[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

SIMS	CHANEL	G	[redacted]	O-4
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

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

By

Special Court-Martial (SPCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by COMMANDER

(Title of Convening Authority)

[redacted]

(Unit/Command of Convening Authority)

Tried at

[redacted] On SEPTEMBER 15-16, OCTOBER 6-8 2020

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

Companion and other cases [redacted]

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

[redacted]

CONVENING ORDER

DEPARTMENT OF THE NAVY
COMMANDER
[redacted]

16 Jul 20

SPECIAL COURT-MARTIAL CONVENING ORDER 1-20

Pursuant to authority contained in paragraph 0120(b), Judge Advocate General of the Navy Instruction 5800.7F CH-1, of 1 January 2020, a Special Court-Martial is convened with the following members:

Captain [redacted] CEC, U.S. Navy;
Captain [redacted] U.S. Navy;
Captain [redacted] SC, U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy, and
Commander [redacted] U.S. Navy.

[redacted]

DEPARTMENT OF THE NAVY
COMMANDER
[redacted]

29 Sep 20

SPECIAL COURT-MARTIAL CONVENING ORDER 1A-20

Pursuant to authority contained in paragraph 0120(b), Judge Advocate General of the Navy Instruction 5800.7F CH-1, of 1 January 2020, a Special Court-Martial is convened. The following members, detailed to the special court-martial convened by order 1-20, this command dated 16 July 2020, are hereby relieved for the trial of LCDR Chanel Sims, U.S. Navy, only:

Captain [redacted] U.S. Navy;
Commander [redacted], U.S. Navy;
Commander [redacted] U.S. Navy, and
Command Master Chief [redacted], U.S. Navy.

The following members are detailed to the special court-martial convened by order 1-20, this command dated 16 July 2020, for the trial of LCDR Chanel Sims, U.S. Navy, only:

Captain [redacted] SC, U.S. Navy;
Captain [redacted], CEC, U.S. Navy;
Captain [redacted] CEC, U.S. Navy;
Captain [redacted] MC, U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted], U.S. Navy;
Commander [redacted] U.S. Navy; and
Commander [redacted] U.S. Navy.

[redacted]

DEPARTMENT OF THE NAVY
COMMANDER
[redacted]

30 Sep 20

SPECIAL COURT-MARTIAL CONVENING ORDER 1B-20

Pursuant to authority contained in paragraph 0120(b), Judge Advocate General of the Navy Instruction 5800.7F CH-1, of 1 January 2020, a Special Court-Martial is convened. The following member, detailed to the special court-martial convened by order 1-20, this command dated 16 July 2020, are hereby relieved for the trial of LCDR Chanel Sims, U.S. Navy, only:

Captain [redacted] CEC, U.S. Navy.

[redacted]

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First Middle Initial)	2. EDIPI:	3. GRADE OR RANK	4. PAY GRADE
SIMS, Chanel G.	[redacted]	LCDR	O-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	12AUG05	INDEF

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$8,090	0	$8,090	None.	

10. CHARGES AND SPECIFICATIONS

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 92

Specification 1: (*Failure to obey other lawful order*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, having knowledge of a lawful order issued by Captain [redacted] U.S. Navy, to wit: a Command Authorization for Search and Seizure signed by Captain [redacted] Commander, [redacted] dated 31 January 2020, an order which it was her duty to obey, did, at or near [redacted] on or about 31 January 2020, fail to obey the same by wrongfully refusing to provide her fingerprints and facial features to unlock her personal and work cellular phones.

Specification 2: (*Failure to obey other lawful order*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, having knowledge of a lawful order issued by Master at Ar[redacted]ief [redacted] U.S. Navy, a military police officer in [redacted] of his duty, "to turn around and not walk away" or words [redacted] 2020 [redacted]ect, an order which it was her duty to obey, at or near [redacted] on or about 31 January 2020, fail to obey the same by wrongfully walking away from Master at Arms Senior Chief [redacted]

(See Supplemental Page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER	
[redacted]	Cpl	[redacted]	
d. SIGNATURE OF ACCUSER [redacted]		e. DATE (YYYYMMDD) 20200625	

AFFIDAVIT Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 25TH day of JUNE 2020 and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

K. S. ESTES
Typed Name of Officer

[redacted]
Organization of Officer

Captain, U.S. MARINE CORPS

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

[redacted]
Signature

12. On 29 June ,20 20 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

[redacted]
Organization of Immediate Commander

CAPTAIN , U.S. NAVY

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at hours 29 June 20 20 at Commander
Designation of Command or

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

FOR THE [1] COMMANDING OFFICER

[redacted]
Typed Name of Officer

Commander
Official Capacity of Officer Signing

CAPTAIN , U.S. NAVY

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	11 AUG 20

Referred for trial to the Special court-martial convened by SPCMCO # 1-20

Dated 11 August 20 20 ,subject to the following instructions. [2] Prior to referral of these charges and specifications, I consulted with a judge advocate on relevant legal issues in accordance with RCM 406A.

By
Command or Order

of

[redacted]
Typed Name of Officer

COMMANDING OFFICER
Official Capacity of Officer Signing

CAPTAIN, U.S. NAVY
Grade

[redacted]

15. On 11 August 2020 . I (caused to be) served a copy hereof on (each of) the above named accused

K. S. ESTES
Typed Name of Trial Counsel

Captain
Grade or Rank of Trial Counsel

[redacted]
Signature

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

Accused: SIMS, Chanel G.
EDIPI: [redacted]

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 131e

Specification: (*Prevention of authorized seizure of property*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, did, at or near [redacted] on or about 31 January 2020, with intent to prevent its seizure, remove or delete from Lieutenant Commander Sims' cellular phone text messages between Chief [redacted] U.S. Navy, and Lieutenant Commander Sims, property which, as Lieutenant Commander Chanel Sims then knew, persons authorized to make searches and seizures were endeavoring to seize.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 131b

Specification: (*Obstructing justice*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, did, at or near [redacted] on or about 31 January 2020, wrongfully [redacted], to wit: remove or delete from Lieutenant Commander Chanel S[redacted]one text messages between Lieutenant Commander Sims [redacted] U.S. Navy, with intent to impede and obstruct the due administration of justice in the case of U.S. v. Chief [redacted] against whom the accused had reason to believe that there were or would be criminal proceedings pending.

