted] was responding to a question about past cases, the Court believed that members could **imply** that Dr. [redacted] believed YN2 Richard was innocent.

An expert's "opinion is not objectionable just because it embraces an ultimate issue." M.R.E. 704. A Court should not improperly limit an expert's opinion. *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007)

In this case, The Court has now set a precedent in this case that expert testimony cannot be considered by the panel if it implies that the Accused is innocent. Thus, the Court should also

limit any expert witness' testimony that implies the Accused is guilty. As the Court has previously stated in this case, "what is good for the goose is good for the gander." In fairness to YN2 Richard, if the Court is precluding expert opinions that imply YN2 Richard is innocent, there should be a similar restriction on expert opinions that imply YN2 Richard is guilty. For these reasons, Defense Counsel is requesting that this Court limit any expert opinion testimony in this case that might imply they believe YN2 Richard is guilty of the offenses charged.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/Connor Simpson
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on this Court and the Government trial counsel in the above captioned case on January 25, 2022.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY ACCUSED'S 19 JUNE 2020 STATEMENT TO CGIS 15 OCT 2021

RELIEF SOUGHT

The United States respectfully requests a preliminary ruling on the admissibility of the Accused's 19 June 2020 statement to Coast Guard Investigative Services.

HEARING

A hearing is requested to lay foundation and demonstrate authenticity of the statement.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Government bears the burden of proof and persuasion that the evidence is admissible, which must be met by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c); Military Rule of Evidence 304(f)(6).

FACTS

The Government incorporates the facts outlined in its response to the Defense's Motion for Appropriate Relief (CGIS Alleged Promises) of 27 August 2021.

LEGAL AUTHORITY

Relevant evidence is generally admissible. M.R.E. 402. Relevant evidence is any evidence which tends "to make the existence of any fact of that is of consequence to the determination of the action more or less probable than it would be without the evidence." M.R.E. 401. Although evidence is generally admissible if relevant, the military judge may exclude relevant evidence if

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its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. M.R.E. 403. M.R.E. 403 is a rule of inclusion, not exclusion. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission.").The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993).

Authentication. Under M.R.E. 901, evidence authenticity serves as a condition to admission. M.R.E. 901(a). M.R.E. 901 requires "authenticating or identifying an item of evidence" by the proponent producing the evidence "sufficient to support a finding that the item is what the proponent claims it is."

Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. M.R.E. 801. Hearsay is not admissible unless any of the following provides otherwise: (a) a federal statute applicable in trial by courts-martial; or (b) these rules. M.R.E. 802. An opposing party's statement is not hearsay. M.R.E. 801(d)(2). This is true when the statement is offered against an opposing party and was made by the party in an individual or representative capacity. M.R.E. 801(d)(2)(A).

Confessions and admissions. If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in M.R.E. 304(e). When the defense has made an appropriate motion or objection under M.R.E.304, the prosecution has the burden of establishing

the admissibility of the evidence.

LEGAL ARGUMENT

The Accused's 19 June 2020 statement to CGIS is admissible. The Accused's statement to CGIS is relevant, can be authenticated through witness testimony, and is not hearsay. Moreover, the Accused's statement was made voluntarily, following proper Article 31 Rights Advisement and free from the use of coercion, unlawful influence, or unlawful inducement. The Accused's Constitutional rights were not violated.

Relevance: The Accused's 19 June 2020 statement to CGIS is highly relevant to all charges and specifications. It includes self-incriminating statements by the Accused which detail the mode and manner of [redacted] death. The high probative value of the Accused's statement is not substantially outweighed by a danger of "unfair prejudice." *See* M.R.E. 403.

Authentication: Authentication or identification will be accomplished through the oral testimony of either CGIS Special Agent [redacted] or Special Agent [redacted] Each were present during the interview of the Accused.

Not Hearsay: The Accused's statement to CGIS is not hearsay. The statement would be offered by the Government against the Accused and was made by the Accused in an individual capacity. *See* M.R.E. 801(d)(2).

Voluntariness: The Government incorporates the argument outlined in its response to the Defense's Motion for Appropriate Relief (CGIS Alleged Promises) of 27 August 2021, specifically pages 20-28. There the Government provides an in-depth analysis proving why the Accused's statement to CGIS is not involuntary and should not be suppressed. She made her statement knowingly and voluntarily.

WITNESSES/EVIDENCE

The Government incorporates all evidence referenced in its response to the Defense's Motion for Appropriate Relief (CGIS Alleged Promises) of 27 August 2021.

The Government intends to call CGIS Special Agent [redacted] to lay foundation for authentication.

CONCLUSION

The United States respectfully requests that this Court determine the admissibility of the Accused's 19 June 2020 statement to CGIS. The United States has met its burden and asks that his Court find the Accused's 19 June 2020 statement admissible.

[redacted] MURRAY.ALLISON.BLAIR.[redacted] Digitally signed by MURRAY.ALLISON.BLAIR.[redacted] Date: 2021.10.15 11:05:27 -07'00'

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 15 OCT 2021.

[redacted]

Allison B. Murray
LCDR, USCG
Trial Counsel

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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR APPROPRIATE RELIEF UNDER R.C.M. 906(b)(6) PRECLUDE IMPROPER ARGUMENT AND TESTIMONY 4 Oct 2021

1. **Nature of Motion.**

Pursuant to Rules for Courts-Martial ("R.C.M.") 905(b)(3) and 906(b)(13), and the Fifth and Sixth Amendments to the Constitution of the United States, the Defense moves to preclude any testimony or argument by Trial Counsel relating to YN2 Richard's alleged discussions with Defense Counsel.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. Coast Guard Investigative Services ("CGIS") Agent [redacted] conducted another interview of BM2 [redacted] on April 1, 2021. During this interview, BM2 [redacted] stated that YN2 Richard retracted her "confession" after speaking with her defense team. BM2 [redacted] tells CGIS that "YN2 Richard, after talking to her attorneys, communicated to BM2 [redacted] that CGIS set her up to say she killed [redacted] but she did not do it." (Defense Appellate Exhibit VV, Bates page 17567, paragraph four).

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c. Billy Little (undersigned attorney) was assigned to this case in June, 2020.

d. The first meeting between YN2 Richard and Billy Little was June 25, 2020. During this first interaction, and every interaction with YN2 Richard, she has maintained her innocence and has insisted that CGIS forced her to agree with their version of events. At no time did Billy Little, or any other member of the defense team, advise YN2 Richard to falsify a story to say that CGIS coerced her to agree with them.

e. CGIS conducted an interview of YN2 Richard's [redacted] (BM2 [redacted]) on June 25, 2020. During this interview, BM2 [redacted] stated that YN2 Richard told him that, "she didn't do it, and that she was pretty much forced into confessing." (Defense Appellate Exhibit R, page 15, lines 15-17).

4. **Law and Argument.**

a. **Overview**.

Ever since first meeting YN2 Richard on June 25, 2020, she has consistently denied killing [redacted] She has also consistently maintained that CGIS forced her to agree to their version of events. Coincidentally, this is exactly what BM2 [redacted] told the CGIS Agents during his interview on June 25, 2020. (Defense Appellate Exhibit R).

Eliciting testimony from any witness that YN2 Richard changed her story after speaking with her legal team, is inappropriate, misleading, and false. The legal citations below are an overview of some of the reasons why this type of testimony is improper. Further, Defense Counsel has included caselaw showing why it would be improper for Trial Counsel to state that YN2 Richard's version of events was influenced by her legal defense team.

b. **Discrediting Defense Counsel.**

Any statement, remark, or insinuation that is intended to discredit defense counsel in front of the members is prohibited. *U.S. v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999) (Prosecutor commits misconduct when denigrating the defense as a sham); *State v. Lundbom*, 96 Or. App. 458, 773 P.2d 11 (1989) (referring to defense counsel as "pimp" and "hired gun"); *Carter v. State*, 356 So.2d 67 (Fla. Dist. Ct. App. 1978) (prosecutor referred to defense counsel as a "mouthpiece");

Commonwealth v. Long, 392 A.2d 810, 813 (Pa. Super. Ct. 1978) (prosecutor referred to defense counsel as a "not guilty machine"); *Commonwealth v. Sargent*, 385 A.2d 484 (Pa. Super. Ct. 1978) (reference to fact that defendant had a "paid attorney" hired to "acquit"); and *People v. Weller*, 258 N.E.2d 806, 810 (Ill. App. Ct. 1970) (stating that defense counsel "could *** qualify as an SS Trooper"); *U.S. v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005) (finding trial counsel's disparaging remarks and criticism of defense counsel to be improper); *U.S. v. Clifton*, 15 M.J. 26, 29–30 (C.M.A. 1983).

c. **Insinuating Defense Counsel is Lying and/or Presenting a Perjured Defense.**

Any statement, comment, or insinuation that the defense attorney established a perjured defense is prohibited. *State v. Pirouzkar*, 98 Or. App. 741, 745, 780 P. 2d 802, 804 (1990).

d. **Characterizing the Defense as a "Story."**

Labeling any defense or explanation by the defendant, or by defense counsel, of any event or fact in the instant case as a "story" is prohibited. *McCarty v. State*, 765 P.2d 1215, 1220-21 (Okla. Cr. 1988); *See, Wade v. State*, 633 P.2d 957, 958-59 (Okla.Cr. 1981); *Cobbs v. State*, 629 P.2d 368, 369 (Okla. Cr. 1981); *U.S. v. Voorhees*, 79 M.J. 5, 12 (C.A.A.F. 2019) (finding error where trial counsel bolstered government's case during closing argument by stating he doesn't "go TDY and leave [his] family 250 days a year to sell [the members] a story.")

e. **Criticizing and/or Threatening Defense Counsel.**

Impugning the integrity of defense counsel, criticizing defense counsel, and/or making baseless threats to have defense counsel held in contempt of court is prohibited. *McCarty*, 765 P.2d at 1220-21 (District Attorney Macy engaged in improper argument); *Coulter v. State*, 734 P.2d 295 (Okla. Cr. 1987); *Bechtel v. State*, 738 P.2d 559, 561 (Okla. Cr. 1987) (Oklahoma County District Attorney's Office criticized).

f. **Right to Counsel.**

It is improper to suggest that the defendant's exercise of her right to counsel is an indication of guilt. *Hunter v. State*, 573 A.2d 85 (Md. 1990). Any statement, remark, or insinuation regarding the defendant's decision to contact an attorney as evidence of a guilty mind. *Id.*

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g. **Any Reference to the Accused Not Testifying.**

Any statement, remark, or insinuation regarding the defendant's failure to testify, or intention to not testify. *State v. Hughes*, 193 Ariz. at 86 ¶ 63, 969 P.2d at 1198 ¶ 63 ("The prosecutor who comments on defendant's failure to testify violates both constitutional and statutory law.") (*citations omitted*); *State v. Halford*, 101 Or. App. 660, 792 P.2d 467 (1990) (prosecutor reminded jurors that defender said in opening statement that the defendant would testify; defendant did not testify; conviction reversed and remanded for determination as to whether retrial barred by jeopardy); *State v. Wederski*, 230 Or. 57, 60, 368 P.2d 393, 394-95 (1962) (such comments had a "presumably harmful effect"); *U.S. v. Carter*, 61 M.J. 30, 34–35 (C.A.A.F. 2005) (finding error where trial counsel's argument repeatedly commented on accused Fifth Amendment right and shifted burden to Defense to contradict Government's case.); *U.S. v. Paige*, 67 M.J. 447, 448–52 (C.A.A.F. 2009) (finding error—but not plain error, where trial counsel argued the accused had to personally "assert" his defense of mistake of fact was honest.).

h. **Characterizing the Accused as a Liar.**

Any statement, comment, or insinuation by the prosecutor characterizing the defendant's out of court statements as "lies" is improper since that constitutes a comment on the defendant's demeanor and character when she has not testified or otherwise put character into issue. *Hughes v. State*, 437 A.2d 559 (Del. 1981); *U.S. v. Fletcher*, 62 M.J. 175, 182–83 (C.A.A.F. 2005) (finding error where trial counsel's language during argument amounted to "more of a personal attack on the defendant than a commentary on the evidence."); *U.S. v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (finding error where trial counsel repeatedly made disparaging statements about the accused during closing argument and referred to him as a "liar".); *Clifton*, 15 M.J. at 29–30.

i. **Characterizing the Accused as Guilty.**

Any statement or insinuation by the prosecutor or person testifying that a person is not arrested unless they are guilty. *Id.* Offering personal opinions as to the guilt of the accused. *McCarty*, 765 P.2d at 1220-21 (District Attorney Macy criticized specifically); *Spees v. State*, 735 P.2d 571, 575-76 (Okla. Cr. 1987); *Tart v. State*, 634 P.2d 750, 751 (Okla. Cr. 1981); *U.S v.*

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Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (finding error, but no prejudice following plain error review of trial counsel's references to accused as "guilty.").

j. **Facts Outside the Record.**

Implying that there are other facts available to the prosecution that are not presented in court is improper. *U.S. v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998) ("It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggestions, insinuations and especially assertions of personal knowledge."); *Clifton*, 15 M.J. at 30 ("it was grossly improper for trial counsel to…suggest that there was other evidence that might have been adduced."). *State v. Woodard*, 516 P.2d 589 (1973) ("'If you think the jury hears all the evidence on this search warrant in a criminal case, you're crazy.' This improper statement injected his personal opinion, commented upon matters not in evidence, and inferred that the judge looked with favor on the prosecution of this case.");

k. **Eliciting Witness Testimony Concerning the Truthfulness of Another Witness.**

Eliciting testimony that, in the witness' opinion, the testimony of another witness is either true or false. *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998) ("It is the jurors' responsibility to determine the credibility ... Testimony regarding a witnesses' credibility is prohibited unless it is admissible as character evidence." (quoting *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (*overruled on other grounds*)); *United States v. Boyd*, 54 F.3d 868, 871 (D.C. Cir. 1995) ("Counsel should not ask one witness to comment on the veracity of the testimony of another witness."); *United States v. Richter*, 826 F.2d 206, 208 (2nd Cir. 1987) (holding that a prosecutor is guilty of misconduct when the defendant is forced to testify that an FBI agent was either mistaken or lying. "We have held that it is reversible error for a witness to testify over objection whether a previous was telling the truth."); *State v. Isom*, 306 Or. 587, 591-92, 761 P.2d 524, 526-27 (1988) (On cross-examination, prosecutor suggested that contradictory witness was either mistaken or lying); *See State v. Graves*, 668 N.W.2d 860 (Iowa 2003).

l. **Vouching for Witnesses.**

Any statement, comment, remark, or insinuation whereby the government lawyer vouches for the credibility or integrity of state's witnesses. *United States v. DiLoretto*, 888 F.2d 996 (3d Cir. 1989) (prosecutorial vouching for credibility of witness is reversible error *per se* when based on facts outside the record); *United States v. Ludwig*, 508 F.2d 140 (10th Cir. 1974) (prosecutorial expression of view of the righteousness of his cause). Personally vouching for the credibility of State's witnesses or offering personal opinions as to the veracity of these witnesses. *See United States v. Swafford*, 766 F.2d 416, 428 (10th Cir. 1985); *Bechtel v. State*, 738 P.2d 559 (Oklahoma County District Attorney's Office criticized); *U.S. v. Voorhees*, 79 M.J. 5, 12 (C.A.A.F. 2019) (finding error where trial counsel referred in closing argument to witness's testimony as "the truth."); *Clifton*, 15 M.J. at 29–30.

5. **Relief Requested.**

The Defense requests an order precluding any witness testimony or comment from Trial Counsel regarding the inaccurate allegation that YN2 Richard changed her story after speaking with Defense Counsel.

6. **Enclosures.**

a. Defense Appellate Exhibit VV. CGIS report dated April 5, 2021.

b. Defense Appellate Exhibit R (previously provided to the Court).

7. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 4th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

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/s/ C.B. Simpson
LT, USCG
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 4th day of October 2021.

Dated this 4th day of October 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

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UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES V. KATHLEEN RICHARD YN2/E5 U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF PRECLUDE IMPROPER ARGUMENT AND TESTIMONY 29 October 2021

RESPONSE

The Government will not seek to illicit testimony from any witness that YN2 Richard changed her story after speaking with her legal team. The Government agrees with the Defense that such testimony is improper and inadmissible.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] 2021.10.29 13:41:24 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 29 Oct 2021.

ROBERTS.JASON.WILLIAM.[redacted] Digitally signed by ROBERTS.JASON.WILLIAM.[redacted] 2021.10.29 13:41:40 -07'00'

Jason W. Roberts
LCDR, USCG
Trial Counsel

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UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	DEFENSE MOTION FOR APPROPRIATE RELIEF REQUEST FOR SPECIAL FINDINGS 6 Feb 2022

1. **Nature of Motion.**

Pursuant to the Fifth Amendment of the Constitution, YN2 Kathleen Richard moves the Court to order the panel to provide special findings for the guilty finding under Article 119 of the UCMJ.

2. **Burden of Persuasion and Burden of Proof.**

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. **Summary of Facts.**

a. An exhaustive statement of facts was provided to this Court in Defense Counsel's Motion to Compel Production of Expert Consultants filed on 8 Jul 2021. In the interest of judicial economy, those facts are incorporated into this filing by this reference. Additional facts relevant to this motion are included below.

b. On 13 Aug 2021, Defense Counsel filed a Motion for a Bill of Particulars. The Court subsequently denied this motion.

c. On 6 Oct 2021, Defense Counsel filed a Motion to Dismiss the Charges for Failure to State an Offense. The Court subsequently denied this motion.

d. On 15 Nov 2021, Defense Counsel filed a Motion to Dismiss the Charges for violating YN2 Richard's Due Process rights. The essence of this motion was that the charges did

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not provide sufficient specificity to defend against the charges. The Court subsequently denied this motion.

e. On 3 Feb 2022, the panel in this case returned a verdict of Not Guilty as to intentional murder under Article 118 of the UCMJ. The panel also returned a verdict of Not Guilty as to the Obstruction charge under Article 131b of the UCMJ.

f. On 3 Feb 2022, the panel returned a verdict of Guilty for Involuntary Manslaughter under Article 119 of the UCMJ. This charge was not listed on the original charge signed on 22 Jun 2021.

g. The charges in this case were based entirely on "asphyxia by asphyxia."

4. **Law and Argument.**

The Court should require the panel to provide special findings as to the theory under which they found YN2 Richard Guilty of Involuntary Manslaughter. Failure to provide a theory under which YN2 Richard was convicted precludes YN2 Richard from intelligently articulating an appellate argument and again violates her Fifth Amendment Due Process Right to a fair trial.

R.C.M. Rule 918(b) permits the judge to make special findings when the judge is the factfinder for findings. The discussion for Rule 918 states that "members may not make special findings." In this case, the comments in the discussion section are inapplicable due to the vagueness of the charges in this case.

Defense Counsel requested specificity in the charges on many occasions. The Court declined to order the prosecutors to provide specificity of the charges. In spite of proceeding to trial for "asphyxia by asphyxia," the Court stated that it was obvious what the allegations entailed. Presumably, the Court was referring to the allegation by Dr. [redacted] that YN2 Richard pushed the child's face into the mattress until she was dead. Thus, the entirety of the Defense case was an attempt to show that Dr. [redacted] theory was untrue.

The panel agreed with Defense Counsel that Dr. [redacted] version of events was untrue when they found that YN2 Richard was Not Guilty of intentional murder. As evidenced by the findings in this case, when Defense Counsel is presented with clear charges, we can easily show

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that those charges are untrue. However, when presented with no specific allegations, it is impossible to present a competent defense. Further, when this case is reviewed on appeal, it will be pure speculation to determine what theory was used to convict YN2 Richard of Involuntary Manslaughter. In order to effectively exercise her right to appeal, specific findings are required.

5. **Relief Requested.**

The Defense requests an order from the Court to compel the panel to provide special findings to state both the specific act/s alleged, as well as the accompanying *mens rea* for each act.

6. **Oral Argument.**

Defense counsel requests oral argument on this motion, if opposed by the Government.

Dated this 6th day of February, 2022.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

/s/ Jen Luce
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/Connor Simpson
C.B. SIMPSON
LT, USCG
Detailed Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 6th day of February 2022.

Dated this 6th day of February 2022.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

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COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. KATHLEEN RICHARD YN2/E-5 USCG	DEFENSE MOTION FOR APPROPRIATE RELIEF – VIOLATION OF ART. 55 11 Apr 22

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 1104(a), the Defense respectfully requests the Court grant YN2 Richard 140 days of confinement credit for a violation of Article 55, UCMJ, cruel and unusual punishment at the Naval Consolidated Brig Chesapeake and either compel the government to reimburse YN2 Richard for her rental car expense during trial or adjudge an additional 155 days of confinement credit for a violation of Article 55, UCMJ. R.C.M. 1104(b)(2) requires post-trial motions to be filed not later than 14 days after defense counsel receives the Statement of Trial Results (STR). The defense requests the court find good cause to consider this motion out of time given the cruel and unusual punishment extended well past 14 days after the receipt of the STR and the time needed to obtain the evidence in support of the defense motion.

BURDEN

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

FACTS

1. On 8 February 2022 YN2 Richard was sentenced to six years of confinement.

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2. YN2 Richard was sent to the Naval Consolidated Brig Detachment Chesapeake on 8 February 2022.
3. The Chesapeake Brig is a Tier 1 facility, meaning it is not permitted to house prisoners with sentences greater than one year.
4. Upon arrival at the brig in Chesapeake, YN2 Richard was placed in a 'maximum security' status because of the adjudged sentence.
5. While in 'maximum security' status, YN2 Richard was kept in solitary confinement and she remained in solitary confinement her entire stay in Chesapeake.
6. YN2 Richard was not permitted to make any personal calls until 18 or 22 February 2022, but according to Enclosure (D), that right was removed on 28 February 2022 for no apparent reason.
7. While in solitary confinement, YN2 Richard was confined to her cell for twenty-three hours a day. She was allowed out for one hour each day to use the recreation room or go outside as long as the outdoor temperature was above 40 degrees Fahrenheit. Enclosure (C).
8. While in Chesapeake, YN2 Richard was kept in a dorm by herself. This dorm consisted of a common area with individual cells surrounding the common area.
9. No other prisoners were housed in the same dorm as YN2 Richard.
10. YN2 Richard was not permitted to regularly use the common area of her dorm. Enclosure (C).
11. YN2 Richard verbally asked when she could transfer from 'maximum security' and was told that she would be in this status until her transfer to the Miramar Brig. Enclosure (C).
12. On 10 March 2022, YN2 Richard submitted matters for the convening authority consider. Included in her request was a request to reimburse YN2 Richard for her rental car during the court-martial. Enclosure (A).

13. YN2 Richard was required to stay in military lodging during the court-martial despite the fact that all witnesses, counsel and enlisted Government support staff were permitted to stay in commercial hotels near the courtroom.

14. Per her orders, YN2 Richard was required to use a taxi or other service such as Uber or Lyft to get to and from her lodging onboard Naval Station Norfolk. When YN2 Richard got to Norfolk, she quickly realized that the out-of-pocket expenses associated with getting a taxi/Uber to and from the courtroom was too much. Additionally, the limited availability of taxis/Ubers in the Norfolk, VA area made arriving to the court-room in time for defense preparations difficult and subjected to substantial delay. YN2 Richard obtained a rental card in order to avoid this continued impact on her participation in the defense preparation. Due to the necessity of finding a solution to this delay, YN2 Richard did not get a rental car through the official orders process.

15. After the court-martial, Mr. [redacted] attempted to submit the receipts for the rental car on behalf of YN2 Richard to get reimbursed.

16. The overall cost of YN2 Richard's rental car expense was less than what the total cost to the Government would have been had YN2 Richard continued to charge for a taxi/Uber to and from the court-room.

17. On 24 March 2022, the convening authority denied YN2 Richard's request to be reimbursed for her rental car. Enclosure (B).

LAW & ARGUMENT

Both the Eighth Amendment and Article 55, UCMJ, prohibit cruel and unusual punishment. Military Courts apply "the Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where . . . legislative intent to provide

greater protections under [Article 55]" is apparent. *See United States v. Defalco*, No. ACM 39607, 2020 CCA LEXIS 164, at *9 (A.F. Ct. Crim. App. May 21, 2020) (quoting *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (citation omitted)). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). As the Supreme Court has explained, "[t]he Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

In order to meet the burden of establishing a violation of the Eighth Amendment, YN2 Richard must demonstrate:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [an appellant]'s health and safety; and (3) that [an appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ . . . ."

Defalco, 2020 CCA LEXIS 164, at *9 *quoting Lovett*, 63 M.J. at 215 (footnotes omitted). "[A] prisoner must seek administrative relief prior to invoking judicial intervention" with respect to concerns about post-trial confinement conditions. *Defalco*, 2020 CCA LEXIS 164, at *10 (quoting *United States v. Wise*, 64 M.J. 468, 473, 471 (C.A.A.F. 2007)). "Absent some unusual or egregious circumstance," an appellant must both exhaust the grievance system at the confinement facility as well as petition for relief under Article 138, UCMJ. *Id.* (quoting *Wise*, 64 M.J. at 469 (citing *United States v. White,* 54 M.J. 469, 472 (C.A.A.F. 2001)).

YN2 Richard suffered cruel and unusual punishment at the hands of the personnel at the Naval Consolidated Brig Chesapeake because they kept her in solitary confinement for nearly 30

days. She was kept in this status because of her adjudged sentence and her gender. Her time at the Chesapeake Brig was temporary while she waited to be transferred to the Miramar Brig. However, she was kept in solitary confinement for an excessive amount of time that was not necessary to serve any legitimate health or safety concerns. Despite the health and safety concerns associated with the Covid-19 pandemic, YN2 Richard was kept in solitary confinement well beyond what was needed. YN2 Richard was kept alone in a cell at least 23 hours each day. She was not allowed regular and consistent use of the common area, despite it being completely unoccupied and despite the fact that she did not commit any disciplinary infractions. She was not allowed to make personal calls for the vast majority of her time in Chesapeake despite the fact that the phone was in her same, unoccupied dorm.

YN2 Richard requested relief from her conditions by asking to no longer be placed on maximum security status. However, that request was denied and her conditions never changed. Despite not submitting an Article 138 complaint in this situation, YN2 Richard verbally requested assistance and was verbally told there was nothing she could do to change her situation. Therefore, submitting an Article 138 complaint would have been futile. Keeping YN2 Richard in a dorm by herself while she waited to be transferred to Miramar is reasonable if for only the amount of time needed to arrange the logistics for her transfer. Because YN2 Richard remained in solitary for 28 days, she suffered cruel and unusual punishment as it was not necessary to ensure her health or safety.

In addition to her confinement status, YN2 Richard was forced to pay out of pocket for her transportation at her own court-martial. YN2 Richard was not authorized a rental car during her time in Norfolk, VA for her court-martial. This court-martial lasted over 4.5 weeks. During this time, the government required that YN2 Richard stay at the Navy Lodge onboard Naval Station Norfolk after the Defense raised concerns with the Government's initial plan to house her at Coast

Guard Base Portsmouth. As noted in Enclosure (A), that is not within walking distance of the courtroom used for this trial. As a result, she required transportation to and from the courtroom every day. YN2 Richard obtained a rental car to ensure she was able to get to trial on time and as needed. Additionally, YN2 Richard's initial orders to Coast Guard Base Portsmouth had included a rental car which was removed following the amendment to allow her to stay at the Navy Lodge. However, the convening authority has refused to reimburse YN2 Richard for her out-of-pocket expenses despite it actually resulting in a cost savings to the Government. Further, the Government refused to allow YN2 Richard to stay at one of the numerous hotels in downtown Norfolk within walking distance of the courtroom under the premise that the JTRs and Coast Guard policy required the use of military lodging if available. However, the Government then failed to follow this this same policy—despite the availability of military lodging—for its own counsel, enlisted support staff, and court-martial witnesses. As such, the purpose for the Government's refusal to allow YN2 Richard to stay in a hotel within walking distance of the courtroom was not based on any valid reason other than the fact that YN2 Richard was accused of an offense. This is cruel and unusual punishment and a violation of Article 55, UCMJ, because it is a punishment that is "incompatible with the evolving standards of decency that mark the progress of a maturing society."

RELIEF REQUESTED

The Defense respectfully requests the Court grant YN2 Richard five days of credit for each day that she was confined at the Naval Consolidated Brig in Chesapeake. Because YN2 Richard was there for 28 days, the defense requests 140 days of credit toward her sentence. In addition, the defense requests the court compel the convening authority to fund YN2 Richard's rental car for the court-martial. If the court believes it does not have the authority to compel this funding, the defense requests an additional 5 days each day in Norfolk, VA (total of 31 days) for a total of 155 days of credit.

EVIDENCE

The Defense offers the following evidence in support of this motion and reserves the right to supplement with additional evidence:

- Enclosure A: Clemency Request ICO YN2 Richard
- Enclosure B: Response to Clemency Request
- Enclosure C: Affidavit from YN2 Kathleen Richard
- Enclosure D: YN2 Richard Progress Report from Chesapeake Brig

ORAL ARGUMENT

If this motion is opposed by the Government and pursuant to R.C.M. 1104(a) the Defense requests a post-trial Article 39(a) session to present oral argument.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

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CERTIFICATE OF SERVICE

I certify that I have served a true copy, via e-mail, of the above on the Court and Government Counsel on 11 April 2022.

[redacted]
J. L. LUCE
LCDR, JAGC, USN
Individual Military Counsel

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MFAR RE:**
	)	**CONFINEMENT CONDITIONS;**
	)	**RENTAL CAR EXPENSES**
	)	
	)	
KATHLEEN RICHARD	)	19 April 2022
YN2/E-5, U.S. COAST GUARD	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States files this motion in response to the Defense's post trial motion seeking credit for YN2 Richard's confinement conditions and her personal decision to purchase a rental car in contravention of her travel orders. Neither claim states any ground for relief. The Defense's motion for sentencing credit should be denied.

HEARING

The Defense has requested oral argument and the United States requests an opportunity to respond orally to any argument made by the Defense.

STATEMENT OF FACTS

1. On 8 February 2022, the general court-martial *United States v. YN2 Kathleen Richard* concluded. YN2 Richard was convicted of involuntary manslaughter under Article 119, Uniform Code of Military Justice, and sentenced to six years confinement, reduction to E-1, and a dishonorable discharge.

Facts Relating to Naval Consolidated Brig Chesapeake

2. On 8 February 2022, YN2 Richard entered confinement at the Naval Consolidated Brig Charleston, Detachment Chesapeake.

3. Upon her arrival at the Brig, YN2 Richard was evaluated to determine her prisoner custody and security status. This initial determination was made by the CDO. After her intake evaluation she was placed into maximum security status, consistent with the Brig's policy. Factors which control a prisoner's security status are confinement level, administrative factors, and classification criteria. Administrative factors include: suicide risk, health problems, mental health problems, and prisoner background information. Classification criteria include: offense severity, substance abuse, history of violence, history of escape, and length of sentence remaining.

4. After their initial intake security level determination, the prisoner receives a review by the Prisoner Services Department on the next business day. Then, the prisoner has their security status reviewed every seven days thereafter. Ultimately, the Brig Officer in Charge's designee has the final determination regarding a prisoner's security level. No prisoner has a right to be classified at any particular security level. When post-trial prisoners are housed in facilities where their sentence length exceeds the capability of the facility, they are classified as maximum security. NAVCONBRIG Detachment Chesapeake is a 90 day, Level I facility. This means that the Chesapeake Brig can temporarily house all prisoners but any post-trial prisoners with sentences exceeding 90 days must be transferred elsewhere.

5. Based upon many factors including the severity of YN2 Richard's crime, her length of sentence, her reported medical history, her intake interview, and her current health issues YN2 Richard was classified by the CDO as a maximum security. She received her next day review by

the Prisoner Services Department who concurred and maintained her security status. She also received the required follow on reviews every 7 days.

6. Contrary to YN2 Richard's claims, she was never placed into solitary confinement. NAVCONBRIG Chesapeake does not even have solitary confinement facilities. YN2 Richard was, however, the only female prisoner at the facility. Therefore, naturally she was the only prisoner in her cell and the only prisoner in the female dorm. She was not isolated, though. There were at least two female dorm supervisor corrections officials supervising her dorm 24 hours per day 7 days per week, checking on her at least every 15 minutes. Medical staff visited her multiple times each day, and prisoner services visited her daily. Similarly, the chaplain visited intermittently, as did the Brig's social workers and other officials. Naval brigs do not comingle male and female prisoners in the same dorms.

7. YN2 Richard was permitted to make personal calls on 10 February 2022. After this, she was allowed personal phone calls beginning on 18 February after she cleared COVID medical protocols.

8. On 28 February 2022, YN2 Richard's phone privileges were suspended in anticipation of her transferring facilities. This is a corrections policy so that prisoners cannot alert family, friends, sympathizers, or anyone else of their upcoming movement.

9. YN2 Richard was not confined in her cell for 23 hours per day during the entire duration of her confinement at Chesapeake. YN2 was allowed to use the common area of her dorm after her medical surveillance ended on 18 February 2022.

10. The Brig had an established grievance policy which was explained to YN2 Richard. YN2 Richard utilized this policy on 15 February 2022 by submitting a grievance. YN2 Richard's grievance concerned an encounter that she had with a contract social worker. The technical

director assigned an investigator and received a report from the investigator on 16 February 2022. The technical director then debriefed with YN2 Richard, and YN2 Richard stated that she did not have any continuing concerns and that she just wanted the incident with the social worker documented.

11. YN2 Richard did not utilize the grievance policy on any additional occasions. She did not make any additional formal complaints.

12. YN2 Richard did make requests to medical for certain things. At her request, YN2 Richard was taken to a medical facility for [redacted] She was subsequently provided [redacted] When YN2 Richard requested [redacted] she was provided them.

13. YN2 Richard did request that the medical clinic provide her with suntan lotion.[1] The medical clinic denied this request because suntan lotion is available through the exchange.

Facts Relating to Rental Car Reimbursement

14. YN2 Kathleen Richard is a Yeoman. She is a graduate of Yeoman "A" School. She has held positions in the Servicing Personnel Officer and Admin departments, and is assuredly well versed in the policy and procedure concerning travel orders, Joint Travel Regulations, and Government Travel Charge Card usage. Travel orders, travel entitlements, and travel claims are among the primary duties of Yeoman.

15. Travel logistics for the court-martial in Norfolk, Virginia, were extensive. Legal counsel, the military judge, YN2 Richard, support staff, and over fifty witnesses and experts traveled to the situs of the trial. The Convening Authority (Director of Operational Logistics) served as Funds Approving Official (AO) for all trial and travel expenses.

[1] It is contradictory when YN2 Richard claims that she was confined in what felt like solitary confinement, 23 hours per day, sometimes longer, and yet she was concerned about needing suntan lotion.

16. As with all pretrial motions hearings, YN2 Richard traveled on Official Military Orders for trial. As before, she worked with the Legal Service Command admin staff for travel coordination and approval.

17. On 1 December 2021, LT Connor Simpson, Assistant Defense Counsel, informed Trial Counsel that YN2 Richard was experiencing financial difficulties with the cost of lodging for Article 39(a) sessions because she "did not have" a Government Travel Charge Card (GTCC).[2] Enclosure 7. She was instructed to get one as soon as possible, as per COMDTINST M4600.18, all service members are required to have one for non-exempt Temporary Duty (TDY) travel.[3]

18. Based on this information and in accordance with standard practice for members awaiting trial, LSC admin staff arranged no-cost Government quarters for YN2 Richard at the Unaccompanied Personnel Housing (UPH) on board USCG Base Portsmouth for trial.

19. On 21 December 2021, LSC admin staff informed Defense Counsel via email that UPH accommodations had been arranged for YN2 Richard pending Base Portsmouth availability for 6-29 January 2022. Enclosure 8. Lodging at UPH was extremely limited.

20. USCG Base Portsmouth UPH does permit overnight guests.

21. On 21 December 2021, LCDR Luce emailed LSC admin staff requesting a hotel room for YN2 Richard and Mr. [redacted] (YN2 Richard's [redacted] so that they could be roomed together for the duration of trial. Enclosure 8. This Court previously held that Government

[2] A subsequent records check revealed that YN2 Richard had been issued a GTCC and used it for travel during the September Art. 39(a) session.
[3] "The IBA GTCC shall be used by all non-exempt personnel for all non-exempt Temporary Duty (TDY) travel." Government Travel Charge Card (GTCC) Program, COMDTINST M4600.18 at 1-1. Enclosure 2.

production/funding of Mr. [redacted] was not necessary for the merits stage of trial; Mr. [redacted] travel would only be reimbursed for the sentencing phase of trial.[4]

22. LSC admin staff informed YN2 Richard via email on 23 December 2021 that she had been confirmed no-cost Government quarters. Enclosure 10.

23. On 29 December 2021, LT Simpson emailed Trial Counsel to arrange a phone call to discuss "admin items." During the call between Trial Counsel and Defense Counsel that day, LT Simpson requested that YN2 Richard not be assigned to the Base Portsmouth UPH during trial because she was "[redacted]" Unprompted, LT Simpson requested that YN2 Richard be allowed to stay at the Navy Lodge near Naval Station Norfolk since "it would be easier for us [Defense Counsel] to get her to trial." Trial Counsel confirmed with Defense Counsel the location she wanted (Hampton Blvd) and told him that Trial Counsel would need to receive approval from the funds authority. See Enclosure 9, Trial Counsel Notes.

24. On the call, Trial Counsel told Defense Counsel that she would take him at his word that YN2 Richard had a medical condition and been [redacted]

25. Immediately after receiving this updated information, Trial Counsel informed LSC admin staff that YN2 Richard could not drive for medical reasons and desired to stay at the Norfolk Navy Lodge vice UPH since it would be easier for her counsel to get her to court. Once approval was granted for commercial lodging, Trial Counsel called LT Simpson back and told him that she could stay at the Navy Lodge. LSC Admin sent Defense Counsel a follow-on email based on the updated information. Enclosure 10.