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 133

Specification 1: (*Conduct unbecoming an officer and a gentleman*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, did, at or near [redacted], on or about [redacted], with intent to prevent its seizure, remove or delete from [redacted] Commander Sims' cellular phone text messages between Chief [redacted] U.S. Navy, and Lieutenant Commander Sims, property which, [redacted] Lieutenant Commander Chanel Sims then knew, persons authorized to make searches and seizures were endeavoring to seize, conduct which was unbecoming of an officer and a gentleman.

Specification 2: (*Conduct unbecoming an officer and a gentleman*) In that Lieutenant Commander Chanel G. Sims, U.S. Navy, while on active duty, having knowledge of a lawful order issued by Master at Arms Senior Chief [redacted] U.S. Navy, a military police officer in the execution of his duty, "to turn around and not walk away" or words to that effect, an order which it was her duty to obey, at or near [redacted] on or about 31 January 2020, fail to obey the same by wrongfully walking away from Master at Arms Senior Chief [redacted] conduct which was unbecoming of an officer and a gentleman.

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES **v.** **CHANEL G. SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPRESS – EVIDENCE DERIVED FROM CASS DATED 31 JAN 20, BASED ON A LACK OF PROBABLE CAUSE** **31 AUG 20**

1. **Nature of Motion**. Defense moves to suppress all evidence obtained and derived from the Command Authorized Search and Seizure issued against LCDR Sims by CAPT [redacted] on 31 January 2020 on the grounds that it was unlawful pursuant to Military Rule Evidence (M.R.E.) 311. Defense also moves to suppress all evidence that flows from the CASS as fruit of the poisonous tree.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

3. **Burden.** Pursuant to M.R.E. 311 (d)(5) the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or else some valid exception applies. Parallel to Prosecution's burden and without supplanting it, Defense bears the burden to show knowing and intentional falsity or reckless disregard for the truth of specific facts, pursuant to M.R.E. 311(g)(2).

4. **Law.**

a. The General Rule Based on the Fourth Amendment of the U.S. Constitution

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized[1]. The "Purpose of the Fourth Amendment was to prevent use of governmental force to search man's house, his person, his papers or his effects and to prevent their seizure against his will."[2]

The military rules of evidence has codified the bulk of the fourth amendment precedent beginning with M.R.E 311 which states that, absent certain exception, "evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is

[1] USCS Const. Amend. 4
[2] *Love v. United States*, 170 F.2d 32, 1948 U.S. App. LEXIS 2540 (4th Cir. 1948), cert. denied, 336 U.S. 912, 69 S. Ct. 601, 93 L. Ed. 1076, 1949 U.S. LEXIS 2757 (1949).

APPELLATE EXHIBIT (III)
PAGE 1 OF 12

inadmissible against the accused."[3]. Probable cause is required for "evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization." [4]

b. Reasonable expectation of privacy applies.

While all people, accused or not, are covered by the protections of the fourth amendment, a warrant requirement or exigent circumstance exists where there is an expectation of privacy.[5] Whether there is an expectation of privacy is found turns "in part, on whether the person who is subject to the search has a subjective expectation of privacy in the object searched and that expectation is objectively reasonable"[6] Smart phones have been held in every jurisdiction, including this one, as having an expectation of privacy in both regards. [7]

Even Government issued computers, and by extension government cell phones, have the expectation of privacy, albeit limited to certain cases as there is a rebuttable presumption of no expectation of privacy in government property not issued for personal use.[8] In *United States v. Long* 64 M.J. 57 (2006) where the court ruled that the expectation of privacy turned on a totality of the circumstances and included such consideration as a warning banner, a private passcode and the number and degree other individuals had access to the device. While a warning that the device is subject to monitoring is a pertinent fact in determining the expectation of privacy it does not completely eliminate it.[9] In Long, a private passcode ensured privacy and only the IT administrator had reign on the stored communications. Where such circumstances warrant a reasonable expectation of privacy exists warrantless searches and seizures are prohibited.[10]

c. The requirement of a Probable Cause determination

Where an expectation of privacy exists the fourth amendment requires a warrant or, in the military, a Search Authorization.[11] An authorizing Commander (in place of an unbiased magistrate) must be able to determine from the face of the Search Authorization application and attached affidavits or relied upon oaths, that there is a "fair probability that ... evidence of a crime will be found in a particular place."[12]. That is to say that in order to be constitutionally valid, a Search authorization can only be issued "when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location."[13]. Normally searches pursuant to prior authorization are given deference, but upon review of a Commander's search authorization, a military judge "may conclude that the commander's probable cause

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[3] M.R.E. 311
[4] M.R.E. 315
[5] *See Katz v. United States*, 389 U.S. 347 (1967)
[6] *United States v. Wicks*, 73 M.J. 93, 98(2014) Citing Katz 389 U.S. 347.
[7] *See Id.* at 99
[8] MRE 314(d).
[9] *See United States v. Long* 64 M.J. 57, 63-63 (2006)
[10] *See Id.*
[11] See MRE 315
[12] *Illinois v. Gates*, 462 U.S. 213, 238 (1983)
[13] *United States v. Perkins*, 78 M.J. 550, 553 (N-M Ct. Crim. App. 2018)

determination "reflected an improper analysis of the totality of the circumstances."[14] A Commander must make an independent determination of probable cause and "his action cannot be a mere ratification of the bare conclusions of others."[15]

d. Bare conclusions may not be considered

Bare conclusions include conclusory allegations and factually unsupported statements by the affiant the search is likely to yield evidence or fruits of crime.[16]. Such inclusions in the basis for search are not sufficient to establish the requisite probable cause to believe that evidence or fruits of a crime will be found in the place to be searched.[17] Probable cause for searching a particular place exists in an affidavit only when the affidavit sets forth facts constituting a substantial basis for finding a fair probability that first, a crime has been committed, and second, the particular place may contain the fruits, instrumentalities or evidence of the crime committed.[18]

e. A probable cause determination must be based on evidence with a nexus to criminal activity and the affidavit must include as much.

If the CASS is not seeking fruits or instrumentalities of a crime, or contraband it must articulate at a minimum the reason why what is being sought constitutes evidence.[19]
This is not a new requirement. The Supreme court has long ago ruled that;

> the requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus -- automatically provided in the case of fruits, instrumentalities or contraband -- between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.[20]

f. A Commander issuing the CASS must be unbiased.