[4] Then Military Judge, CDR Paul Casey, ruled during the 9-10 December 2021 Article 39(a) session that YN2 Richard was not entitled to an "emotional support person."

26. The Government did not force YN2 Richard to stay at the Navy Lodge; this specific lodging location was requested by Defense Counsel and booked by YN2 Richard directly. Enclosure 9; 11.

27. YN2 Richard's Official Orders DID NOT authorize a rental car. Enclosure 1. Based on information passed by Defense Counsel on 29 December 2021, it was understood that a medical provider had [redacted] Local travel (taxi, Uber, etc.) was authorized.

28. At no point in time before or during trial did YN2 Richard or her Defense Counsel ask permission for YN2 Richard to procure a rental car. Neither YN2 Richard nor her Defense Counsel clarified with LSC admin staff if a rental car was authorized. At various stages, either YN2 Richard or Defense Counsel spoke with LSC admin staff about other financial and travel issues; however, the topic of a rental car for YN2 Richard was never raised.

29. YN2 Richard arrived in Norfolk, Virginia, for trial on Thursday, 6 January 2022. Trial commenced on Monday, 10 January 2022.

30. By 1:40 p.m. on Sunday, 9 January 2022, YN2 Richard, without permission or approval from any member of LSC staff or the Funds Approving Official (AO), used her personal credit[5] card to rent a vehicle from Budget Car Rental at the Norfolk International Airport for 9-29 January 2022. The total estimated charge was [redacted] YN2 Richard did not book the rental car using the Government required Travel Management Center or ETS; she likewise did not receive the Government rate or a compact vehicle. Enclosure 3.

[5] "Unless the IBA GTCC use is specifically exempted by this Manual, GTCC holders shall use their card for transportation tickets, lodging, rental cars, and meals (unless use of the card is impractical, e.g., group meals or the travel card is not accepted), Temporary Lodging Expense (TLE) and Temporary Lodging Allowance (TLA) expenses that are authorized and reimbursable under the travel orders." Government Travel Charge Card (GTCC) Program, COMDTINST M4600.18 at 1-1.

31. From 9 January 2022 to 29 January 2022, neither YN2 Richard nor her Defense Counsel approached Trial Counsel or LSC admin staff to inquire whether a rental car was an authorized expense on her orders.

32. Instead, on Saturday, 29 January 2022, YN2 Richard returned the Budget rental car she purchased and arranged a *second* rental car from Avis for 29 January to 9 February 2022. Here, YN2 Richard used her Government Travel Charge Card and incurred an expense of [redacted] including a [redacted] late fee. Enclosure 4.

33. Once again, YN2 Richard did not seek authorization or permission from the appropriate authorities to obtain a rental car. YN2 Richard neither used the Government's required Travel Management Center nor opted for a compact vehicle. She did not receive the Government rate.[6]

34. Following trial, Mr. [redacted] submitted a request to LSC admin staff for reimbursement of the rental cars purchased by YN2 Richard, in addition to other unauthorized expenses. Because YN2 Richard was not authorized a rental car, the reimbursement request was forwarded for higher level review (DOL Budget Officer/Chief, Comptroller Division). Enclosure 13.

35. On 4 March 2022, Defense Counsel emailed LSC admin staff requesting that YN2 Richard's rental car be reimbursed. Defense Counsel stated that "due to the cost (approximately $25-$30 per trip) for a taxi and the time/unreliability due to lack of ubers in Norfolk, YN2 Richard purchased a rental car to facilitate a more efficient travel and *elected to not take the* [redacted]" Defense Counsel falsely claimed that the situation was "created in part by the Government's unwillingness to allow YN2 Richard to stay

[6] Because YN2 Richard chose not to utilize the proper channels to procure this rental car, YN2 Richard's vehicle would also not have been covered by the United States were she to have been involved in a wreck or damaged property. This is yet another reason that travelers are not allowed to personally procure vehicles to use for official travel.

at a hotel located close to the LSC building." In fact, the Government was never consulted on this issue; YN2 Richard chose the Navy Lodge following her release from UPH. Enclosure 12.

36. Citing the Joint Travel Regulations, the DOL Comptroller verbally denied YN2 Richard's reimbursement request for rental car on 14 March 2022.

37. The Convening Authority similarly denied the Defense's request in Clemency on 23 March 2022.

38. YN2 Richard also admitted that she did not get a rental car through the official orders process nor did she use the required Government TMC to make the reservation. Def. Motion at 3.

39. The Joint Travel Regulations provide the following instruction:

a. A travel order identifies the travel purpose and includes necessary financial information for budgetary and reimbursement purposes. Enclosure 14 at 1. The travel order provides the traveler information regarding what expenses will be reimbursed. Id.

b. Authorizing or Approving Official (AO). An AO determines whether travel is necessary and appropriate to the mission, ensures that all expenses claimed by the traveler are valid, and authorizes or approves the valid expenses. Expenses must not be approved if they are inflated, inaccurate, or higher than normal for similar services in the locality. If the JTR indicates an expense, allowance, or other item must or may be authorized (such as the mode of transportation), it means the AO must give permission before the action takes place. Likewise, if the JTR indicates "may or must be approved," then the AO may or must give the traveler permission after the action takes place. Enclosure 5, JTR 010201 at 1-2.

c. Obtaining Authorization. To be reimbursed, an AO must authorize or approve use of a rental vehicle. A traveler must obtain a rental vehicle through an electronic system when it is available or through the TMC if it is not available. Enclosure 5, JTR 020209 at 2-17 (Rental Vehicle).

d. 37 U.S.C. § 452(g) states that "any unauthorized travel or transportation expense is not the responsibility of the United States." Enclosure 6.

WITNESSES AND EVIDENCE

The Government includes the following as enclosures to this motion:

Enclosure 1: YN2 Richard TAD Travel Authorization - Authorized Expenses

Enclosure 2: Government Travel Charge Card Policies and Procedures, COMDINST M4600.18

Enclosure 3: Budget Rental Car Rental Record 9–29 January 2022

Enclosure 4: Avis Rental Car Rental Record 29 January – 9 February 2022

Enclosure 5: Applicable Joint Travel Regulations Pages

Enclosure 6: 37 U.S.C. § 452 – Allowable travel and transportation

Enclosure 7: 1 DEC 2021 – DC Email to TC, LSC Admin re GTCC, lodging expenses

Enclosure 8: 21 DEC 2021 – DC to LSC Admin Email Correspondence

Enclosure 9: 29 DEC 2021 – TC Notes from DC Phone Call

Enclosure 10: 29 DEC 2021 – LSC Amin Email to DC re Change to Travel due to [redacted]

Enclosure 11: 30 DEC 2021 – YN2 Richard email to YN1 [redacted] confirming Navy Lodge

Enclosure 12: 4 MAR 2021 – DC Email to TC re Rental Car Reimbursement

Enclosure 13: 17 MAR 2021 – [redacted] Email re YN2 Richard Rental Car Reimbursement

Enclosure 14: JTR Travel Orders Supplement

Enclosure 15: Affidavit of [redacted] NAVCONBRIG Charleston, Detachment Chesapeake

The United States intends to call LT Connor Simpson as a witness if the Court deems it necessary to take additional evidence on these matters. LT Simpson is the witness who made all of the assertions captured herein related to the situation with YN2 Richard's housing during trial and her transportation.

LEGAL AUTHORITY AND ARGUMENT

I. Pursuant to R.C.M. 1104, the untimeliness of this filing prevents further review.

Military courts are unlike standing Article III courts in that they are ad hoc tribunals and are limited in their jurisdiction. A military judge's authority to hold a post-trial Article 39(a) session is limited in multiple manners. It is limited in subject-matter and timing. Considering timing, before the changes effected by the Military Justice Act of 2016, the military judge's authority to issue any case related rulings ended at authentication of the record of trial. *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). After the MJA of 2016, the military judge's authority now ends at entry of judgement. R.C.M. 1104(a).

A. Timing of Post-Trial Motions

Post-trial motions must be filed within 14 days after the defense counsel receives the statement of trial results. R.C.M. 1104(b)(2)(A). Had the Defense requested an extension, the military judge would have been empowered to extend this deadline up to an additional 30 days, if the Defense had shown good cause.

In this case, the Defense did not request an extension of R.C.M. 1104(b)(2)(A)'s deadline, nor was an extension granted by the Court. This Rule's use of the word "shall" in connection with the filing deadline indicates that non-compliance with the Rule is dispositive. As

admitted by the Defense in their supplemental filing, the Defense failed all aspects of this deadline. First, the Defense did not file this motion within 14 days. Second, the Defense did not request as extension, did not present good cause, and the Court did not grant an extension. Third, even if the Court had granted an extension, the Court was only empowered to grant an extension for "not more than an additional 30 days." *Id.* The limit of the Court's authority, had it been presented with good cause, was to grant an extension until day 44. Even if the Defense had received an approved extension, a filing at day 62 would have been outside of the Court's ability to consider. CAAF recently issued a helpful opinion on this issue, holding that if the prisoner wants the convening authority to consider their post-trial confinement conditions, the appropriate place to include that is in a clemency request. *United States v. Miller*, -- M.J. --, 2022 WL 1021386 (C.A.A.F. April 4, 2022). CAAF then proceeded to opine that because the defense did not follow the timelines and file a post-trial motion within five days of receiving the Convening Authority's action, they had no ability to review it. *Id.* at 5. CAAF's recent specific reference to these post-trial motions timelines is meaningful because it indicates CAAF's intentions that the deadlines be enforced.

B. Subject Matter of Post-Trial Motions

In addition to the timing of this motion, there is some question as to whether a military trial judge has the subject matter authority to rule on a motion alleging cruel and unusual punishment. Claims of post-trial cruel and unusual punishment are within a Court of Criminal Appeals Article 66 review authority. *United States v. Roth*, 57 M.J. 740 (A.C.C.A. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003) (summary disposition). Similarly, both R.C.M. 1104(b) and its predecessor before 2019, R.C.M. 1102(b)(2) provide language as to the subject matter that military judge's may hear in post-trial sessions. It appears that the language from the pre-2019

R.C.M. 1102(b)(2) was made more narrow and more specific in R.C.M. 1104(b). Nonetheless, however, because R.C.M. 1104(b) says "such matters as" before listing items (A)-(F), there is a fair argument that items (A)-(F) are merely examples and the Court may hear matters outside this list.

Within approximately the last four years, at least two trial level military judges conducted post-trial Article 39(a) sessions on issues raised relating to conditions of confinement which were mentioned in appellate opinions. *United States v. Lemburg*, 2018 WL 4440397 (A.F.C.C.A. Aug. 30, 2018) (unpublished); *United States v. Miller*, 2021 WL 494852 (N.M.C.C.A. Feb. 10, 2021) (unpublished) (*rev'd on other grounds*). These two non-controlling, unpublished cases do not offer dispositive support on this issue, as the opinions do not indicate whether these military judges considered their authority to rule on such issues, or whether the issue was ever raised.

II. The Defense Failed to Exhaust Administrative Remedies Which Prevents This Court From Granting Relief

The Defense's motion glosses over the strict requirement that a prisoner must seek administrative relief before invoking judicial intervention to redress post-trial confinement conditions issues. Specifically, the law requires a prisoner to exhaust the prisoner grievance system and petition for relief via Article 138, UCMJ before he can seek judicial remedies. *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). Based upon the evidence submitted by the Defense, and the Defense's own concessions, it is evident that YN2 Richard does not satisfy either of the required elements for exhausting administrative remedies. YN2 Richard did not exhaust her grievance rights through the Chesapeake brig nor did she attempt an Article 138 complaint. Moreover, neither YN2 Richard nor her counsel raised her conditions of confinement in her clemency request. Despite the fact that YN2 Richard was granted an extension to file

clemency matters, and did not submit them until 10 March 2022, there were no complaints about her conditions of confinement in her clemency submission.[7]

CAAF has held that particularly unusual or egregious circumstances involving confinement conditions may warrant review without exhausting administrative remedies. *United States v. Wise*, 64 M.J. 468, 470 (C.A.A.F. 2007). The very limited exception in *Wise*, however, in wholly inapplicable to YN2 Richard's claims. In *Wise*, the Court considered the prisoner's claims that he was confined with enemy prisoners of war in Iraq, that he was confined in "irons"[8], that he was confined in a makeshift confinement area called "the cage,"[9] that he was confined in close quarters with enemy prisoners of war who had tuberculosis, and that he was ordered to wear a blue jumpsuit similar to that worn by the enemy prisoners of war. *Id.*

The striking difference between the concerns voiced by the prisoner in *Wise* and the concerns voiced by YN2 Richard are immediately apparent. This analysis focuses on whether YN2 Richard's situation involves particularly unusual or egregious circumstances such that she should be exempt from the requirement to exhaust administrative remedies. Looking at the prisoner in *Wise*, the conditions of his confinement are patently concerning, yet CAAF found no Article 55 or Eighth Amendment violations but authorized a rehearing to determine the length of time and reasons why Wise was confined in irons. *Id.* at. 478. Notably, the dissent would have held that the failure to exhaust administrative remedies was controlling and not even remanded the case. *Id.* at 478 (Effron, Chief Judge (dissenting)). Nonetheless, the majority's decision

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[7] CAAF has been critical of the Defense's failure to raise conditions of confinement in clemency matters as it, along with failing to exhaust other available remedies, speaks to the legitimacy of the complaints. *See United States v. Wise*, 64 M.J. 468, 472 (C.A.A.F. 2007); *see also United States v. Miller*, -- M.J. --, 2022 WL 1021368 (C.A.A.F. 2022).

[8] "Irons" consisted of double leg shackles and handcuffs which the prisoner was required to wear at all times, even while eating and sleeping, with them only being removed to use the latrine.

[9] "The cage" was not a structure but an outdoor area which was cordoned off by concertina wire for its boundaries and its sections, and then was surrounded by armed guards.

focused on the makeshift confinement area's lack of a formal complaint mechanism, his denial of contact with his attorney, and "the cage's" lack of explanation of how to raise complaints, which all amounted to unusual circumstances that allowed consideration of his complaints without the normally required exhaustion of administrative remedies. *Id.* at 473.

YN2 Richard cannot make any straight-faced arguments that her situation at the NAVCONBRIG Chesapeake even resembled Wise's situation at "the cage" in Iraq. As such YN2 Richard was not exempt from the requirement to exhaust administrative remedies. She faced no unusual circumstances, she had full access to her counsel, and she had full awareness of the brig's complaint policies. Further, her attorneys could have aided her in filing a 138 complaint as required, but instead the Defense and YN2 Richard chose to skip that step and file this motion. YN2 Richard's counsel did so without good cause and at their peril. As such, this Court should deny YN2 Richard's requested relief for failing to exhaust administrative remedies.

III. YN2 Richard's Confinement at NAVCONBRIG Chesapeake Did Not Violate Article 55

YN2 Richard did not experience any non-standard conditions of confinement during her brief time at the Chesapeake Brig. She certainly might wish that her conditions of confinement were more luxurious, but ultimately she is serving a sentence for killing another human being and that sentence is not supposed to be enjoyable. YN2 Richard's lack of enjoyment, however, does not amount to cruel and unusual punishment.

Article 55's protections are co-extensive with the Eighth Amendment and do not offer greater protections than the Constitutional minimums. *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006). Further, "federal courts ought to afford appropriate deference and flexibility to [prison] officials trying to manage a volatile environment." *United States v. Smith,* 56 M.J. 653, 658 (A.C.C.A. 2001) (quoting *Sandin v. Conner,* 515 U.S. 472, 482, (1995)). Every prisoner

suffers some discomfort in prison but that does not equate to cruel and unusual punishment unless both an objective and subjective test warrants relief. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the objective test, the inmate must demonstrate that the deprivation was "sufficiently serious." *United States v. Sanchez*, 53 M.J. 393, 395 (CA.A.F. 2000). Further, the inmate must establish that the guard or official who exercised the cruelty towards them had a culpable state of mind and subjectively intended to maliciously or sadistically harm them. *Hudson v. McMillan*, 503 U.S. 1, 5-7 (1992); *United States v. Kinsch*, 54 M.J. 641, 647 (A.C.C.A. 2000). Misconduct by prison officials does not constitute cruel and unusual punishment unless it falls within certain Eighth Amendment standards, notably that the conduct must involve a punishment which is incompatible with the "evolving standards of decency that mark the progress of a maturing society" or punishment which involves the "unnecessary and wanton infliction of pain." *United States v. Brennan*, 58 M.J. 351, 353 (C.A.A.F. 2003) (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976)). While the Eight Amendment does not permit inhumane conditions, it does not mandate comfortable prisons. *Brennan*, 58 M.J. at 353 (citing *Farmer*, 511 U.S. at 832).

In 2003, CAAF further refined the two part test for cruel and unusual punishment: (1) the objective test: was there a sufficiently serious act(s) or omission that produced a denial of necessities; and (2) the subjective test: whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety. *Brennan*, 58 M.J. at 353. Further, CAAF endorsed an additional element, which was created by the U.S. Supreme Court, that to sustain an Eighth Amendment violation there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain. *Id.* at 354 (citing *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001).

When analyzing YN2 Richard's factual allegations against the actual legal standards to sustain an Eighth Amendment claim, it is evident that this motion falls tremendously short. No actual analysis is really necessary because on its face the Defense does not make any claim of a sufficiently serious act which denied YN2 Richard her necessities. Second, the Defense does not provide even a factual proffer (much less any evidence) regarding the subjective state of mind of the prison official and how that proves a deliberate indifference to inmate health or safety. Finally, the Defense provides no evidence showing that YN2 Richard sustained any injury.

The basic facts that the Defense puts forward are (1) YN2 Richard claims that she was in solitary confinement, (2) YN2 Richard claims she was in a dorm by herself, (3) YN2 Richard claims she could not make personal phone calls for 10 days, and (4) YN2 Richard claim she could not "regularly" use the common area of her dorm.[10] First, factually, YN2 Richard was not in solitary confinement, the Naval Brig at Chesapeake does not even have such facilities. YN2 Richard was simply the only female prisoner at the facility at that time. Second, legally, even if YN2 Richard had been placed into administrative segregation or special quarters those conditions do not amount to cruel and unusual punishment. *United States v. Evans*, 55 M.J. 732, 741 (N.M.C.C.A. 2001). Finally, denial of personal phone calls is an aspect of prison life and does not amount to any form of cruelty.

Therefore, should this Court reach the merits of this allegation, it should expeditiously deny the Defense's motion because it lacks all substance and does not approach the legal standard required for relief in this area.

[10] It is unclear what "regular" use of the common area means, and similarly it is unclear how irregular use of the common area amounts to cruel and unusual punishment. As such, it will not be further addressed.

IV. The Defense have similarly failed to show a violation of Article 55 for denial of rental car reimbursement.

The Government is not responsible for any unauthorized travel or transportation expense incurred by a traveler. 37 U.S.C. § 452(g). YN2 Richard was not authorized a rental car on her travel orders[11] and did not seek permission from the appropriate authorities prior to obtaining two rental cars, as required by JTR 020209. YN2 Richard violated her orders without good cause and at her peril. Alleging an Article 55 violation based upon YN2 Richard's intentional decisions to misrepresent and ignore her orders strains all credulity. There is nothing cruel or unusual about the Government enforcing the standards applicable to any traveler as written in law. *See United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (Article 55's protections do not offer greater protections than the Constitutional minimums).

Defense Counsel's claim that YN2 Richard was "forced to pay out of pocket for her own transportation at her own court-martial" is nonsense. YN2 Richard was authorized local taxi and transportation expenses; she simply chose *not* to use this entitlement. Prior to trial, LT Simpson, YN2 Richard's Defense Counsel, requested that she stay at the Navy Lodge. He argued to Trial Counsel that "[redacted]and that the Norfolk Navy Lodge "would be easier for us to get her to trial." YN2 Richard chose to stay at the Norfolk Navy Lodge. YN2 Richard's counsel had transportation and no one from the Defense team made the Government aware of any transportation issues at any point during the trial. Instead, YN2 Richard made her own rules and circumvented policy. YN2 Richard is responsible for that choice. Had the Government been made aware of concerns with taxi availability – if that is even the truth – the Government would have found a solution (for example, a duty driver could have

[11] See Enclosure 1, Authorization Expense Summary

been assigned, or her hotel could have been shifted). The Government would certainly not place YN2 Richard in a position to forgo necessary [redacted]

YN2 Richard's decision to contravene her orders (twice no less), and to knowingly and secretly, go outside the bounds of established procedure to obtain a rental car without permission shows that she knew what she was doing.[12] The assertion by Defense Counsel to Trial Counsel that YN2 Richard [redacted] was nothing more than a ruse to get her out of UPH and authorized commercial lodging so that she could obtain the benefit of commercial lodging for [redacted] for three additional weeks at Government expense.[13] The decision to stop [redacted] and not alert the Government of that fact so that she could remain in commercial lodging was purposeful. To now argue that she should be entitled to an unauthorized rental car reimbursement is beyond comprehension. It is also untenable that her counsel seem to be complicit in YN2 Richard's deceptive efforts, or, at the very least are attempting to secure her additional benefits when they know that YN2 Richard's rental car situation was her own decision.

YN2 Richard cannot feign ignorance regarding the appropriate policies and procedures. Though the same standard would apply to any service member who deviated from authorized expenditures, YN2 Richard is a Yeoman. She has attended Yeoman "A" School, been assigned to both SPO and Admin departments, completed her ERATS requirements for YN1, and is versed in travel orders, appropriate Government Charge Card usage, and travel arrangement

[12] Emails by YN2 Richard to LSC admin staff leading up to trial demonstrate that YN2 Richard knew that approval was required for travel deviations.
[13] As shown by YN2 Richard's decision to stop [redacted] less than two days after arrival in Norfolk to obtain a rental car.

procedures. The Government is under no obligation to reimburse her for personal expenses. Her request for confinement credit should be denied.[14]

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion.

Respectfully Submitted,

//s//
A.B. Murray, LCDR
Trial Counsel

//s//
R.W. Canoy, LCDR
Trial Counsel

[14] YN2 Richard's use of her Government Travel Charge Card for the second rental car (an unauthorized expense) was a violation of Article 92, UCMJ, pursuant to Government Travel Charge Card (GTCC) Program, COMDTINST M4600.18 at 2; Ch. 1.D.5. (Prohibited GTCC Usage).

APPELLATE EXHIBIT 387
PAGE 20 OF 20 PAGE (S)

REQUESTS

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	GOVERNMENT REQUEST FOR WITNESS DEPOSITION IN LIEU OF LIVE TESTIMONY 15 OCT 2021

RELIEF SOUGHT

The United States respectfully requests the oral deposition of Ms. [redacted] of [redacted] Kodiak, Alaska. The Government further requests the deposition's use at trial in lieu of live testimony.

HEARING

The United States requests oral argument on this motion if it is opposed.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Government bears the burden of proof and persuasion, which must be met by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c).

FACTS

The facts relevant to the issues raised in this motion are as follows:

1. This case was referred to General Court-Martial on 25 June 2021. YN2 Kathleen Richard (hereinafter: "the Accused") has been charged with two specifications of Article 118 (Murder), one specification of Article 119 (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice), UCMJ.

2. Ms. [redacted] is a Government witness. She was [redacted] primary infant [redacted] prior to her death. On 20 September 2021, Ms. [redacted] was served a subpoena issued by Trial Counsel to testify at trial.

3. Since issuance of the subpoena, Trial Counsel received a letter from Ms. [redacted] healthcare provider at Kodiak Community Health Center requesting Ms. [redacted] exemption from travel to Norfolk, Virginia, due to age and health related concerns, including COVID-19 risk of exposure. The provider note is attached. A.E. II – O.

4. In addition, Trial Counsel was informed by Pastor [redacted] that the daycare center would need to close its doors or turn families away if Ms. [redacted] were called to travel to Norfolk, Virginia, for trial. Due to mandatory child-to-caregiver ratios[1], Ms. [redacted] service as an infant caregiver is essential to continued operations. Her absence would adversely impact at least five Kodiak families, leaving some without infant childcare options. A letter from Pastor [redacted] is attached. A.E. II – P.

5. Ms. [redacted] has requested this Court grant relief from the subpoena pursuant to R.C.M. 703(g)(3)(G).

6. Trial Counsel forwarded Ms. [redacted] health care letter to Defense Counsel on 8 October 2021 and proposed alternatives to live testimony, including video-teleconference or a Stipulation of Live Testimony. In an emailed response, Defense Counsel cited its need to cross-examine Ms. [redacted] in person.

LEGAL AUTHORITY AND ARGUMENT

Trial Counsel respectfully requests an oral deposition be taken of Ms. [redacted]

[1] 7 Alaska Admin. Code §57.510 – Maximum group size in child care centers; 7 Alaska Admin. Code §57.505(c) – Child-to-caregiver ratios

including video and audio recording, where the Accused and her Counsel have full opportunity to question the witness during the proceeding. Due to Ms. [redacted] underlying health condition and age, as well as the significant impact her absence from Kodiak would have on the [redacted] and families of Kodiak should she be compelled to testify in person, "exceptional circumstances" exist such that Ms. [redacted] is likely to be unavailable to testify at the time of trial. A deposition would preserve critical Confrontation Clause rights for the Accused while relieving the health and hardship concerns of a key witness.

After referral, the military judge may order that a deposition be taken on request of a party. R.C.M. 702(b). A request for an oral deposition may be approved without the consent of the opposing party. R.C.M. 702(a)(5).

In accordance with R.C.M. 702(c), the following information applies to the deponent: [redacted] Ms. [redacted] is to be examined on all matters relating to [redacted] prior to her death on 18 April 2020, including observations of [redacted] condition, health and care.

Should the deposition be approved by this Court, the Government further requests the deposition's use at trial in lieu of live testimony. Military Rule of Evidence 804(b)(1) expressly allows for the admission of depositions during a court-martial when a witness is unavailable. A declarant is considered to be unavailable as a witness if the declarant ... (6) has previously been deposed about the subject matter and is absent due to military necessity, age, imprisonment, non-amenability to process, or other reasonable cause. M.R.E. 804(a). A lawful deposition where Defense Counsel and the Accused have an opportunity to direct, cross, or redirect the deponent serves as an exception to hearsay at trial. M.R.E. 804(b)(1)(A). Based on proffers from Ms. [redacted] she is not likely to be available for testimony at trial due to the concerns listed above.

The Government notes that use of the deposition at trial would allow the Defense greater latitude in shaping the testimony presented to the factfinder. In this case, Defense Counsel can object to questions in advance and ensure improper evidence is not admitted or even heard by the members. Use of depositions also ensures there are no surprise responses, which allows the Defense to better prepare for trial.

WITNESSES/EVIDENCE

The Government offers the following evidence as enclosures to support this motion.

- **A.E. II – O**: Letter from Kodiak Community Health Center
- **A.E. II – P**: Letter from [redacted]
- **A.E. II – Q**: Alaska Code Sections

CONCLUSION

The United States respectfully requests the oral deposition of Ms. [redacted] of [redacted] Kodiak, Alaska. The Government further requests the deposition's use at trial in lieu of live testimony.

[redacted] MURRAY.ALLISON.BLAIR.[redacted] Digitally signed by MURRAY.ALLISON.BLAIR.[redacted] Date: 2021.10.15 11:19:21 -07'00'

Allison B. Murray
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel on 15 OCT 2021.

[redacted]
Allison B. Murray
LCDR, USCG
Trial Counsel

Appellate Exhibit SO
Page 4 of 4

NOTICES

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA v. KATHLEEN RICHARD YN2/E-5 USCG	DEFENSE NOTICE OF POTENTIONAL EXPERT WITNESS TESTIMONY 8 OCTOBER 2021

The defense provides of the following potential expert witness testimony. All defense experts remain consultants at this time. The defense asks that the government refrain from contacting any of the defense experts directly without coordinating with the defense counsel.

1. Dr. [redacted] M.D.

Dr. [redacted] is a pediatric forensic pathologist. If called to testify, she will offer testimony to rebut Dr. [redacted] opinions. Specifically, she will rebut the opinion that YN2 Richard suffocated [redacted] In addition, she will offer testimony to rebut any opinion related to Col [redacted] testimony as it relates to allegations of child abuse in this case.

2. Dr. [redacted] M.D.

Dr. [redacted] is a forensic pathologist and medical examiner. If called to testify, he will offer testimony to rebut Dr. [redacted] Because Dr. [redacted] was only recently approved and the defense has not received a contract, the defense is unable to provide any additional specific information.

3. Dr. [redacted]

Dr. [redacted] is a forensic psychologist. If called to testify, she will offer testimony to rebut testimony from Dr. [redacted]

4. Dr. [redacted]

Dr. [redacted] is a forensic psychologist that specializes in coercive interrogations. If called to testify, he will testify to the coercive nature of YN2 Richard's interrogation.

5. Mr. [redacted]

Mr. [redacted] is an expert if digital forensics. If called to testify, he will rebut any testimony by Mr. [redacted] and any other relevant evidence or opinions presented related to his field.

/s/
J. L. LUCE

Enclosures:

(1) Dr. [redacted] CV
(2) Dr. [redacted] CV
(3) Dr. [redacted] CV
(4) Dr. [redacted] CV
(5) Mr. [redacted] CV

UNITED STATES COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES vs. KATHLEEN RICHARD YN2/E-5 U.S. COAST GUARD	CIVILIAN COUNSEL NOTICE OF APPEARANCE 29 June 2021

1. I, Billy Lee Little, Jr., represent the accused, YN2 Kathleen Richard, with respect to the charges referred to trial by court-martial in this case. Specifically, I represent YN2 Richard with respect to the following referred charges: (1) UCMJ, Article 118 (Murder); (2) UCMJ, Article 131b (Obstruction of Justice); and (3) UCMJ, Article 119 (Manslaughter).

2. My full name, mailing address, phone number and email address are as follows:

a. Billy Lee Little, Jr.

[redacted]

3. I am licensed to practice law in the State of Arizona. I am a member in good standing with the Supreme Court of Arizona. I have been qualified by the Supreme Court of Arizona as a capital defense attorney (death penalty/learned counsel).

4. I have not acted in any manner that might tend to disqualify me from representing the accused at trial by court-martial.

5. I have read and understand the "Court Rules of Practice and Procedure Before Coast Guard Courts-Martial" (Revised January 2019).

Dated this 29th day of June 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

Appellate Exhibit VIII
Page 1 of 2

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 29th day of June 2021.

Dated this 29th day of June 2021.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

Appellate Exhibit VIII
Page 2 of 2

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. COAST GUARD	NOTICE OF APPEARANCE ARTICLE 6b(c) DESIGNATION [redacted] 18 Aug 2021

NOW COMES BM2 [redacted] a victim specified in the charges, and respectfully submits the following notice of appearance pursuant to Article 6b(c).

1. I am [redacted] of now deceased [redacted] the named victim in the case now in hearing. Pursuant to Article 6b(c) and USCG Rules of Practice Rule 5.1, I request to be designated as her representative in the court-martial before this Court.

2. [redacted] at the time of her death on 18 April 2020.

3. The situs of the trial is Norfolk, Virginia. There would be no additional cost to the Government affecting this appointment, as I will already be called to testify as a witness.

4. As [redacted] I am best able to represent her rights and interests and would do so willingly.

Respectfully submitted,

[redacted]

BM2, USCG

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Government and Defense Counsel on 18 Aug 2021.

[redacted]

BM2, USCG

Appellate Exhibit XVIII
Page 1 of 1

UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **KATHLEEN RICHARD** **YN2/E-5 USN**	**DEFENSE NOTICE OF TECHNOLOGY USE** **4 January 2022**

1. The Defense hereby provides notice of intent to utilize the following technology:

   a. Digital technology, to include PowerPoint presentations, during opening and closing statements and displays of exhibits onto screens during opening and closing statements, as well as during direct and cross examinations.

   b. Audio and video technology to play recordings entered into evidence (if any).

2. The Defense will coordinate with the Government to ensure that the members are provided with the necessary equipment to view exhibits and view/listen to recordings entered into evidence while deliberating.

/s/ Billy L. Little, Jr.
B. L. LITTLE, JR.
Counsel for YN2 Kathleen Richard

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

/s/ Connor Simpson
C.B. SIMPSON
LT, USCG
Defense Counsel

Appellate Exhibit 156
Page 1 of 2

CERTIFICATE OF SERVICE

I hereby certify that on 4 January 2022, a copy of this proposed voir dire was electronically served on court and Trial Counsel.

[redacted]
J. LUCE
LCDR, JAGC, USN
Individual Military Counsel

Appellate Exhibit 156
Page 2 of 2

COURT RULINGS & ORDERS

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF DEFENSE EXPERT (DR. [redacted]) 22 Dec 2021

RELIEF SOUGHT

The Government moved this Court to exclude the testimony of Defense expert witnesses.[1] AE 81. The Defense opposed the Defense motion. AE 82. An Article 39(a) session to hear argument on this motion was held on 10 December 2021.

ISSUE PRESENTED

Is the expert testimony of Dr. [redacted] in the field of coercive interrogation techniques admissible at trial?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Dr. [redacted] PhD, JD, is a Professor of Law and Psychology at the [redacted] He previously served as a professor of psychology and criminology at the [redacted]

4. Dr. [redacted] has focused his career in academia, where he has focused his research on the field of police interrogation practices, false conviction, and wrongful convictions.

[1] At the Article 39(a) session, the Court reserved ruling on Dr. [redacted] Dr. [redacted] and Dr. [redacted] until time that the Defense offers their expert testimony.

5. Dr. [redacted] has published numerous articles on these subjects, including articles in scientific and legal journals. He has also written numerous books on the subject. Most of Dr. [redacted] writings have been peer-reviewed.

6. Dr. [redacted] has testified as an expert witness 384 times on the subject of coercive police interrogations. He has testified for the defense 380 times.

7. Dr. [redacted] opinion has been deemed "not reliable" by courts between 15 and 18 times.

8. In preparation for this case, Dr. [redacted] reviewed recorded interviews of the accused, including the accused's 19 June 2020 interview with Coast Guard Investigative Service (CGIS) agents.

9. Dr. [redacted] also review the Government's forensic pathologist, Dr. [redacted] report regarding his review of [redacted] autopsy findings.

10. Dr. [redacted] will explain that generally three groups are particularly susceptible to coercion during interrogation: (1) persons with prior mental trauma; (2) persons with significant mental disabilities; and (3) teenagers and young adults.

11. Dr. [redacted] research has identified certain law enforcement practices and techniques found to contribute to false confessions. Some of these techniques include: isolating suspects with no distractions, extensive rapport building, downplaying significance of rights warnings, confrontations towards witness denials, and both minimizing suspected conduct and maximizing the ramifications of not confessing.

12. In his review of the case file materials, Dr. [redacted] observed CGIS agents employ: isolation; extensive rapport building; downplaying significance of rights warnings, confrontation, minimizing conduct and maximizing potential ramifications for not confessing.

13. Dr. [redacted] research suggest that false confessions are common after 6 hours of continued interrogation.

14. Dr. [redacted] acknowledged there is no rate of false confessions as there is no data available to test.

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

PRINCIPLES OF LAW

A military judge must decide any preliminary question about whether a witness is…qualified…or evidence is admissible. M.R.E. 104(a). The military judge is charged with being a gatekeeper of expert testimony pursuant to M.R.E. 104(a). An expert witness may provide testimony if it "will assist the trier of fact to understand the evidence

or to determine a fact in issue..." M.R.E. 702. However, the military judge has the responsibility to act as "gatekeeper" in determining the admissibility of expert testimony. United States v. Billings, 61 M.J. 163, 169 (C.A.A.F. 2005) (citations omitted). Citing the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), the Court of Appeals for the Armed Forces identified four factors a judge may consider in determining the reliability of expert testimony:

> (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.
>
> Billings, 61 M.J. at 168.

In addition to the Daubert factors, United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993), also provides useful criteria to determine the admissibility of expert testimony. The Houser factors are:

> (A) the qualifications of the expert, M.R.E. 702;
> (B) the subject matter of the expert testimony, M.R.E. 702;
> (C) the basis for the expert testimony, M.R.E. 703;
> (D) the legal relevance of the evidence, M.R.E. 401 and 402;
> (E) the reliability of the evidence, United States v. Gipson, 24 M.J. 246 (C.M.A. 1987), and M.R.E. 401; and
> (F) whether the "probative value" of the testimony outweighs other considerations, M.R.E. 403.

ANALYSIS

Houser provides a detailed set of criteria to illuminate the reliability of an expert's opinion under Daubert. Therefore, the Court applies the Houser test to assess whether or not the testimony of Dr. [redacted] is admissible at trial.

The Qualifications of the Experts

Dr. [redacted] possesses sufficient qualifications. He is a professor of law and psychology at the [redacted] having previously served in tenured academic positions with the [redacted] system. . His extensive scholarship in the field of false confessions and the factors common in proven false confessions are well-known and have been peer reviewed. He has testified as an expert witness in over three hundred cases.

The Subject Matter of the Testimony

Dr. [redacted] testimony regarding coercive interrogation techniques will help the trier of fact to understand the evidence or to determine a fact at issue.

Here, Dr. [redacted] research and specialized knowledge on coercive interrogation techniques will assist the finders of fact in analyzing the accused's confession/admission that will be admitted by the Government.

The Bases for the Experts' Opinion

There is sufficient basis for Dr. [redacted] opinion. Dr. [redacted] was able to observe the accused's 19 June 2020 recorded CGIS interview. He also had access to various case files in which to gain background on the Government's theory of the case, particularly with the evidence in which the accused was confronted during her interview. This information is what experts in this field would rely upon in forming their opinions.