While search authorizations issued by commanders are permitted in the military there is the requirement "that a commanding officer stands in the same position as a federal magistrate issuing a search warrant and the military officer's decision to authorize a search on probable cause must be made with a magistrate's neutrality and detachment."[21]

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[14] Id.
[15] Id
[16] Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)
[17] Id.
[18] See Id. at 236, 238-239.
[19] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307, 87 S. Ct. 1642, 1650 (1967)
[20] Id.
[21] United States v. Rivera, 10 M.J. 55, 58 (C.M.A. 1980); United States v. Sam, 22 U.S.C.M.A. 124, 127, 46 C.M.R. 124, 127 (1973)

Furthermore, the commander may *not* become personally involved in the actual evidence-gathering process.[22]. If he does become "engaged in the often competitive enterprise of ferreting out crime, he thereby loses the objectivity and impartiality constitutionally required of an official who authorizes a search based on probable cause."[23] Additionally, in the analysis of bias the Commander's "pre-search involvement must be considered in tandem with his participation in and direction of the search itself."[24]

g. Factual predicate for a search or seizure may be challenged if the affiant included false statement knowingly and intentionally, or with reckless disregard for the truth.

One final consideration regarding the law on Search warrants and Command authorized Search and Seizures must be the Supreme Court case Franks v. Delaware, 438 U.S. 154 (1978). In that case the Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."[25] The Court goes on to rule that;

If established by a preponderance of the evidence such false information must be set aside and if the remaining material in the affidavit is insufficient to establish probable cause, the search warrant or CASS is voided. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. [26]

The Rules of Military Evidence have codified this standard by stating "the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth."[27]

5. **Argument**.

a. The General Rule Based on the Fourth Amendment of The U.S. Constitution

The search involved in the facts of this case unquestionably trigger a analysis under the fourth amendment of the U. S. Constitution. The CASS was issued by Captain [redacted] in order to retrieve purported evidence from LCDR Sims phones.[28]

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[22] *See Generally United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)
[23] *Johnson v. United States*, 333 U.S. 10 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948)
[24] United States v. Rivera, 10 M.J. 55, 61 (C.M.A. 1980)
[25] Franks v. Delaware, 438 U.S. 154, 155, 98 S. Ct. 2674, 2676 (1978)
[26] Id.
[27] M.R.E. 311(g)(2).
[28] Defense Exhibit (G)

b. Reasonable expectation of privacy applies.

The subject of the CASS is not in question and included LCDR Sims's personal and work phone.[29] The personal phone is undeniably subject to a reasonable expectation of privacy.[30]

In this case LCDR Sims had an expectation of privacy in her work phone as well. In US. v. Long the appellant had a government issued computer which she accessed personal email from. The administrator was the only one to have access to it and the computer and email service each had personal password and pin code associated. While the court found that routine administrative intrusions into the computer itself was allowed, a full search without probable cause on personal emails was not.[31] That was even though she was notified that the system was subject to routine monitoring. In this case LCDR Sims had a personal PIN code that no one else in her command had.[32] Additionally, the domain that the government wished to search was the iMessage app which connected to her personal iCloud account.[33] It was secured by an entirely separate password and authentication process.[34] No administrator had access to the phone on a routine basis as updates were handled by Apple.[35] No banner existed that warned of routine monitoring and routine monitoring was in fact never conducted.[36] While she would have to turn in her phone to her relief, a full wipe of the phones internal storage and the removal of her iCloud account would have to be conducted before any turn over occurred.[37] Based on these factors a reasonable expectation of privacy exists and probable cause is required in order to seize the phone or search for evidence. The presumption found in MRE 314(d) is unwarranted in this case.

c. The requirement of a Probable Cause determination

For the aforementioned reasons a probable cause determination is required for each phone seized. The totality of the circumstances in this case do not support the notion that any evidence was located in LCDR Sims's phones. The exchange that was viewed by LT [redacted] on 14 January did not reveal any objective facts that would constitute criminal activity. The fact that NCC [redacted] communicated with his boss about his arrival time or disclosed that security had picked him up at the gate does not objectively show, in the totality of the circumstances, that any evidence could be found on her phones. Even if it had no facts were included in the CASS or affidavit that would provide a basis for probable cause at all.

d. Bare conclusions may not be considered

As described in the above statement of law bare conclusions are not to be considered in

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[29] Id
[30] See Wicks, 73 M.J. 93, 98
[31] See Long 64 M.J. 57, 63-63
[32] Fact drawn from expected testimony
[33] Id.
[34] Id.
[35] Id.
[36] Id.
[37] Id.

the Probable cause determination.[38] In US v Morales the Army court of appeals considered this issue when determining if the lower court judge had abused her discretion by not suppressing evidence based on a motion by Defense. In that case the affidavit in support of the case included the request to search and seize "any depiction of SPC [AC] between the time/date group 0000, 9 F[e]b 14 and 0900, 25, 25 Feb 14."[39] While in that case there was presumably some indication of that evidence of a crime was present, the four corners of the affidavit failed to lay out any facts "—only the assertion that probable cause exists to believe evidence of indecent viewing, visual recording, or broadcasting is on appellant's phone."[40] The Court in that case found that the judge did indeed abuse her discretion.[41] Furthermore, the court found that where the "affidavit provided no factual predicate to establish its request" and the good faith exception could not be used to admit the evidence.[42]

In the CAAF Case United States v Perkins the NMCCA ruled on the issue. That case held the unsupported inference that the appellant "had used his cell phone while … engaged in sexual activity and that later he threatened to reveal pictures and videos" was a bare conclusion which led to an unlawful search of his house.[43] In that case the named victim had made the allegation to NCIS agents and those agents included it in the affidavit in support of the CASS.[44] While the court allowed the evidence based on good faith, that case stands for the precedent that the affiant must include something other than a conclusory allegation.