The Legal Relevance of the Evidence

The opinion of Dr. [redacted] that the 19 June 2020 CGIS interview utilized coercive interrogation tactics is relevant. At trial, the members will review the entirety of the accused's 19 June 2020 interview with CGIS. During that interview, the members will observe two CGIS agents utilize extensive rapport building with the accused, and minimization tactics, including repeatedly telling the accused that she "didn't deserve to be in jail," that her actions were understandable due to her multiple stressors, and that they needed the accused to tell them what happened before the case got to the "prosecutors." The members will further observe the accused admit that she might have pressed [redacted] into the mattress while she was under stress and harm [redacted] but not "intentionally."

Dr. [redacted] testimony will highlight the coercive tactics used by CGIS during the interview. This testimony is relevant in that it makes the accused's admissions less probative that it would be without Dr. [redacted] testimony.

The Reliability of the Evidence

The Court finds Dr. [redacted] testimony to be sufficiently reliable to go to the finders of fact. In their brief and at oral argument, the Government argues that the science behind false confessions is entirely unreliable. See United States v. Griffin, 50 M.J. 278 (C.A.A.F. 1999)(holding the military judge did not abuse his discretion in finding an expert's opinion regarding false confessions as unreliable); see also United States v. Deuman, 892 F.Supp.2d 881 (W.D. Mich. 2012)(finding Dr. [redacted] testimony unreliable).

In Deuman, the court deemed Dr. [redacted] testimony unreliable. The court noted that Dr. [redacted] forthrightly admitted that his research cannot accurately predict the frequency and causes of false confessions. Moreover, the court found that Dr. [redacted] theories or

methodology could not be tested and could not be subjected to an error rate analysis. Id. at 886.

Here, as in Deuman and Griffin, Dr. [redacted] readily admits that the science of coercive police interrogations and false confessions is not subject to testing and an error rate. However, the Court finds that the lack of error rate does not render Dr. [redacted] testimony unreliable in this case. First, the facts in Deuman and Griffin are distinguishable to the facts in this case. Unlike Deuman, where the accused did not confess to a crime, here, the accused did confess to pressing [redacted] face into the mattress of her crib. Unlike Griffin, which involved the accused's statements following a polygraph examination, here, the accused was not subject to polygraph, but instead merely subjected to a one-hour and forty minute interview.

Furthermore, the Supreme Court has readily acknowledged there is "mounting empirical evidence that (law enforcement tactics) can induce a frighteningly high percentage of people to confess to crimes they have never committed." Corley v. United States, 556 U.S. 303, 321 (2009). In making this observation, the Supreme Court cited to Dr. [redacted]

Therefore, based on the Supreme Court's acknowledge and citation to Dr. [redacted] work, coupled with the distinctions between this case and Deuman, the Court finds Dr. [redacted] testimony as sufficiently reliable. As Trial Counsel have already displayed to the Court, they will have the ability to highlight any deficiencies in Dr. [redacted] theories, but such deficiencies ultimately go to the weight the members will give to such testimony, not its admissibility.

Whether the Probative Value of the Testimony Outweighs other Considerations

The probative value of Dr. [redacted] testimony is strong. Dr. [redacted] testimony suggests to the fact-finder that the accused confessions/admissions made to CGIS may have led to a false admission. On the other hand, CGIS tactics may have led to a truthful admission. That ultimate determination is up to the finder of fact.

The Court is not concerned that Dr. [redacted] testimony would be given undue weight by the members. At trial, a members panel will consist of eight members in the ranks of E-6 and above. The Court is satisfied this senior panel will use their knowledge and life experience to appropriately weigh this evidence. Lastly, any further concerns by the Government may be alleviated by appropriately tailored instructions.

CONCLUSION OF LAW

The expert testimony of Dr. [redacted] in the field of coercive interrogation techniques is admissible at trial.

RULING

The Government motion to preclude the testimony of Dr. [redacted] is DENIED, consistent with the above conclusion of law.

22 Dec 2021

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR RECONSIDERATION – FUNDING FOR A HOMICIDE INVESTIGATOR 18 Nov 2021

RELIEF SOUGHT

The Defense moved this Court to reconsider the Court's ruling of 27 Sept 2021, which denied the Defense's motion to compel the production of homicide investigator [redacted] as an expert consultant. AE 69. The Government opposed the motion to reconsider. AE 70. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUE PRESENTED

Is the assistance of a homicide investigator necessary for an adequate defense?

FINDINGS OF FACT

The Defense must prove by a preponderance of the evidence that one hundred twenty hours of consultation with Mr. [redacted] is necessary for an adequate defense. In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base [redacted] on 18 April 2020.

3. The body of [redacted] was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

4. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

5. The autopsy concluded that the cause of death to be "asphyxia" due to "prone position of swaddled infant in bedding."

6. The autopsy further concluded that the manner of death was classified as "undetermined."

7. From 26 April to 10 May 2020, U.S. Coast Guard Reserve Special Agent [redacted] was activated to assist the team in Alaska with its early investigation.

8. Special Agent [redacted] has served in various law enforcement roles from 2003 to the present.

9. From [redacted] Special Agent [redacted] was employed as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During that time period, Special Agent [redacted] resume notes that he earned recognition as the Detective of the Year in [redacted]

10. Special Agent [redacted] has served as a CGIS Special Agent since 2015. Special Agent [redacted] resume notes that he is a "subject matter expert in death investigation/homicide" and that he is a "founding member of Global homicide response team."

11. In the awards and accomplishments section of his resume, Special Agent [redacted] notes that he was the Lead Homicide Investigator for the State of Illinois.

12. S/A [redacted] had a telephone discussion with Dr. [redacted] in late April 2020.

13. S/A [redacted] considers Dr. [redacted] a close professional colleague, having worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

14. Dr. [redacted] was later contracted by the Government in July 2020 to assist the Government.

15. Dr. [redacted] reviewed the results of [redacted] autopsy, opined that the autopsy results were indicative of a homicide, and will testify for the Government at trial.

16. S/A [redacted] did not serve as a lead agent on this case, but he reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation.

17. S/A [redacted] His did not respond to the scene, attend the autopsy, or conduct any interviews of YN2 Richard or BM2 [redacted]

18. The Government disclosed to the Defense the fact and nature of S/A [redacted] participation in the case on 8 November 2021.

19. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. He was previously assigned as a detective investigator while with the San Antonio Police Department. In this capacity, he investigated murder cases, among other felony level crimes.

20. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. She was previously assigned as a detective with the homicide bureau for the Memphis Police Department.

21. S/A [redacted] CGIS, who participated in the Government's investigation, completed a homicide investigations course and was issued a certificate of completion by the Robert Presley Institute of Criminal Investigation.

22. The Defense team is comprised, in part, of Mr. Billy Little, Civilian Defense Counsel, and LCDR Jennifer Luce, Individual Military Counsel. Mr. Little is an experienced defense attorney and has defended numerous capital murder cases. Similarly, LCDR Luce is an experience defense attorney and has also previously defended murder cases.

23. The U.S. Navy employs Defense Litigation Support Specialists. To date, however, according to the Government, the U.S. Navy has not assigned a Defense Litigation Support Specialist to the accused's defense team.

24. On 08 July 2021, the Defense moved to compel the production of homicide investigator [redacted] In this motion, the Defense proffered that Mr. [redacted] assistance would be used in "(1) Determining what investigative steps should be taken in preparation for trial; (2) identification of possible affirmative defenses; (3) preparation for, and conducting, pretrial interviews; (4) identifying investigative leads to pursue prior to trial; and (5) preparing for cross-examination of the investigating CGIS agents.." AE XX. The Defense further offered that "[t]his expert will also be necessary to determine whether or not a defense theory is viable or whether an accused should attempt to negotiate a plea agreement." Id. The Defense also noted that "[Mr. [redacted] will help educate the panel in determining the credibility, impartiality, and professionalism of the CGIS investigation." Id.

25. In its request for reconsideration of the Court's initial denial of this expert request, the Defense also indicated that Mr. [redacted] assistance was needed to develop a third party defense. AE XX.

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

PRINCIPLES OF LAW

Under Article 46, UCMJ, and M.R.E. 706(a), the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain expert witnesses.

R.C.M. 703(b) states that each party is entitled to the production of any witness

whose testimony on a matter in issue on the merits…would be relevant and necessary.

The accused bears the burden of establishing a reasonable probability that: (1) an expert would be of assistance to the defense; and (2) denial of expert assistance would result in a fundamentally unfair trial. United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008). To satisfy the first prong of this test, courts apply a three-part analysis set forth in United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994). 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. Id.

ANALYSIS

The Court finds that the Defense has met its burden in establishing that the request for a homicide investigator would be of assistance and that the denial of the expert assistance would result in a fundamentally unfair trial. The Court's ruling on the original motion for the assistance of a defense investigator hinged on the inability of the Defense to show how the defense team was unable to conduct an adequate investigation on its own. This ruling took into account the strong working relationship the defense team appeared to have with the government team, and the government team's willingness to provide witness access and discovery.

Since its original ruling, additional Government disclosures have made the Defense and Court aware that the Government's investigative team benefited from the assistance of CGIS Special Agents who had significant experience in homicide investigations. CGIS activated S/A [redacted] a reserve agent, from 26 April to 10 May 2020 to assist with the investigation in Alaska. S/A [redacted] resume notes that he served as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During the this time period, his resume notes that he earned recognition as the Detective of the Year in [redacted] Additionally, the resume notes he is a "subject matter expert in death investigation/ homicide" and that he is a "founding member of [the] Global homicide response team." The Government indicated that while not the lead agent, S/A [redacted] "reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation."

Additional Government disclosures have also made the Defense and Court aware that S/A [redacted] was apparently the first government agent to make contact with Dr. [redacted] This contact came in the form of a telephone call, while S/A [redacted] was activated in support of the investigation. Dr. [redacted] would later be contracted by the Government and will testify as an expert witness in the Government's case concerning the cause of [redacted] death. S/A [redacted] considers Dr. [redacted] to be a close professional colleague, because they worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

Finally, the Court notes that CGIS also activated reserve special agents [redacted] and [redacted] for the investigation team. Both individuals' resumes list experience as previous homicide detectives in their civilian law enforcement careers.

The Court is persuaded that this additional evidence, when coupled with evidence previously presented to the Court, makes the assistance of a homicide investigator necessary to the preparation of the Defense's case. As part of its strategy, the Defense will focus on the shift from the initial classification of the cause of death as "undetermined" to a later classification that the cause was homicide. The defense will also focus on the Government's reliance on multiple medical examiners; how the opinions of those medical examiners were obtained, and how the fact finder should ultimately weigh differences in those medical opinions. It is now clear that the Government used an investigative team with experience in homicide investigations as the investigation progressed. The members of this investigative team, including S/A [redacted] made contact with the medical examiners at issue, recorded, and analyzed their findings. The Court finds it would be fundamentally unfair to deny the Defense access to an experienced homicide investigator, as it prepares to defend the accused from a case investigated in part by similarly experienced special agents. Whereas the Court originally found that the defense team could handle the investigation on its own, that finding is no longer valid.

In summary, the Court finds that the Defense has met its burden under the three prong test articulated in United States. v. Gonzalez to establish the necessity of a homicide investigator's assistance. Additionally, under United States v. Freeman, given the Government's use of an investigative team with significant homicide experience, it would be fundamentally unfair to deprive the defense of this expert request.

CONCLUSIONS OF LAW

Assistance by an expert in the field of homicide investigations is necessary for an adequate defense.

RULING AND ORDER

The Defense's motion to reconsider the Court's denial to compel production of an expert consultant in the field of homicide investigation is GRANTED.

The Government shall fund an expert homicide investigator for no more than 120 total hours for pretrial preparation and one day of testimony at trial, at his cited hourly rate of [redacted] The funding shall not exceed [redacted]

It is so ordered.

CASEY.PA[redacted] Digitally signed by CASEY.PAUL.R[redacted] Date: 2021.11.19 14:07:02 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

UNITED STATES COAST GUARD

TRIAL JUDICIARY

IN RE: PRETRIAL INVESTIGATIVE SUBPOENA (YN2 KATHLEEN RICHARD) U.S. Coast Guard	RULING ON MOTION TO QUASH SUBPOENA TO AT&T 17 May 2021

1. Relief Sought

On 21 April 2021, this Court issued a pre-referral investigative subpoena to AT&T Mobility, LLC and AT&T Corporation in search of records pertaining to YN2 Kathleen Richard. On 8 May 2021, YN2 Richard filed a motion to quash the subpoena, or, in the alternative, modify the subpoena's temporal scope. On 12 May 2021, the Government filed a response in opposition. A hearing was not held.

2. Issues Presented

2.1. Is YN2 Richard's motion timely?

2.2. Does YN2 Richard have standing to file a motion to quash a pre-trial investigative subpoena?

2.3. If so, was there adequate evidence supporting the subpoena?

3. Findings of Fact

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

3.1. YN2 Richard is under investigation for murder and obstruction of justice.

3.2. On 21 Apr 2021 this Court issued an investigative subpoena to AT&T Mobility, LLC and AT&T Corporation seeking records associated with the cell phone number [redacted]

3.3. The subpoena directed AT&T to produce non-content records such as customer

name, length of service, call logs, SMS logs, and methods of payment.

3.4. The subpoena commanded AT&T to produce these records for the date range starting 22 May 2020 and ending on the date of the subpoena.

3.5. YN2 Richard received a letter on 1 May 2021 from AT&T regarding the subpoena and informing YN2 Richard that AT&T intended to comply with the subpoena by 8 May 2021 unless otherwise notified.

3.6. YN2 Richard has detailed defense counsel for charges that are preferred but not yet referred. YN2 Richard's counsel filed a motion to quash on 8 May 2021.

3.7. This Court ordered the government to seal any response received from AT&T pending resolution of this motion.

3.8. AT&T provided a response to the government. The government affirms that the response has been sealed and not yet reviewed.

4. Principles of Law

As the moving party, YN2 Richard must show, by a preponderance of the evidence, that the subpoena to AT&T is unreasonable, oppressive, or prohibited by law.

As the document in question is a pre-trial investigative subpoena, the Rules for Court-Martial 309 and 703 apply.[1] R.C.M. 309(b)(3) provides that "a person in receipt of a pre-referral investigative subpoena . . . may request relief on grounds that compliance with the subpoena . . . is unreasonable, oppressive, or prohibited by law." Accord. R.C.M. 703(g)(3)(G). While the text suggests that only the "person in receipt" of a subpoena has standing to object, courts have recognized third party standing when the subpoena seeks information protected by privilege or some other legally cognizable interest. United States v. Johnson, 53 M.J. 459, 461 (C.A.A.F. 2000). Indeed, R.C.M. 703 itself contemplates third party standing as it directs the notification of a victim prior to issuing a subpoena for the victim's "personal or confidential" information, thus permitting the victim to "move for relief under subparagraph (g)(3)(G)." R.C.M. 703(g)(3)(C)(ii), In re A.H., 79 M.J. 672, 673 (C.G. Ct. Crim. App. 2019).

[1] R.C.M. 703A, cited by YN2 Richard in her motion to quash, addresses warrants and orders under the Stored Communications Act and not pre-trial investigative subpoenas.

Military Rule of Evidence (M.R.E.) 502 protects "confidential communications" between the client and her attorney "made for the purpose of facilitating the rendition of professional legal services." Generally, a communication must contain some content to fall under the ambit of M.R.E. 502. 24 Fed. Prac. & Proc. Evid. § 5484 (1st ed.). The mere fact that a client communicated with her attorney is not privileged.

The Rules for Court-Martial do not prescribe a particular standard to support the issuance of an investigative subpoena. The Supreme Court of the United States provided some guidance, noting that the requesting party must show that: (1) the documents are evidentiary and relevant; (2) even with diligence, the documents are not otherwise procurable before trial; (3) the party cannot prepare for trial and may, in fact, delay trial; and (4) the application is made in good faith and not a "fishing expedition." United States v. Nixon, 418 U.S. 683, 699 (1974). Because this is a lower showing than probable cause, a subpoena cannot compel production of information protected by the Fourth Amendment, such as email, See, e.g., United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010), text messages on a privately owned cell phone, Riley v. California, 573 U.S. 373, 386 (2014), or the contents of a phone call. Katz v. United States, 389 U.S. 347, 359 (1967). There is not, however, a similar Fourth Amendment interest in telephone numbers, Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018), or, by extension, the destination for a text message. See, e.g., United States v. Streett, 363 F. Supp. 3d 1212, 1315 (D.N.M. 2018).

5. Analysis

5.1. YN2 Richard's motion is not untimely

The government argues that YN2 Richard's motion to quash is untimely because she filed after the deadline set by AT&T. While AT&T may set a deadline for its own processes, it cannot set a deadline that binds this Court. Even though the government has received the records, they have not yet reviewed them, thus preserving YN2 Richard's purported interests. Because there are other defects with YN2 Richard's motion, the Court will assume without deciding that YN2 Richard's is timely.

5.2. YN2 Richard does not have standing to quash the subpoena

YN2 Richard is not the party compelled to act by the subpoena. Therefore, she needs to identify some legally cognizable interest that would permit her to challenge the subpoena.

YN2 Richard avers that the subpoena will reveal communications protected by M.R.E. 502. This contention fails because M.R.E. 502 protects information that is unattainable with an investigative subpoena. M.R.E. 502 protects the contents of the communications, not the existence of those communications. After all, the fact that YN2 Richard texted counsel reveals nothing about whether she was seeking legal advice or merely commenting on the weather. The Fourth Amendment already protects that content which, by definition, cannot be retrieved with a subpoena. Accordingly, YN2 Richard failed to articulate a legally cognizable interest in the data sought by the government and lacks standing to challenge the subpoena.

5.3. The subpoena was adequately supported by evidence

Even if YN2 Richard had standing, her motion would fail. YN2 Richard speculated about the relevance (or lack thereof) of the temporal scope of the subpoena. Speculation, however, must give way to the articulable facts in the government's sworn affidavit. The Court re-examined the application and sworn affidavit and affirmed that it provided a sufficient basis for the subpoena.

6. Conclusions of Law

6.1. YN2 Richard's motion to quash was not untimely.

6.2. YN2 Richard does not have standing to challenge the subpoena.

6.3. The evidence presented adequately supported the issuance of the subpoena.

7. Ruling and Order

YN2 Richard's motion to quash the subpoena is **DENIED** in accordance with the above conclusions of law.

So ordered this 17th day of May 2021.

[redacted]

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Date: 2021.05.17 10:55:48 -04'00'

Jeffery C. Barnum
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	COVID MITIGATION ORDER 31 Aug 2021

1. **Nature of Order**. The subject case is currently docketed for several pretrial motion sessions in Norfolk, Virginia on: 2-3 September; 3-4 November; and 9-10 December 2021. The subject case is docketed for trial in Norfolk, Virginia from 10-28 January 2022. In order to mitigate COVID-19 health risks to all trial personnel and any members of the general public who may desire to attend the proceedings, the Court orders the following mitigation measures implemented during the trial of the subject case. Thesemitigation measures address only those measures that will be taken within the Courtroom, the judicial chambers, and members' deliberation room. However, should there be any conflict between the measures imposed by this Court and any other official direction, the measures ordered by the Court shall be enforced.

2. **The following mitigation measures are hereby ordered by the Court to be observed within the Coast Guard courtroom at the Main Street Tower, Norfolk, VA, the judicial chambers, and members' deliberations room during the proceedings conducted in the General Court-Martial of United States v. YN2 Kathleen Richard, U.S. Coast Guard.**

3. Measures related to courtroom spaces:

a. Absent good cause, sessions of court will be held from 0900-1630 each day.

b. Prior to the commencement of any session of court, all tables, podiums, chairs, and surfaces within the courtroom, the judicial chambers, and members deliberation rooms will be cleaned with appropriate cleaning agents. The cleaning of these spaces and items will occur before the start of each day's proceedings, during the mid-day recess, and at the conclusion of each day's proceedings.

c. To reduce "mask fatigue" and to allow for the "airing out" of the courtroom, the Court will observe frequent recesses throughout the proceedings. Typically, the session will be recessed every 45 minutes for a period of 15 minutes. During these recesses, the courtroom doors should be opened to the greatest extent possible to maximize fresh air flow within the courtroom.

d. In order to maximize social distancing, the Court is limiting the number of spectators allowed in the courtroom to 15 individuals.[1] Trial counsel is directed to designate seating in the spectators' area to ensure minimum social distancing occurs consistent with this order. Nothing in this order is intended to interfere with the requirements of an open trial pursuant to RULE FOR COURTS-MARTIAL 806.

e. An alternate deliberation room shall be identified to facilitate the members' ability to practice social distancing during deliberations and any breaks longer than fifteen minutes. A large group room on the third deck of the Main Street Tower will be utilized for the members' deliberations. For breaks under fifteen minutes, the members shall utilize two conference rooms on the ninth deck of the Main Street Tower.

4. Measures related to counsel. All counsel will wear face masks at all times while within the Courtroom unless granted specific permission by the Court to remove their mask.
Should the Court grant counsel permission to remove their mask, counsel will maintain six (6) feet distance from any other participant at all times while unmasked.

5. Measures related to the accused. The accused may, but is not required to, wear a face mask while court is in session. Should the accused choose not to wear a mask while court is in session, defense counsel will arrange seating at counsel table in order to observe appropriate social distancing from the accused. When consulting with counsel in the courtroom, the accused will wear a face mask. During all periods of recess, the accused will wear a face mask while within the courtroom.

6. Measures related to members.

a. The Government is directed to split the members into two groups for group *voir dire*, with staggered start times. During group voir dire members' chairs shall be positioned six feet apart. Members will remain masked.

b. Subsequently, all members will be questioned in individual *voir dire*. The court will liberally permit follow on questions during individual *voir dire* to ensure the parties have had adequate opportunity to develop potential challenges. During individual *voir dire*, members will not wear masks in order to allow the military judge and counsel to have an unobstructed view.

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[1] Spectators are any member of the general public and any individual not specifically detailed to this court-martial, including, but not limited to, the accused's or victim's family members and supporters, members of the press, trial team support staff, and supervisory counsel.

c. At all other times, members are required to wear a face mask while within the courtroom.

d. During deliberations, members may, but are not require to, remain unmasked. While in the deliberation room, members should maintain social distancing at all times.

7. Measures related to other participants and spectators.

a. The court reporter is required to wear a face mask at all times within the courtroom.

b. The bailiffs appointed in this case shall monitor and assist the members in complying with the Court's mitigation measures during recesses and back-and-forth to the alternate deliberation room. The bailiffs are required to wear a face mask at all times within the courtroom.

c. Witnesses are required to wear a face mask when entering and exiting the courtroom. Prior to swearing in, the trial counsel will direct witnesses to remove their face mask which will not be worn during testimony. During examination, counsel will remain at least six (6) feet away from the witness at all times. Should counsel need to pass any exhibit to a witness on the witness stand, that exhibit will be passed to the witness via the bailiff. Once a witness is excused from the stand and prior to the next witness taking the stand, the witness chair and all surfaces in the witness box will be cleaned with appropriate cleaning agents.

d. All spectators will wear a mask while within the courtroom. Any spectator who fails to wear a mask will not be permitted to enter the courtroom.

e. All court personnel, including spectators, will receive a daily temperature screening prior to being allowed in the courtroom.

It is so ordered.

CASEY.PAUL.R. [redacted] Digitally signed by CASEY.PAUL.R. [redacted] Date: 2021.08.31 15:58:56 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS – IMPROPER REFERRAL 12 October 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss all Charges and specifications against the accused due to an improper referral of charges which violated Articles 34 and 32 of the Uniform Code of Military Justice and the accused's Fifth Amendment right to Due Process. AE XIX. The Government opposed the motion. AE XX. An Article 39(a) session to hear argument on these motions was held on 30 August 2021.

ISSUES PRESENTED

1. Was the Article 34 advice defective?
2. Did referral of charges against the accused constitute selective prosecution?
3. Is the Base Kodiak Commanding Officer an Accuser?
4. Did the Base Kodiak command violated the accused's constitutional rights in denying her funding to travel to participate in the Defense pretrial investigation?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] on 18 April 2020.

3. In April 2020, the accused was assigned to the Base Kodiak Servicing Personnel Office (SPO).

4. At some point in April 2020, the accused filed a claim with her command that she was being discriminated against at the SPO.

5. [redacted] was the [redacted] the accused and [redacted] BM2 [redacted] At the time of her death, [redacted] with the accused and BM2 [redacted] in base housing onboard Base Kodiak.

6. Following her death, [redacted] body was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

7. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

8. The autopsy concluded that the cause of death to be "asphyxia" due to "prone position of swaddled infant in bedding."

9. The autopsy further concluded that the manner of death was classified as "undetermined."

10. Due to the death of [redacted] Coast Guard Investigative Service (CGIS) initiated an investigation. During the early stages of the investigation, CGIS agents had frequent contact with the accused and [redacted] BM2 [redacted]

11. During a 19 June 2020 voluntary interview with CGIS, the accused stated she "might have" put her hand on the back of [redacted] head and neck and pushed her face into the mattress to get [redacted] to stop crying.

12. BM2 [redacted] later told CGIS agents that the accused told him that she pushed [redacted] face into mattress until [redacted] stopped crying.

13. Charges were preferred on 1 February 2021. The accused was charged with two specifications of violations of Article 118 (murder) and one specification of Article 131b (Obstruction of Justice).

14. Specification 1 of Charge I stated, "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia."

15. Specification 2 of Charge I stated, "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: asphyxia."

16. The sole specification of Charge II stated, "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, from on or about April 18, 2020 to June 2020, wrongfully do certain acts, to wit:

delete electronic data, including text messages, photographs, and internet search and browser history, from her personal phone (red Apple iPhone 11, Serial Number [redacted] laptop (silver Apple Macbook Air, Serial Number [redacted] and Apple iCloud Account (associated with telephone number [redacted] with intent to influence, impede and obstruct the due administration of justice in the case of the said Petty Officer Kathleen Richard, against whom the accused had reason to believe that there were or would be criminal proceedings pending."

17. An Article 32, UCMJ hearing was held on 5 May 2021 in Alameda, California. During the hearing, the Government submitted the following evidence: the State of Alaska Medical Examiner's Autopsy Report, a disk containing images of crime scene and [redacted] the Forensic Pathology Report, the FBI Digital Forensic Examiner's Report, the R.C.M. 706 Report, [redacted] Member Info of the accused, and a CGIS interview of [redacted]

18. The Preliminary Hearing Officer (PHO) submitted his report on 17 May 2021 to the Convening Authority, CAPT [redacted] USCG, the Commanding Officer (CO) of Coast Guard Base Kodiak, Alaska (Base Kodiak).

19. In his report, the PHO concluded that there was not sufficient evidence to find probable cause that the accused committed the offense of intentional, but not premediated murder as charged in specification 1 of Charge I.

20. In his report, the PHO concluded there was probable cause that the accused committed the offense of murder while engaging in an inherently dangerous act.

21. The PHO further concluded there was not probable cause that the accused committed obstruction of justice as charged in the sole specification of Charge II.

22. The PHO further considered and recommended that the Convening Authority refer an additional charge of Involuntary Manslaughter (Article 119, UCMJ).

23. Upon receiving the PHO report, CAPT [redacted] (the Summary Court Martial Convening Authority) forwarded the case to the General Court Martial Convening Authority, (Coast Guard Director of Operational Logistics (DOL)) for disposition.

24. On 22 June 2021, the additional charge of Involuntary Manslaughter was preferred.

25. On 24 June 2021, the Staff Judge Advocate, CAPT [redacted] provided his written Article 34, UCMJ advice to the Convening Authority.

26. In his Article 34 advice, the SJA stated that he reviewed the CGIS Report of Investigation, the PHO report, and the associated evidence relied upon by the CO of Base Kodiak in his forwarding memorandum.

27. After reviewing the evidence, the SJA concluded: each specification alleged an offense under the UCMJ; there was probable cause to believe the accused committed

each offense charged in the specifications: and the court martial would have jurisdiction over the accused and offenses.

28. The SJA recommended that all charges and specifications be referred to a general court-martial.

29. The Convening Authority referred the charges to this court-martial on 25 June 2021.

30. On 10 May 2021, the accused requested Government funding to travel with her defense counsel to [redacted] from Kodiak, Alaska for two weeks while the Defense conducted pretrial investigation and witness interviews.

31. On 19 May 2021, the CO of Base Kodiak denied the accused's request for funding but stated he would approved regular leave for the accused to travel to [redacted]

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

PRINCIPLES OF LAW

It is well-settled law that members of the military enjoy curtailed constitutional protections within the military justice system. Parker v. Levy, 47 U.S. 733 (1974); Ex parte Quirin, 317 U.S. 1 (1942). Case precedents have consistently treated military courts-martial as categorically different from the Constitution's typical procedural paradigms. See Reid v. Covert, 354 U.S. 1, (1957).

As an Article I court, the court-martial process does not have the protections of a grand jury. See U.S. Amend. V. However, Congress and the President have both provided statutory and procedural protections similar to those provided by the grand jury requirement of the Fifth Amendment. Under Article 32 of the UCMJ, a preliminary hearing should be held prior to referring charges to a general court-martial. The purpose of the preliminary hearing is limited to: whether the specifications allege an offense under the UCMJ; whether or not there is probable cause to believe that the accused committed the offense charged; whether or not the convening authority has jurisdiction over the offense and the accused; and a recommendation of the disposition of the case. Article 32(a)(2), UCMJ.

R.C.M. 405 implements Article 32 and substantially repeats the language of the Article. The Discussion section of R.C.M. 405(a) states, "[t]he function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing…determinations and recommendations of the preliminary hearing officer are advisory." R.C.M. 405(e)(2) authorizes the preliminary hearing officer to consider uncharged offenses and make the considerations under R.C.M. 405(a) as to any uncharged offense.

Article 34, UCMJ, provides in pertinent part: "[t]he convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been

advised in writing by the staff judge advocate that— (1) the specification alleges an offense under this chapter; (2) the specification is warranted by the evidence indicated in the report of investigation under ...[Article 32]; and (3) a court-martial would have jurisdiction over the accused and the offense." It continues: "[t]he advice of the staff judge advocate ... with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate (1) expressing his conclusions with respect to each matter set forth ...; and (2) recommending action that the convening authority take regarding the specification."

R.C.M. 406 implements Article 34 and substantially repeats the language of the Article. Again, in pertinent part: "(b) ...[t]he advice of the staff judge advocate shall include a written and signed statement which sets forth that person's: (1) Conclusion with respect to whether each specification alleges an offense under the code; (2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation ...; (3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and (4) Recommendation of the action to be taken by the convening authority." The discussion to R.C.M. 406(b) recites, in pertinent part, "[t]he staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice." In providing Article 34 advice, the staff judge advocate is not bound by the findings of the preliminary hearing officer. United States v. Meador, 75 M.J. 682 (C.G.Ct.Crim.App. 2016).

R.C.M. 601(d)(2) provides in pertinent part that there may not be a referral to general court-martial unless: "[t]here has been substantial compliance with the pretrial investigation requirements of R.C.M. 405; and ...[t]he convening authority has received the advice of the staff judge advocate required under R.C.M. 406."

ANALYSIS

The Article 34 Advice

The Court finds that the Article 34 advice was proper. On 24 June 2021, the Staff Judge Advocate provided written advice to the Director of Operational Logistics as required by Article 34 and R.C.M. 406. In this advice, the SJA states that he reviewed the CGIS Report of Investigation, the Preliminary Hearing Officer's report, and associated evidence relied upon by Base Kodiak in forwarding the charges for disposition. Based on his independent review, the SJA then concluded each specification alleged an offense under the UCMJ; there was probable cause to believe the accused committed each offense charged in the specifications, and a court-martial would have jurisdiction over the accused and each offense alleged. Based on these conclusions, the SJA recommended that all charges and specifications be referred to a genera court-martial. In providing this advice, the SJA met the statutory requirements of Article 34 utilizing the procedures outlined in R.C.M. 406.

The Defense argues that the SJA violated Article 34 and the accused's constitutional rights. The Court does not agree. Here, prior to referral, as required by Article 34, the SJA provided advice to the convening authority. This advice contained

the requirements specified in Article 34 and RCM 406. Furthermore, the defense has provided no evidence to suggest the SJA failed to make the "independent and informed appraisal of the charges and evidence" before rendering the advice. See Discussion to RCM 406.

Additionally, the Defense has failed to point to any "information which is incorrect or so incomplete as to be misleading." While the Article 34 Advice does not contain a summary of the evidence, recommendations of the Article 32 preliminary hearing officer, or other additional information, "there is no legal requirement to include such information [in the Article 34 advice], and failure to do so is not error." Discussion to RCM 406. The SJA's decision to exclude information not required by the UCMJ or Rules for Courts-Martial neither makes the advice inherently defective or misleading nor violates the accused's Constitutional rights.

Relatedly, pursuant to Article 34, the SJA and Convening Authority were not bound by the advisory findings of the PHO. Meador, 75 M.J. at 684. Moreover, the plain language of Article 34 does not require the SJA to provide detailed legal analysis regarding the charges and specifications, nor is the SJA required to outline where he disagreed with the recommendations of the PHO. As such, the Court finds the Article 34 advice was proper.

Lastly, the Court does not concur with the Defense assertions that the accused is being punished for asserting her right to an Article 32 hearing. In his report, the PHO articulated that he considered the additional charge of Manslaughter after being presented with the evidence during the hearing. This action was clearly authorized pursuant to R.C.M. 405(e)(2). The PHO articulated his reasoning in his report, and this charge was reviewed independently by the SJA. There is no evidence to show that the PHO or SJA added the charge to punish the accused for exercising her right.

Selective Prosecution

In their motion, the Defense argues further that referral of charges against the accused violated her Due Process and Equal Protection rights because she is the victim of selective prosecution. Def. Mot. at 14-15. The Defense argues further that the Government has deliberately decided to avoid charging BM2 [redacted] who was present in the hours surrounding [redacted] death. Id. The Court finds the Defense argument without merit. Evidence presented at the motion indicates charges in this case were preferred following an extensive investigation involving multiple law enforcement agencies. The Defense has failed to present any evidence which would support these assertions. Accordingly, the Court finds the Defense argument unpersuasive.

Base Kodiak

The Defense raised several other claims of error surrounding the actions of the CO of Base Kodiak. The Defense first argues that the CO of Base Kodiak, as the Summary Court-Martial Convening Authority, was an Accuser in this case due to his actions in handling the accused's claims of discrimination at the Base Kodiak SPO

shortly before the death of [redacted] Def. Mot. at 12. The Court does not agree. An accuser is defined as an individual who: (1) who signs and swears to the charges; (2) who directs that charges nominally be signed and sworn to by another; and (3) who has an interest other than the official interest in the prosecution of the accused. Article 1(9), UCMJ. Despite the fact that the accused filed a discrimination claim concerning the work environment at the Base Kodiak, SPO, there is no evidence to show that the CO of Base Kodiak had any interest other than an official interest in the prosecution of the accused. More importantly, the CO of Base Kodiak did not refer these charges, rather, he forwarded the charges to the Officer Exercising General Court Martial Jurisdiction in this case, the Director of Operational Logistics. The Court finds the Defense argument without merit.

Lastly, the Defense also claims the accused's rights to Due Process were violated when the Base Kodiak command refused to fund her travel to [redacted] in order to assist her Defense team with their pretrial investigation. Def. Mot. at 15. The Court finds this argument also lacks merit. The Defense presented no authority, nor is the Court aware, that an accused is entitled to Government funding to join her Defense team in their pretrial investigation. There is no evidence that the Base Kodiak command has blocked the accused access to her defense counsel. Furthermore, the command supported the accused utilizing her personal leave to travel to [redacted] if she desired. The Government is not required to fund the accused's request, and denial of such request warrants no relief from the Court.

CONCLUSION OF LAW

1. The Article 34 advice was not defective.
2. Referral of charges against the accused did not constitute selective prosecution.
3. The Base Kodiak Commanding Officer is not an Accuser in this case.
4. The Base Kodiak command did not violate the accused's constitutional rights in denying her funding to travel to participate in the Defense pretrial investigation.

RULING

The Defense motion to dismiss the charges and specifications is DENIED consistent with the above conclusions of law.

CASEY.PA[redacted] Digitally signed by CASEY.PAUL.R[redacted] Date: 2021.10.14 16:57:12 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: BILL OF PARTICULARS 7 October 2021

RELIEF SOUGHT

In accordance with Rule for Courts-Martial (R.C.M.) 906(b)(6), the Defense moved this Court to issue an order to compel the Government to provide a bill of particulars for: (1) Charge I Specifications 1 and 2; (2) Charge II; and (3) Additional Charge I. AE (22). The Government opposed. AE (23). An Article 39(a) session to hear argument on these motions was held on 30 August 2021.

ISSUE PRESENTED

Is a Bill of Particulars required for specifications 1-2 of Charge I, Charge II, and the Additional Charge?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base Kodiak, Alaska on 18 April 2020.

3. Following her death, [redacted] body was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

4. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

5. The autopsy concluded that the cause of death to be "asphyxia" due to "prone

position of swaddled infant in bedding."

6. The autopsy further concluded that the manner of death was classified as "undetermined."

7. Due to the death of [redacted] Coast Guard Investigative Service (CGIS) initiated an investigation. During the early stages of the investigation, CGIS agents had frequent contact with the accused and [redacted] BM2 [redacted]

8. CGIS agents conducted an estimated sixteen hours of interviews of the accused and BM2 [redacted]

9. On 19 June 2020, the accused conducted a voluntary interview with CGIS Special Agents (S/A) [redacted] and [redacted]

10. The 19 June 2020 interview was videotaped. A transcript of the interview was also produced.

11. The agents provided the accused with her Article 31(b) rights. The accused waived her rights both verbally and in writing and agreed to speak with the agents.

[redacted]

20. The Government seized various data pursuant to either a search authorization or process under the Stored Communications Act from the accused's iPhone, MacBook, and iCloud account.

21. On 1 April 2021, BM2 [redacted] told CGIS agents that on the evening of [redacted] death, the accused asked him for her Apple laptop computer.

22. The Government provided the Defense discovery relating to the search and seizures of the accused's iPhone, MacBook and iCloud accounts. The Government further provided discovery containing forensic analysis reports of electronic evidence. Lastly, the Government has provided the Defense with the contact information of two expert witnesses in digital forensics the Government intends to call as witnesses at trial, Mr. [redacted] and Ms. [redacted]

23. Specification 1 of Charge I states: "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia.

24. Specification 2 of Charge I states: In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: by asphyxia.

25. The Sole Specification of Charge II states: In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, from on or about April 18, 2020 to June 2020, wrongfully do certain acts, to wit: delete electronic data from her personal phone (red Apple iPhone 11, Serial Number [redacted], laptop (silver Apple Macbook Air, Serial Number [redacted]), and Apple iCloud Account (associated with telephone number [redacted]), with intent to influence, impede and obstruct the due administration of justice in the case of the said Petty Officer Kathleen Richard, against whom the accused had reason to believe there were or would be criminal proceedings pending.

26. The Sole Specification of Additional Charge states: "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, by culpable negligence, unlawfully kill [redacted] a child under the age of 16 years, by asphyxia.

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

PRINCIPLES OF LAW

"While a charge states the article of the UCMJ... which the accused is alleged to have violated.... a specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication..." R.C.M 307(c).

Rule for Court-Martial 906(a) states that "[a] motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting a case." Rule for Court-Martial 906 (b) expressly recognizes the use of a bill of particulars in military practice where the interests of justice require. The discussion to R.C.M. 906 (b) (6) states "[t]he purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes."

The discussion further states that "[a] bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial." Discussion to R.C.M. 906(b).

A bill of particulars need not be sworn because is not part of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient." Id.

ANALYSIS

Specifications 1 and 2 of Charge I, Sole Specification of Charge II, and Sole Specification of Additional Charge I expressly allege every element of the charged offenses as required by R.C.M. 307. Each specification charged provides notice of the place, general time and temporally associated events, and the manner in which the government alleges the acts were committed. Each specification charged adequately informs the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid surprise at the time of trial, and to enable her to plead the acquittal or conviction in bar of subsequent jeopardy.

For the specifications of Charge I and Additional Charge I, the Defense's specific argument for a Bill of Particulars is two-pronged: (1) the Government has charged three different mens reas for the same act that killed [redacted] and (2) the Government has failed to identify the overt act forming the basis of Specifications 1 and 2 of Charge I and Specification of Additional Charge I. AE X at 3.

First, the Government is entitled to charge multiple theories of liability for exigencies of proof. See, e.g., United States v. Elespru, 73 M.J. 326 (C.A.A.F. 2014). The Government may also advance evidence that a charge was committed by two or

more means. See United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 1997). While the Defense's ability to prepare would certainly be made easier by limiting the Government to one theory, the Defense has failed to demonstrate how they are unable to prepare a defense to the offenses charged.

Second, regarding the alleged failure to identify the overt act, the Government has charged that [redacted] was killed by asphyxiation, and the Government has turned over corresponding discovery, including the interviews of the accused, which is probative of asphyxiation. Requiring additional notice regarding the nature of the alleged asphyxiation would accomplish nothing more than impose the type of inappropriate discovery and proof limitations warned against in the discussion to R.C.M. 906(b)(6).

For the sole specification of Charge II, the Defense specifically argues that a Bill of Particulars is required because the Government has failed to identify what data was deleted and when that data was deleted. The Court finds that the Government has provided ample discovery to the Defense surrounding the alleged information deleted, including the discovery of the searches of the accused's Apple devices. The discovery also could orient the general timeframe of when the items may have been deleted and the actions taken to delete the information from the accused's Apple devices. The Defense also has the ability to contact the Government's digital forensic experts regarding the provided discovery. In total, this discovery is sufficient to orient the Defense in their preparations for trial. Requiring further disclosure by the Government would impose a detailed disclosure prohibited by R.C.M. 906(b)(6).

CONCLUSION OF LAW

A Bill of Particulars is not required for specifications 1-2 of Charge I, Charge II, or the Additional Charge.

RULING AND ORDER

The Defense motion to compel the Government to issue a Bill of Particulars is DENIED, consistent with the above conclusion of law.

CASEY.PAUL.R
.[redacted]
7 October 2021
Digitally signed by CASEY.PAUL.R.[redacted]
Date: 2021.10.07 15:40:23 -04'00'
Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 24
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL EXPERT ASSISTANCE 27 Sep 2021

RELIEF SOUGHT

In accordance with Rule for Courts-Martial (R.C.M.) 703, the Defense moved this Court to compel production of four expert consultant in the fields of: autopsy/medical examinations, homicide investigations, interrogation techniques, and neuropsychology. AE (28), AE (29). The Government opposed. AE (30). An Article 39(a) session to hear argument on these motions was held on 30 August 2021.

ISSUES PRESENTED

1. Is assistance by an expert in the field of autopsies necessary for an adequate defense?
2. Is assistance by an expert in the field of homicide investigations necessary for an adequate defense?
3. Is assistance by an expert in the field of interrogation techniques necessary for an adequate defense?
4. Is assistance by an expert in the field of neuropsychology necessary for an adequate defense?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base Kodiak, Alaska on 18 April 2020.

3. The body of [redacted] was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

4. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

5. The autopsy concluded that the cause of death to be "asphyxia" due to "prone position of swaddled infant in bedding."

6. The autopsy further concluded that the manner of death was classified as "undetermined."

7. Due to the death of [redacted] Coast Guard Investigative Service (CGIS) commenced an investigation. During the early stages of the investigation, CGIS agents had frequent contact with the accused and [redacted] BM2 [redacted]

8. Between April 2020 and July 2020 CGIS agents conducted approximately sixteen hours of interviews of the accused and BM2 [redacted]

9. On several occasions, the accused approached CGIS with various questions about the status of the investigation. CGIS agreed to speak with the accused upon her request.

10. On 19 June 2020, the accused conducted a voluntary interview with CGIS Special Agents (S/A) [redacted] and [redacted]

11. The 19 June 2020 interview was videotaped. A transcript of the interview was also produced.

12. Prior to the 19 June 2020 interview, the agents provided the accused with her Article 31(b) rights, informing the accused she was suspected of violating Articles 107, 118, and 119b of the UCMJ. The accused waived her rights both verbally and in writing and agreed to speak with the agents.

[redacted]

[redacted]

21. On 2 August 2021, the Defense filed a request to the Convening Authority for the appointment of Dr. [redacted] in the field of autopsies.

22. On 5 August 2021, the Convening Authority denied the Defense request.

23. On 18 June 2021, the Convening Authority granted the accused 40 hours of pretrial assistance from Dr. [redacted] M.D. an expert in the field of pediatric forensic pathology. The Defense requested the assistance of Dr. [redacted] in part, to assist them in preparing for trial regarding injuries in children.

24. On 27 August 2021, Dr. [redacted] provided an affidavit to the Court. In her affidavit, Dr. [redacted] stated that her specific area of expertise was in the field of pediatrics, and pediatric pathology as it relates to injuries in children. Dr. [redacted] stated that the Government's expert pathologist, Dr. [redacted] provided a report that "may represent controversial positions within the field of general forensic pathology," and recommended to the Defense that they seek further consultation with a general forensic pathology to evaluate Dr. [redacted] findings.

25. Dr. [redacted] has served as a [redacted] for over ten years in the State of Minnesota.

26. The Government will call Dr. [redacted] and Dr. [redacted] to testify regarding the autopsy of [redacted] at trial.

27. On 19 May 2021, the Defense requested the Convening Authority appoint Mr. [redacted] as a defense expert consultant and investigator in the field of child homicide investigations.

28. Mr. [redacted] is a 25-year veteran of the Oceanside, CA police department where he spent 13 years as a homicide investigator. His expertise is focused on predatory behavior on child victims.

29. On 11 June 2021, Trial Counsel negatively endorsed the Defense request for appointment of Mr. [redacted]

30. On 18 June 2021, the Convening Authority denied the Defense request for Mr. [redacted]

31. On 19 May 2021, the Defense requested the Convening Authority appoint Dr. [redacted] Ph.D., J.D., as a defense expert consultant in the field of false confessions.

32. Dr. [redacted] is a tenured professor of law and psychology at the [redacted] He is a well-known expert on the subject on forced confessions and suggestive interrogations.

33. On 11 June 2021, Trial Counsel negatively endorsed the Defense request for appointment of Dr. [redacted]

34. On 18 June 2021, the Convening Authority denied the Defense request for Dr. [redacted]

35. On 5 March 2021, the Defense requested the Convening Authority appoint Dr [redacted] Ph.D. as an expert in the field of neuropsychology and forensic psychology. In the 5 March request, the Defense stated Dr. [redacted] was needed to consult with the Defense regarding a R.C.M. 706 board and to consult with the Defense regarding [redacted] matters for both trial on the merits and to prepare for a sentencing case, if necessary.

36. On 10 March 2021, the Convening Authority denied the Defense request for Dr. [redacted]

37. On 29 July 2021, the Defense also requested the Convening Authority appoint Dr. [redacted] Psy.D. as an expert in forensic psychology to help the Defense analyze the [redacted]

38. On 2 August 2021, the Convening Authority approved the appointment of Dr. [redacted] authorizing up to 40 hours of consultation.

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

PRINCIPLES OF LAW

At a court-martial, the parties and the Court shall have an equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Art. 46, UCMJ. RCM 703(d) governs the appointment of expert witnesses and consultants. If the Convening Authority denies appointment of an expert, the matter may be referred to the Military Judge for resolution. In the case of an expert consultant, the judge may order appointment of an expert if the assistance is "*necessary* for an adequate defense." R.C.M. 703(d)(2)(A)(ii) (emphasis added).

Necessity goes well beyond mere relevance or helpfulness. United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005). The "mere possibility" of assistance is not sufficient to prevail on a request. Id. To prove necessity, the defense "has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally

unfair trial." United States v. Gunkle, 55 M.J. 26, 31-32 (C.A.A.F. 2005). In determining whether an expert would be of assistance, defense must demonstrate "(1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

With regard to the second prong, a trial is considered fundamentally unfair where the government's actions are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431-32 (1973). One factor courts use to determine if a trial would be fundamentally unfair is whether the content of the expert's knowledge is central to the government's case. Where scientific analysis is the "linchpin" of the government's case, the C.A.A.F. held that the denial of an expert by the military judge constitutes an abuse of discretion. United States v. McAllister, 55 M.J. 270, 276 (C.A.A.F. 2001). On the other hand, where the content of the expert's expertise does not constitute the "linchpin" of the government's case, military courts have readily distinguished McAllister. See, e.g., Lloyd, 69 M.J. at 100 ("Absent a more precise explanation of the theory they hoped to pursue through the assistance of a blood spatter expert, we cannot find that the military judge abused her discretion when she denied the defense motion for expert assistance.").

ANALYSIS

Dr. [redacted]

The Defense has demonstrated the necessity of Dr. [redacted] assistance. The evidence provided to the Court demonstrates that the investigation of [redacted] death, to included CGIS' interview techniques, centered around the results of the autopsy completed by Dr. [redacted] at the Alaska State Medical Examiner's office. Dr. [redacted] will provide critical testimony at trial regarding her observations during the autopsy, and the Defense must be fully prepared to challenge the procedures and findings, if appropriate, at trial. Dr. [redacted] will be able to review the medical documentation of the autopsy and prepare the Defense at trial. While the Government authorized the expert assistance of Dr. [redacted] her affidavit provided to the Court states that her expertise will be focused on "pediatric pathology as it relates to forensic examinations of injuries on children." While Dr. [redacted] has performed autopsies in her career, that is not her field of expertise and that is not how the Defense desired to utilize her assistance in this case.

Furthermore, the Court finds that the autopsy, and the findings of Dr. [redacted] and Dr. [redacted] represent the "linchpin" of the Government's case against the accused. Accordingly, the Court finds that an additional appointment of an expert in autopsies is warranted. The Court will order the Government fund Dr. [redacted] for a total of 40 hours assistance for the Defense.

Mr. [redacted]

The Defense failed to demonstrate the necessity of Mr. [redacted] assistance. First, it is settled law that even if the Defense could establish necessity for an investigator, they must accept a military investigator provided by the Government under an order of confidentiality. U.S. v. Short, 50 M.J. 370, 373 (C.A.A.F. 1999). Here, the Defense failed to recognize this requirement while also conceding that the Navy Defense Service Office has assigned investigators throughout their organization.

Second, the Defense points to the sheer volume of discovery and amount of hours CGIS has spent investigating this case in support of their motion. However, such argument presumes all of the evidence uncovered by the Government helps the prosecution. Further, the Defense has failed to show that the discovery provided to the Defense is of no value to the Defense. To date, the parties appear to have a strong working relationship, and the Government has demonstrated they are amenable to providing additional discovery and access to witnesses upon request. The Defense has failed to show how three experienced counsel, and their staffs, cannot conduct adequate investigations. Moreover, the Defense expert consultants, to include Dr. [redacted] Dr. [redacted] Dr. [redacted] will also provide critical assistance to the Defense in analyzing the evidence in advance of trial. Although, the Defense has certainly demonstrated how Mr. [redacted] would be helpful to their preparations, helpfulness does not rise to the required level of necessity.

Dr. [redacted]

The Defense failed to demonstrate the necessity of Dr. [redacted] assistance. Specifically, the Defense failed to demonstrate why they are unable to gather and present the evidence that Dr. [redacted] would develop. The Defense proffered that Dr. [redacted] would review the videotaped interview of the accused and assist the Defense in preparing motions and potentially educate the members regarding interrogation techniques that may induce false admissions. Challenging the voluntariness of an accused's statement is precisely what defense counsel should do at trial. The Court has no doubt that this extremely capable and experienced Defense team will be able to easily do so at trial without the assistance of Dr. [redacted] Furthermore, the Defense in this case has the benefit of having a videotaped and audiotaped interview of the accused's various interactions with CGIS investigators throughout the investigation.

Although Dr. [redacted] would likely be helpful to the Defense in preparing for trial, the Court finds it is not beyond the capabilities of the Defense to study and prepare for coercive tactics and be ready to confront CGIS at trial. In their brief, the Defense has already demonstrated their ability to identify and develop witness testimony regarding these coercive tactics. See Def. Mot. at 9-11.

Dr. [redacted]

The Defense failed to demonstrate the necessity of Dr. [redacted] In their original request to the Convening Authority, the Defense requested the assistance of Dr. [redacted]

to assist them in preparations for and reviewing the results of the accused R.C.M. 706 board and to prepare for trial. The Defense motion now asks the Court to order the assistance of Dr. [redacted] to prepare for a potential sentencing case in extenuation and mitigation. However, the Defense has failed to offer any evidence to the Court as to what, exactly, Dr. [redacted] would do to prepare any potential sentencing case. More importantly, the Defense failed to articulate how Dr. [redacted] assistance remains necessary in light of the 40 hours' of assistance that Dr. [redacted] a forensic psychologist, is providing to the Defense. The Defense acknowledged that Dr. [redacted] would assist the Defense in evaluating the accused's [redacted] in preparing for both trial on the merits and for any potential sentencing case. As such, the Defense motion fails.

CONCLUSIONS OF LAW

1. Assistance by an expert in the field of autopsies is necessary for an adequate defense.
2. Assistance by an expert in the field of homicide investigations is not necessary for an adequate defense.
3. Assistance by an expert in the field of coercive interrogation techniques is not necessary for an adequate defense.
4. Assistance by an expert in the field of neuropsychology is not necessary for an adequate defense.

RULING AND ORDER

The Defense motion to compel expert assistance is GRANTED, in part, and DENIED, in part, consistent with the above conclusions of law.

The Government is ordered to provide funding for Dr. [redacted] to serve as an expert consultant to the Defense in the field of autopsies. The Government shall fund up to 40 hours of consultation.

It is so ordered.

CASEY.PA[redacted] Digitally signed by CASEY.PAUL.R[redacted]
Date: 2021.10.05 13:54:44 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 21
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY 6 Oct 2021

RELIEF SOUGHT

In accordance with Rules for Courts-Martial (R.C.M.) 701, 703, and 906(b)(7), the Defense moved this Court to compel production of several items of evidence. AE (35). The Government opposed the Defense motion. AE (36). An Article 39(a) session to hear argument on these motions was held on 30 August 2021.

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges were referred to this court-martial on 25 June 2021.

3. On 8 July 2021, the Defense filed an initial discovery request with the Government.

4. On 29 July 2021, the Defense filed a supplementary discovery request with the Government.

5. The Government provided one written response to the Defense requests on 9 August 2021. The Government denied production of several items, stating the requested items were not relevant to Defense preparations in accordance with R.C.M. 701 or not in the Government's possession.

6. To date, the Government has produced over 22,000 files to the Defense.

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

PRINCIPLES OF LAW

Article 46, U.C.M.J. provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." R.C.M. 701 directs that "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." Appellate courts have recognized that "[m]iltary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." United States v. Reece, 25 M.J. 93, 94 (C.M.A. 1987). The only restrictions placed upon this liberal discovery are that the information requested must be relevant… to the subject of the inquiry, and the request must be reasonable. Reece at 95.

Rule for Courts-Martial 701(a)(2)(A) provides that the Government must permit the Defense, upon request, to inspect materials "which are within the possession, custody, or control of military authorities, and which are…relevant to the defense preparation. The Analysis to the Rules for Courts-Martial explains:

> This rules is taken from Rule 701 of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments: R.C.M. 701(a)(2)(A)(i) and (a)(2)(B)(i) are amended and specify the scope of trial counsel discovery obligations. The provisions broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case, and adding a requirement to disclose items the government anticipates using in rebuttal.

R.C.M. 703 provides the process to follow when ordering the production of witnesses or evidence. Under R.C.M. 703(e)(1), "[e]ach party is entitled to the production of evidence which is relevant and necessary." The Discussion section to R.C.M. 703(e)(1) states, "[e]vidence is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. The moving party must show that the requested evidence exists and is subject to compulsory process; broad "fishing expeditions" for evidence are prohibited. United States v. Rodriguez, 60 M.J. 239 (C.A.A.F. 2004); United States v. Briggs, 48 M.J. 143 (C.A.A.F. 1998).

CONCLUSIONS OF LAW

1. Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication between law enforcement and members of the accused's command, the convening authority the staff judge advocate or any officer directing the investigation

The Government stated, both in their motion and at the Article 39(a) session that all responsive documents to this request have been provided to the Defense. Further, an affidavit from Dr. [redacted] regarding his involvement in this case, specifically stating

that he did not direct CGIS investigatory efforts in this case, will be provided to the Defense. The Court finds the Government has satisfied this request.

2. The names of all government investigators who have participated, or are presently participating, in the investigation of this case, as well as their accreditation, any previous law enforcement or investigative jobs held, and a statement as to their length of service in such jobs

At the Article 39(a) session, the Court ordered the Government to inquire and provide any CV/resume of any CGIS agents who participated in the investigation into this case. The Court ordered the production of any responsive information to be completed no later than 1 October 2021.

3. Evidence affecting the credibility of any potential government witness

The Court finds this information is relevant to Defense preparations in accordance with R.C.M. 701(a)(6). The Government stated in their motion and at the Article 39(a) that all personnel files of active-duty Coast Guard members involved in this case were reviewed and the Defense provided with any responsive documents. The Government also acknowledged their ongoing discovery obligations regarding this information. The Court finds the Government continues to satisfy this request.

4. Any other evidence from unit personnel files demonstrating any disciplinary actions against a potential government witness

The Government affirmatively stated they have conducted a review of the files in their possession regarding government witnesses and have found no responsive documentation. The Government also acknowledged their continuing obligations regarding this discovery. The Court finds the Government continues to satisfy this request.

5. All personnel records for law enforcement and military witnesses for evidence of adverse performance, bias, or any evidence that would constitute grounds for impeachment

The Court finds this evidence is relevant to Defense preparations in accordance with R.C.M. 701. The Court also finds that the personnel files of members of the Alaska state troopers and any other local law enforcement participating in the investigation of this case are subject to R.C.M. 701. Here, the Government has knowledge of and access to the files of local law enforcement partners who were involved in the investigation. Trial counsel has a legal right to obtain adverse personnel information regarding these officers despite these files being in the possession of a state agency. Lastly, the evidence presented to the Court demonstrates that the initial stages of the investigation involved both CGIS agents and local law enforcement. As such, the Court finds the investigation was closely aligned. See United States v. Stellato, 74 M.J. 473, 484-85 (C.A.A.F. 2015).

The Government is **ordered to produce** any negative records indicating adverse performance, bias, or negative documentation from the personnel files of local law enforcement officers who participated in this investigation. The Government shall deliver any responsive documents to the Defense **no later than 28 October 2021**.

6. With respect to BM2 [redacted] Defense Counsel requests discovery of, and information relating to prosecution, punishment, a decision not to punish, a promise of leniency, or the final disciplinary resolution for: manslaughter, [redacted] child endangerment, aiding and abetting illegal entry into the United States, possible misconduct, or any other misconduct allegations

The Court finds that the Government has satisfactorily reviewed the materials in Government possession, including the accused's PDR, and found no responsive documents. The Court further finds the Defense has offered no evidence to demonstrate the assertions of BM2 [redacted] "aiding and abetting illegal entry into the United States," or where to find such information. As such, the Court will not order the Government to search for this information.

7. With respect to YN3 [redacted] Defense Counsel requests discovery of the following: leniency about YN3 [redacted] lying to government investigators about her [redacted] with BM2 [redacted] and any reprimand or counselling concerning her [redacted] with BM2 [redacted]

The Court finds the Government has satisfactorily searched the files in the Government's possession for any responsive material.

8. Picture of [redacted] referred to during BM2 [redacted] 25 June 2020 CGIS interview

The Government has satisfied this request and provided the picture to the Defense.

9. Information regarding the June 2020 notice regarding lead in the water onboard Base Kodiak and the dangers to women and infants

The Court finds this evidence is relevant to the Defense preparations. Although the Government correctly points out that many of these notices occurred prior to the accused's arrival to Base Kodiak, the Defense proffered that some of the notices were provided following the accused's arrival and during her [redacted] The Court further acknowledges that a toxicology analysis was conducted during [redacted] autopsy and provided to the Defense. The Court finds information regarding potential dangers of lead contaminants in the Base Kodiak water during the time of the accused's [redacted] and prior to [redacted] death is relevant to the Defense preparations and is in possession of the Government.

Accordingly, the Government shall provide the Defense any information regarding lead contaminants at Base Kodiak from April 2019 – April 2020. **The Government is ordered to produce** all responsive material to the Defense **no later than 28 October 2021**.

10. Any and all information regarding why the remains of [redacted] were released for cremation during the homicide investigation

The Court finds this information is not within the Government's possession. At the Article 39(a) session, the Government stated that efforts have been made to secure all documentary evidence regarding [redacted] autopsy from the Alaska State Medical Examiner's office. The Court also issued a Court Order for tissue samples from the autopsy to be produced to the Defense.

There is no other evidence regarding the decision for the disposition of the remains of [redacted] The Government has satisfied its discovery obligations.

11. Contact information of the CGIS agent who conducted an interview with the accused in December 2018

The Government provided this information to the Defense.

12. The original copy of the CGIS report, particularly where it appears that the font has been changed regarding interviews of [redacted]

During the Article 39(a) session, the Court ordered the Government to search CGIS files to determine if any drafts of reports existed regarding interviews of [redacted] On 10 September 2021, the Government provided notice to the Court and the Defense that the final version of the interview summary previously provided to the Defense is the only copy in Government possession.

13. The contact information of anyone who reviewed the accused's discrimination complaint against her command

The Court finds the Government has satisfied their discovery obligations regarding this request. An administrative investigation convened by Base Kodiak concerning the accused's claims of harassment in the workplace was conducted shortly before the alleged crimes. However, the investigation was never finalized or submitted due to the death of [redacted] The Government has provided the draft investigation and all attachments to the Defense, including the names and information of the Coast Guard members involved in the investigation.

14. All information, communication, correspondence relating to the discrimination complaint between the accused's chain of command or any person interviewed by the Government agents in this case

As discussed in Paragraph 13, the Court finds this request has been satisfied by the Government.

15. Personnel and training records for Government agents involved in this case focusing on interrogation methods

The Defense established how training records involving CGIS interrogation techniques are relevant to the Defense preparations. On 18 June 2020, during an interview with CGIS, the accused admitted to "maybe" pressing [redacted] face into her crib. This admission came after two agents confronted the accused with this theory.

During the Article 39(a) session, the Court ordered the Government to ascertain whether CGIS maintains training records for agents. The Government **is ordered to** produce any training records in possession of the Government involving agent involved with interviewing the accused during the investigation **no later than 28 October 2021.**

16. Instructions or guidance regarding how long or how many times a person should be interviewed/interrogated

As discussed in Paragraph 15, the Government is to ascertain whether the training records for any CGIS agent involved in this case includes training related to interrogation techniques or methods. If such records exist, the **Government is ordered** to produce those records to the Defense **no later than 28 October 2021**.

17. Any information whether Government agents had any experience in investigating homicide cases

The Government shall inquire if any training records exist of CGIS agents' experience in investigating homicide cases. If such records exist, **they shall be produced to the Defense no later than 28 October 2021**.

18. Any and all medical training of Government investigators

The Government shall inquire if any records exist of CGIS agents' record of medical training. If such record exist, **they shall be produced to the Defense no later than 28 October 2021**.

19. Any and all training of Government investigators regarding Sudden Infant Death Syndrome (SIDS)

The Government shall inquire if any records exist of CGIS agents' training regarding Sudden Infant Death Syndrome (SIDS). If such record exist, they shall be produced to the Defense.

20. Discovery related to Dr. [redacted]

The Court finds that the Government has satisfied the Defense request. During the Article 39(a) session, the Government reported that the contracting information regarding Dr. [redacted] employment by the Government was provided to the Defense.

21. A copy of the CGIS Manual relating to the ways interviews and interrogations are to be conducted

The Defense has established the relevance of the CGIS Manual in accordance with R.C.M. 701. However, the Government cites M.R.E. 506 as a basis for denial for production. The Court notes that in order to claim this privilege that the Government is required to follow the procedural requirements outlined in M.R.E. 506(h)(1)(A).

The Government **shall produce the CGIS Manual to the Court** for an *in camera* review **no later than 15 October 2021**. If the Government maintains the privilege asserted in their motion, they must file with the Court **a declaration** invoking the United States' government informational privilege and setting forth the detriment to the public interest that the discovery of such information could reasonably be expected to cause. The declaration must be signed by a knowledgeable United States official as described in M.R.E. 506. **The declaration is due to the Court on 15 October 2021**.

22. Information regarding the training of Base Kodiak personnel provided after the death of [redacted] relating to SIDS

The Defense failed to demonstrate how this information is relevant to the Defense preparations. The Defense proffered that following the death of [redacted] Base Kodiak provided training to Base personnel on SIDS. This training was held after it was believed that [redacted] death was due to SIDS. The Court finds that general military training, held after the charged incident is not relevant to the Defense preparations in this case. Accordingly, the Defense request is denied.

23. Notes of Agents [redacted] and [redacted] during the 7 May 2020 interview of [redacted] and any and all notes used during the investigation

The Court finds the Government satisfied this request. During the Article 39(a) session, the Government represented that all responsive files were turned over to the Defense.

24. A complete list of names and of people briefed at Coast Guard headquarters regarding this case

During the Article 39(a) session, the Court ordered the Government to turn over all responsive documents to the Defense.

RULING AND ORDER

The Defense motion to compel discovery is GRANTED, in part, and DENIED, in part, consistent with the above conclusions of law.

The Government is ordered to produce the following discovery:

1. Any negative personnel files from local law enforcement officers who participated in the investigation of this case no later than 28 October 2021;
2. Information regarding notices from Base Kodiak of lead contamination in the drinking water from April 2019-April 2020 no later than 28 October 2021;
3. Any training records of participating CGIS agents no later than 28 October 2021;
4. CGIS Manual for an *in camera* review no later than 15 October. .

It is so ordered.

CASEY.PAUL.R. Digitally signed by CASEY.PAUL.R. Date: 2021.10.07 15:48:31 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 37
PAGE 8 OF 8 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES 1 Oct 2021

RELIEF SOUGHT

In accordance with Rule for Courts-Martial (R.C.M.) 703, the Defense moved this Court to compel production of several witnesses for both trial on the merits and sentencing[1]. AE (38) The Government opposed the motion. AE (39). An Article 39(a) session to hear argument on these motions was held on 30 August 2021.

ISSUES PRESENTED

Are the requested witnesses relevant and necessary for production at trial?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base Kodiak, Alaska on 18 April 2020.

3. LCDR [redacted] was stationed onboard Coast Guard Base Kodiak. LCDR [redacted] was physically present when the accused was presented with the charge sheet and observed the accused's skin becoming red and blotchy after reading the charge sheet.

4. CWO2 [redacted] was also stationed onboard Base Kodiak with the accused at

[1] At the 30 August 2021 Article 39a session, the Court granted the Defense motion for in-person production of sentencing witnesses.

the time of the alleged offenses. He served as the Preliminary Inquiry Officer (PIO) for an investigation into the accused's claims that she was being discriminated against in her workplace at the Base Kodiak Servicing Personnel Office (SPO). During the course of his preliminary investigation, CWO2 [redacted] received evidence of the accused's red and blotchy skin can be caused by the stress of the workplace.

5. Coast Guard Investigative Service (CGIS) Special-Agent (S/A) [redacted] was a participating agent in the investigation. S/A [redacted] conducted several interviews of the family of the accused's [redacted] BM2 [redacted] including: [redacted] and [redacted]

6. During the course of these interviews, the witnesses described their observations of the accused with [redacted] and their general observations of the accused as [redacted] The witnesses stated they did not see anything alarming in her behavior. The witnesses also stated that once the accused was [redacted] she was "a different person."

7. S/A [redacted] The investigation resulted in a court-martial conviction. During the course of the investigation, the accused told S/A [redacted] that she deleted messages from her phone. S/A [redacted] assured the accused deleting messages was not a problem.

8. S/A [redacted] was a participating agent in the investigation. Primarily, S/A [redacted] attempted to recover video from the accused and BM2 [redacted] S/A [redacted] also recovered the accused's Skype conversations from her Coast Guard network computer.

9. Ms. [redacted] the BM2 [redacted] the accused. Ms. [redacted] observed the accused interact with [redacted] in the months leading up to 18 April 2020. Ms. [redacted] did not have any concerns with how the accused acted towards or [redacted]

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

PRINCIPLES OF LAW

At a court-martial, the parties and the Court shall have an equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Art. 46, UCMJ. RCM 703(b) governs the production of witnesses on the merits, stating that each party is entitled to the production of any witness whose testimony on a matter in issue on the merits…would be relevant and necessary. R.C.M. 703(b). Testimony is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. M.R.E. 401. Relevant evidence is necessary when it is not cumulative and it will contribute to a party's presentation of the case in some positive way on a matter at issue. R.C.M. 703(b)(Discussion).

R.C.M. 703(c)(2)(B)(i) requires the Defense to submit to trial counsel a written request for witnesses that contains a synopsis of the expected testimony sufficient to show its relevance and necessity. The Court of Appeal for the Armed Forces requires the Defense to state in their request a synopsis of expected testimony. United States v. Rockwood, 52 M.J. 98, 105 (C.A.A.F. 1999).

ANALYSIS

LCDR [redacted]

The Defense failed to demonstrate the relevance or necessity of LCDR [redacted] testimony. LCDR [redacted] observations of the accused's reaction when presented with, and after reading, the charges in this case does not make a fact at issue more or less probable than it would be without the evidence. Even if this evidence was relevant, the danger of confusion of the issues and misuse by the members substantially outweigh probative value of such testimony. The testimony of LCDR [redacted] will not contribute to the Defense presentation of the case in a positive way on a matter at issue.

CWO2 [redacted]

The Defense failed to demonstrate the necessity of CWO2 [redacted] testimony. The Defense argues in their motion that CWO2 [redacted] investigation in the week leading up to [redacted] death is relevant to show how the accused's command was biased toward the accused. Although the Court finds the command's treatment of the accused is relevant at trial, the testimony of CWO2 [redacted] is not necessary. Several witnesses on both the Government and Defense witness list will be able to testify that the accused felt that she was being discriminated in the workplace and felt that she was not supported by the command. CWO2 [redacted] was a fact-finding PIO who made findings of fact regarding the workplace environment within the Base Kodiak Servicing Personnel Office. Moreover, he will not be able to testify regarding his opinion of the workplace climate nor will he be able to testify to statements provided to him during his investigation. Lastly, as discussed above, the Court finds no relevance in the pictures of the accused's skin regarding to the stress of her workplace.

S/A [redacted]

The Defense failed to meet their burden in establishing the necessity of S/A [redacted] testimony. As an investigating agent in this case, S/A [redacted] testimony is relevant, however, it will likely be cumulative to the testimony of BM2 [redacted] The Court does not agree with the assertions by the Defense that it is necessary to produce S/A [redacted] in the event that other witnesses must be confronted with an inconsistent statement. Such assertions are highly speculative, as there is no evidence before the Court that any witness will deny previous statements which would allow such extrinsic evidence to be admissible.

S/A [redacted]

The Defense has met their burden in demonstrating the relevance and necessity of S/A [redacted] testimony. The accused is charged with Obstruction of Justice in violation of Article 131b for allegedly deleting and removing data from her Apple accounts. The Government must prove the accused did so with the intent to influence, impede or otherwise obstruct the due administration of justice. Here, S/A [redacted] testimony would be relevant to the Defense theory that the accused would not have had intent to impede the investigation if she had previously known that deleting information ([redacted]) was acceptable behavior. The testimony of S/A [redacted] is necessary because his testimony will contribute to the Defense's case in a positive way.

S/A [redacted]

The Defense failed to meet their burden of demonstrating the relevance or necessity of S/A [redacted] testimony. There is no evidence currently before the Court demonstrating what S/A [redacted] would testify to. Although he was involved in investigatory steps of reviewing the accused's Skype conversations and attempting to find footage from the accused's home camera, there does not appear to be any relevant information gleaned from these steps.

Ms. [redacted]

The Defense has met their burden in demonstrating the relevance and necessity of Ms. [redacted] testimony. Ms. [redacted] testimony is relevant and necessary because her observations of the accused's positive interactions with [redacted] prior to 18 April 2020 make it less probable that the accused would try to hurt the child.

CONCLUSIONS OF LAW

The testimony of S/A [redacted] and Ms. [redacted] is relevant and necessary at trial.

RULING AND ORDER

The Defense motion to compel production of witnesses is GRANTED, in part, and DENIED, in part, consistent with the above conclusions of law. .

The Government is ordered to produce S/A [redacted] and Ms. [redacted] at trial.

It is so ordered.

CASEY.PA[redacted] Digitally signed by CASEY.PAUL.R[redacted] Date: 2021.10.05 13:25:19 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 40
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	ORDER FOR GOVERNMENT CONTRACTING 3 September 2021

1. **Background:**

   a. The accused, YN2 Kathleen Richard, is charged with violations of Article 118, UCMJ (Murder), Article 119 (Manslaughter), and Article 131b (Obstruction of Justice). The Court has set trial to begin on 10 January 2022.

   b. On 18 June 2021, the Convening Authority, RDML Jon Hickey, approved the appointment of Dr. [redacted] to serve as a defense expert consultant in the field of pediatric forensic pathology. The approval was limited to 40 hours of pretrial consultation at the rate of [redacted] for a total not to exceed [redacted]

   c. On 2 August 2021, RDML Hickey approved the appointment of Dr. [redacted] to serve as a defense expert consultant in the field of forensic psychology. The approval was limited to 40 hours of pretrial consultation at a rate of [redacted] for a total not to exceed [redacted]

   d. As of 2 September 2021, the Coast Guard contracting process had not been finalized for either Dr. [redacted] or Dr. [redacted] As a result, the Defense is not able to begin consultation with these previously approved expert consultants.

   e. Further delays in the contracting process jeopardizes the ability for the Defense to adequately prepare for what is expected to be a highly complex trial.

2. **Order:** The Government (Coast Guard Contracting Office, CG-912) is hereby ordered to complete the contracting process for Dr. [redacted] **no later than Friday, 10 September 2021** to allow the Defense to begin immediate consultation with Dr. [redacted] The Government (Coast Guard Contracting Office, CG-912) is hereby ordered to complete the contracting process for Dr. [redacted] **no later than 1 October 2021** to ensure the Defense has ample time to complete approved consultation in preparation for trial.

It is so ordered.

CASEY.P [redacted] Digitally signed by CASEY.P [redacted] Date: 2021.09.03 12:26:04 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	ORDER FOR GOVERNMENT CONTRACTING 22 Oct 2021

1. **Background:**

   a. The accused, YN2 Kathleen Richard, is charged with violations of Article 118, UCMJ (Murder), Article 119 (Manslaughter), and Article 131b (Obstruction of Justice). The Court has set trial to begin on 10 January 2022.

   b. On 27 September 2021, the Court ordered the Government to fund 40 hours of expert assistance from Dr. [redacted]

   c. On 15 October 2021, Trial Counsel provided required documentation to the Coast Guard contracting office. Generally, the contracting process takes 30 days. However, any delays in contracting jeopardizes the ability for trial to begin on time. There are currently over 70 witnesses scheduled to travel to Norfolk for trial.

2. **Order:** The Government (Coast Guard Contracting Office, CG-912) is hereby ordered to complete the contracting process for Dr. [redacted] **no later than Monday, 1 November 2021** to allow the Defense to begin immediate consultation with Dr. [redacted] This order is necessary to ensure the Defense has ample time to complete approved consultation in preparation for trial.

It is so ordered.