This case is a unique circumstance in that the affiant, who is the trial counsel, does not even attempt to include connective facts to the case he is prosecuting. Ms. [redacted] his paralegal and the applicant for the search does not attempt to address the link either. The issue of probable cause is simply bypassed in favor of stating the location of the text message that were sought.[45] In Morales, there was at least a reference to the criminal activity. The language, which failed in that case, provided a location that the agent though contained the evidence and the assertion that it was evidence. In this case, neither LT [redacted] description not the application on its face had any language describing why the text messages were connected to NCC [redacted] alleged alcohol consumption.[46] It simply assumed it existed. This is the very definition of a bare conclusion. In Perkins, the affiant included a statement from the victim which took for granted its own veracity without providing anything else to warrant a determination on its face.[47] The agent in that case seemingly used the position of the informant as the named victim in order to shore up any doubt. In this case the CASS fails to even make such a claim. In asserting only that evidence existed, the Trial Counsels position is invoked to grant unlimited authority to the governments aims.

A bare conclusion on its own does not give a substantial basis to a Search authority and is an improper consideration when evaluating probable cause.

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[38] Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)
[39] United States v. Morales, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017)
[40] Id.
[41] Id at 577.
[42] Id.
[43] United States v. Perkins, 78 M.J. 550, 557 (N-M Ct. Crim. App. 2018)
[44] Id.
[45] Defense Exhibit (G)
[46] Id.
[47] See generally Perkins, 78 M.J. 550, 557

e. A probable cause determination must be based on evidence with a nexus to criminal activity and the affidavit must include as much.

While related to the analysis of bare conclusions, the issue of a nexus to criminal activity stands on its own as critical analysis in this case. This is because the text messages in this case are in no way connected to the case of NCC [redacted] suspected criminal activities. There are seemingly about a separate issue that fails to rise to the level of criminal activity. Mainly the text messages appear to be about NCC [redacted] calling in late at 0730 and then explaining his additionally delay, an area that LCDR Sims unquestionably has the authority over.

The need for criminal nexus for the items sought in a CASS is of central focus in United *States v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017). In that case the search was for incriminating videos and photographs reportedly taken using a phone. Investigators seized a laptop pursuant to a warrant issued by a magistrate. On review the Court found that the "the magistrate did not independently establish a particularized nexus between (a) the crime the accused was alleged to have committed with his cell phone … and (b) the laptop."[48]

While the facts between this case and that one are dissimilar, the underlying issue is the same. The CASS in this case purportedly sought evidence, on both LCDR Sims's personal and work phone, of two UCMJ violations; an Article 92 and an Article 107 each related to drinking and driving.[49] Yet neither the affidavit nor the text of CASS relate why anything on her cell phones would relate to those offenses or any other. Expected testimony from both LT [redacted] and [redacted] will show that neither of them suspected her of failing to report an offense, despite the government's continued torturous treatment of her. LT [redacted] description of the text message indicates nothing unlawful nor do they indicate that any other messages in the phone are tied to the criminal conduct at issue – what was essentially drinking and driving. There is no indication anywhere that he ever admitted to his boss any pertinent facts.

Ultimately the Government seized her phone for nothing more than communicating with the accused in a Court Martial about his charges. Allowing this to stand would stretch the protections of the fourth amendment so thin that it would logically permit the government to seize the phones of everyone involved in a Court Martial simply for describing the charges in email or text message.

f. A Commander issuing the CASS must be unbiased.

This case is unique in that the CASS application, the supporting affidavit and the "informant" are essentially all the same person, LT [redacted] LT [redacted] paralegal prepared a document which he seemingly dictated to her and then swore her to.[50] After which he provided it to the Command. Ms. [redacted] never spoke to Captain [redacted] and there is no indication that he explored any of the application in depth.[51] No one in the command opened any guidance or the Quickman checklist. The entire process, from inception to execution – including gaining support from CFAY security – took less than three hours.[52] The approval

[48] United States v. Nieto, 76 M.J. 101, 107 (C.A.A.F. 2017)
[49] Defense Exhibit (G)
[50] Id.
[51] Expected Testimony
[52] Id.

process appears to be simply reading and signing the CASS.[53] In addition, Captain [redacted] appears to have been participating in issuing the previous unlawful subpoena.[54]

This case involved no questioning of the affiant nor any exploration of the informant. This is likely because there is no distinguishable difference between Ms. [redacted] and LT [redacted]. Then, in reliance on the CASS LT [redacted] procured with his own observations, he proceeded to personally conduct the search. There is no case law on point to this because presumably no RLSO has ever tried this maneuver before.

A case that comes close is *U.S. v Washington*, 39 M.J. 1014 (A.C.M.R. 1994) an army appeals case which considers the concept of "rubber stamping" a CASS. In that case the search authority spent only two minutes reviewing the CASS.[55] He relied only on his SJAs and investigators view of facts and did not view the facts in any meaningful way.[56] Because of this he missed the important credibility and bias issues inherent in the informant's hearsay statements.[57] The court considered the fact that the commander did not open the CASS guide but "simply relied on his memory after having read the guide once or twice."[58] Ultimately the court held that "failing to ask to see the sworn statements [the investigator] referred to in his briefing, or to ask questions concerning the informant and his knowledge base, [the commander] demonstrated an uncritical approach to this important judicial duty assigned to commanders."[59] As such the probable cause determination was inappropriate and the evidence was suppressed.[60] Additionally, in that case the court determined good faith would not save the evidence because the circumstances showed the commander "did not qualify as an impartial individual."[61] That alone was enough to "indicate that investigators did not have a substantial basis for seeking to search the appellant's room and vehicle and did not act reasonably and in good faith."[62] The Court was openly critical of the Commander for relying on "highly exaggerated information to the commander that materially misrepresented the thrust of the informant's statement regarding the appellant."[63] The court concluded the issue by invoking the words of *Johnson*, and holding that the commander was "not provided with a substantial basis for a warrant, but only with the hurried leap of logic of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"[64]

In "rubber stamping" the CASS the Commander adopted the investigators bias. In this case, the "informant" is the Trial Counsel in the exact trial where evidence is sought by the CASS. Thus the informant is by nature a biased party. The applicant for the search warrant is Ms. [redacted] the trial counsel's paralegal. By nature she is just as inherently biased as her boss. Added to that equation is that she is apparently only parroting in her affidavit exactly what the Trial counsel is identifying. It is clear that Captain [redacted] did not rely on her in any

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[53] Id.
[54] Id.
[55] See United States v. Washington, 39 M.J. 1014, 1018 (A.C.M.R. 1994)
[56] Id.
[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] Id.
[64] Id.

substantive way. If he understood the bias inherent in the trial counsel's job, he certainly did not give any indication. He did not seem to acknowledge at all that LT [redacted] bias was inherent because he was at that very moment engaged in the often competitive enterprise of ferreting out and prosecuting crime. It may have been a forgone conclusion that the CASS was going to be executed because Captain [redacted] was himself involve in attempting to get at what was reportedly in LCDR Sims phone. In summary all of the same failures that existed in *Washington*, also exist here. That is in addition to the fact that he relied in an absurdly unquestionable degree on the opinion of a party to the court martial he was convening. He followed up by allowing the trial Counsel to search the phone indiscriminately without holding him to any identifiable measure.

These actions really have no precedent. To the extent that they may not have have been expressly disallowed by anything, they certainly call in to question the unbiased nature of this decision.

g. Factual predicate for a search or seizure may be challenged if the affiant included false statement knowingly and intentionally, or with reckless disregard for the truth.

As described above, this case is unique in that the CASS application, the supporting affidavit and the "informant" are all the same person. It is difficult to ascertain, because of this, whether the normal presumptions regarding the police officers and affidavits are apt here. There is, once again no case law on point. This is presumably because no Navy Trial Counsel has been this creative before.

The first issue relevant to this topic is the fact that the actual meaning of the text messages in question are in opposition to the portrayal in the CASS. Essentially, LT [redacted] cleaved away all the context leaving behind only the a few scraps of the original message that he felt was most convincing to his position. He then took the bold step of implying that those scraps indicated criminality without anything to back that up. He did so presumably because of his inherent and understandable bias toward winning his case.

The fact that a message was sent at 0730 stating he would be late is an innocent action based on the timing and context. The next message at approximately 1000 states: "[redacted] stuck with security, they got me with the breathalyzer and are taking me to main base. I'll talk to you when I get there."[65] The next message by him is in response to LCDR Sims asking "How are you?"[66] To which he responds, "In the dumps. Just can't believe this happened."[67] Her response to that was, "Yeah, I saw the shock in your face."[68] There is nothing in this exchange, when taken in context, to suggest that anything having a criminal nexus is concealed in the phones. There is nothing that connects these messages to the criminality stated in the CASS, namely that Chief [redacted] failed to follow an order or lied about it. The purpose of the interview with LCDR Sims apparently concerned his lateness to work and whether he had prearranged something with LCDR Sims. A fact which innocent on its face. The very clear inference by the actual messages is a normal back and forth between boss and subordinate. However, when cut of

[65] Defense Exhibit (B)
[66] Id.
[67] Id.
[68] Id.

all of their substance and left naked on the page, the words apparently seemed insidious to Captain [redacted] It is hard to believe this was not done on purpose. Whether motivated by malicious intent or not, the removal of that context fits neatly into the aims of LT [redacted] in his role as the Trial Counsel and shows a reckless disregard for the truth.

Furthermore, the calculation involved in this action is telling of LT [redacted] motivations. He avoided all possibility of being subject to review. Had he served it on Chief [redacted] or taken any other steps that subjected the CASS to review he would have been conflicted from trying the case because he would be a witness and an advocate in the same trial.

The second time LT [redacted] omitted information was with regard to the unlawful subpoena that had been quashed in court earlier that day. It was quashed because the subpoena intruded on communications stored in her phone where she clearly had an expectation of privacy. The Military Judge quashed the Subpoena. He even followed up with an email which was attached to the record stating "For the reasons I outlined at the 39A session the government's motion is denied and LCDR Sim's motion to quash the subpoena is granted."[69] The CASS includes the words: "On 17 January 2020, LCDR Sims was served a subpoena to provide copies of all text communications between herself and NCC [redacted] that occurred on 7 October 2019. The records were due on 21 January 2020. LCDR Sims has not responded to the subpoena or provided copies of the relevant text messages."[70] This seems to indicate that she had an obligation to provide the text. The affidavit was signed by Ms. [redacted] again with LT [redacted] as the person administering the oath, well after the subpoena was quashed. The statement is a reckless misrepresentation of the truth because it omits the fact that the subpoena was quashed because it violated the Constitution. It also fails to indicate that LCDR Sims invoked her fifth amendment rights on the stand – a subject that Defense covers in separate motion. Not only was it quashed but the Military Judge criticized LT [redacted] for having not thought about the 4th amendment prior to issuing the subpoena when he stated regarding the required fourth amendment analysis: "I think with respect to the subpoena for information; that was a question that could have been asked and answered prior to this hearing."[71] He followed by stating, "my ruling with respect to the writ of attachment is [the] one thing I need to look at, is whether the writ is--or the subpoena was lawful. I find as of right now that it was not a lawfully-issued subpoena for the content that you wanted."[72]

The fact that a subpoena was issued without including that it had been quashed in the affidavit was clearly something the Commander would want to know, as it reduces the credibility of the attorney asking for the CASS – LT [redacted] The Command clearly did not, and may still not, understand the previous Constitutional violation. In fact, the expected testimony from the legal officer is that LT [redacted] relayed to the command the Military Judge told them to get the text by issuing a CASS on LCDR Sims. A fact which is false.

It is clear that these facts were omitted. Of course, the central part of the analysis must be the whether their omission was done with a reckless disregard for the truth. The answer to that question is, more likely than not, yes.

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[69] Defense Exhibit (L)
[70] Defense Exhibit (D)
[71] Defense Exhibit (F)
[72] Id.

6. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

A. Testimony LCDR Chanel Sims;
B. Testimony [redacted]
C. Testimony LT [redacted]
D. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
E. Defense Exhibit (B) – Text Messages
F. Defense Exhibit (C) – Emails Between LCDR Sims, LT [redacted] and [redacted]
G. Defense Exhibit (D) – Subpoena
H. Defense Exhibit (E) – Email from LT [redacted]
I. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
J. Defense Exhibit (G) – Command Authorized Search and Seizure
K. Defense Exhibit (H) – Report excerpt MA2 [redacted] Statement
L. Defense Exhibit (I) – Report of Arrest
M. Defense Exhibit (J) – Art 31 rights advisement form
N. Defense Exhibit (K) – Command Investigation appointment
O. Defense Exhibit (L) – Email from Judge Reyes in regard to Subpeona

7. **Relief Requested**. Defense request that the Command Authorized Search and Seizure be found unlawful and all evidence derived from it be suppress. Defense further request that the seizure of LCDR Sims person be found unlawful, as it was a result of this unlawful search, and all derived evidence from that seizure be likewise suppress.