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Date: 2021.10.22 09:30:17 -04'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 42
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	ORDER FOR DELIVERY OF MEDICAL EVIDENCE 16 December 2021

1. **Background:**

   a. The accused, YN2 Kathleen Richard, is charged with violations of Article 118, UCMJ (Murder), Article 119 (Manslaughter), and Article 131b (Obstruction of Justice).

   b. Dr. [redacted] MD is retained by the Government as an expert witness in this case.

   c. As part of the investigation in this case, an autopsy was conducted for the deceased child, [redacted] on 21 April 2020 at the Alaska State Medical Examiner's Office in Anchorage, AK. This autopsy was performed by Dr. [redacted] The SME case is #20-00614.

   d. In order to prepare for trial, the Government counsel and Dr. [redacted] must have the ability to inspect the results of the autopsy in this case and review the physical evidence obtained during the autopsy and retained by the Medical Examiner's office.

2. **Order:** The Alaska State Medical Examiner shall produce recuts of tissue samples and slides retained by the Medical Examiner's Office. Trial is set to begin on 10 January 2022, the Alaska State Medical Examiner is requested to take all reasonable steps to produce recuts of slides and deliver samples to Dr. [redacted] no later than Monday, 3 January 2022.

The Coast Guard trial counsel shall coordinate funding and delivery information.

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Date: 2021.12.16 14:36:52 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

Appellate Exhibit 49
Page 1 of 3

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	ORDER FOR DELIVERY OF MEDICAL EVIDENCE 17 September 2021

1. **Background:**

   a. The accused, YN2 Kathleen Richard, is charged with violations of Article 118, UCMJ (Murder), Article 119 (Manslaughter), and Article 131b (Obstruction of Justice).

   b. Mr. Billy Little; LCDR Jennifer Luce, JAGC, USN; and LT Caitlin Spence, JAGC, USN, represent YN2 Richard. Dr. [redacted] has been retained as a defense expert consultant in this case.

   c. As part of the investigation in this case, an autopsy was conducted for the deceased child, [redacted] on 21 April 2020 at the Alaska State Medical Examiner's Office in Anchorage, AK. This autopsy was performed by Dr. [redacted] The SME case is #20-00614.

   d. In order to prepare for trial, the defense counsel and their expert consultant must have the ability to inspect the results of the autopsy in this case and review the physical evidence obtained during the autopsy and retained by the Medical Examiner's office.

2. **Order:** The Government shall ensure the defense counsel and their expert consultants have access to the complete autopsy file, including the physical evidence, retained by the Alaska Medical Examiner's Office in the above referenced case. Any physical evidence that can be provided directly to the defense counsel and/or their expert consultant shall be provided expeditiously. This includes, but is not limited to recuts of tissue samples and slides retained by the Medical Examiner's Office.

Upon completion of review by the defense counsel's expert and no later than 28 October 2021, the Defense shall ensure that any physical evidence, including recuts of tissue samples, is forwarded to the Government's expert, Dr. [redacted] for examination.

The government shall provide the funding required to produce the physical

evidence to the defense team and ship samples between parties.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

Appellate Exhibit 49
Page 3 of 3

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON GOVERNMENT REQUEST FOR DEPOSITION IN LIEU OF LIVE TESTIMONY 10 Nov 2021

RELIEF SOUGHT

The Government moved this Court to order oral depositions for a Government witness. AE 50. The Defense opposed the motion. AE 51. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUES PRESENTED

1. Do exceptional circumstances exist in the interest of justice for the Court to order testimony of a prospective witness be taken and preserved for trial?

2. Is the issued subpoena for a witness to appear to provide testimony at trial unreasonable, oppressive, or prohibited by law?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The Convening Authority designated the site of trial to be Norfolk, Virginia.

3. The charges involve the death of the accused's [redacted] on 18 `April 2020.

4. Ms. [redacted] is a Government witness. She received a subpoena to appear at trial to provide testimony. The subpoena was served on 20 September 2021.

5. Trial in this case is set to begin on 10 January 2022 in Norfolk, Virginia.

6. Ms. [redacted]

7. Ms. [redacted]

8. Ms. [redacted] currently works as an infant caregiver at [redacted]

9. Ms. [redacted] was [redacted] in the weeks preceding [redacted] death.

10. At trial, Ms. [redacted] is expected to testify to her observations of [redacted] during that time period, to include: her observations of [redacted] ability to raise her head and roll over from her stomach to her back, that [redacted] was not a good sleeper, and her observations of bruising on [redacted] legs.

11. Ms. [redacted] provided a note from Ms. [redacted] with the Kodiak Community Health Center to Trial Counsel.

12. In the note, Ms. [redacted] stated that Ms. [redacted] is under her care for a health condition. Ms. [redacted] requested Ms. [redacted] be exempt from travelling to Norfolk for trial due to "age and health related concerns." Ms. [redacted] concluded that she did not feel Ms. [redacted] could comfortably or safely participate in long court proceedings.

13. In her note, Ms. [redacted] reminded the Court that "the CDC has advised that travel during the COVID pandemic and current COVID surge that is not essential is not advised.".

14. There is no information provided to the Court regarding Ms. [redacted] medical condition.

15. On October 13, 2021, the [redacted] submitted a letter to Trial Counsel. In the letter, the Director of the daycare stated that Ms. [redacted] is a critical employee at the daycare.

16. The Director stated that if Ms. [redacted] is absent for five days, the daycare might have to turn away families due to staffing shortages.

17. In their pleading and within their oral motion, Trial Counsel joined Ms. [redacted] request to modify her subpoena.

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

PRINCIPLES OF LAW

Article 46, UCMJ proscribes that in cases referred to trial by court-martial, the

trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

R.C.M. 703(g)(3)(A) outlines that civilian witnesses not under the control of the Government may be obtained by subpoena. R.C.M. 703(g)(3)(G) states that if a person subpoenaed requests relief on the ground that compliance is unreasonable, oppressive, or prohibited by law, the military judge...shall review the request and shall: (1) order that the subpoena be modified or quashed, as appropriate; or (2) order the person to comply with the subpoena.

R.C.M. 703(b) states that each party is entitled to the production of any witness whose testimony on a matter in issue on the merits...would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify over remote means.

Pursuant to R.C.M. 702, a deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial. "Exceptional circumstances" under the rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial.

ANALYSIS

Request for Deposition

The Court finds that the Government did not meet their burden of establishing that exceptional circumstances exist for the Court to order a deposition of Ms. [redacted]. The Court notes that Ms. [redacted] woman who is under a medical provider's care. However, there are limited facts for the Court to analyze as to what condition(s) she is being treated. The evidence provided demonstrates that Ms. [redacted] is a valued employee of [redacted] where she works in the newborn room. Such work would never be described as "easy" for anyone who has experienced caring for a newborn, let alone multiple infants at a time. Moreover, her medical provider's concern regarding Ms. [redacted] exposure to COVID if required to travel does not seem to also extend to Ms. [redacted] ability to continue to work with and around several young children, whom, to date, do not have the ability to become vaccinated against COVID[1].

The Court also does not find the concerns of [redacted] regarding staffing shortages, if Ms. [redacted] were to personally appear at trial, rises to the level of "exceptional circumstances," as required by R.C.M. 702. The Court understands and is sympathetic to the daycare's concerns; however, the accused is facing significant charges, which include murder. Ms. [redacted] testimony is relevant and necessary. The

[1] As the Court stated in the 4 November 2021 Article 39(a) session, if there is more evidence provided concerning Ms. [redacted] medical condition, the Court would consider that information with regard to this request.

Defense, as is their right provided for in R.C.M. 703(b), did not consent to the virtual testimony of Ms. [redacted] Nearly every subpoena to appear will likely involve inconveniences to families, employers, and the individual. However, those inconveniences do not warrant the exceptional remedy of taking a deposition to preserve testimony.

Request to Modify Subpoena

The Court also finds that Ms. [redacted] failed to demonstrate that the subpoena ordering her to appear in Norfolk, VA to provide testimony is unreasonable, oppressive, or prohibited by law. As discussed above, the evidence presented to the Court in support of this motion demonstrates that Ms. [redacted] and her employer would be inconvenienced by her travel to Norfolk; however, that inconvenience is not unreasonable or oppressive when balanced against the accused's right to confront relevant and necessary witnesses against her.

Trial Counsel in this case have demonstrated an ability to work with their staff to ensure an efficient use of Ms. [redacted] time and safety. The Court has no doubt that the Government will ensure her presence in Norfolk will be limited to only the time that is absolutely required.

CONCLUSIONS OF LAW

1. Exceptional circumstances do not exist in the interest of justice for the Court to order testimony of a prospective witness be taken and preserved for trial.

2. The issued subpoena for the witness to appear to provide testimony is not unreasonable, oppressive, or prohibited by law.

RULING AND ORDER

The Government motion to request a deposition and/or modify Ms. [redacted] subpoena is DENIED, consistent with the above conclusions of law.

Ms. [redacted] is ordered to comply with the 20 September 2021 subpoena.

It is so ordered.

10 November 2021

CASEY.PA [redacted] Digitally signed by CASEY.PAUL.R [redacted] Date: 2021.11.12 10:42:28 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE 29 Nov 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss Charge I, Specifications 1 and 2, violation of Article 118, UCMJ, and the Additional Charge, violation of Article 119, UCMJ for failure to state an offense. AE 62. The Government opposed the motion. AE 63. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUE PRESENTED

Do Charge I, Specifications 1 and 2, and the Additional Charge, Sole Specification, state an offense?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. Charge I, Specification 1 states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia.

3. Charge I, Specification 2 states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020,

with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: by asphyxia.

4. Additional Charge, Sole Specification, states:

In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, by culpable negligence, unlawfully kill [redacted] a child under the age of 16 years, by asphyxia.

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

PRINCIPLES OF LAW

The military is a notice pleading jurisdiction. United States v. Sell, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a 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." Hamling v. United States, 418 U.S. 87, 117, (1974); see also United States v. Resendiz-Ponce, 549 U.S. 102, 108, (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).

The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also Miller, 67 M.J. at 388.

Trial counsel should "meticulously follow the language contained in the UCMJ sample specifications" when crafting UCMJ charges and that failure to do so may call a specification's sufficiency into question. United States v. Turner, 79 M.J. 401, 404 n.2 (C.A.A.F. 2020).

When a specification is challenged at trial, courts are instructed to read the words narrowly and only accept interpretations that are close to the plain text. Turner, 79 M.J. at 403 (citing United States v. Fosler, 70 M.J. 225, 230 (C.A.A.F. 2011)).

The Manual for Courts-Martial, Part IV, and the Military Judge's Benchbook indicate that the elements of unpremeditated murder are:

(1) That (state the name or description of the alleged victim) is dead;
(2) That his/her death resulted from the (act) (omission) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);
(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; and
(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

The sample specification contained in the Manual for Courts-Martial, Part IV, for Article 118(2) states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____ by means of (shooting (him) (her) with a rifle) (_____)."

The elements of murder while engaging in an inherently dangerous act are:

(1) That (state the name or description of the alleged victim) is dead;
(2) That (his) (her) death resulted from the intentional act of the accused in (state the act alleged), at (state the time and place alleged);
(3) That this act was inherently dangerous to another and showed a wanton disregard for human life;
(4) That the accused knew that death or great bodily harm was a probable consequence of the act; and
(5) That the killing by the accused was unlawful.

The sample specification contained in the Manual for Courts-Martial, Part IV, for Article 118(3) is identical to Article 118(2) above. It states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____by means of (shooting (him) (her) with a rifle) (_____)."

The elements of involuntary manslaughter are:

(1) That (state the name or description of the alleged victim) is dead;
(2) That (his) (her) death resulted from the (act) (omission) of the accused in (state the act or omission alleged) at (state the time and place alleged);
(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; (and)
(4) That this (act) (omission) constituted culpable negligence; [and]
[(5)] That (state the name or description of the alleged victim) was a child under the age of 16 years.

The sample specification contained in the Manual for Courts-Martial, Part IV, states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, willfully and

unlawfully kill _____, (a child under 16 years of age) by _____ (him) (her) (in) (on) the _____ with a _____." This mirrors what is also included in the Military Judges Benchbook.

ANALYSIS

Specifications 1 and 2 of Charge I and the Sole Specification of the Additional Charge state an offense. Specification 1 charges every element of unpremeditated murder either expressly or by necessary implication. Specification 2 charges every element of murder while engaging in an inherently dangerous act either expressly or by necessary implication. The Sole Specification of the Additional Charge charges every element of voluntary manslaughter either expressly or by necessary implication.

As stated above, each of the charged specifications requires the Government to charge an act or omission. In Specifications 1 and 2 of Charge I, the Government charges that the accused "did… murder… by asphyxia." In the Sole Specification of the Additional Charge, the Government charges that the accused "did… kill… by asphyxia."

The Defense argues that each of the challenged specifications fails for the same reason – that none of them allege an act or omission of the accused, which is a required element of each charge. The Defense does not rely on precedential or persuasive authority regarding whether "by asphyxia" represents an act or omission. Instead, the Defense cites various secondary sources for the proposition that asphyxia is a "medical condition" and not something that the accused did or failed to do. The Merriam-Webster Dictionary, a source cited by the Defense, contradicts this proposition. The verb "to asphyxiate" is defined as "to cause asphyxia in : to kill, suspend animation in, or make unconscious through want of adequate oxygen, presence of noxious agents, or other obstruction to normal breathing." www.merriam-webster.com/dictionary/asphyxiate. The example provided states "[t]he murder victim was asphyxiated." None of the model specifications at issue require the government to state the act or omission using the act's verb tense. Instead, the model specifications call for the government to charge the act as a noun within a prepositional phrase. Using an example mentioned by the Defense, the model specification favors "the accused…did murder… by means of shooting" rather than "the accused did shoot and murder" the victim. Here, like shooting, asphyxia is the noun form for "to asphyxiate." In short, the act of asphyxiation does represent an act that may have been performed by the accused.

Notably, the Government failed to use the words "by means of asphyxia" suggested by the model specification, instead using simply "by asphyxia." The Court finds that this is a difference without a distinction. The phrase "by means of asphyxia" and "by asphyxia" share the same meaning.

Here, the Government has expressed every element of the offense and placed Defense on notice of the charges so that they can properly prepare a defense.

CONCLUSIONS OF LAW

Specifications 1 and 2 of Charge I and the Sole Specification of the Additional Charge state an offense.

RULING

The Defense Motion to Dismiss is DENIED, consistent with the above conclusions of law.

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Date: 2021.11.30 09:54:45 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

Appellate Exhibit C4
Page 5 of 5

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS: MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES 12 Nov 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss specifications 1 and 2 of Charge I because they are multiplicious with the Additional Charge. AE 65. The Government opposed the motion. AE 66. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUES PRESENTED

1. Is Specification 2 of Charge I (Murder While Engaging in an Act Inherently Dangerous to Another) multiplicious with Specification 1 of Charge I (Unpremeditated Murder)?

2. Is the Additional Charge, Article 119 (Involuntary Manslaughter) multiplicious with Specification 2 of Charge I (Unpremeditated Murder)?

3. Does Specification 2 of Charge I constitute an unreasonable multiplication of charges with Specification 1 of Charge I?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. In Specification 1 of Charge I, the accused is charged with unpremeditated murder, in violation of Article 118(2), UCMJ. The specification reads: "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily

harm, murder [redacted] a child under the age of 16 years, by asphyxia.

3. In Specification 2 of Charge I, the accused is charged with murder while engaging in an act inherently dangerous to another in violation of Article 118(3), UCMJ. The specification reads: "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to with: by asphyxia.

4. In the Additional Charge, the accused is charged with involuntary manslaughter in violation of Article 119, UCMJ. The specification reads: "In that Yeoman Second Class Petty Officer Kathleen Richard, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, by culpable negligence, unlawfully kill [redacted] a child under the age of 16 years, by asphyxia.

5. The alleged criminal action in Specifications 1-2 of Charge I and the Additional Charge involve the same actions (killing of [redacted] by asphyxiation) but represent alternate theories of criminal liability.

6. Both parties concur that the Additional Charge represents a lesser-included offense to specification 1 of Charge I.

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

PRINCIPLES OF LAW

Multiplicity

R.C.M. 907(b)(3)(B) provides that a specification may be dismissed upon timely motion if:

> The specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

The Discussion section of R.C.M. 907(b)(3)(B) explains the concept of multiplicity and cautions against dismissing a specification prior to trial unless it clearly alleges the same offense:

> Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicious specifications after findings

have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

Article 79, UCMJ defines a lesser-included offense to include: (1) an offense that is necessarily included in the offense charged; and (2) any lesser included offense so designated by regulation prescribed by the President. 10 U.S.C. §879 (2019). An offense is "necessarily included in a charged offense when the elements of the lesser offense are a subset of the charged offense. Manual for Courts-Martial, pt. IV, para. 3.b.(2)(2019 ed.). The President has set forth a list of lesser-included offenses in Appendix 12A of the Manual for Courts-Martial. Id. at para.3.b.(3)(b).

The Court of Military Appeals' ruling in United States v. Teters, 37 M.J. 370 (C.M.A. 1993), gives the analysis as to whether charges are multiplicious:

> Our initial inquiry in this regard is: How does Congress express its intent concerning multiple convictions at a single trial for different statutory violations arising from the same act or transaction? It could do so expressly in the pertinent statutes violated or in their legislative histories. Absent such an overt expression of legislative intent, it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other. *See* Blockburger v. United States, 284 U.S. at 304, 52 S.Ct. at 182. Finally, other recognized guidelines for discerning congressional intent may then be considered to determine whether the above presumption of separateness is overcome by clear indications of a contrary legislative intent. Id. at 376-77 (other internal citations omitted).

R.C.M. 307(c)(3) provides that a specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. The Discussion section to R.C.M. 307(c)(3) advises trial counsel that "[w]here there is doubt as to whether an offense is a lesser included offense or whether a particular offense should be charged in the alternative, preferral of a separate chare or specification may be warranted. If the accused is convicted of two or more offenses, the trial counsel should consider asking the military judge to determine whether any convictions that were charged in the alternative or as potential lesser included offense should be dismissed or conditionally dismissed subject to appellate review."

Unreasonable Multiplication of Charges

Rule for Court-Martial (R.C.M.) 307(c)(4) provides that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The concept of an unreasonable multiplication of charges applies to both findings and sentencing. United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012).

The Court of Military Appeals, in United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001), gave a five-part test to use when evaluating claims of unreasonable multiplication

of charges: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?; (2) Is each charge and specification aimed at distinctly separate criminal acts?; (3) Does the number of charges and specifications misrepresent or exaggerate the [accused's] criminality?; (4) Does the number of charges and specifications *unfairly* increase the [accused's] punitive exposure; and 5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? Id. at 338.

ANALYSIS

Multiplicity

The Court finds that Specification 2 of Charge I is not multiplicious with specification 1 of Charge I. The charge of Murder While Engaged in an Act Inherently Dangerous to Another is not a lesser included offense to the charge of Unpremeditated Murder. The two offenses are not necessarily included in the offense charge, nor are they listed by the President as lesser included offenses.

Unpremeditated murder has four elements: (1) that a certain named person is dead; (2) that the death resulted from the act or omission of the accused; (3) that the killing was unlawful; and (4) that at the time of the killing the accused had the intent to kill or inflict great bodily harm upon a person. Art. 118, UCMJ, MCM, Part IV ¶56(b)(2). (2019 ed.).

Murder While Engaged in an Act Inherently Dangerous to Another has five elements: (1) that a certain named person is dead; (2) that the death resulted from an intentional act of the accused; (3) that this act was inherently dangerous to another and showed a wanton disregard for human life; (4) that the accused knew that death or great bodily harm was a probable consequence of the act; and (5) that the killing was unlawful. Article 118, UCMJ, MCM, Part IV ¶56(b)(3). (2019 ed.).

The offense of Murder While Engaged in an Act Inherently Dangerous to Another has an additional element and actions that the offense that Unpremeditated Murder does not. As such, the offenses are not necessarily included.

However, the Court finds that, as plead, the sole Specification of the Additional Charge is multiplicious with Specification 2 of Charge I. Accordingly, the Additional Charge shall be dismissed.

The Court of Appeals for the Armed Forces has found that the offense of Involuntary Manslaughter is a lesser-included offense of Unpremeditated Murder. See United States v. Dalton, 72 M.J. 446 (C.A.A.F. 2013). However, the elements of the charged offenses, and the pleadings in this case require closer analysis. As discussed above, Unpremeditated murder has four elements: (1) that a certain named person is dead; (2) that the death resulted from the act or omission of the accused; (3) that the killing was unlawful; and (4) that at the time of the killing the accused had the intent to kill or inflict great bodily harm upon a person. Art. 118, UCMJ, MCM, Part IV

¶56(b)(2). (2019 ed.).

Involuntary Manslaughter of a child under 16 has five elements: (1) that a certain named or described person is dead; (2) that the death resulted from the act or omission from the accused; (3) that the killing was unlawful; (4) that this act or omission of the accused constituted culpable negligence...; and (5) that the person killed was a child under the age of 16 years. Article 119, UCMJ, MCM, Part IV ¶ 57(b)(2).

Here, based on a review of the elements, it would appear that Involuntary Manslaughter of a Child Under 16 years is not a lesser-included offense of Unpremeditated Murder. The Involuntary Manslaughter offense adds an element (child under 16 years) that is not in the Unpremeditated Murder charge. However, in Specification 1 of Charge I, the Government seems to add an element to the offense, stating in the specification that the accused, "did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] *a child under the age of 16 years*, by asphyxia." The Government included an individual element in the specification for a child under 16 years of age. Such element does not appear in the model specification or in the list of elements. However, by adding this element, the Government has added the element into the offense of Unpremeditated Murder.

Therefore, as plead in Specification 1 of Charge I, the elements of the offense are: (1) that [redacted] is dead; (2) that her death resulted from the act or omission of the accused; (3) the her killing was unlawful; (4) that at the time of the killing the accused had the intent to kill or inflict great bodily harm on her; and (5) that [redacted] was under 16 years of age.

Based on CAAF's ruling in Dalton, the parties' agreement, and the Court's review of the elements as charged, the Court finds that the Additional Charge is a lesser-included offense of specification 1 of Charge I.

Unreasonable Multiplication of Charges

In applying the Quiroz factors, the Court finds that Specification 2 of Charge I does not constitute an unreasonable multiplication of charges to Specification 1 of Charge I. The first two Quiroz factors favor the Defense, as they have objected and the charges clearly constitute the same criminal acts. However, Specification 2 of Charge I does not unfairly exaggerate the accused's criminality. Here, it is evident that the Government has presented Specification 2 of Charge I as an alternate theory of criminal liability. Such tactics have long been accepted. United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014). As such, there is no evidence of prosecutorial overreach. In their motion and at the Article 39(a) session, the Government clearly indicated Specification 2 of Charge I (and the Additional Charge) were being offered as alternative theories of criminal liability.

CONCLUSIONS OF LAW

1. Specification 2 of Charge I (Murder While Engaging in an Act Inherently Dangerous to Another) is not multiplicious with Specification 1 of Charge I (Unpremeditated Murder).

2. The Additional Charge, Article 119 (Involuntary Manslaughter) is multiplicious with Specification 2 of Charge I (Unpremeditated Murder).

3. Specification 2 of Charge I does not constitute an unreasonable multiplication of charges with Specification 1 of Charge I.

RULING AND ORDER

The Defense motion is GRANTED, in part, and DENIED[1], in part consistent with the above conclusions of law.

The Additional Charge is dismissed, without prejudice. If reasonably raised by the evidence, the Court will instruct the members that Involuntary Manslaughter may be considered as a lesser-included offense to specification 1 of Charge I (Unpremeditated Murder).

It is so ordered.

CASEY.PA[redacted] Digitally signed by CASEY.PAUL.R[redacted]
Date: 2021.11.15 22:48:10 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

[1] The Defense may petition for reconsideration at two subsequent points in the trial: 1) After the evidence is in and before the Court deliberates on the findings (the instruction phase); and 2) After findings are announced but prior to sentencing.

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR RECONSIDERATION – FUNDING FOR A HOMICIDE INVESTIGATOR 18 Nov 2021

RELIEF SOUGHT

The Defense moved this Court to reconsider the Court's ruling of 27 Sept 2021, which denied the Defense's motion to compel the production of homicide investigator [redacted] as an expert consultant. AE 69. The Government opposed the motion to reconsider. AE 70. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUE PRESENTED

Is the assistance of a homicide investigator necessary for an adequate defense?

FINDINGS OF FACT

The Defense must prove by a preponderance of the evidence that one hundred twenty hours of consultation with Mr. [redacted] is necessary for an adequate defense. In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base Kodiak, Alaska on 18 April 2020.

3. The body of [redacted] was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

4. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

5. The autopsy concluded that the cause of death to be "asphyxia" due to "prone position of swaddled infant in bedding."

6. The autopsy further concluded that the manner of death was classified as "undetermined."

7. From 26 April to 10 May 2020, U.S. Coast Guard Reserve Special Agent [redacted] was activated to assist the team in Alaska with its early investigation.

8. Special Agent [redacted] has served in various law enforcement roles from 2003 to the present.

9. From [redacted] Special Agent [redacted] was employed as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During that time period, Special Agent [redacted] resume notes that he earned recognition as the Detective of the Year in [redacted]

10. Special Agent [redacted] has served as a CGIS Special Agent since 2015. Special Agent [redacted] resume notes that he is a "subject matter expert in death investigation/homicide" and that he is a "founding member of Global homicide response team."

11. In the awards and accomplishments section of his resume, Special Agent [redacted] notes that he was the Lead Homicide Investigator for the State of Illinois.

12. S/A [redacted] had a telephone discussion with Dr. [redacted] in late April 2020.

13. S/A [redacted] considers Dr. [redacted] a close professional colleague, having worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

14. Dr. [redacted] was later contracted by the Government in July 2020 to assist the Government.

15. Dr. [redacted] reviewed the results of [redacted] autopsy, opined that the autopsy results were indicative of a homicide, and will testify for the Government at trial.

16. S/A [redacted] did not serve as a lead agent on this case, but he reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation.

17. S/A [redacted] His did not respond to the scene, attend the autopsy, or conduct any interviews of YN2 Richard or BM2 [redacted]

18. The Government disclosed to the Defense the fact and nature of S/A [redacted] participation in the case on 8 November 2021.

19. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. He was previously assigned as a detective investigator while with the San Antonio Police Department. In this capacity, he investigated murder cases, among other felony level crimes.

20. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. She was previously assigned as a detective with the homicide bureau for the Memphis Police Department.

21. S/A [redacted] CGIS, who participated in the Government's investigation, completed a homicide investigations course and was issued a certificate of completion by the Robert Presley Institute of Criminal Investigation.

22. The Defense team is comprised, in part, of Mr. Billy Little, Civilian Defense Counsel, and LCDR Jennifer Luce, Individual Military Counsel. Mr. Little is an experienced defense attorney and has defended numerous capital murder cases. Similarly, LCDR Luce is an experience defense attorney and has also previously defended murder cases.

23. The U.S. Navy employs Defense Litigation Support Specialists. To date, however, according to the Government, the U.S. Navy has not assigned a Defense Litigation Support Specialist to the accused's defense team.

24. On 08 July 2021, the Defense moved to compel the production of homicide investigator [redacted] In this motion, the Defense proffered that Mr. [redacted] assistance would be used in "(1) Determining what investigative steps should be taken in preparation for trial; (2) identification of possible affirmative defenses; (3) preparation for, and conducting, pretrial interviews; (4) identifying investigative leads to pursue prior to trial; and (5) preparing for cross-examination of the investigating CGIS agents.." AE XX. The Defense further offered that "[t]his expert will also be necessary to determine whether or not a defense theory is viable or whether an accused should attempt to negotiate a plea agreement." Id. The Defense also noted that "[Mr. [redacted] will help educate the panel in determining the credibility, impartiality, and professionalism of the CGIS investigation." Id.

25. In its request for reconsideration of the Court's initial denial of this expert request, the Defense also indicated that Mr. [redacted] assistance was needed to develop a third party defense. AE XX.

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

PRINCIPLES OF LAW

Under Article 46, UCMJ, and M.R.E. 706(a), the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain expert witnesses.

R.C.M. 703(b) states that each party is entitled to the production of any witness

whose testimony on a matter in issue on the merits...would be relevant and necessary.

The accused bears the burden of establishing a reasonable probability that: (1) an expert would be of assistance to the defense; and (2) denial of expert assistance would result in a fundamentally unfair trial. United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008). To satisfy the first prong of this test, courts apply a three-part analysis set forth in United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994). 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. Id.

ANALYSIS

The Court finds that the Defense has met its burden in establishing that the request for a homicide investigator would be of assistance and that the denial of the expert assistance would result in a fundamentally unfair trial. The Court's ruling on the original motion for the assistance of a defense investigator hinged on the inability of the Defense to show how the defense team was unable to conduct an adequate investigation on its own. This ruling took into account the strong working relationship the defense team appeared to have with the government team, and the government team's willingness to provide witness access and discovery.

Since its original ruling, additional Government disclosures have made the Defense and Court aware that the Government's investigative team benefited from the assistance of CGIS Special Agents who had significant experience in homicide investigations. CGIS activated S/A [redacted] a reserve agent, from 26 April to 10 May 2020 to assist with the investigation in Alaska. S/A [redacted] resume notes that he served as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During the this time period, his resume notes that he earned recognition as the Detective of the Year in [redacted] Additionally, the resume notes he is a "subject matter expert in death investigation/ homicide" and that he is a "founding member of [the] Global homicide response team." The Government indicated that while not the lead agent, S/A [redacted] "reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation."

Additional Government disclosures have also made the Defense and Court aware that S/A [redacted] was apparently the first government agent to make contact with Dr. [redacted] This contact came in the form of a telephone call, while S/A [redacted] was activated in support of the investigation. Dr. [redacted] would later be contracted by the Government and will testify as an expert witness in the Government's case concerning the cause of [redacted] death. S/A [redacted] considers Dr. [redacted] to be a close professional colleague, because they worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

Finally, the Court notes that CGIS also activated reserve special agents [redacted] and [redacted] for the investigation team. Both individuals' resumes list experience as previous homicide detectives in their civilian law enforcement careers.

The Court is persuaded that this additional evidence, when coupled with evidence previously presented to the Court, makes the assistance of a homicide investigator necessary to the preparation of the Defense's case. As part of its strategy, the Defense will focus on the shift from the initial classification of the cause of death as "undetermined" to a later classification that the cause was homicide. The defense will also focus on the Government's reliance on multiple medical examiners; how the opinions of those medical examiners were obtained, and how the fact finder should ultimately weigh differences in those medical opinions. It is now clear that the Government used an investigative team with experience in homicide investigations as the investigation progressed. The members of this investigative team, including S/A [redacted] made contact with the medical examiners at issue, recorded, and analyzed their findings. The Court finds it would be fundamentally unfair to deny the Defense access to an experienced homicide investigator, as it prepares to defend the accused from a case investigated in part by similarly experienced special agents. Whereas the Court originally found that the defense team could handle the investigation on its own, that finding is no longer valid.

In summary, the Court finds that the Defense has met its burden under the three prong test articulated in United States. v. Gonzalez to establish the necessity of a homicide investigator's assistance. Additionally, under United States v. Freeman, given the Government's use of an investigative team with significant homicide experience, it would be fundamentally unfair to deprive the defense of this expert request.

CONCLUSIONS OF LAW

Assistance by an expert in the field of homicide investigations is necessary for an adequate defense.

RULING AND ORDER

The Defense's motion to reconsider the Court's denial to compel production of an expert consultant in the field of homicide investigation is GRANTED.

The Government shall fund an expert homicide investigator for no more than 120 total hours for pretrial preparation and one day of testimony at trial, at his cited hourly rate of [redacted] The funding shall not exceed [redacted]

It is so ordered.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS: DISCOVERY VIOLATIONS 14 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss all charges and specifications against the accused due to purported discovery violations committed by the Government AE 56. The Government opposed the Defense motion. AE 57. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUE PRESENTED

Did the Government commit any discovery violations which warrant remedies up to and including dismissal of charges?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Coast Guard Investigative Service (CGIS) agents began a criminal investigation into [redacted] shortly after her death.

4. During the early stages of the investigation, CGIS agents had informal discussions on how to proceed with the homicide investigation. CGIS agents sought out colleagues within the Federal Bureau of Investigations (FBI) to discuss the case.

5. During one of these phone conversations, an FBI agent offered to have a physician review the autopsy report and photographs.

6. Agent [redacted] FBI, facilitated a phone conversation between Dr. [redacted] and Special Agent (S/A) [redacted] of CGIS on 12 June 2020. Prior to the call, Dr. [redacted] noted injuries on [redacted] neck and asked follow-up questions to Agent [redacted] Agent [redacted] forwarded Dr. [redacted] questions to S/A [redacted]

7. During the 12 June 2020 phone conversation, Dr. [redacted] stated the injuries depicted in the autopsy report indicated a homicide.

8. Dr. [redacted] did not create a report for his findings.

9. On 12 June 2020, CGIS agents interviewed the responding emergency room physician and nurse who attempted to revive [redacted] on 18 April 2020. The doctor and nurse's observation were captured in the CGIS Report of Investigation (ROI) and provided to the Defense.

10. To provide additional assistance at the beginning of the investigation, CGIS Reserve S/A [redacted] was activated for a two-week period. During this two-week period (April – May 2020), S/A [redacted] had one telephonic conversation with Dr. [redacted] to discuss the investigation.

11. S/A [redacted] considers Dr. [redacted] a professional colleague. S/A [redacted] had previously worked with Dr. [redacted] in S/A [redacted] civilian law-enforcement career.

12. After this phone conversation, Dr. [redacted] was not involved in the case until the Government retained his consultation services in July 2020.

13. The Court previously ordered the Government to discover any briefing slides CGIS may have presented to Coast Guard leadership involving this case.

14. The Government discovered a CGIS-prepared Power Point slide deck which was dated 12 May 2020. One of the slide states "third ME (medical examiner) brought into investigation. Initial opinion based on photos was asphyxiation by overlay, suggesting weight applied to infant's back."

15. As a result of this discovered evidence, the Defense sought out the names of the three medical examiners referenced in the briefing slides.

16. At the time of this request, trial counsel were not aware of Dr. [redacted] involvement in this case. As a result of their responsive efforts to the Defense request, they learned of Dr. [redacted] involvement in the early stages of the investigation.

17. On 1 November 2021, the Government disclosed that the three medical examiners were: Dr. [redacted] Dr. [redacted] and Dr. [redacted] (Alaska Medical Examiner who conducted the autopsy).

18. On 9 November 2021, the Defense contacted Dr. [redacted] to determine his

involvement in the case. Dr. [redacted] could not recall any facts of this case and denied having any records of the case.

19. The Defense has been provided contact information of all medical examiners in this case.

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

PRINCIPLES OF LAW

The United States must comply with not only regulatory and statutory discovery requirements (those contained in the Rules for Courts-Martial (RCMs and the UCMJ)), but also constitutionally based discovery requirements (such as Brady v. Maryland, 373 US 83 (1963)). The military's discovery process is designed to provide protections greater than those provided by the Constitutional protections in Brady. See United States v. Kinney, Daily J. 56 MJ 156 (C.A.A.F. 2001). The CAAF in Kinney set out in detail the military's discovery rights, including statutory, regulatory and Constitutional rights.

Regulatory / Statutory Discovery:

Under Article 46, UCMJ, both parties must have an "equal opportunity to obtain . . . evidence. . . ." This statutory provision is implemented by RCM 701(e), which provides "[e]ach party shall have . . . equal opportunity to . . . inspect evidence" and "[n]o party may unreasonably impede the access of another party . . . to evidence." Under RCM 701(d), there is a continuing duty to disclose.

The duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute, see United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F.2015); (2) evidence that is of such central importance to the defense that it is essential to a fair trial, see R.C.M. 703(e)(2); and (3) statements of witnesses testifying at trial, see United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F.2015); United States v. Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015)).

RCM 701(a)(6)(A) – (D) mandates that trial counsel, as soon as possible, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to: (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; (c) reduce the punishment; or (d) adversely affect the credibility of any prosecution witness or evidence.

RCM 701(g)(3) states that if at any time during the court-martial if is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions: (a) order the party to permit discovery; (b) grant a continuance; (c) prohibit the party from introducing evidence calling a witness, or raising a defense not disclosed; and (d) enter such other order as is just under the circumstances.

Constitutional Discovery:

The Government is required to disclose to the Defense all evidence that is favorable to the defense and material to the issue of guilt or to punishment. Brady v. Maryland, 373 US 83, 87 (1963). Pursuant to Brady, the Government violates an accused's "right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 (2012). Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case. United States v. Orena, 145 F.3d 551, 557 (2d Cir.1998) (citing United States v. Bagley, 473 U.S. 667, 676, (1985)). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith, at 76. To be material, the evidence must have made the "likelihood of a different result ... great enough to 'undermine confidence in the outcome of the trial.' " Id. Once a Brady violation is established, courts need not test for harmlessness. Kyles v. Whitley, 514 U.S. 419, 435–36 (1995).

ANALYSIS

The Government complied with their statutory and constitutionally based discovery requirements, thus the Defense motion to dismiss must be denied.