8. **Oral Argument.** Defense requests oral argument.

[redacted]LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:50:38 -04'00'

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (II)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (II)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO MOTION TO SUPPRESS EVIDENCE DERIVED FROM CASS BASED ON LACK OF PROBABLE CAUSE** 4 September 2020

1. Nature of Response.

This response is to a defense motion to suppress evidence derived from the 31 January 2020 command authorization for search and seizure signed by Captain [redacted], USN. The government requests the court DENY the defense motion to suppress evidence derived from 31 January 2020 command authorization for search and seizure.

2. Summary of Facts

For a summary of relevant facts, please see the government's summary of common facts attached as enclosure (1).

3. Discussion

a. Fourth Amendment Protection from Unreasonable Search and Seizure

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.[1] The Fourth Amendment applies to search and seizure of cellular phones and contents of communications.[2] Cell phones

[1] USCS Const. Amend. 4
[2] United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014)

and their contents are not outside of the purview of the Fourth Amendment, and the same Fourth Amendment principles apply to cell phones and their contents.[3]

For these reasons, the government believes the Accused *did* have a reasonable expectation of privacy in her work and personal cellular phones.

b. Captain [redacted] relied on probable cause when he signed the command authorization for search and seizure.

Protecting against unreasonable searches and seizures, the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[4] Searches conducted pursuant to a warrant are presumed to be reasonable.[5]

Search authorizations in the military are akin to civilian warrants and, and have similar requirements. A military commander has authority to issue a search authorization based upon probable cause.[6] That commander's determination may be based on written or oral statements and may include hearsay statements in part or in whole.[7] Appellate courts have determined a commander is provided with a significant amount of discretion when deciding whether a substantial basis for probable cause exists.[8] In order to find a substantial basis, the commander must be presented with "sufficient information," and not a "mere ratification of the bare conclusions of others."[9] While the courts do not explicitly define "bare conclusions," examples include magistrates that sign search authorizations for cellular phones when the search

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[3] Id.
[4] USCS Const. Amend. 4
[5] Wicks at 99.
[6] Military Rule of Evidence 315
[7] Id.
[8] United States v. Perkins, 78 M.J. 550, 553 (N-M Ct. Crim. App. 2018).
[9] United States v. Hoffmann, 75 M.J. 120, 126 (C.A.A.F. 2016), citing Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)

authorization is clearly devoid of a link between the evidence sought and the alleged offense,[10] or where an authorization is based solely on a victim's unsworn statement without any link between the evidence sought and the alleged offense.[11]

Captain [redacted] authorization for search and seizure was based on probable cause. The affidavit for search authorization clearly lays out the trial counsel's belief that evidence related to the NCC [redacted] court martial was located on the Accused's cell phones. NCC [redacted] told the Accused that [redacted] and that he [redacted][12] Both statements are evidence that NCC [redacted] was stopped for driving under the influence on the morning of 7 October 2019.

The assertion that Captain [redacted] relied on "bare conclusions" is not accurate. On 31 January 2020, when Captain [redacted] signed the authorization to seize and search the Accused's cellular phones, Captain [redacted] based his probable cause determination on an affidavit signed and sworn by Ms. [redacted]. Most of the affidavit is based on Ms. [redacted] direct observations from the 14 January interview with LCDR Sims and the follow on actions the TSO took to obtain the text messages from the Accused. At the interview on 14 January 2020 where the Accused showed the trial counsel the text messages. Ms. [redacted] observed the Accused show the messages to trial counsel, and

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[10] *See* U.S. v. Morales, where the investigating agent sought a CASS for the accused's cell phone. The agent was investigating an alleged sexual assault, and later found out the accused may have taken explicit photos of the victim. The agent believed explicit photos of the victim were located on the phone, but failed in her affidavit to establish a link between the photos and the alleged sexual assault, and omitted key statements in the affidavit. The magistrate based his probable cause determination solely on paperwork presented by the agent. United States v. Morales, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017).

[11] *See* U.S. v. Perkins. The station commanding officer signed an authorization to search the accused's home based solely on the investigating agent's recitation of the victim's unsworn allegation. No affidavit was presented to the commanding officer, and the victim's allegation was unsupported by any corroborating evidence. United States v. Perkins, 78 M.J. 550, 556 (N-M Ct. Crim. App. 2018).

[12] Def. Mot. Encl. B

subsequently sent emails to the Accused asking for the messages. In the email exchange between Ms. [redacted] and the Accused, the Accused acknowledges the messages exist, but admits she "does not feel comfortable" providing screenshots of the messages. Trial counsel copied Ms. [redacted] on his 16 January email to the Accused, and in the email the trial counsel specifically stated that he believed the messages between the Accused and NCC [redacted] are relevant and necessary to the NCC [redacted] court martial. Ms. [redacted] was not operating in a vacuum, closed off from the observations of the trial counsel or the facts she swore to in her affidavit, the facts were based on her direct observations and knowledge of the NCC [redacted] case, and interview with the Accused.

That Captain [redacted] relied on hearsay in the affidavit is irrelevant. Military Rule of Evidence 315(f) expressly permits a search authorization to be based on hearsay in the form of oral or written statements.