First, it is important to note that the Government is not obligated to create discovery for the use of the Defense under Article 46, UCMJ or RCM 701. Here, the pursuant to Court Order and discovery responses, the Government provided information regarding Dr. [redacted] and Dr. [redacted] involvement in the early investigatory stages of the investigation. After reviewing the information, they both opined that the cause of death was a homicide. Neither doctor created a report or took notes of the discussions. CGIS did not appear to have documented these conversations in their ROI, however, at some point CGIS put the information into a Power Point slide. The doctor's opinions did not: (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; (c) reduce the punishment; or (d) adversely affect the credibility of any prosecution witness or evidence, thus trial counsel were under no obligation to provide materials regarding these conversations to the Defense pursuant to RCM 701(a)(6). Moreover, it is evident that trial counsel were initially unaware of Dr. [redacted] involvement in the earlier stages of the investigation, but once made aware, have taken diligent steps to ensure the Defense had access to both Dr. [redacted] and Dr. [redacted]

The Government did not have any duty to create documentation memorializing Dr. [redacted] involvement in this investigation. Dr. [redacted] opinion that the autopsy indicated a death by homicide is not exculpatory to the accused. Further, this information is not central to the defense case, nor is it a statement of a witness at trial. Accordingly, the Government had no duty to preserve such evidence for use at trial.

The Court further finds there was no Brady violation and thus no remedy is required by the Court. Dr. [redacted] opinion was that the autopsy of [redacted] indicated a homicide occurred. Such opinion is not exculpatory, nor does it have any ability to impeach the Government's case. If this evidence would be presented to the members, it would only strengthen the Government's case, not hinder it. Even if Dr. [redacted] opinion would have differed from Dr. [redacted] opinion, non-disclosure of the opinion would not amount to a Brady violation. See United States v. Thomas, 396 F. Supp. 3d 813, 821 (N.D. Indiana 2019)(holding a "mere disagreement" amongst experts does not trigger disclosure requirement).

In their motions, the Defense alleges that the Government is "concealing" Dr. [redacted] and Dr. [redacted] involvement in the investigation in this case. The Court finds that the Defense provided no evidence to indicate that the Government concealed Dr. [redacted] or Dr. [redacted] involvement in this case. The record indicates that trial counsel was unaware of Dr. [redacted] minor involvement in the case. That seems logical, since he only conducted one telephonic consultation with CGIS, created no record, and when asked, the case was not of much significance to him. Furthermore, the Government has made efforts to make Dr. [redacted] Dr. [redacted] and CGIS available to the Defense. In sum, the Court finds the Government has complied with all discovery requirements in this case.

CONCLUSION OF LAW

The Government did not commit any discovery violations which warrant remedy by the Court.

RULING

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

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 74
PAGE 5 OF 5 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO EXCLUDE TESTIMONY OF GOVERNMENT EXPERTS 22 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to exclude the testimony of Government expert witnesses[1]. AE 78. The Government opposed the Defense motion. AE 79. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUES PRESENTED

1. Is the expert testimony of Dr. [redacted] M.D. admissible at trial?

2. Is the expert testimony of Dr. [redacted] M.D. admissible at trial?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Dr. [redacted] has been a practicing forensic pathologist and medical examiner for over 31 years. He estimates that he has either conducted or observed over 10,000 autopsies. As a consultant, he estimates he has reviewed over 17,000 autopsy reports.

4. Dr. [redacted] has testified as an expert in forensic pathology in state, federal and

[1] In their reply motion, the Government stated they do not intend on introducing the testimony of Dr. [redacted] at trial. As such, this ruling will focus on only the experts the Government intends on offering at trial.

military courts hundreds of times. He has never failed to be recognized as an expert by any court.

5. Dr. [redacted] holds certifications from the National Board of Medical Examiners and the American Board of Pathology (Anatomic (1994), Clinical (1994), and Forensic (1995)).

6. Dr. Downs graduated from the University of Georgia in 1983 with a Bachelor of Science in Biochemistry (Magna Cum Laude), and his medical degree in 1988 from the Medical University of South Carolina in 1988. He completed multiple residencies and fellowships in pathology and clinical pathology.

7. In his career, Dr. [redacted] has reviewed a couple hundred cases involving sudden-infant death syndrome (SIDS). Most recently, he has worked on 2 cases involving SIDS over the past year.

8. Trial Counsel consulted with Dr. [redacted] in July 2020 to conduct a review of the investigation and to provide his expert opinion regarding potential causes of death to [redacted]

9. Dr. [redacted] reviewed the CGIS report of investigation, to include: photographs of the crib where [redacted] was discovered, medical treatment records of the responding emergency room staff, and post-mortem medical examination notes, photographs, and reports.

10. Based on his review of the autopsy, particularly the multiple noted injuries to [redacted] opinion is that [redacted] did not die of SIDS.

11. Dr. [redacted] observed significant injuries to [redacted] rear scalp. Dr. [redacted] opined those injuries occurred prior to death (due to flow of blood to region causing bruising) and were indicative of blunt-force trauma which was consistent with pressing a head down into a hard/soft surface.

12. Dr. [redacted] further observed injuries to [redacted] chin which were consistent with a struggle to breathe and not as a result of resuscitation efforts. Dr. [redacted] also noted what appears to be an imprint of [redacted] pacifier in post-mortem pictures of [redacted] which are consistent with being pressed into a surface.

13. Dr. [redacted] observed significant livor mortis on [redacted] Livor mortis is a reddish purple coloration in dependent areas of the body due to accumulation of blood in the small vessels of the dependent areas secondary to gravity. Dependent areas resting against a firm surface will appear pale in contrast to the surrounding livor mortis due to compression of the vessels in this area, which prevents the accumulation of blood.

14. Based on the livor mortis patterns found on [redacted] Dr. [redacted] opinion is that [redacted] was moved from a prone to supine position in the postmortem interval. Given the prominence of the lividity pattern, Dr. [redacted] believes [redacted] was likely dead and face

down for well more than an hour, perhaps two or more when she was discovered in her crib.

15. Ultimately, Dr. [redacted] believes that [redacted] was suffocated and subsequently left in her crib prior to anyone seeking medical assistance on her behalf.

16. Colonel [redacted] M.D., USAF, Medical Corps is a child abuse pediatrician stationed at the San Antonio Medical Center at Ft. Sam Houston, Texas.

17. Dr. [redacted] has practiced as a child abuse pediatrician since 2006. She is licensed to practice medicine in Texas and West Virginia.

18. Dr. [redacted] has a Bachelor of Science in Math. She attended medical school at [redacted] She completed a pediatric residency in San Antonio. She also completed a pediatric child abuse fellowship at [redacted]

19. In her current role, Dr. [redacted] teaches extensively in the field of pediatrics and child abuse pediatrics to doctors completing residency programs in pediatrics.

20. Dr. [redacted] is frequently called to serve on boards reviewing deaths of infants and to determine unsafe sleep environments.

21. Dr. [redacted] has testified several times as an expert witness in the field of child abuse pediatrics. She has never failed to be recognized as an expert.

22. Dr. [redacted] reviewed the CGIS investigative files, autopsy photos, and medical records of [redacted]

23. Dr. [redacted] observed that [redacted] had bruising noted by her caregivers in February. Dr. [redacted] does not believe that the bruising would have occurred by "kissing" as reported by the accused.

24. Dr. [redacted] believes that [redacted] was a normally-developed [redacted] child and would have had the ability to lift and control her head.

25. Dr. [redacted] does not believe that [redacted] died of SIDS.

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

PRINCIPLES OF LAW

A military judge must decide any preliminary question about whether a witness is...qualified...or evidence is admissible. M.R.E. 104(a). The military judge is charged with being a gatekeeper of expert testimony pursuant to M.R.E. 104(a). An expert witness may provide testimony if it "will assist the trier of fact to understand the evidence

or to determine a fact in issue..." M.R.E. 702. However, the military judge has the responsibility to act as "gatekeeper" in determining the admissibility of expert testimony. United States v. Billings, 61 M.J. 163, 169 (C.A.A.F. 2005) (citations omitted). Citing the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), the Court of Appeals for the Armed Forces identified four factors a judge may consider in determining the reliability of expert testimony:

> (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.
>
> Billings, 61 M.J. at 168.

In addition to the Daubert factors, United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993), also provides useful criteria to determine the admissibility of expert testimony. The Houser factors are:

> (A) the qualifications of the expert, M.R.E. 702;
> (B) the subject matter of the expert testimony, M.R.E. 702;
> (C) the basis for the expert testimony, M.R.E. 703;
> (D) the legal relevance of the evidence, M.R.E. 401 and 402;
> (E) the reliability of the evidence, United States v. Gipson, 24 M.J. 246 (C.M.A. 1987), and M.R.E. 401; and
> (F) whether the "probative value" of the testimony outweighs other considerations, M.R.E. 403.

ANALYSIS

Houser provides a detailed set of criteria to illuminate the reliability of an expert's opinion under Daubert. Therefore, the Court applies the Houser test to assess whether or not the testimony of Dr. [redacted] and Dr. [redacted] is admissible at trial.

The Qualifications of the Experts

Both Dr. [redacted] and Dr. [redacted] possess the qualifications to serve as experts in the fields of forensic pathology and child abuse pediatrics.

Dr. [redacted] has served as a forensic pathologist for over 30 years. He has conducted or observed over 10,000 autopsies. Furthermore, he has conducted autopsies of hundreds of infants suspected of dying of SIDS. He has testified in federal, state, and military courts on hundreds of occasions and has always be recognized as an expert in forensic pathology.

Dr. [redacted] has served as a child abuse pediatrician for over fifteen years following a completion of a pediatric child abuse fellowship at [redacted] Over

the course of her career, she has seen hundreds of patients, and reviewed case files of patients suspected of being victims of child abuse. Her practice involves the study of injuries on children. Further, Dr. [redacted] has served on numerous "safe sleep" review boards in determining whether SIDs cases were a result of unsafe sleep environments. Lastly, she has testified as an expert in child abuse pediatrics and has always been recognized as an expert.

The Subject Matter of the Testimony

Dr. [redacted] and Dr. [redacted] specialized knowledge in the fields of forensic pathology and pediatric child abuse will assist the trier of fact to understand the evidence at trial.

Dr. [redacted] experience as a forensic pathologist will help the finder of fact in analyzing the autopsy results and the injuries noted to [redacted] in her post-mortem care. Dr. [redacted] will also assist the finder of fact in educating them regarding the potential causes for the numerous injuries noted during the autopsy of [redacted] and ultimately the cause of death.

Dr. [redacted] experience as a child abuse pediatrician will also help the finder of fact in understanding the significance of [redacted] development prior to her death. Further, Dr. [redacted] will be able to explain to the finders of fact the risk factors associated with SIDS, as she can rely on her experience reviewing numerous safe sleep and SIDS cases during her career.

The Bases for the Experts' Opinion

There is sufficient basis for both expert's opinions. Both Dr. [redacted] and Dr. [redacted] were able to review the CGIS report, review the autopsy report and photos, and the medical records of [redacted] including the medical report of her emergency care upon arriving at the emergency room. This information is precisely what experts in the field of forensic pathology and child abuse pediatrics would rely upon in forming their opinions.

The Legal Relevance of the Evidence

The opinions of both Dr. [redacted] and Dr. [redacted] are relevant. Dr. [redacted] opinion regarding the cause of death (asphyxia) and the significance of the injuries make it more likely than not that the accused killed [redacted] with intent, or, in the alternative, was culpably negligent in [redacted] death.

Dr. [redacted] opinion regarding [redacted] development make it less-likely that she died due to SIDs, thus refuting the Defense argument that [redacted] death was of natural causes.

However, Dr. [redacted] opinion that the bruising noted on [redacted] in February was potentially from abuse is only relevant if the Defense opens the door to such evidence by introducing testimony that caregivers did not suspect the accused of abuse in February.

The Reliability of the Evidence

The opinions of both Dr. [redacted] and Dr. [redacted] are reliable. Dr. [redacted] opinion regarding the cause of death (asphyxia) is rooted upon accepted science of pathology and the study of the presentation of injuries found during autopsies. Both Dr. [redacted] and Dr. [redacted] testified at the Article 39(a) that due to the apparent injuries found on [redacted] during her autopsy, a finding of SIDS as a cause of death was automatically ruled out.

The Defense contends Dr. [redacted] testimony is unreliable because Dr. [redacted] did not apply a known "error rate" in this case. The Court does not agree. As explained during testimony, pathology is not a science that comports to "error rate," but that fact alone does not render Dr. [redacted] opinion unreliable, rather, it goes to the weight the finder of fact may give to his opinion.

The Defense further contends Dr. [redacted] opinion regarding SIDS is unreliable because she does not have training or experience as a pathologist to render such an opinion. The Court does not agree. Dr. [redacted] has served as a child abuse pediatrician for over fifteen years. She has served on numerous "safe sleep" boards, and reviewed autopsies of abuse victims in her practice. She may testify to her opinion that [redacted] did not die of SIDS. The fact that Dr. [redacted] is not a pathologist goes to the weight, not the admissibility of her opinion.

Whether the Probative Value of the Testimony Outweighs other Considerations

The probative value of Dr. [redacted] and Dr. [redacted] testimony is significant. Dr. [redacted] opinion that the injuries sustained by [redacted] prior to and at the time of her death indicate she was suffocated and died of asphyxia directly supports the Government's theory that the accused killed [redacted] Dr. [redacted] testimony that at the time of her death [redacted] was a healthy, well-developed child who likely could hold her head up weakens the Defense claims that [redacted] may have died of SIDS.

The Defense correctly points out that the neither doctor can point to who was responsible for the death of [redacted] The Defense further points out that responding physicians in the emergency room noted no signs of abuse on [redacted] Lastly, the Defense also correctly points out the medical examiner conducting the autopsy of [redacted] labeled the cause of death to be "undetermined." However, such contrary evidence does not render the probative value of Dr. [redacted] and Dr. [redacted] opinions substantially outweighed by the danger of unfair prejudice or confusion of the issues.

As the Government has satisfied all six Houser factors, the Court will permit the Government to offer the testimony and opinion of Dr. [redacted] and Dr. [redacted] on the issues of forensic pathology and pediatric child abuse.

CONCLUSIONS OF LAW

1. The expert testimony of Dr. [redacted] M.D. is admissible at trial.
2. The expert testimony of Dr. [redacted] M.D. is admissible at trial.

RULING

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

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF DEFENSE EXPERT (DR. [redacted] 22 Dec 2021

RELIEF SOUGHT

The Government moved this Court to exclude the testimony of Defense expert witnesses.[1] AE 81. The Defense opposed the Defense motion. AE 82. An Article 39(a) session to hear argument on this motion was held on 10 December 2021.

ISSUE PRESENTED

Is the expert testimony of Dr. [redacted] in the field of coercive interrogation techniques admissible at trial?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Dr. [redacted] PhD, JD, is a Professor of Law and Psychology at the [redacted] He previously served as a professor of psychology and criminology at the [redacted]

4. Dr. [redacted] has focused his career in academia, where he has focused his research on the field of police interrogation practices, false conviction, and wrongful convictions.

[1] At the Article 39(a) session, the Court reserved ruling on Dr. [redacted] Dr. [redacted] and Dr. [redacted] until time that the Defense offers their expert testimony.

5. Dr. [redacted] has published numerous articles on these subjects, including articles in scientific and legal journals. He has also written numerous books on the subject. Most of Dr. [redacted] writings have been peer-reviewed.

6. Dr. [redacted] has testified as an expert witness 384 times on the subject of coercive police interrogations. He has testified for the defense 380 times.

7. Dr. [redacted] opinion has been deemed "not reliable" by courts between 15 and 18 times.

8. In preparation for this case, Dr. [redacted] reviewed recorded interviews of the accused, including the accused's 19 June 2020 interview with Coast Guard Investigative Service (CGIS) agents.

9. Dr. [redacted] also review the Government's forensic pathologist, Dr. [redacted] report regarding his review of [redacted] autopsy findings.

10. Dr. [redacted] will explain that generally three groups are particularly susceptible to coercion during interrogation: (1) persons with prior mental trauma; (2) persons with significant mental disabilities; and (3) teenagers and young adults.

11. Dr. [redacted] research has identified certain law enforcement practices and techniques found to contribute to false confessions. Some of these techniques include: isolating suspects with no distractions, extensive rapport building, downplaying significance of rights warnings, confrontations towards witness denials, and both minimizing suspected conduct and maximizing the ramifications of not confessing.

12. In his review of the case file materials, Dr. [redacted] observed CGIS agents employ: isolation; extensive rapport building; downplaying significance of rights warnings, confrontation, minimizing conduct and maximizing potential ramifications for not confessing.

13. Dr. [redacted] research suggest that false confessions are common after 6 hours of continued interrogation.

14. Dr. [redacted] acknowledged there is no rate of false confessions as there is no data available to test.

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

PRINCIPLES OF LAW

A military judge must decide any preliminary question about whether a witness is...qualified...or evidence is admissible. M.R.E. 104(a). The military judge is charged with being a gatekeeper of expert testimony pursuant to M.R.E. 104(a). An expert witness may provide testimony if it "will assist the trier of fact to understand the evidence

or to determine a fact in issue..." M.R.E. 702. However, the military judge has the responsibility to act as "gatekeeper" in determining the admissibility of expert testimony. United States v. Billings, 61 M.J. 163, 169 (C.A.A.F. 2005) (citations omitted). Citing the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), the Court of Appeals for the Armed Forces identified four factors a judge may consider in determining the reliability of expert testimony:

> (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.
>
> Billings, 61 M.J. at 168.

In addition to the Daubert factors, United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993), also provides useful criteria to determine the admissibility of expert testimony. The Houser factors are:

(A) the qualifications of the expert, M.R.E. 702;
(B) the subject matter of the expert testimony, M.R.E. 702;
(C) the basis for the expert testimony, M.R.E. 703;
(D) the legal relevance of the evidence, M.R.E. 401 and 402;
(E) the reliability of the evidence, United States v. Gipson, 24 M.J. 246 (C.M.A. 1987), and M.R.E. 401; and
(F) whether the "probative value" of the testimony outweighs other considerations, M.R.E. 403.

ANALYSIS

Houser provides a detailed set of criteria to illuminate the reliability of an expert's opinion under Daubert. Therefore, the Court applies the Houser test to assess whether or not the testimony of Dr. [redacted] is admissible at trial.

The Qualifications of the Experts

Dr. [redacted] possesses sufficient qualifications. He is a professor of law and psychology at the [redacted] having previously served in tenured academic positions with the [redacted] system. . His extensive scholarship in the field of false confessions and the factors common in proven false confessions are well-known and have been peer reviewed. He has testified as an expert witness in over three hundred cases.

The Subject Matter of the Testimony

Dr. [redacted] testimony regarding coercive interrogation techniques will help the trier of fact to understand the evidence or to determine a fact at issue.

Here, Dr. [redacted] research and specialized knowledge on coercive interrogation techniques will assist the finders of fact in analyzing the accused's confession/admission that will be admitted by the Government.

The Bases for the Experts' Opinion

There is sufficient basis for Dr. [redacted] opinion. Dr. [redacted] was able to observe the accused's 19 June 2020 recorded CGIS interview. He also had access to various case files in which to gain background on the Government's theory of the case, particularly with the evidence in which the accused was confronted during her interview. This information is what experts in this field would rely upon in forming their opinions.

The Legal Relevance of the Evidence

The opinion of Dr. [redacted] that the 19 June 2020 CGIS interview utilized coercive interrogation tactics is relevant. At trial, the members will review the entirety of the accused's 19 June 2020 interview with CGIS. During that interview, the members will observe two CGIS agents utilize extensive rapport building with the accused, and minimization tactics, including repeatedly telling the accused that she "didn't deserve to be in jail," that her actions were understandable due to her multiple stressors, and that they needed the accused to tell them what happened before the case got to the "prosecutors." The members will further observe the accused admit that she might have pressed [redacted] into the mattress while she was under stress and harm [redacted] but not "intentionally."

Dr. [redacted] testimony will highlight the coercive tactics used by CGIS during the interview. This testimony is relevant in that it makes the accused's admissions less probative that it would be without Dr. [redacted] testimony.

The Reliability of the Evidence

The Court finds Dr. [redacted] testimony to be sufficiently reliable to go to the finders of fact. In their brief and at oral argument, the Government argues that the science behind false confessions is entirely unreliable. See United States v. Griffin, 50 M.J. 278 (C.A.A.F. 1999)(holding the military judge did not abuse his discretion in finding an expert's opinion regarding false confessions as unreliable); see also United States v. Deuman, 892 F.Supp.2d 881 (W.D. Mich. 2012)(finding Dr. [redacted] testimony unreliable).

In Deuman, the court deemed Dr. [redacted] testimony unreliable. The court noted that Dr. [redacted] forthrightly admitted that his research cannot accurately predict the frequency and causes of false confessions. Moreover, the court found that Dr. [redacted] theories or

methodology could not be tested and could not be subjected to an error rate analysis. Id. at 886.

Here, as in Deuman and Griffin, Dr. [redacted] readily admits that the science of coercive police interrogations and false confessions is not subject to testing and an error rate. However, the Court finds that the lack of error rate does not render Dr. [redacted] testimony unreliable in this case. First, the facts in Deuman and Griffin are distinguishable to the facts in this case. Unlike Deuman, where the accused did not confess to a crime, here, the accused did confess to pressing [redacted] face into the mattress of her crib. Unlike Griffin, which involved the accused's statements following a polygraph examination, here, the accused was not subject to polygraph, but instead merely subjected to a one-hour and forty minute interview.

Furthermore, the Supreme Court has readily acknowledged there is "mounting empirical evidence that (law enforcement tactics) can induce a frighteningly high percentage of people to confess to crimes they have never committed." Corley v. United States, 556 U.S. 303, 321 (2009). In making this observation, the Supreme Court cited to Dr. [redacted]

Therefore, based on the Supreme Court's acknowledge and citation to Dr. [redacted] work, coupled with the distinctions between this case and Deuman, the Court finds Dr. [redacted] testimony as sufficiently reliable. As Trial Counsel have already displayed to the Court, they will have the ability to highlight any deficiencies in Dr. [redacted] theories, but such deficiencies ultimately go to the weight the members will give to such testimony, not its admissibility.

Whether the Probative Value of the Testimony Outweighs other Considerations

The probative value of Dr. [redacted] testimony is strong. Dr. [redacted] testimony suggests to the fact-finder that the accused confessions/admissions made to CGIS may have led to a false admission. On the other hand, CGIS tactics may have led to a truthful admission. That ultimate determination is up to the finder of fact.

The Court is not concerned that Dr. [redacted] testimony would be given undue weight by the members. At trial, a members panel will consist of eight members in the ranks of E-6 and above. The Court is satisfied this senior panel will use their knowledge and life experience to appropriately weigh this evidence. Lastly, any further concerns by the Government may be alleviated by appropriately tailored instructions.

CONCLUSION OF LAW

The expert testimony of Dr. [redacted] in the field of coercive interrogation techniques is admissible at trial.

RULING

The Government motion to preclude the testimony of Dr. [redacted] is DENIED, consistent with the above conclusion of law.

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Date: 2021.12.22 16:53:47 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS: DISCOVERY VIOLATIONS 22 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss all charges and specifications against the accused due to purported discovery violations committed by the Government AE 84. The Government opposed the Defense motion. AE 85. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUE PRESENTED

Did the Government commit any discovery violations which warrant remedies up to and including dismissal of charges?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Coast Guard Investigative Service (CGIS) agents began a criminal investigation into [redacted] shortly after her death.

4. During the early stages of the investigation, CGIS agents had informal discussions on how to proceed with the homicide investigation. CGIS agents sought out colleagues within the Federal Bureau of Investigations (FBI) to discuss the case.

5. During one of these phone conversations, an FBI agent offered to have a physician review the autopsy report and photographs.

6. Agent [redacted] FBI, facilitated a phone conversation between Dr. [redacted] and Special Agent (S/A) [redacted] of CGIS on 12 June 2020. Prior to the call, Dr. [redacted] noted injuries on [redacted] neck and asked follow-up questions to Agent [redacted] Agent [redacted] forwarded Dr. [redacted] questions to S/A [redacted]

7. During the 12 June 2020 phone conversation, Dr. [redacted] stated the injuries depicted in the autopsy report indicated a homicide.

8. Dr. [redacted] did not create a report for his findings.

9. On 12 June 2020, CGIS agents interviewed the responding emergency room physician and nurse who attempted to revive [redacted] on 18 April 2020. The doctor and nurse's observation were captured in the CGIS Report of Investigation (ROI) and provided to the Defense.

10. To provide additional assistance at the beginning of the investigation, CGIS Reserve S/A [redacted] was activated for a two-week period. During this two-week period (April – May 2020), S/A [redacted] had one telephonic conversation with Dr. [redacted] to discuss the investigation.

11. S/A [redacted] considers Dr. [redacted] a professional colleague. S/A [redacted] had previously worked with Dr. [redacted] in S/A [redacted] civilian law-enforcement career.

12. After this phone conversation, Dr. [redacted] was not involved in the case until the Government retained his consultation services in July 2020.

13. The Court previously ordered the Government to discover any briefing slides CGIS may have presented to Coast Guard leadership involving this case.

14. The Government discovered a CGIS-prepared Power Point slide deck which was dated 12 May 2020. One of the slide states "third ME (medical examiner) brought into investigation. Initial opinion based on photos was asphyxiation by overlay, suggesting weight applied to infant's back."

15. As a result of this discovered evidence, the Defense sought out the names of the three medical examiners referenced in the briefing slides.

16. At the time of this request, trial counsel were not aware of Dr. [redacted] involvement in this case. As a result of their responsive efforts to the Defense request, they learned of Dr. [redacted] involvement in the early stages of the investigation.

17. On 1 November 2021, the Government disclosed that the three medical examiners were: Dr. [redacted] Dr. [redacted] and Dr. [redacted] (Alaska Medical Examiner who conducted the autopsy).

18. On 9 November 2021, the Defense contacted Dr. [redacted] to determine his

involvement in the case. Dr. [redacted] could not recall any facts of this case and denied having any records of the case.

19. The Defense has been provided contact information of all medical examiners in this case.

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

PRINCIPLES OF LAW

The United States must comply with not only regulatory and statutory discovery requirements (those contained in the Rules for Courts-Martial (RCMs and the UCMJ)), but also constitutionally based discovery requirements (such as Brady v. Maryland, 373 US 83 (1963)). The military's discovery process is designed to provide protections greater than those provided by the Constitutional protections in Brady. See United States v. Kinney, Daily J. 56 MJ 156 (C.A.A.F. 2001). The CAAF in Kinney set out in detail the military's discovery rights, including statutory, regulatory and Constitutional rights.

Regulatory / Statutory Discovery:

Under Article 46, UCMJ, both parties must have an "equal opportunity to obtain . . . evidence. . . ." This statutory provision is implemented by RCM 701(e), which provides "[e]ach party shall have . . . equal opportunity to . . . inspect evidence" and "[n]o party may unreasonably impede the access of another party . . . to evidence." Under RCM 701(d), there is a continuing duty to disclose.

The duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute, see United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F.2015); (2) evidence that is of such central importance to the defense that it is essential to a fair trial, see R.C.M. 703(e)(2); and (3) statements of witnesses testifying at trial, see United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F.2015); United States v. Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015)).

RCM 701(a)(6)(A) – (D) mandates that trial counsel, as soon as possible, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to: (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; (c) reduce the punishment; or (d) adversely affect the credibility of any prosecution witness or evidence.

RCM 701(g)(3) states that if at any time during the court-martial if is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions: (a) order the party to permit discovery; (b) grant a continuance; (c) prohibit the party from introducing evidence calling a witness, or raising a defense not disclosed; and (d) enter such other order as is just under the circumstances.

Constitutional Discovery:

The Government is required to disclose to the Defense all evidence that is favorable to the defense and material to the issue of guilt or to punishment. Brady v. Maryland, 373 US 83, 87 (1963). Pursuant to Brady, the Government violates an accused's "right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 (2012). Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case. United States v. Orena, 145 F.3d 551, 557 (2d Cir.1998) (citing United States v. Bagley, 473 U.S. 667, 676, (1985)). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith, at 76. To be material, the evidence must have made the "likelihood of a different result ... great enough to 'undermine confidence in the outcome of the trial.' " Id. Once a Brady violation is established, courts need not test for harmlessness. Kyles v. Whitley, 514 U.S. 419, 435–36 (1995).

ANALYSIS

The Government complied with their statutory and constitutionally based discovery requirements, thus the Defense motion to dismiss must be denied.

First, it is important to note that the Government is not obligated to create discovery for the use of the Defense under Article 46, UCMJ or RCM 701. Here, the pursuant to Court Order and discovery responses, the Government provided information regarding Dr. [redacted] and Dr. [redacted] involvement in the early investigatory stages of the investigation. After reviewing the information, they both opined that the cause of death was a homicide. Neither doctor created a report or took notes of the discussions. CGIS did not appear to have documented these conversations in their ROI, however, at some point CGIS put the information into a Power Point slide. The doctor's opinions did not: (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; (c) reduce the punishment; or (d) adversely affect the credibility of any prosecution witness or evidence, thus trial counsel were under no obligation to provide materials regarding these conversations to the Defense pursuant to RCM 701(a)(6). Moreover, it is evident that trial counsel were initially unaware of Dr. [redacted] involvement in the earlier stages of the investigation, but once made aware, have taken diligent steps to ensure the Defense had access to both Dr. [redacted] and Dr. [redacted]

The Government did not have any duty to create documentation memorializing Dr. [redacted] involvement in this investigation. Dr. [redacted] opinion that the autopsy indicated a death by homicide is not exculpatory to the accused. Further, this information is not central to the defense case, nor is it a statement of a witness at trial. Accordingly, the Government had no duty to preserve such evidence for use at trial.

The Court further finds there was no Brady violation and thus no remedy is required by the Court. Dr. [redacted] opinion was that the autopsy of [redacted] indicated a homicide occurred. Such opinion is not exculpatory, nor does it have any ability to impeach the Government's case. If this evidence would be presented to the members, it would only strengthen the Government's case, not hinder it. Even if Dr. [redacted] opinion would have differed from Dr. [redacted] opinion, non-disclosure of the opinion would not amount to a Brady violation. See United States v. Thomas, 396 F. Supp. 3d 813, 821 (N.D. Indiana 2019)(holding a "mere disagreement" amongst experts does not trigger disclosure requirement).

In their motions, the Defense alleges that the Government is "concealing" Dr. [redacted] and Dr. [redacted] involvement in the investigation in this case. The Court finds that the Defense provided no evidence to indicate that the Government concealed Dr. [redacted] or Dr. [redacted] involvement in this case. The record indicates that trial counsel was unaware of Dr. [redacted] minor involvement in the case. That seems logical, since he only conducted one telephonic consultation with CGIS, created no record, and when asked, the case was not of much significance to him. Furthermore, the Government has made efforts to make Dr. [redacted] Dr. [redacted] and CGIS available to the Defense. In sum, the Court finds the Government has complied with all discovery requirements in this case.

CONCLUSION OF LAW

The Government did not commit any discovery violations which warrant remedy by the Court.

RULING

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

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Date: 2021.12.22 16:41:23 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 86
PAGE 5 OF 5 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS: IMPROPER REFERRAL 16 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss all charges and specifications against the accused due to an improper referral of charges Government AE 87. The Government opposed the Defense motion. AE 88. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUE PRESENTED

Were charges appropriately referred to this court-martial?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The original charges were preferred on 1 February 2021.

3. A preliminary hearing was held on 5 May 2021.

4. The charges were forwarded to the Director of Operational Logistics, RADM Bouboulis, on 2 June 2021.

5. RDML Jonathan Hickey, USCG relieved RADM Bouboulis of Director, DOL on (date).

6. The charges were referred to this court-martial on 25 June 2021.

7. Block 14 of the charge sheet states that the Convening Authority is the Director of Operational Logistics (DOL).

8. The court-martial was convened by DOL Convening Order No. 01-19 dated 28 February 2019.

9. DOL Convening Order No. 01-19 is signed by RADM J. M. Heinz, who was the Director of Operational Logistics on 28 February 2019.

10. Block 14 of the charge sheet was signed by Captain [redacted] the Acting Convening Authority.

11. The Director of Operational Logistics is RDML Jonathan Hickey, USCG.

12. On Friday, 18 June 2021, RDML Hickey sent an email to several Coast Guard admirals, including RADM Kevin Lunday, USCG and VADM Paul Thomas, USCG. RADM Lunday and VADM Thomas are RDML supervising officers in RDML Hickey's chain of command.

13. In the 18 June 2021 email, RDML Hickey stated that he was on leave between 19-25 June 2021 and that CAPT [redacted] "is acting DOL while I'm on leave."

14. The Coast Guard Military Justice Manual, COMDTINST M5810.1H designates the Director of Operational Logistics (DOL) as a general court-martial convening authority.

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

PRINCIPLES OF LAW

Rule for Courts-Martial (R.C.M.) 601(a) states that referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial. The Discussion section of R.C.M. 601(a) further explains:

> Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified; preferred charges which have been received by the convening authority for disposition; and a court-martial convened by that convening authority or a predecessor.

Referral shall be by the personal order of the convening authority. R.C.M. 601(e). The Discussion section of 601(e) further explains that referral is ordinarily evidenced by an indorsement on the charge sheet. The signature may be that of a person acting by the order or direction of the convening authority. In such a case, the signature element must reflect the signer's authority.

ANALYSIS

The Court finds that referral in this case was proper. Turning to the first element of a proper referral: the Court finds that CAPT [redacted] was authorized to convene the court martial and was not disqualified. The Coast Guard has designated the Director, DOL as a general court-martial convening authority. RDML Hickey assumed command of the DOL on (date) and was the general court-martial convening authority. Due to RDML Hickey's leave period on 19-25, his deputy, CAPT [redacted] was acting as the convening authority. During that time frame, CAPT [redacted] referred the charges on 25 June 2021 to this court-martial. Block 14 indicates that CAPT [redacted] was the "Acting Convening Authority," and therefore the signature indorsement was proper.

Turning to the second element, the Court finds that preferred charges were received by the Convening Authority for disposition. On 2 June 2021, the Commanding Officer of Coast Guard Base Kodiak, CAPT [redacted] forwarded the charges to the then-Director of the DOL, RADM Bouboulis.

Lastly, the charge sheet indicates that these charges were referred to this general court-martial via DOL Convening Order 01-19 dated 28 February 2019. This Convening Order was signed by RADM Heinz, who was a predecessor of the current convening authority in this case.

CONCLUSION OF LAW

Charges in this case were properly referred to this court-martial.

RULING

The Defense motion to dismiss is DENIED, consistent with the above conclusion of law.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR DUE PROCESS VIOLATION 22 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss Charge I, Specifications 1 and 2, violation of Article 118, UCMJ because the charges violate the accused's Fifth and Sixth Amendment rights. AE 90. The Government opposed the motion. AE 91. An Article 39(a) session to hear argument on these motions was held on 9-10 December 2021.

ISSUES PRESENTED

1. Do specifications 1 and 2 of Charge 1 violate the accused's Fifth Amendment right to due process?

2. Do specifications 1 and 2 of Charge 1 violate the accused's Sixth Amendment right to counsel?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. Charge I, Specification 1 states:

> In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with an intent to kill or inflict great bodily harm, murder [redacted] a child under the age of 16 years, by asphyxia.

3. Charge I, Specification 2 states:

In that Yeoman Second Class Petty Officer Kathleen RICHARD, U.S. Coast Guard, on active duty, did, at or near Kodiak, Alaska, on or about 18 April 2020, with knowledge that death or great bodily harm was the probable consequence, murder [redacted] a child under the age of 16 years, while engaging in an act which is inherently dangerous to another and evinces a wanton disregard of human life, to wit: by asphyxia.

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

PRINCIPLES OF LAW

The Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. Further, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," and no person shall be "subject for the same offence to be twice put in jeopardy." U.S. Const. amend V. Thus, when an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, "either expressly or by necessary implication," "every element" of the offense, "so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted) (quoting Rule for Courts-Martial (R.C.M.) 307(c)(3)).

The military is a notice pleading jurisdiction. United States v. Sell, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a 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." Hamling v. United States, 418 U.S. 87, 117, (1974); see also United States v. Resendiz-Ponce, 549 U.S. 102, 108, (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).

The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also Miller, 67 M.J. at 388.

At trial, a "court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the

reasons for its decision to convict or acquit." United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F.1997). The Court of Appeals for the Armed Forces further explained a panel's responsibility at trial: "a court-martial panel resolves the issue presented to it: did the accused commit the offense charged, or a valid lesser included offense, beyond a reasonable doubt? A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007).

The Manual for Courts-Martial, Part IV, and the Military Judge's Benchbook indicate that the elements of unpremeditated murder are:

(1) That (state the name or description of the alleged victim) is dead;
(2) That his/her death resulted from the (act) (omission) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);
(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; and
(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

The sample specification contained in the Manual for Courts-Martial, Part IV, for Article 118(2) states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____ by means of (shooting (him) (her) with a rifle) (_____)."

The elements of murder while engaging in an inherently dangerous act are:

(1) That (state the name or description of the alleged victim) is dead;
(2) That (his) (her) death resulted from the intentional act of the accused in (state the act alleged), at (state the time and place alleged);
(3) That this act was inherently dangerous to another and showed a wanton disregard for human life;
(4) That the accused knew that death or great bodily harm was a probable consequence of the act; and
(5) That the killing by the accused was unlawful.

The sample specification contained in the Manual for Courts-Martial, Part IV, for Article 118(3) is identical to Article 118(2) above. It states, "In that _____ (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 20__, [ ] murder _____by means of (shooting (him) (her) with a rifle) (_____)."

ANALYSIS

The specifications contained in Charge I do not violate the accused's Fifth Amendment due process right, nor do they violate the accused's Sixth Amendment right to be informed by the nature and cause of the accusation.

In a previous ruling, the Court found that specifications 1 and 2 of Charge I state an offense. Specification 1 charges every element of unpremeditated murder either expressly or by necessary implication. Specification 2 charges every element of murder while engaging in an inherently dangerous act either expressly or by necessary implication. In the ruling the Court found that the term "by asphyxia" as expressly alleged in both specifications represents an act or omission.

Having determined that the specifications state an offense, the Court further finds the specifications do not violate the accused's Fifth Amendment right to due process, or Sixth Amendment right to counsel. At trial, presumably, the Government will present factual matters regarding different theories of how [redacted] was asphyxiated, including being pressed against the accused or having her head pressed into her crib mattress. Here, like Brown, asphyxiation may have occurred by two or more means. The panel may enter a general verdict to either specification as long as long as the evidence supports one of the means beyond a reasonable doubt. Such verdicts have long been held proper. See United States v. Greig, 44 M.J. 356, (C.A.A.F. 1996); United States v. Valdez, 40 M.J. 491 (C.M.A. 1994); United States v. Huebner, 2015 WL 2061991 (A.F.Ct.Crim.App. 2015).

In their motion, the Defense requested alternate relief in the form of findings instructions. The Defense requested that the panel be instructed that the cause of death is asphyxiation and the manner of death is asphyxiation and to limit the Government's presentation of evidence to that which is relevant to death caused from asphyxiation by asphyxiation. Def. Mot. at 5. The Court is not persuaded that such instructions are a correct statement of the law or the facts as proffered by the Government. As such, the Court does not plan on instructing the members as requested. After the evidence is presented, the Defense may ask the Court to reconsider this ruling.

CONCLUSIONS OF LAW

1. Specifications 1 and 2 of Charge I do not violate the accused's Fifth Amendment right to due process.

2. Specifications 1 and 2 of Charge I do not violate the accused's Sixth Amendment right to counsel.

RULING

The Defense Motion to Dismiss is DENIED, consistent with the above conclusions of law.

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Date: 2021.12.22 16:59:37 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS: SPOLIATION OF EVIDENCE 22 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to dismiss all charges and specifications against the accused due to purported discovery violations committed by the Government AE 93. The Government opposed the Defense motion. AE 94. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUE PRESENTED

Did the Government lose or destroy evidence requiring relief by the Court?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

3. Coast Guard Investigative Service (CGIS) agents began a criminal investigation into [redacted] shortly after her death.

4. During the early stages of the investigation, CGIS agents had informal discussions on how to proceed with the homicide investigation. CGIS agents sought out colleagues within the Federal Bureau of Investigations (FBI) to discuss the case.

5. During one of these phone conversations, an FBI agent offered to have a physician review the autopsy report and photographs.

6. Agent [redacted] FBI, facilitated a phone conversation between Dr. [redacted] and Special Agent (S/A) [redacted] of CGIS on 12 June 2020. Prior to the call, Dr. [redacted] noted injuries on [redacted] neck and asked follow-up questions to Agent [redacted] Agent [redacted] forwarded Dr. [redacted] questions to S/A [redacted]

7. During the 12 June 2020 phone conversation, Dr. [redacted] stated the injuries depicted in the autopsy report indicated a homicide.

8. Dr. [redacted] did not create a report for his findings.

9. The Court previously ordered the Government to discover any briefing slides CGIS may have presented to Coast Guard leadership involving this case.

10. The Government discovered a CGIS-prepared Power Point slide deck which was dated 12 May 2020. One of the slide states "third ME (medical examiner) brought into investigation. Initial opinion based on photos was asphyxiation by overlay, suggesting weight applied to infant's back."

11. As a result of this discovered evidence, the Defense sought out the names of the three medical examiners referenced in the briefing slides.

12. At the time of this request, trial counsel were not aware of Dr. [redacted] involvement in this case. As a result of their responsive efforts to the Defense request, they learned of Dr. [redacted] involvement in the early stages of the investigation.

13. On 1 November 2021, the Government disclosed that the three medical examiners were: Dr. [redacted] Dr. [redacted] and Dr. [redacted] (Alaska Medical Examiner who conducted the autopsy).

14. On 9 November 2021, the Defense contacted Dr. [redacted] to determine his involvement in the case. Dr. [redacted] could not recall any facts of this case and denied having any records of the case.

15. The Government provided the contact information for Dr. [redacted] to the Defense.

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

PRINCIPLES OF LAW

The government has "a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused." United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986). Evidence subject to discovery and thus the duty to preserve includes items "relevant to defense preparation" that are "within the possession, custody, or control of military authorities." R.C.M. 701(a)(2)(A). The government's duty applies beyond what is in the prosecution's files and extends to:

> (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.

United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999). This duty can also extend to situations where:

> (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.

United States v. Stellato, 74 M.J. 473, 485 (C.A.A.F. 2015) (citations omitted). Failure to comply with discovery obligations may give rise to various forms of relief, including granting a continuance or prohibiting a party from introducing evidence or calling a witness. R.C.M. 701(g)(3).

For a constitutional duty to preserve evidence to exist, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F. 2015) (quoting California v. Trombetta, 467 U.S. 479, 489 (1984)). The government's failure to disclose material exculpatory evidence to the accused violates due process irrespective of whether the government acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 57 (1988). However, if the evidence is only potentially useful to the accused, the government's failure to preserve it does not violate due process absent a showing of bad faith. Id. at 58.

In courts-martial, both parties "shall have equal opportunity to obtain witnesses and other evidence." Article 46, UCMJ. Such equal opportunity includes the right to the production of evidence which is relevant and necessary—i.e., evidence that is non-cumulative and contributes to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(e)(1), Discussion. Notwithstanding this general rule,

> a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

R.C.M. 703(e)(2). Thus, to be entitled to relief under R.C.M. 703(e)(2), an accused must show: (1) the evidence is relevant and necessary; (2) the evidence has been destroyed, lost, or otherwise not subject to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) the accused is not at fault or could not have prevented the unavailability of the evidence. United States v. Yarber, 2014 WL 843602 at *3 (A. F. Ct. Crim. App. 2014).

ANALYSIS

In a previous ruling, the Court found that Dr. [redacted] initial opinion that [redacted] death was a homicide was not exculpatory evidence. Similarly, in this motion, the Defense fails to meet their burden that Dr. [redacted] opinion given during a phone consultation with CGIS agents was exculpatory, or that the Government should have recognized its exculpatory value.

The record before the Court establishes that no record of the conversation between Dr. [redacted] and CGIS was created. Furthermore, in applying the standard outlined in Yarber, the Court finds that the Defense has failed to demonstrate how Dr. [redacted] opinion was relevant or necessary, how this evidence is of such a central importance to an issue that is essential to a fair trial, and how there is no adequate substitute for such evidence.

To be clear, the Court does not consider Dr. [redacted] original opinion evidence. Dr. [redacted] original opinion of [redacted] autopsy is not evidence. The Government is not calling Dr. [redacted] at trial to give testimony at trial. Further, the Defense has been granted access to Dr. [redacted] and are free to re-engage him to invigorate his memory on his original opinion.

CONCLUSION OF LAW

The Government did not lose or destroy evidence requiring relief by the Court.

RULING

The Defense motion to dismiss is DENIED, consistent with the above conclusion of law.

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Date: 2021.12.22 16:56:48 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: UNANIMOUS VERDICT INSTRUCTION 15 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to instruct the members they must reach a unanimous verdict in order to convict the accused. AE 99. The Government opposed the Defense motion. AE 100. An Article 39(a) session to hear argument on this motion was held on 9-10 December 2021[1].

ISSUES PRESENTED

1. Does the Sixth Amendment right to a unanimous verdict extend to this general court-martial?

2. Does the Due Process Clause of the Fifth Amendment require a unanimous verdict at this general court-martial?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted]

Further facts necessary for an appropriate ruling are contained within the Analysis

[1] At the Article 39(a) session, both parties rested argument on their filed motions.

section.

PRINCIPLES OF LAW

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces*, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added).

U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (emphasis added).

U.S. CONST. amend. VI.

In order to provide for the common defense, the Constitution gives Congress the power to raise, support and regulate the Armed Forces. U.S. CONST. Art 1, § 8, cl. 14. Under this authority, Congress enacted the UCMJ. 10 U.S.C. §§ 801-946a (Articles 1 – 146a). The UCMJ is the code of military criminal law and procedure applicable to all U.S. military members worldwide. In exercising this Constitutional authority to establish a disciplinary system for the military, Congress created court-martial panels in Article 29, UCMJ, and authorized non-unanimous verdicts in Article 52, UCMJ.

The Supreme Court has thus far upheld the court-martial system put in place by Congress holding the Sixth Amendment right to a trial "by an impartial jury" does not extend to military courts-martial. See Ex parte Milligan, 71 U.S. 2, 123 (1866); Ex Parte Quirin, 317 U.S. 1 (1942).

In Milligan, the Supreme Court held that "[t]he framers of the Constitution, doubtless, meant to limit the right of a trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." at 123. In Quirin, a more recent

decision, the Supreme Court held once again that "[a] military accused has no Sixth Amendment right to a trial by petit jury." at 39-40.

The Court of Appeals for the Armed Forces (C.A.A.F.) has also held, consistent with Supreme Court precedent, that the Sixth Amendment right to trial by impartial jury does not apply to military courts-martial. See generally, United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002).

In United States v. Easton, 71 M.J. 168, (C.A.A.F. 2012), the military's highest court held that "[b]y enacting Article 29, UCMJ, Congress evinced the intent that, in light of the nature of the military, an accused does not have the same right to have a trial completed by a particular court panel as a defendant in a civilian jury does. Id. at 175-76.

While a military accused has no right to a trial by jury under the Sixth Amendment, Congress has provided for trial by members at a court-martial. United States v. Witham, 47 MJ 297, 301 (C.A.A.F. 1997). The Witham court goes on to note that an accused does have a right to due process of law under the Fifth Amendment. Id. Therefore, military members facing courts-martial are entitled to a fair and impartial panel. Riesbeck, at 163. Article 25, UCMJ, which establishes who may serve on a court-martial panel, is designed to effectuate such a fair and impartial panel. Id.; Weisen, at 50.

The Supreme Court has regularly and consistently distinguished between civilian law, and military law. "The military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974)). Just as military society is distinct from the civilian sector, so too the Supreme Court has recognized that military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Id. quoting Burns v. Wilson, 346 U.S. 137, 140 (1953). The Uniform Code of Military Justice "cannot be equated to a civilian criminal code." Id. at 749.

Although the military justice system reflects civilian courts in many ways and includes many of the same protections contained in the Sixth Amendment, the military justice system is also distinct in some ways based upon the "unique needs of military society." The Supreme Court has developed the "military deference doctrine," deferring to Congressional exercise of its Article I §8 cl. 14 powers[2] to regulated the military justice system: "Judicial deference to ... congressional exercise of authority is at its apogee when legislative action is under the congressional authority to raise and support armies and make rules and regulations for their governance." Parker v. Levy, 417 U.S. 733, 756 (1974); see also Loving v. United States, 517 U.S. 748, 759, 768 (1996) (The Supreme Court "give[s] Congress the highest deference in ordering military affairs" under its constitutional mandate "[t]o make Rules for the Government and Regulation of the land and naval Forces")(citing Solorio v. United States, 483 U.S. 435, 447-48 (1987)).

[2] Often referred to as the "War Powers."

The Supreme Court has evaluated the scope of constitutionally required "due process" under the Fifth Amendment at courts-martial by using a contextual analysis that fully appreciates the unique needs of the military and its overriding mission that sometimes necessitates and/or justifies different applications of otherwise available constitutional protections: "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." Burns v. Wilson, 346 U.S. 140, 146 (1953).

In holding they have jurisdiction to review C.A.A.F. decisions, the Supreme Court reaffirmed the distinction between civilian and military courts in Ortiz v. United States, 138 S. Ct. 2165 (2018), noting: "this Court early held, Article I gives Congress the power—"entirely independent" of Article III—"to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations." at 2178.

In April 2020, the Supreme Court decided Ramos v. Louisiana, 140 S. Ct 1490 (2020), in which the Court held non-unanimous jury verdicts in Louisiana and Oregon violated the Sixth Amendment. That opinion held the Sixth Amendment right to trial by an impartial jury requires a unanimous verdict and applies to the states through the Fourteenth Amendment, therefore a jury trial in a state court requires a unanimous verdict.

In Ramos the majority deciding on the issue of unanimity of verdicts concluded that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment.'" *Ramos*, at 1397. The decision in Ramos extended the long held requirement for unanimity in federal trials to the state courts. See Apodaca v. Oregon, 406 U.S. 404 (1972). The Supreme Court's decision in Ramos made no mention of Article I courts, the military justice system, or courts-martial panels.

In United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015), the Court stated "[a]n 'equal protection violation' is discrimination that is so unjustifiable it violates due process." Id. at 406. "However, 'equal protection is not denied when there is a reasonable basis for a difference in treatment.'" Id.

ANALYSIS

Sixth Amendment

Courts-martial do not fall under the judiciary of the United States within the meaning of Article III of the U.S. Constitution, they derive their authority from Article I of the Constitution. Under that authority, Congress created the Uniform Code of Military Justice. Those rules incorporate many procedural safeguards which protect the rights of an accused and also establish rules which differ from civilian practice to fit the unique

needs of the military. For example in Solorio v. United States, 483 U.S. 435, 440 (1987) the Court stated "[t]he rights of men [and women] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment. The Supreme Court stated in Ex Parte Milligan that the Framers of the Constitution no doubt intended to limit the right of trial by jury under the Sixth Amendment to those subject to indictment or presentment in the Fifth. Since then, the Supreme Court and military courts have consistently held the Sixth Amendment right to trial by jury does not extend to military trials. In Ex Parte Quirin, the Supreme Court in 1942, reiterated "a military accused has no sixth amendment right to a trial by petit jury." 317 US at 39-40.

In 1950, Congress enacted the Uniform Code of Military Justice under their War Power authority to address the specific needs of the military justice system. Based on the long history of courts-martial which have been conducted for centuries with non-unanimous panels, Congress created "court-martial panels" as opposed to civilian "juries." Article 29, UCMJ. Furthermore, Article 52, UCMJ, provides for non-unanimous panel verdicts in courts-martial.

Since the enactment of those rules, military courts have consistently held that the Sixth Amendment right to a jury trial does not extend to trial by courts-martial. See generally, Easton, 71 M.J. 168; Riesbeck, 77 M.J. 154 Tulloch, 47 M.J. 283; Smith, 27 M.J. 242; and Wiesen, 57 M.J. 48. This Court is bound by the precedent of superior military courts. Despite the long history of unanimous verdicts in federal jury trials, neither party cited to, nor is this Court aware of, any case law which extends the federal requirement for unanimous jury verdicts to military courts-martial. Therefore, the Supreme Court decision in Ramos v. Louisiana does not disrupt the precedent of previous Supreme Court or military court decisions on this issue.

Moreover, this Court rejects the Defense as applied argument that the Coast Guard must apply this Sixth Amendment unanimity right to courts-martial of Coast Guard members. As defined in the U.S. Code, the term "armed force" means the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 101(a)(4). Pursuant to Article 2 of the UCMJ, members of the regular component of the armed forces are subject to the UCMJ. Clearly, the accused, as defined by Congress, is a member of the regular component of the Coast Guard, therefore, as applied, is not afforded the Sixth Amendment right to a jury trial at this court-martial. The Coast Guard's impressive authorities outlined in Title 14 do not change the Court's analysis.

Fifth Amendment Due Process

The Defense motion next argues that the Accused is entitled to a unanimous verdict as a matter of due process given that it is "inextricably interwoven" with the Fifth

Amendment's requirement for the Government to prove its case beyond a reasonable doubt.

C.A.A.F. has concluded that servicemembers maintain a right under the Fifth Amendment due process clause to an impartial panel. Witham at 301. In Witham, C.A.A.F. stated that "[i]t is beyond cavil that there are differences between our military justice system and the various civilian criminal justice systems in our country. However, these differences do not necessarily dictate that constitutional decisions on civilian criminal justice be found per se inapplicable to the military justice system." Id. Despite the fact that the military has utilized non-unanimous verdicts for years while federal trials have required unanimous verdicts, there is no case law supporting that non-unanimous verdicts is a violation of the due process rights of a military accused. As stated above, there are many rights which are applied in military courts due to the protections of the due process clause, such as the right to a fair and impartial panel. That does not automatically require additional protections from the Fifth Amendment or elsewhere.

Under the military deference doctrine, Congress is given great deference in their legislative action to raise and support armies and make rules and regulations for their governance. Parker v. Levy, at 756. As recently as 2016, Congress conducted an overhaul of the military justice system in the Military Justice Act of 2016. In that transformative legislation, as mentioned by the Defense, Congress deemed it appropriate to change the number of votes necessary for a finding of guilty from two-thirds (2/3) to three-fourths (3/4). This indicates that Congress considered the idea of adjusting the number of votes needed for conviction and deemed it necessary to maintain non-unanimous verdicts.[3]

Defense also argues that they fail to see how departing from the civilian world in this context is justified by any military exigency. At least two military interests in non-unanimous verdicts come to mind. First, finality of verdicts in an environment where "[i]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[4] United States ex rel Toth v. Quarles, 350 U.S. 11 (1955). Second, is the need to avoid unlawful command influence, often called the "mortal enemy of military justice."[5] Non-unanimous verdicts provide a system where a specific court-member's vote remains anonymous and any member can leave deliberations without concern their vote will be known by superiors, potentially subjecting them to unlawful command influence or reprisal. While finality and anonymity may not be important considerations for a civilian criminal trial, their value in the military is obvious, and often those rules, which allow for an acquittal rather than a mistrial and ensure a military accused a fair trial heard by fair panel members free from improper influence, inures to the benefit of an accused.

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[3] The change even resulted in increasing the number of votes required for a finding of guilty in most cases.

[4] The Supreme Court goes on to state that the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." Quarles, 17.

[5] See, United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004); United States v. Douglas, 68 M.J. 349 (C.A.A.F. 2010); United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013).

By virtue of the unique necessities of the military system, the protections and rights which have been extended to a military accused to ensure a fair and just trial, and the fact that Congress explicitly enacted a non-unanimous system, the Accused is not denied due process through application of the same non-unanimous panel system which has long been used in the military. Furthermore, while Ramos changed the landscape of state courts which previously used non-unanimous verdicts, that decision did not conduct an analysis balancing military necessity against the rights in question.

Given the deference which the Supreme Court extends to Congress in enacting legislation under their War Powers authority and deference given to military courts in dealing with law particular to the military branches, this Court will not depart from the procedural safeguards established by Congress which has not been found to violate a military accused's Fifth Amendment right to due process by the Supreme Court or military courts.

CONCLUSIONS OF LAW

1. The Sixth Amendment right to a unanimous verdict does not apply to this general court-martial.

2. The Due Process Clause of the Fifth Amendment does not require a unanimous verdict at this general court-martial.

RULING

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

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Date: 2021.12.22 16:46:21 -05'00'

Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON GOVERNMENT MOTION IN LIMINE: ADMISSIBILITY OF EVIDENCE 17 Dec 2021

RELIEF SOUGHT

The Government requested this Court issue a preliminary ruling on the admissibility of videos and photographs of [redacted] autopsy photographs, and death scene photographs. AE 123. The Defense opposed the motion. AE 124. An Article 39(a) session to hear argument on this motion was held on 9 December 2021.

ISSUES PRESENTED[1]

1. Are videos of [redacted] depicting her body control in March/April 2020 relevant?
2. Are pictures of [redacted] taken on 17/18 April relevant?
3. Are pictures and video taken from the emergency room medical response of [redacted] relevant?
4. Are autopsy photos of [redacted] relevant?
5. Are photographs of [redacted] crib relevant?

FINDINGS OF FACT

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

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. On 18 April 2020, [redacted] was found unresponsive in her crib at [redacted]

[1] At the Article 39(a), Trial Counsel stated they would not seek to introduce all video and photographs described in their motion. Accordingly, the Court will not be able to conduct a MRE 403 balancing test on the evidence until trial. This ruling is limited to the relevance of the requested evidence.

3. [redacted] was brought to Providence Kodiak Island Hospital where emergency room providers attempted to save [redacted]

4. Kodiak police officers responded to Providence Hospital and took photographs of [redacted] after she was pronounced dead. The police officer's bodycam devices also recorded their response.

5. Providence Kodiak video surveillance captured the accused and [redacted] BM2 [redacted] arriving at the hospital with [redacted]

6. Coast Guard Investigative Service (CGIS) special agents (S/A) went to the [redacted] bedroom on 18 April 2020 and took photographs of her crib.

7. CGIS agents also took photographs of [redacted] on 22 April 2020.

8. An autopsy of [redacted] body was conducted on 21 April 2020. Photographs were taken during the autopsy.

9. In March and April 2020 both the accused and BM2 [redacted] took videos of [redacted] In the videos [redacted] can be observed lifting her head and holding it without assistance. The videos also depict [redacted] able to kick her legs.

10. The accused also took pictures of [redacted] on the day prior to and the day of her death. The last photograph of [redacted] alive was taken around 1300. The pictures depict [redacted] with no visible injuries to her face, scalp, and neck.

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

PRINCIPLES OF LAW

Military Rule of Evidence (M.R.E.) 401 states that evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. M.R.E. 402 states that relevant evidence is admissible, irrelevant evidence is inadmissible.

ANALYSIS

Videos of [redacted]

Videos showing [redacted] between March and April 2020 are relevant. The videos depict [redacted] in the weeks preceding her death. In these videos, [redacted] can be seen raising her head and kicking her legs. This evidence would be relevant to show [redacted] ability to raise her head and move her body if she needed to breath on her own, thus making it less likely that her death was a result of Sudden Infant Death Syndrome (SIDS)

or that her death was caused accidentally when she was placed into her crib face down for a nap.

Pictures of [redacted] on 17-18 April

Pictures taken of [redacted] on the day before and day of her death are relevant. These photographs depict [redacted] well-nourished and healthy. The pictures also depict [redacted] face having no injuries particularly that her chin did not have any abrasions and her neck did not contain any petechiae. These injuries were found on [redacted] at the time of her death. These pictures are relevant in that they make it more likely that she sustained these injuries at or near the time of her death.

Pictures and Video of Providence Kodiak Emergency Room

Any video and pictures that recorded the medical response from Providence Kodiak Hospital are relevant. First, the surveillance video of the accused and BM2 [redacted] arriving at the hospital is relevant to show the time of arrival, the physical state of [redacted] at the time of arrival, and the first steps of [redacted] medical care. This evidence is probative of [redacted] time of death.

The body cam video is relevant to depict the injuries present on [redacted] upon her arrival at the hospital. The injuries are relevant because it makes the Government's theory that [redacted] did not die accidentally more likely than it would be without the evidence.

The pictures taken of [redacted] at Providence Kodiak Hospital following the efforts to resuscitate her are relevant. These pictures depict several injuries on [redacted] to include: injuries to her mouth, abrasions on her chin, injuries to her scalp, and significant livor mortis. These photographs are relevant in that they will assist the members in understanding the Government expert's testimony regarding his opinion on the time and cause of death.

Death Scene[2] Photographs

Photographs of [redacted] crib and room where her body was discovered are relevant. The photograph show a blanket and pacifier present which may show how [redacted] could have suffered an imprint of the pacifier on her face if her head was forced into the mattress.

[2] At the Article 39(a) session, the Court orally granted the Defense request to prevent the Government from using the term "crime scene." Instead, the parties may refer to [redacted] as the "death scene."

CONCLUSION OF LAW

1. Videos of [redacted] depicting her body control in March/April 2020 are relevant.
2. Pictures of [redacted] taken on 17/18 April are relevant.
3. Pictures and video taken from the emergency room medical response of [redacted] are relevant.
4. Autopsy photos of [redacted] are relevant.
5. Photographs of [redacted] are relevant.

RULING

The Government motion is GRANTED, in part, the Court reserves a ruling on the admissibility of the evidence until trial, at which time the Government shall ensure evidence satisfying MRE 901 and MRE 403 is offered.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: PRESERVE CLAIMS FOR FEDERAL REVIEW 22 Dec 2021

RELIEF SOUGHT

The Defense moved this Court to preclude BM2 [redacted] from testifying against the accused, dismiss the case due to the charges being unconstitutionally vague, and to suppress the admission of evidence provided by the accused to investigators. AE 129. The Government opposed the motion. AE 130. An Article 39(a) session to hear argument on these motions was held on 9-10 December 2021[1].

ISSUES PRESENTED

1. Are the accused's communications with [redacted] concerning her actions towards [redacted] privileged communications?

2. As charged, are Articles 118, 119, and 131b unconstitutionally vague?

3. Were search authorizations issued for the accused's cellular phone and laptop valid?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility.

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused and [redacted] (BM2 [redacted]

[1] At the Article 39(a) motion the Defense chose not to provide further argument on the motion. The Government also did not provide substantive argument.

3. The accused met with CGIS investigators in Kodiak, AK on 19 June 2020. After knowingly and voluntarily waiving her Article 31b rights, the accused made several statements admitting to harming [redacted] when she attempted to lay her in her crib on 18 April 2020.

4. Following this interview, the accused had a private conversation with BM2 [redacted] During this conversation, the accused told BM2 [redacted] that on the day of [redacted] death, she swaddled her, put her face-down in her crib, held [redacted] head down against the mattress until she stopped crying, and left the room.

5. Several days later, [redacted] in Anchorage, Alaska, the accused called BM2 [redacted] During this conversation, the accused once again told BM2 [redacted] that she harmed [redacted] by pushing her head into her mattress. BM2 [redacted] did not believe the accused and questioned her about the sincerity of her statements, but the accused responded, "no, this is what happened."

6. A short time later, the accused retracted her previous statements to [redacted] explaining to him that 'they (CGIS) kind of just, like, pressured me into, like, saying it."

7. On 14 September 2020, the Superior Court of the State of Alaska [redacted] between the accused and BM2 [redacted] The Court noted '[redacted]'

8. On 26 May 2020, the accused granted CGIS consent to search her iPhone 11, phone number [redacted] The accused's authorization allowed CGIS to search the phone for: preserved or deleted text messages, call logs, picture messages, video messages, photos, video, web data to include searches and cached data and email relating to the alleged offenses.

9. On 30 May 2020, CDR Jeff Barnum, USCG, a military judge, issued a search authorization to CGIS to search the accused's Apple iPhone, identified by phone number [redacted] for: phone call history; call logs; contacts; SMS/MMS messages,; photos and videos (including any photos or videos wherever they are stored on the device); geolocations data; and application data for the following applications: Instagram, Facebook.

10. CDR Barnum issued the search warrant after finding probable cause exists to believe the iPhone contained evidence of crimes, to wit: Articles 118, 119, 134, 119b, 107, 83, and 86 of the UCMJ. CDR Barnum determine probable cause existed due to a written affidavit submitted by CGIS S/A [redacted] and after taking telephonic testimony from S/A [redacted] on 21 May 2020.

11. On 25 June 2020, the accused revoked her previous consent to search her iPhone.

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

PRINCIPLES OF LAW

[redacted]

Vagueness

Due process requires that any criminal statute or punitive article of the UCMJ, that either (1) fails to give a person of ordinary intelligence fair notice that her conduct is forbidden, (2) is so indefinite that it encourages arbitrary convictions, or (3) fails to articulate any ascertainable standard of conduct, be held to be void for vagueness. See Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379, 391 (1979); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); United States v. Harris, 347 U.S. 612, 617 (1954); Smith v. Goguen, 415 U.S. 566, 571 (1974); see also Parker v. Levy, 417 U.S. 733 (1974).

However, in Parker, v. Levy, the Supreme Court explicitly clarified that a person who has received fair warning of the criminality of their own conduct from the statute in question is not entitled to attack the statute for vagueness because the language would not give similar fair warning with respect to other conduct which might be within the broad reach of the statute. Id. at 756.

Searches

M.R.E. 315 states that evidence obtained from reasonable searches conducted pursuant to a search authorization is admissible at trial. M.R.E. 311 states that upon a timely motion to suppress by the accused, 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. When the defense makes an appropriate motion or objection, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of unlawful search or seizure. M.R.E. 311(d)(5)(A).

ANALYSIS

[redacted]

Vagueness

The Defense makes several "as applied" challenges to the vagueness of both specifications of Charge I (Violations of Article 118, UCMJ (murder)), and the Article 119 Charge.[2] The Court finds that the accused does not have standing to make an as-applied challenge to the Article 118 specifications. Here, as in Parker v. Levy, the accused has received fair warning of the criminality of her actions from the statute in question. In several previous rulings, the Court has ruled that both specifications state an offense, as they "contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend and enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." See Hamling v. United States, 418 U.S. 87, 117 (1974).

Even if the accused has standing, the Court finds as charged the charges (1) give a person of ordinary intelligence fair notice that her conduct is forbidden, (2) is not so indefinite that it encourages arbitrary convictions, and (3) articulates an ascertainable standard of conduct.

Lastly, the Court finds the Defense argument that the Article 131b specification is vague on its face is without merit. The charge gives a person with ordinary intelligence that her conduct is forbidden, is not indefinite, and it adequately articulates standards of conduct in the statute. The specification contains the elements of the offense charge and fairly informs the accused of the charge against which she must defend and enable her to plead an acquittal or conviction in bar of future prosecutions.

Search

Here, the Government has shown, by a preponderance of the evidence that all evidence obtained from the accused's iPhone was not obtained from an unlawful search and seizure. The evidence demonstrates that the accused provided consent on 26 May for CGIS to search her phone for: preserved or deleted text messages, call logs, picture

[2] In a previous ruling the Court found the Article 119 (Involuntary Manslaughter) specification as multiplicious with specification 1 of Charge I.

messages, video messages, photos, video, web data to include searches and cached data and email relating to the alleged offenses. The accused signed a "voluntary consent to search form." There is no evidence that the accused was "coerced" as argued by the Defense.

Further, the 30 May 2020 search of the accused's iPhone and relevant files was granted pursuant to a valid search authorization. S/A [redacted] submitted an affidavit to a military judge, who reviewed the affidavit and conducted a follow-on interview of the agent. After reviewing the submissions from the agent, CDR Barnum found there was probable cause that evidence of several crimes would be found in the iPhone files. As such, the Government has met their burden.

The Court acknowledges that the accused withdrew consent on 25 June 2020. There is no evidence before the Court that the Government continued to conduct searches of the accused's iPhone following her revocation.

CONCLUSIONS OF LAW

1. The accused's communications with [redacted] concerning [redacted] are not privileged communications.

2. The specifications, as charged, are not unconstitutionally vague.

3. The search authorizations issued for the accused's cellular phone and laptop were valid.

RULING

The Defense Motion for Appropriate Relief is DENIED, consistent with the above conclusions of law.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN RICHARD U.S. Coast Guard	RULING ON DEFENSE MOTION FOR RECONSIDERATION – FUNDING FOR A HOMICIDE INVESTIGATOR 18 Nov 2021

RELIEF SOUGHT

The Defense moved this Court to reconsider the Court's ruling of 27 Sept 2021, which denied the Defense's motion to compel the production of homicide investigator [redacted] as an expert consultant. AE 69. The Government opposed the motion to reconsider. AE 70. An Article 39(a) session to hear argument on these motions was held on 4 November 2021.

ISSUE PRESENTED

Is the assistance of a homicide investigator necessary for an adequate defense?

FINDINGS OF FACT

The Defense must prove by a preponderance of the evidence that one hundred twenty hours of consultation with Mr. [redacted] is necessary for an adequate defense. In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

1. The accused, YN2 Kathleen Richard, USCG is accused of violating two specifications of Article 118, UCMJ (Murder), one specification of Article 119a, UCMJ (Involuntary Manslaughter), and one specification of Article 131b, UCMJ (Obstructing Justice).

2. The charges involve the death of the accused's [redacted] who was discovered by the accused unresponsive in her crib onboard Coast Guard Base Kodiak, Alaska on 18 April 2020.

3. The body of [redacted] was sent to the Alaska State Medical Examiner's Office for an autopsy. The autopsy was performed by Dr. [redacted] M.D. on 21 April 2021.

4. The autopsy report noted [redacted] had abrasions on her chin and petechiae of the neck.

5. The autopsy concluded that the cause of death to be "asphyxia" due to "prone position of swaddled infant in bedding."

6. The autopsy further concluded that the manner of death was classified as "undetermined."

7. From 26 April to 10 May 2020, U.S. Coast Guard Reserve Special Agent [redacted] was activated to assist the team in Alaska with its early investigation.

8. Special Agent [redacted] has served in various law enforcement roles from 2003 to the present.

9. From [redacted] Special Agent [redacted] was employed as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During that time period, Special Agent [redacted] resume notes that he earned recognition as the Detective of the Year in [redacted]

10. Special Agent [redacted] has served as a CGIS Special Agent since 2015. Special Agent [redacted] resume notes that he is a "subject matter expert in death investigation/homicide" and that he is a "founding member of Global homicide response team."

11. In the awards and accomplishments section of his resume, Special Agent [redacted] notes that he was the Lead Homicide Investigator for the State of Illinois.

12. S/A [redacted] had a telephone discussion with Dr. [redacted] in late April 2020.

13. S/A [redacted] considers Dr. [redacted] a close professional colleague, having worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

14. Dr. [redacted] was later contracted by the Government in July 2020 to assist the Government.

15. Dr. [redacted] reviewed the results of [redacted] autopsy, opined that the autopsy results were indicative of a homicide, and will testify for the Government at trial.

16. S/A [redacted] did not serve as a lead agent on this case, but he reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation.

17. S/A [redacted] His did not respond to the scene, attend the autopsy, or conduct any interviews of YN2 Richard or BM2 [redacted]

18. The Government disclosed to the Defense the fact and nature of S/A [redacted] participation in the case on 8 November 2021.

19. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. He was previously assigned as a detective investigator while with the San Antonio Police Department. In this capacity, he investigated murder cases, among other felony level crimes.

20. S/A [redacted] is a reserve special agent with CGIS and was activated to participate in the Government's investigation. She was previously assigned as a detective with the homicide bureau for the Memphis Police Department.

21. S/A [redacted] CGIS, who participated in the Government's investigation, completed a homicide investigations course and was issued a certificate of completion by the Robert Presley Institute of Criminal Investigation.

22. The Defense team is comprised, in part, of Mr. Billy Little, Civilian Defense Counsel, and LCDR Jennifer Luce, Individual Military Counsel. Mr. Little is an experienced defense attorney and has defended numerous capital murder cases. Similarly, LCDR Luce is an experience defense attorney and has also previously defended murder cases.

23. The U.S. Navy employs Defense Litigation Support Specialists. To date, however, according to the Government, the U.S. Navy has not assigned a Defense Litigation Support Specialist to the accused's defense team.

24. On 08 July 2021, the Defense moved to compel the production of homicide investigator [redacted] In this motion, the Defense proffered that Mr. [redacted] assistance would be used in "(1) Determining what investigative steps should be taken in preparation for trial; (2) identification of possible affirmative defenses; (3) preparation for, and conducting, pretrial interviews; (4) identifying investigative leads to pursue prior to trial; and (5) preparing for cross-examination of the investigating CGIS agents.." AE XX. The Defense further offered that "[t]his expert will also be necessary to determine whether or not a defense theory is viable or whether an accused should attempt to negotiate a plea agreement." Id. The Defense also noted that "[Mr. [redacted] will help educate the panel in determining the credibility, impartiality, and professionalism of the CGIS investigation." Id.

25. In its request for reconsideration of the Court's initial denial of this expert request, the Defense also indicated that Mr. [redacted] assistance was needed to develop a third party defense. AE XX.

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

PRINCIPLES OF LAW

Under Article 46, UCMJ, and M.R.E. 706(a), the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain expert witnesses.

R.C.M. 703(b) states that each party is entitled to the production of any witness

whose testimony on a matter in issue on the merits…would be relevant and necessary.

The accused bears the burden of establishing a reasonable probability that: (1) an expert would be of assistance to the defense; and (2) denial of expert assistance would result in a fundamentally unfair trial. United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008). To satisfy the first prong of this test, courts apply a three-part analysis set forth in United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994). 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. Id.

ANALYSIS

The Court finds that the Defense has met its burden in establishing that the request for a homicide investigator would be of assistance and that the denial of the expert assistance would result in a fundamentally unfair trial. The Court's ruling on the original motion for the assistance of a defense investigator hinged on the inability of the Defense to show how the defense team was unable to conduct an adequate investigation on its own. This ruling took into account the strong working relationship the defense team appeared to have with the government team, and the government team's willingness to provide witness access and discovery.

Since its original ruling, additional Government disclosures have made the Defense and Court aware that the Government's investigative team benefited from the assistance of CGIS Special Agents who had significant experience in homicide investigations. CGIS activated S/A [redacted] a reserve agent, from 26 April to 10 May 2020 to assist with the investigation in Alaska. S/A [redacted] resume notes that he served as a detective in the Savannah Chatham Metro Police Department's Homicide Unit. During the this time period, his resume notes that he earned recognition as the Detective of the Year in [redacted] Additionally, the resume notes he is a "subject matter expert in death investigation/ homicide" and that he is a "founding member of [the] Global homicide response team." The Government indicated that while not the lead agent, S/A [redacted] "reviewed the case, collaborated with colleagues, and assisted with search warrant preparation and other tasks documented in the CGIS Report of Investigation."

Additional Government disclosures have also made the Defense and Court aware that S/A [redacted] was apparently the first government agent to make contact with Dr. [redacted] This contact came in the form of a telephone call, while S/A [redacted] was activated in support of the investigation. Dr. [redacted] would later be contracted by the Government and will testify as an expert witness in the Government's case concerning the cause of [redacted] death. S/A [redacted] considers Dr. [redacted] to be a close professional colleague, because they worked together extensively while S/A [redacted] was employed in the Savannah Chatham Metro Police Department.

Finally, the Court notes that CGIS also activated reserve special agents [redacted] and [redacted] for the investigation team. Both individuals' resumes list experience as previous homicide detectives in their civilian law enforcement careers.