Captain [redacted] signed the authorization for search and seizure based on a sworn affidavit from someone with direct knowledge of the case and the evidence sought by the authorization. The affidavit clearly explained to Captain [redacted] why there was probable cause to believe the messages were on the phone, and why the messages were evidence of an offense under the UCMJ. For these reasons, the government believes there was probable cause, and the authorization for search and seizure was lawful.

c. <u>Even without probable cause, the good faith exception applies to evidence derived from the search authorization for the Accused's cellular phones.</u>

Evidence seized in violation of the Fourth Amendment is inadmissible under the exclusionary rule carved out by the Supreme Court in *Weeks v. United States*. The intent of the

Court was to deter law enforcement agents from abusing their great authority.[13] The Court has long held that the "good faith" exception applies to law enforcement officers who rely on a magistrate's probable cause determination of a warrant, and that reliance was "objectively reasonable."[14] When courts have considered whether the good faith exception applies, they generally look at the actions of the law enforcement agent(s), and the neutral and detached actions of the magistrate with no "stake in the outcome."[15]

The Military Rules of Evidence incorporate the "good faith" exception to evidence obtained as a result of an unlawful search and seizure.[16] The rule requires three elements be met in order for the exception to apply:

1. The search and seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d);
2. The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
3. The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

The government contends that even if the probable cause determination was insufficient, the good faith exception applies to the evidence seized by Investigators [redacted] and [redacted] and each of the MRE 315(d) requirements are met. The search and seizure of the phones was conducted pursuant to the CASS signed by Captain [redacted] The next requirement was

[13] Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 344 (1914).
[14] United States v. Leon, 468 U.S. 897, 920, 104 S. Ct. 3405, 3419 (1984).
[15] Id. at 917.
[16] Mil. R. Evid. 311(c)(3), Manual for Court Martial, 2019 ed.

discussed previously in this motion. The government believes Captain [redacted] had a substantial basis for the CASS, and relied on the sworn affidavit from Ms. [redacted] who had individual knowledge of the events in the affidavit.

The final requirement under MRE 315(d) is that the investigators acted reasonably, and in good faith. According to their statements, the CID investigators were contacted on 31 January 2020, just prior to execution of the CASS. The investigators were briefed on the affidavit and Captain [redacted] authorization shortly before walking into the Accused's office to execute the CASS. The CID investigators were able to review the CASS, and believed it was valid based on the Commanding Officer's signature and the attached affidavit. Furthermore, the investigators executed the CASS in a reasonable manner, and within the scope of the CASS. The CASS sought the Accused cell phones from a space under Captain [redacted] control, and the investigators remained within the scope of the CASS when they seized her phones from the Accused's workspace.

4. <u>Burden of Proof and Evidence</u>

a. Pursuant to M.R.E. 311(d)(5), when the defense makes an appropriate motion, the government has the burden of proving by a preponderance of the evidence that the evidence was not obtained as the result of an unlawful search and seizure, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of the authorization to search, seize, or apprehend.

b. In addition to the evidence provided in the defense motion, the government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (1): General Summary of Facts

Enclosure (6): Interview notes with MA1 [redacted] dtd 2 Sept 2020

Enclosure (7): Interview notes with MA1 [redacted] dtd 2 Sept 2020

Enclosure (8): Interview notes with MACS [redacted] dtd 16 Jun 2020

The government intends to call the following witnesses in support of its motion:

1. Ms. [redacted]
2. MA1 [redacted]
3. MA1 [redacted] (via telephone)

5. Oral argument. The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 Sept 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPPRESS INVOLUNTARY STATEMENTS** **31 AUG 20**

1. **Nature of Motion**. Pursuant to 10 U.S.C. §31, Article 31, Uniform Code of Military Justice (U.C.M.J.), Rule for Courts-Martial (R.C.M.) 905(d)(3), and Military Rules of Evidence (Mil. R. Evid.) 304 and 305, the Defense moves to suppress all statements made by LCDR Chanel Sims that prosecution intends to submit.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

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

4. **Law**

Article 31 prohibits a person subject to the U.C.M.J. from interrogating or eliciting a statement from a servicemember accused or suspected of an offense without first (1) informing them of the nature of the accusation, (2) advising them that they have the right to remain silent, and (3) advising them that anything they say may be used against them later at court-martial.[1] These rights warnings are required when (1) a person subject to the U.C.M.J. (2) interrogates or requests any statement (3) from an accused or person suspected of an offense, and (4) the statements pertain to the offense of which the person is suspected or accused.[2] "No statement obtained from any person in violation of this Article [...] may be received in evidence against him in a trial by court-martial."[3] Military Rules of Evidence 304 and 305 implement the Code's prescription.

[1] 10 U.S.C. §31(b).
[2] *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).
[3] 10 U.S.C. §831(d).

APPELLATE EXHIBIT (IV)
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For the purposes of Article 31 and Mil. R. Evid. 305, a "person subject to the code" means a "person subject to the Uniform Code of Military Justice" and "includes [...] a knowing agent of any such person or military unit."[4]

Military questioners are required to warn servicemembers under Article 31(b) if the servicemember is suspected of an offense and "the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry."[5] Whether a person is suspected of an offense is a question that "is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense."[6]

Courts must consider "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[7] Whether the questioner could reasonably be considered to be acting in a disciplinary capacity is "judged by reference to a reasonable man in the [suspect's] position."[8] (internal quotation marks omitted). Where there is a mixed purpose for questioning "the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was designed to evade the accused's constitutional or codal rights."[9]

An adequate rights advisement under Article 31(b) must include "informing the accused or suspect of the nature of the accusation."[10] The purpose of informing a suspect of the nature of the accusation "is to orient him to the transaction or incident in which he is allegedly involved."[11] While "technical nicety" is not required in this regard, the suspect "must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event."[12]

Among the factors to be considered in reviewing the sufficiency of this requirement are "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses.[13] "Necessarily, in questions of this type, each case must turn on its own facts."[14]

For example, in *Nitschke*, 12 U.S.C.M.A. 489, the accused was suspected of having caused a traffic accident resulting in the death of another. The court held that orientation to the traffic accident itself, even without notice that he was suspected of the homicide, was sufficient to orient the accused to the suspicion because it referred to the relevant transaction.[15]

Under Mil. R. Evid. 305, a "statement obtained from the accused in violation of an accused's rights under Article 31 is involuntary and is therefore inadmissible against the accused,"

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[4] Mil. R. Evid. 305; *see also* 10 U.S.C. §31(b)
[5] *Jones*, 73 M.J. at 361.
[6] *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted)
[7] *Id.*
[8] *Jones* 73, M.J. at 362
[9] *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006)
[10] Mil. R. Evid. 305(c)(1)(A).
[11] *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960)(internal citations omitted).
[12] *Simpson*, 54 M.J. at 284.
[13] *Id.*(internal citations omitted).
[14] *United States v. Pipkin*, 58 M.J. 358, 361(CA.A.F. 2003)(quoting *United States v. Nitschke*, 12 C.M.A. 489, 492 (1961)).
[15] *Id.*

APPELLATE EXHIBIT (IV)
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subject to a handful of exceptions.[16] The Government bears the burden to establish compliance with the rights warning requirements by a preponderance of the evidence.[17]

5. **Argument**

At the time that LCDR Sims initially was approached by LT [redacted] and LT [redacted] both LT [redacted] and LT [redacted] were subject to the UCMJ. Additionally Senior Chief [redacted] MA1 [redacted] MA2 [redacted] and MA2 [redacted] were all subject to the UCMJ on 31 January. All individuals with whom LCDR Sims interacted in any capacity regarding the charged offenses have questioned her specifically about the text messages, her phone or the Chief [redacted] case. Each individual purported acted in a law enforcement capacity with regard specifically to the questions that were asked of her.