The Court is persuaded that this additional evidence, when coupled with evidence previously presented to the Court, makes the assistance of a homicide investigator necessary to the preparation of the Defense's case. As part of its strategy, the Defense will focus on the shift from the initial classification of the cause of death as "undetermined" to a later classification that the cause was homicide. The defense will also focus on the Government's reliance on multiple medical examiners; how the opinions of those medical examiners were obtained, and how the fact finder should ultimately weigh differences in those medical opinions. It is now clear that the Government used an investigative team with experience in homicide investigations as the investigation progressed. The members of this investigative team, including S/A [redacted] made contact with the medical examiners at issue, recorded, and analyzed their findings. The Court finds it would be fundamentally unfair to deny the Defense access to an experienced homicide investigator, as it prepares to defend the accused from a case investigated in part by similarly experienced special agents. Whereas the Court originally found that the defense team could handle the investigation on its own, that finding is no longer valid.

In summary, the Court finds that the Defense has met its burden under the three prong test articulated in United States. v. Gonzalez to establish the necessity of a homicide investigator's assistance. Additionally, under United States v. Freeman, given the Government's use of an investigative team with significant homicide experience, it would be fundamentally unfair to deprive the defense of this expert request.

CONCLUSIONS OF LAW

Assistance by an expert in the field of homicide investigations is necessary for an adequate defense.

RULING AND ORDER

The Defense's motion to reconsider the Court's denial to compel production of an expert consultant in the field of homicide investigation is GRANTED.

The Government shall fund an expert homicide investigator for no more than 120 total hours for pretrial preparation and one day of testimony at trial, at his cited hourly rate of [redacted] The funding shall not exceed [redacted]

It is so ordered.

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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. YN2 KATHLEEN E. RICHARD U.S. Coast Guard	ORDER FOR GOVERNMENT CONTRACTING 28 Dec 2021

1. **Background:**

   a. The accused, YN2 Kathleen Richard, is charged with violations of Article 118, UCMJ (Murder), Article 119 (Manslaughter), and Article 131b (Obstruction of Justice). The Court has set trial to begin on 10 January 2022.

   b. On 19 November 2021, the Court ordered the Government to fund 120 hours of expert assistance from Mr. [redacted]

   c. To date, all parties have provided the necessary information for contract completion. However, any delays in contracting jeopardizes the ability for trial to begin on time. There are currently over 70 witnesses scheduled to travel to Norfolk for trial.

2. **Order:** The Government (Coast Guard Contracting Office, CG-912) is hereby ordered to complete the contracting process for Mr. [redacted] **no later than Tuesday, 28 December 2021** to allow the Defense to begin immediate consultation with Mr. [redacted] This order is necessary to ensure the Defense has ample time to complete approved consultation in preparation for trial.

It is so ordered.

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28 December 2021
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[redacted] Date: 2021.12.28
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Paul R. Casey
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 377
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES **V.** **KATHLEEN RICHARD** **YN2/E-5,** **U.S. COAST GUARD**	**RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF – VIOLATION OF ART. 55**

Nature of the Motion

Pursuant to Rules for Courts-Martial (R.C.M.) 1104(a), the Defense asks the Court grant YN2 Richard 140 days of confinement credit for a violation of Article 55, U.C.M.J., cruel and unusual punishment at the Naval Consolidated Brig Chesapeake (Chesapeake Brig), and either compel the Government to reimburse YN2 Richard for her rental car expense during trial or adjudge an additional 155 days of confinement credit for a violation of Article 55, U.C.M.J.

Additionally, since Defense filed their motion 62 days after the Statement of Trial Results (STR) was signed, the Defense requests the Court find good cause to consider this motion out of time given the alleged cruel and unusual punishment extended well past 14 days after the receipt of the STR and the time needed to obtain the evidence in support of the Defense motion.

Findings of Fact

The Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

On 8 February 2022, the general court-martial *United States v. YN2 Kathleen Richard* concluded. YN2 Richard was convicted of involuntary manslaughter under Article 119, Uniform Code of Military Justice, and sentenced to six years confinement, reduction to E-1, and a dishonorable discharge.

Facts relating to timeliness of filing its Article 55 Motion

A STR was signed by the Military Judge on 8 February 2022. The same day, YN2 Richard entered the Chesapeake brig. On 11 February 2022, the Defense sent an email to the Chesapeake

APPELLATE EXHIBIT 388
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brig to determine when YN2 Richard would be transferred to Miramar. That request for information by the Defense went unanswered. YN2 Richard was transferred from the Chesapeake brig to the Miramar Consolidated Brig on 8 May 2022. The day before YN2 Richard's transfer, on 7 March 2022, the Defense made its initial request for the Chesapeake brig policies and procedures. The Defense submitted their request for clemency on 11 March and on 24 March 2022. The convening authority denied YN2 Richard's clemency request to be reimbursed for her rental car. This denial occurred 44 days after the Defense received the STR. On 5 April 2022, the Defense again requested, and did not receive, the brig policies and procedures. On 5 April 2022, Defense submitted a third request to a different point of contact at the brig. This time, the Defense received confirmation that the brig was processing the Defense's request. On 7 April 2022, the Defense received the response from the Chesapeake Brig regarding the treatment of YN2 Richard during her time at that brig. On 14 April 2022, the CA took action in this case. This motion for appropriate relief was filed on 12 April 2022.

Facts Relating to Naval Consolidated Brig Chesapeake

As stated above, on 8 February 2022, YN2 Richard entered confinement at the Chesapeake Brig. The Chesapeake Brig is a Tier 1 facility, meaning it is not permitted to house prisoners with sentences greater than one year. Upon her arrival at the Chesapeake Brig, YN2 Richard was evaluated to determine her prisoner custody and security status. This initial determination was made by the Command Duty Officer (CDO). After her intake evaluation she was placed into maximum security status, consistent with the Brig's policy. Factors which control a prisoner's security status are confinement level, administrative factors, and classification criteria. Administrative factors include: suicide risk, health problems, mental health problems, and prisoner background information. Classification criteria include: offense severity, substance abuse, history of violence, history of escape, and length of sentence remaining.

After their initial intake security level determination, the prisoner receives a review by the Prisoner Services Department on the next business day. Then, the prisoner has their security status reviewed every seven days thereafter. Ultimately, the brig Officer-in-Charge's designee has the final determination regarding a prisoner's security level. When post-trial prisoners are housed in facilities where their sentence length exceeds the capability of the facility, they are classified as maximum security. The Chesapeake Brig is a 90 day, Level I facility. This means that the

Chesapeake Brig can temporarily house all prisoners, but any post-trial prisoners with sentences exceeding 90 days must be transferred elsewhere.

Based upon many factors including the severity of YN2 Richard's crime, her length of sentence, her reported medical history, her intake interview, and her current health issues, YN2 Richard was classified by the CDO as a maximum security. She received her next day review by the Prisoner Services Department who concurred and maintained her security status. She also received the required follow-on reviews every 7 days. YN2 Richard was never placed into solitary confinement. The Chesapeake Brig does not have solitary confinement facilities. YN2 Richard was, however, the only female prisoner at the facility. As the only female, she was the only prisoner in her cell and the only prisoner in the female dorm. She was not isolated, though. There were at least two female dorm corrections officials supervising her dorm 24-hours per day 7-days per week, checking on her at least every 15 minutes. Medical staff visited her multiple times each day, and prisoner services visited her daily. Similarly, the chaplain visited intermittently, as did the brig's social workers and other officials. Naval brigs do not comingle male and female prisoners in the same dorms.

YN2 Richard was permitted to make a call to her attorney on 10 February 2022. After this, she was allowed personal phone calls beginning on 18 February after she cleared COVID medical protocols, which was 10 days. On 28 February 2022, YN2 Richard's phone privileges were suspended in anticipation of her transferring facilities. This is a corrections policy so that prisoners cannot alert family, friends, sympathizers, or anyone else of their upcoming movement.

During her 10-day medical surveillance, YN2 Richard was confined in her cell for the entire day, with the exception of recreation time, weather permitting. After her medical surveillance ended on 18 February 2022, YN2 Richard was allowed to use the common area of her dorm. The Chesapeake Brig had an established grievance policy which was explained to YN2 Richard. YN2 Richard utilized this policy on 15 February 2022 by submitting a grievance. YN2 Richard's grievance concerned an encounter that she had with a contract social worker. The technical director assigned an investigator and received a report from the investigator on 16 February 2022. The technical director then debriefed with YN2 Richard, and YN2 Richard stated that she did not have any continuing concerns and that she just wanted the incident with the social worker documented. YN2 Richard did not utilize the grievance policy on any additional occasions. She did not make any additional formal complaints.

YN2 Richard did make requests to medical for certain things. At her request, YN2 Richard was taken to [redacted] She was subsequently provided [redacted] When YN2 Richard requested [redacted] she was provided them. YN2 Richard did request that the medical clinic provide her with suntan lotion. The medical clinic denied this request because suntan lotion is available through the exchange.

Facts Relating to Rental Car Reimbursement

YN2 Kathleen Richard is a Yeoman. She is a graduate of Yeoman "A" School. She has held positions in the Servicing Personnel Officer and Admin departments. Dealing with travel orders, travel entitlements, and travel claims are among the primary duties of Yeoman.

Travel logistics for the court-martial in Norfolk, Virginia, were extensive. Legal counsel, YN2 Richard, support staff, and over fifty witnesses and experts traveled to the situs of the trial. The Convening Authority, or Director of Operational Logistics (DOL) served as Funds Approving Official (AO) for all trial and travel expenses. As with all pretrial motions hearings, YN2 Richard traveled on Official Military Orders for trial. YN2 Richard worked with the Legal Service Command (LSC) admin staff for travel coordination and approval.

On 1 December 2021, LT Connor Simpson, Assistant Defense Counsel, informed Trial Counsel that YN2 Richard was experiencing financial difficulties with the cost of lodging for Article 39(a) sessions because she "did not have" a Government Travel Charge Card (GTCC). She was instructed to get one as soon as possible, as per COMDTINST M4600.18, all service members are required to have one for non-exempt Temporary Duty (TDY) travel.

Based on this information and in accordance with standard practice for members awaiting trial, LSC admin staff arranged no-cost Government quarters for YN2 Richard at the Unaccompanied Personnel Housing (UPH) on board USCG Base Portsmouth for trial.

On 21 December 2021, LSC admin staff informed Defense Counsel via email that UPH accommodations had been arranged for YN2 Richard pending Base Portsmouth availability for 6-29 January 2022. Lodging at UPH was extremely limited. USCG Base Portsmouth UPH does permit overnight guests.

On 21 December 2021, LCDR Luce emailed LSC admin staff requesting a hotel room for YN2 Richard and Mr. [redacted] (YN2 Richard's [redacted] so that they could be roomed together for the duration of trial. In a previous ruling, the Court held that Government production/funding

of Mr. [redacted] was not necessary for the merits stage of trial; Mr. [redacted] travel would only be reimbursed for the sentencing phase of trial.

LSC admin staff informed YN2 Richard via email on 23 December 2021 that she had been confirmed no-cost Government quarters at the UPH. On 29 December 2021, LT Simpson emailed Trial Counsel to arrange a phone call to discuss "admin items." During the call between Trial Counsel and Defense Counsel that day, LT Simpson requested that YN2 Richard not be assigned to the Base Portsmouth UPH during trial because she was "[redacted]" Unprompted, LT Simpson requested that YN2 Richard be allowed to stay at the Navy Lodge near Naval Station Norfolk since "it would be easier for us [Defense Counsel] to get her to trial." Trial Counsel confirmed with Defense Counsel the location she wanted (Hampton Blvd) and told him that Trial Counsel would need to receive approval from the funds authority. On the call, Trial Counsel told Defense Counsel that she would take him at his word that YN2 Richard had a medical condition and been [redacted]

Immediately after receiving this updated information, Trial Counsel informed LSC admin staff that YN2 Richard could not drive [redacted] and desired to stay at the Norfolk Navy Lodge instead of the UPH since it would be easier for her counsel to get her to court. Once approval was granted for commercial lodging, Trial Counsel called LT Simpson back and told him that she could stay at the Navy Lodge. LSC Admin sent Defense Counsel a follow-on email based on the updated information. Through her counsel YN2 Richard made the choice to stay at the Navy Lodge on Hampton Blvd; this specific lodging location was booked by YN2 Richard directly.

YN2 Richard's Official Orders did not authorize a rental car. Based on information passed by Defense Counsel on 29 December 2021, it was understood that [redacted] YN2 Richard [redacted] Local travel (taxi, Uber, etc.) was authorized.

In their motion, the Government proffers that at no point in time before or during trial did YN2 Richard or her Defense Counsel ask permission for YN2 Richard to procure a rental car. Neither YN2 Richard nor her Defense Counsel clarified with LSC admin staff if a rental car was authorized. At various stages, either YN2 Richard or Defense Counsel spoke with LSC admin staff about other financial and travel issues; however, the topic of a rental car for YN2 Richard was never raised.

YN2 Richard arrived in Norfolk, Virginia, for trial on Thursday, 6 January 2022. Trial commenced on Monday, 10 January 2022. On Sunday, 9 January 2022, YN2 Richard, without permission or approval from any member of LSC staff or the Funds Approving Official (AO), used her personal credit card to rent a vehicle from Budget Car Rental at the Norfolk International Airport for 9-29 January 2022. The total estimated charge was [redacted] YN2 Richard did not book the rental car using the Government required Travel Management Center or ETS; she likewise did not receive the Government rate or a compact vehicle. According to the Government's proffer, from 9 January 2022 to 29 January 2022, neither YN2 Richard nor her Defense Counsel approached Trial Counsel or LSC admin staff to inquire whether a rental car was an authorized expense on her orders. Instead, on Saturday, 29 January 2022, YN2 Richard returned the Budget rental car where she purchased and arranged a second rental car from Avis for 29 January to 9 February 2022. In this rental, YN2 Richard used her GTCC and incurred an expense of [redacted] including a [redacted] late fee. There is no evidence before the Court that YN2 Richard sought authorization or permission from the appropriate authorities to obtain a rental car. YN2 Richard neither used the Government's required Travel Management Center nor opted for a compact vehicle. She did not receive the Government rate.

Following trial, Mr. [redacted] submitted a request to LSC admin staff for reimbursement of the rental cars purchased by YN2 Richard. Because YN2 Richard was not authorized a rental car, the reimbursement request was forwarded for higher level review (DOL Budget Officer/Chief, Comptroller Division). On 4 March 2022, Defense Counsel emailed LSC admin staff requesting that YN2 Richard's rental car be reimbursed. Defense Counsel stated that "due to the cost (approximately [redacted] per trip) for a taxi and the time/unreliability due to lack of Ubers in Norfolk, YN2 Richard purchased a rental car to facilitate a more efficient travel and elected to not [redacted]" Citing the Joint Travel Regulations, the DOL Comptroller verbally denied YN2 Richard's reimbursement request for rental car on 14 March 2022. The Convening Authority similarly denied the Defense's request in Clemency on 23 March 2022.

The Joint Travel Regulations and the U.S. Code provide the following relevant instructions:

1. A travel order identifies the travel purpose and includes necessary financial information for budgetary and reimbursement purposes. The travel order provides

the traveler information regarding what expenses will be reimbursed. PDTATAC - AP-1610-01.

2. Authorizing or Approving Official (AO). An AO determines whether travel is necessary and appropriate to the mission, ensures that all expenses claimed by the traveler are valid, and authorizes or approves the valid expenses. Expenses must not be approved if they are inflated, inaccurate, or higher than normal for similar services in the locality. If the JTR indicates an expense, allowance, or other item must or may be authorized (such as the mode of transportation), it means the AO must give permission before the action takes place. Likewise, if the JTR indicates "may or must be approved," then the AO may or must give the traveler permission after the action takes place. JTR 010201 at 1-2.

3. If an AO authorizes a transportation mode for TDY travel that a traveler does not use, then the traveler is reimbursed for the transportation mode that has been used, up to the cost of the authorized mode, unless stated otherwise in the JTR. 020201

4. Obtaining Authorization for Rental Vehicle. To be reimbursed, an AO must authorize or approve use of a rental vehicle. A traveler must obtain a rental vehicle through an electronic system when it is available or through the TMC if it is not available. JTR 020209 at 2-17 (Rental Vehicle).

5. 37 U.S.C. § 452(g) states that "any unauthorized travel or transportation expense is not the responsibility of the United States."

Analysis and Conclusions of Law

Timeliness and Subject Matter Jurisdiction

Upon motion of either party or *sua sponte*, the military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment under R.C.M. 1111. R.C.M. 1104(a). Post-trial motions must be filed within 14 days after the Defense counsel receives the STR. R.C.M. 1104(b)(2)(A). The military judge is empowered to extend this deadline up to an additional 30 days, if the Defense can show good cause. *Id.*

R.C.M. 1104(b)(1)[1] provides a non-exhaustive list of matters that may be raised in a post-trial motion. Although not on the list of matters contained in R.C.M. 1104(b)(1), motions for

[1] (b) Post-trial motions.

appropriate relief under U.C.M.J. Article 55 have been considered in post-trial motions. *See, e.g. United States v. Miller*, 2022 C.A.A.F. LEXIS 272.

Allegations of Article 55 violations inherently take time to develop. Filing an Article 55 post-trial motion is normally is not possible within the 14-day requirement since alleged Article 55 violations are either just beginning to occur or the administrative process has not been exhausted. The same ripeness issues apply to the requirement to request a 30-day extension.[2]

In the present case, Defense first sought information to support an Article 55 motion as early as 11 February and then again on 7 March 2022 and 5 April. The Chesapeake Brig did not provide the requested information until 7 April 2022. Under these facts it was difficult, if not impossible, for the Defense to file this motion within the time limits imposed by R.C.M. 1104(b)(2). Since this motion was filed within 7-days of Defense receiving the evidence from the Chesapeake Brig and occurring prior to this Court signing an Entry of Judgment, the Court finds good cause for allowing this motion to be filed out of time.

Law relating to Eighth Amendment and Article 55, U.C.M.J.

Both the Eighth Amendment and Article 55, U.C.M.J., prohibit cruel and unusual punishment. Military Courts apply "the Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where . . . legislative intent to provide greater protections under [Article 55]" is apparent. *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (citation omitted)). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). As the Supreme Court has explained, "[t]he Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane

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(1) Matters. Post-trial motions may be filed by either party or when directed by the military judge to address *such* matters as—

(A) An allegation of error in the acceptance of a plea of guilty;
(B) A motion to set aside one or more findings because the evidence is legally insufficient;
(C) A motion to correct a computational, technical, or other clear error in the sentence;
(D) An allegation of error in the Statement of Trial Results;
(E) An allegation of error in the post-trial processing of the court-martial; and
(F) An allegation of error in the convening authority's action under R.C.M. 1109 or 1110.

[2] The Defense should have, however, requested a formal extension as soon as it was apparent that a motion would be forthcoming or possible.

ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

In order to meet the burden of establishing a violation of the Eighth Amendment, YN2 Richard must demonstrate: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [an appellant]'s health and safety; and (3) that [an appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, U.C.M.J. . . ." *Lovett*, 63 M.J. at 215, *quoting United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997) (internal quotation marks omitted).

Before analyzing the first two requirements under *Lovett*, the Court will analyze the third requirement—exhaustion of administrative remedies.

Exhaustion of administrative remedies.

"[A] prisoner must seek administrative relief prior to invoking judicial intervention" with respect to concerns about post-trial confinement conditions. *United States v. Wise*, 64 M.J. 468, 471, 473 (C.A.A.F. 2007) (citing, *US v. White*, 54 M.J. 469, 472 (C.A.A.F 2001); *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997). "Absent some unusual or egregious circumstance," an appellant must both exhaust the grievance system at the confinement facility as well as petition for relief under Article 138, U.C.M.J.. *Id* at 469 (citing *United States v. White* at, 472). This requirement "promotes resolution of grievances at the lowest possible level and ensures that an adequate record has been developed to aid appellate review." *Id.* (Citing *Miller* at 250).

Exhaustion requires the convicted person to demonstrate that two paths of redress have been attempted, each without satisfactory result. The convicted person must show that "absent some unusual or egregious circumstance . . . [s]he has exhausted the prisoner-grievance system [in her detention facility] and that she has petitioned for relief under Article 138." *White*, 54 M.J. at 472; *see also*, *Lovett*, 63 M.J. at 215 (holding that in order to claim Eighth Amendment violations, the appellant must show, *inter alia*, "that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138")

Article 138, U.C.M.J., provides that:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior officer, who shall forward the complaint to the commissioned officer exercising general court-martial jurisdiction

> over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had there on.

Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated. *Wise*, at 472 (*citing*, *United States v. White*, No. ACM 33583, 1999 CCA LEXIS 220, at *4, 1999 WL 605616 (A.F. Ct. Crim. App. July 23, 1999) (holding that solely raising conditions of confinement complaints in post-release clemency submissions is inadequate to fulfill the requirement of exhausting administrative remedies and that "after the appellant has been released from confinement . . . we have no remedy to provide"), aff'd, *White* at 475.

Although the exhaustion of administrative is the general requirement, C.A.A.F. has held that particularly unusual or egregious circumstances involving confinement conditions may warrant review without exhausting administrative remedies. *Wise* at 470. In *Wise*, the Court considered the prisoner's claims that he was confined with enemy prisoners of war in Iraq, that he was confined in "irons", that he was confined in a makeshift confinement area called "the cage," that he was confined in close quarters with enemy prisoners of war who had tuberculosis, and that he was ordered to wear a blue jumpsuit similar to that worn by the enemy prisoners of war. *Id.*

In finding "unusual, or egregious circumstances" in *Wise*, C.A.A.F.'s majority's decision focused on the makeshift confinement area's lack of a formal complaint mechanism, his denial of contact with his attorney, and "the cage's" lack of explanation of how to raise complaints, which all amounted to unusual circumstances that allowed consideration of his complaints without the normally required exhaustion of administrative remedies. *Id.* at 473.

In the present case, there is nothing in the evidence to support a finding that YN2 Richard exhausted administrative remedies as required by C.A.A.F's precedence. The Defense asserts in their motion and in YN2 Richard's affidavit, that YN2 Richard verbally requested assistance with her current circumstances and was told there was nothing she could done to change her situation. Based on this, the Defense asserts that pursuing a complaint under Article 138 would have been futile. Nothing in the evidence supports this claim, and even if it did, an assumption that the effort would been futile does not absolved a convicted prisoner of the requirement to pursue administrative remedies.

Also, there is also no evidence to support that proposition that YN2 Richard's situation at the Chesapeake Brig in any way resembled Wise's situation at "the cage" in Iraq. She faced no unusual circumstances, she had full access to her counsel, and she had full awareness of the brig's complaint policies. Further, her attorneys could have aided her in filing an Article 138 complaint as required. Since YN2 Richard failed to exhaust administrative remedies, YN2 Richard's motion for relief in a post-trial motion is premature, and is therefore **DENIED** on that basis alone.

YN2 Richard's Confinement at the Chesapeake Brig and U.C.M.J. Article 55

Despite finding the motion for relief under Article 55, U.C.M.J. fails due to YN2 Richard not exhausting administrative remedies, the Court will analyze the merits of her claims made under Article 55, U.C.M.J.

Article 55's protections are co-extensive with the Eighth Amendment and do not offer greater protections than the Constitutional minimums. *United States v. Lovett*, 63 M.J. at 215. Further, "federal courts ought to afford appropriate deference and flexibility to officials trying to manage a volatile environment." *United States v. Smith*, 56 M.J. 653, 658 (A.C.C.A. 2001) (quoting, *Sandin v. Conner*, 515 U.S. 472, 482, (1995)). Every prisoner suffers some discomfort in prison but that does not equate to cruel and unusual punishment unless both an objective and subjective test warrants relief. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the objective test, the inmate must demonstrate that the deprivation was "sufficiently serious." *United States v. Sanchez*, 53 M.J. 393, 395 (CA.A.F. 2000). Further, the inmate must establish that the guard or official who exercised the cruelty towards them had a culpable state of mind and subjectively intended to maliciously or sadistically harm them. *Hudson v. McMillan*, 503 U.S. 1, 5-7 (1992); *United States v. Kinsch*, 54 M.J. 641, 647 (A.C.C.A. 2000). Misconduct by prison officials does not constitute cruel and unusual punishment unless it falls within certain Eighth Amendment standards, notably that the conduct must involve a punishment which is incompatible with the "evolving standards of decency that mark the progress of a maturing society" or punishment which involves the "unnecessary and wanton infliction of pain." *United States v. Brennan*, 58 M.J. 351, 353 (C.A.A.F. 2003) (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976)). While the Eight Amendment does not permit inhumane conditions, it does not mandate comfortable prisons. *Brennan*, 58 M.J. at 353 (citing *Farmer*, 511 U.S. at 832).

In 2003, C.A.A.F. further refined the two part test for cruel and unusual punishment: (1) the objective test: was there a sufficiently serious act(s) or omission that produced a denial of

necessities; and (2) the subjective test: whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety. *Brennan*, 58 M.J. at 353. Further, C.A.A.F. endorsed an additional element, which was created by the U.S. Supreme Court, that to sustain an Eighth Amendment violation there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain. *Id.* at 354 (citing *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001).

The basic facts that the Defense puts forward in their motion are: (1) YN2 Richard claims that she was in solitary confinement; (2) YN2 Richard claims she could not make personal phone calls during the 10-days of medical surveillance, and the 3-days before her departure from the Chesapeake Brig; (3) YN2 Richard claims she could not "regularly" use the common area of her dorm; (4) YN2 Richard claims that she could not attend group religious activities due to her maximum security status; and, (5) YN2 Richard claims that she was denied adequate medical care.

First, like every incoming convicted prisoner entering the Chesapeake Brig in February 2022, YN2 Richard was required to undergo a 10-day medical surveillance. This status required her to remain in her cell, with the exception of limited time to engage in periodic solo recreation time. Contrary to her assertions in her affidavit, YN2 Richard was not in solitary confinement since the Naval Brig at Chesapeake does not even have such facilities. Just because YN2 Richard was the only female prisoner at her dorm does not equate to solitary confinement. Upon her arrival at the Chesapeake Brig, YN2 Richard was evaluated to determine her prisoner custody and security status. An initial determination was made by the CDO. After her intake evaluation she was placed into maximum security status, consistent with the Chesapeake Brig's policy. The factors use to determine her status were confinement level, administrative factors, and classification criteria. Administrative factors include: suicide risk, health problems, mental health problems, and prisoner background information. Classification criteria include: offense severity, substance abuse, history of violence, history of escape, and length of sentence remaining. The Brig reviewed her status every seven days. There is no evidence in the record indicating that it was unreasonable to keep YN2 Richard on the security status that she remained in during her stay at the Chesapeake Brig. Even if YN2 Richard had been placed into administrative segregation or special quarters those conditions do not amount to cruel and unusual punishment. *United States v. Evans*, 55 M.J. 732, 741 (N.M.C.C.A. 2001).

On the issue of YN2 Richard's phone access, YN2 Richard was able to contact her attorney on 10 February 2022. There is no evidence in the record that YN2 Richard was ever denied access to her attorneys during her entire stay at the Chesapeake Brig. Although it appears from the evidence that

YN2 Richard was denied personal phone calls during her initial 10-day medical surveillance, nothing in the record establishes YN2 Richard was treated differently than any other prisoner similarly situated during their 10-day medical surveillance. Denial of personal phone calls due to medical surveillance is an aspect of prison life and does not amount to any form of cruelty.

On the issue of religious group activities, the evidence supports YN2 Richard's claim that she was denied the opportunity to attend group religious activities. YN2 Richard, did however, receive periodic visits from the Chaplin and was issued several written religious books during her 28-day stay. While not ideal, nothing in the evidence supports that this denial of group religious services was inconsistent with Brig policy, or that it amounted to a substantial deprivation rising to the level of a violation of Article 55, U.C.M.J., or the Eighth Amendment.

On the issue of adequate medical care, the evidence does not support YN2 Richard's claim that was denied sufficient medical care during her stay at the Chesapeake Brig. YN2 Richard made several requests to brig officials for various medical treatment. Each request was answered. While it is not entirely clear from the evidence the entire scope of treatment received, it is clear that the brig medical staff made efforts to evaluate YN2 Richard's needs and provide adequate treatment. The evidence establishes that YN2 Richard's medical records were not immediately available, and therefore brig's medical staff reviewed her medical conditions anew. As part of that evaluation, YN2 Richard was taken to [redacted] The evidence also supports that YN2 Richard was [redacted] There is nothing in the record to establish that she was deprived adequate medical treatment to such a degree as to violate Article 55, U.C.M.J., or the Eight Amendment.

In summary, when comparing YN2 Richard's factual allegations about her treatment at the Chesapeake Brig against the legal standards laid out in *Brennen* and *Erby* that are required to sustain a viable Article 55, U.C.M.J. and Eighth Amendment claim, it is evident that YN2 Ricard's treatment at the Chesapeake Brig falls well short. Moreover, there is no evidence before the Court concerning the subjective state of mind of the prison official and how that proves a deliberate indifference to inmate health or safety. Finally, there is no evidence showing that YN2 Richard sustained any actual injury beyond the basic discomfort of being confined in a military confinement facility. For these reasons the Defense's Article 55, U.C.M.J. motion for relief based on her treatment at the Chesapeake Brig is **DENIED**.

Denial of rental car reimbursement and violation of U.C.M.J. Article 55.

The Government is not responsible for any unauthorized travel or transportation expense incurred by a traveler. 37 U.S.C. § 452(g). JTR 020201 authorizes a traveler reimbursement for the transportation mode that has been used, up to the cost of the authorized mode, unless stated otherwise in the JTR. JTR 020209, explicitly states that to be reimbursed [for a rental car], an AO must authorize or approve use of a rental vehicle. And, a traveler must obtain a rental vehicle through an electronic system when it is available or through the TMC if it is not available. Because JTR 020209 explicitly prohibits reimbursement for unapproved rental vehicle expenses without AO approval, JTR 020201 inapplicable to YN2 Richard's choice to rent a car on her own.

YN2 Richard was not authorized a rental car on her travel orders and did not seek permission from the appropriate authorities prior to obtaining two rental cars, as required by JTR 020209. There is nothing to suggest an Article 55 violation or an Eighth Amendment violation of cruel or unusual punishment by the Government simply enforcing the standards applicable to any traveler as written in law. *See United States v. Lovett*, 63 M.J. at 215.

YN2 Richard was authorized local taxi and transportation expenses; she simply chose not to use this entitlement. While there were likely practical considerations for YN2 Richard choice to obtain a rental vehicle—namely so that she would have unconstrained transportation during the month long duration of the trial for her and [redacted]—a rental vehicle was nonetheless not approved. Prior to trial, LT Simpson, YN2 Richard's Defense Counsel, requested that she stay at the Navy Lodge. He argued to Trial Counsel that [redacted] and that the Norfolk Navy Lodge "would be easier for us to get her to trial." YN2 Richard chose to stay at the Norfolk Navy Lodge, instead of the UPH, ostensibly to enable her to stay with [redacted] at Government expense. There is no evidence before the Court to show that the authorized mode of transportation was not sufficient. There is also no evidence before the Court to establish that YN2 Richard, or her Defense team made a request for a rental car on YN2 Richard's orders. Instead, YN2 Richard chose to avoid the JTR and Commandant Policy and rented a vehicle using both her personal card and her GTCC. YN2 Richard is responsible for that choice. The Government's denial of a claim of reimbursement for an unauthorized travel expense was reasonable, and in no way rises to the level of a violation of Article 55, U.C.M.J., or the Eighth Amendment's prohibition of Cruel and Unusual punishment. For these reasons, Defenses motion for relief is **DENIED**.

Ruling

Accordingly, the Defense motion for relief under Article 55, U.C.M.J. and the Eighth Amendment is **DENIED**.

So **ORDERED** this 14th day of May, 2022.

[redacted]

[redacted]Justin R. McEwen
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT 388
PAGE 15 OF 15 PAGE (S)

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
Richard, Kathleen E.	Coast Guard	E-5	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
Director of Operational Logistics	General	Enlisted Members	Feb 8, 2022

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	6 years	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
0	0	0 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

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

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

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

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

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

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
McEwen, Justin R.	Navy	O-5	Feb 8, 2022	MCEWEN.JUSTIN.[redacted] Digitally signed by MCEWEN.JUSTIN.[redacted] Date: 2022.02.08 20:28:25 +01'00'

37. NOTES: N/A

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:	118	Specification 1:	**Not Guilty**	Guilty to LIO			118-B-
		Offense description	Unpremeditated murder				
		LIO description	Involuntary Manslaughter				
		Specification 2:	**Not Guilty**	Not Guilty			118-C-
		Offense description	Murder while engaging in an inherently dangerous act				
Charge II:	131b	Specification:	**Not Guilty**	Not Guilty			134-U2
		Offense description	Obstructing justice				

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
Richard, Kathleen E.	E5	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
U.S. Coast Guard Base Kodiak	19 February 2019	4 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Director of Operational Logistics	General	Enlisted Members	08-Feb-2022

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	(•) Yes	( ) No
12. Has the accused made a request for deferment of confinement?	( ) Yes	(•) No
13. Has the accused made a request for deferment of adjudged forfeitures?	( ) Yes	(•) No
14. Has the accused made a request for deferment of automatic forfeitures?	( ) Yes	(•) No
15. Has the accused made a request for waiver of automatic forfeitures?	( ) Yes	(•) No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	( ) Yes	(•) No
17. Has the accused submitted matters for convening authority's review?	(•) Yes	( ) No
18. Has the victim(s) submitted matters for convening authority's review?	( ) Yes	(•) No
19. Has the accused submitted any rebuttal matters?	( ) Yes	(•) No
20. Has the military judge made a suspension or clemency recommendation?	( ) Yes	(•) No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	( ) Yes	(•) No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	( ) Yes	(•) No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

Clemency Request: The accused requests the Convening Authority suspend the adjudged reduction in rank to E-1 until six months after the Entry of Judgment, at which time, unless sooner vacated, the adjudged reduction in rank be remitted.

The accused also requests that the Convening Authority add language to the Convening Authority Action for the Coast Guard Court of Criminal Appeals to exercise its authority under Article 66, UCMJ, to reduce the confinement portion of the sentence.

The accused also requests reimbursement of rental car expenses incurred during the trial.

24. Convening Authority Name/Title	25. SJA Name
CAPT [redacted] Convening Authority (Acting), Director of Operational Logistics	CAPT [redacted] Staff Judge Advocate

26. SJA signature	27. Date
[redacted]	Apr 12, 2022

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

The clemency request was denied by the Convening Authority on 23 March 2022. The Convening Authority takes no further action.

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

N/A

30. Convening Authority's signature	31. Date
[redacted]	14 Apr 2022

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

SECTION C - ENTRY OF JUDGMENT

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

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

Charge I: Violation of the UCMJ, Article 118
Offense Description: Unpremeditated Murder
Plea: Not Guilty
Specification 1 Plea: Not Guilty
Specification 2 Plea: Not Guilty
Findings:
Specification 1 Finding: Guilty to Lesser Included Offense (Involuntary Manslaughter)
Specification 2 Finding: Not Guilty

Charge II: Violation of the UCMJ, Article 131b
Offense Description: Obstructing Justice
Plea: Not Guilty
Sole Specification Plea: Not Guilty
Finding: Not Guilty

34. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

Dishonorable Discharge;

Confinement for six (6) years;

Reduction to pay grade E-1.

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

A request for deferral of reduction in rank was denied by the Convening Authority on 23 March 2022.

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

N/A

37. Judge's signature:	38. Date judgment entered:
MCEWEN.JUSTIN. [redacted] Digitally signed by MCEWEN.JUSTIN [redacted] Date: 2022.05.14 20:47:57 +02'00'	May 14, 2022

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

N/A

40. Judge's signature:	41. Date judgment entered:
MCEWEN.JUSTIN. [redacted] Digitally signed by MCEWEN.JUSTIN [redacted] Date: 2022.05.14 20:48:45 +02'00'	May 14, 2022

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

Must be signed by the Military Judge (or Circuit Military Judge) within 10 days of receipt

33. Findings of each charge and specification referred to trial [summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, and the findings. Account for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge.]:

Example [if necessary, add continuation page]:
Charge I: Violation of the UCMJ, Article 120(b)
Plea: Not Guilty Finding: Guilty
Spec. 1: Sexual assault to wit: penetration of vagina with penis without victim's consent.
Plea: Not Guilty Finding: Guilty
Spec 2: Sexual assault to wit: penetration of victim's mouth with penis when victim was incapable of consenting to the sexual act.
Plea: Not Guilty Finding: Not Guilty

Charge I: Violation of the UCMJ, Article 128, Battery
Sole Specification: Assault consummated by battery to wit: unlawful touching of victim's backside, chest, and torso with hand, and unlawful kissing of victim's neck.
Plea: Guilty Finding: Guilty

34. Sentence adjudged. Account for any modifications made by reason of any post-trial action by the convening authority, or any post-trial rule, order, or other determination by the military judge:

Example: Member sentencing: 19 years confinement, DD, total forfeitures, $15,000 fine, reduction to E-1.

Example: Military judge:
Charge I: Violation of the UCMJ, Article 120(b): Total Forfeitures, reduction to E-1, Reprimand
Spec 1: 6 years confinement and $4,000 fine
Spec 2: 2 years confinement and $1,000 fine
Confinement will run concurrently
Total confinement time is 6 years.
Total fine is $5,000.

Reduction to E-3 and 30 days confinement.

35. Deferment and Waiver of Forfeitures. If accused requested deferment and/or waiver of forfeitures, include the details of the request and the impact of CA's Action:

No requests were made.

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

N/A

37. Judge's signature:	38. Date judgment entered:
BARNUM.JEFFERY.C[redacted] Digitally signed by BARNUM.JEFFERY.C[redacted] Date: 2019.08.16 11:12:31 -04'00'	16 August 2019

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

40. Judge's signature:	41. Date judgment entered:

42. A copy of the judgment shall be provided to the accused or the accused's defense counsel.

43. A copy of the judgment shall be provided upon request to any crime victim or crime victim's counsel, without regard to whether the accused was convicted or acquitted of any offense.

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)