LT [redacted] at the time he interviewed LCDR Sims was there to collect evidence that he could use at trial against Chief [redacted]. The interview seems to be affected by the sense that LT [redacted] was suspicious of LCDR Sims. He ended the meeting with a demand for the text messages that she had in her phone.[18] Despite claims otherwise forwarded by LT [redacted] that demand was never agreed to. Instead LCDR Sims agreed to testify.[19] Shortly before this interview, It appears that LT [redacted] began to suspect, at the trial of Chief [redacted] that a developing narrative that Chief [redacted] had walked his kids to school the morning of October 7th was false. This narrative that LT [redacted] believed was false was relayed on the record on 04 January during an Article 39 (a) hearing. During this hearing PSC [redacted] was called to testify about the potential that UCI would keep people from testifying in Chief [redacted] case. The relevant section of the record is:

[redacted]

[16] Mil. R. Evid. 305I(1

[17] Mil. R. Evid. 304I; *see also United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000).

[18] Expected Testimony

[19] Defense Exhibit (C)

APPELLATE EXHIBIT (IV)
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[redacted]

LT [redacted] who was the lead Trial counsel for that exchange immediately set up a meeting to talk with LCDR Sims about the exact subject of that exchange.[21] That meeting took place on 14 January, just ten days after PSC [redacted] indicated that a member of the triad suspected her of colluding with Chief [redacted]. He then demanded to have text messages between LCDR Sims and Chief [redacted], messages that he thought related to the circumstance highlighted in the above record.[22] That exchange, which allegedly indicates that LCDR Sims has a target on her back because of the suspicion that she was hiding Chief [redacted] whereabouts between 0730 and 1000 on 07 October. As spurious as that claim may be, it seems unlikely that LT [redacted] was not looking for that connection. While he may have had other reasons for exploring that connection, the primary thrust seems to be this contention that LCDR Sims was hiding something, all the while denying that he suspected LCDR Sims of anything. LT [redacted] continued to engage her about the issue Chief [redacted] tardiness in a fairly consistent manner.[23] He then became aggressive by issuing a subpoena for the information, through his assistant defense counsel LT [redacted].[24] He aggressively attempted to persuade her comply with that unlawful subpoena, at the behest of her CO, the C.A in the [redacted] case. LT [redacted] called her to the stand to testify in his warrant for attachment against her. At which time she pled the fifth because she was convinced he was coming after her. After the Subpoena was quashed he coopted CFAY Security to execute a CASS. Ultimately they arrested her for exactly what she was implicated with on 04 January at the Article 39(a) hearing. Shortly before her arrest Senior Chief [redacted] ordered her to speak with him about her phones

[20] Defense Exhibit (F)
[21] Expected Testimony
[22] Id.
[23] Id.
[24] Defense Exhibit (D)

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containing the suspicious text messages.[25] At the CFAY security interrogation room she was order to speak again.[26] Ultimately she did.

At no time during any of those interactions with LT [redacted] the Investigators, or Senior Chief [redacted] was she ever given her Article 31(b) rights advisement in any capacity. It wasn't until her attorney demanded, after she spoke, that she be released that MA2 [redacted] finally give her an advisement, which she promptly signed and declined to make a statement.[27]

It is important to highlight here that despite the constant verbal assurances to the contrary after the fact, every government actor that she has come in contact with has repeatedly treated her as though she was accused of wrongdoing. It would defy the logic of Article 31 if all that was needed to avoid a person's rights was to simply deny that they were suspected. That is essentially what happened in this case. While LCDR Sims continues to assert not only that she is innocent in the charged offenses but also that the supposed evidence that was sought was not evidence at all, LT [redacted] and CFAY security objectively acted like she was suspected of an offense from the very beginning. The reason for this is simple. They did suspect her. And now, the government seeks to admit every compelled and involuntary statement.

It is clear from "all the facts and circumstances at the time of the interview" that "the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense."[28] They should have issued her an advisement from the very first interaction.

While CDR [redacted] did advise LCDR Sims later of her rights, the taint of the previous involuntary statements persisted and no cleansing warnings were given. The impending destructive force of the previous unlawful actions by law enforcement continued throughout the subsequent investigation. Given the earlier result of attempting to assert her rights she did not feel comfortable doing so with him. The statement to him, although conducted in a less egregious manner, was still affected by and connected to the previous violations thus should be considered involuntary.

7. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

   b. Testimony LCDR Chanel Sims;
   c. Testimony [redacted]
   d. Testimony LT [redacted]
   e. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
   f. Defense Exhibit (B) – Text Messages
   g. Defense Exhibit (C) – Emails Between LCDR Sims, LT [redacted], and [redacted]
   h. Defense Exhibit (D) – Subpoena
   i. Defense Exhibit (E) – Email from LT [redacted]
   j. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
   k. Defense Exhibit (G) – Command Authorized Search and Seizure
   l. Defense Exhibit (H) – Report excerpt MA2 [redacted] Statement
   m. Defense Exhibit (I) – Report of Arrest
   n. Defense Exhibit (J) – Art 31 rights advisement form

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[25] Expect Testimony
[26] Expect Testimony
[27] Defense Exhibit (J)
[28] *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted).

o. Defense Exhibit (A) – Command Investigation appointment
p. Defense Exhibit (A) – Email from Judge Reyes in regard to Subpeona

8. **Relief Requested**. In accordance with Military Rule of Evidence 304(f), the Defense moves the Court to suppress all statements made by LCDR Sims between 04 January, 12 February to [redacted] as well as CDR [redacted]. All derivative evidence of any of the unwarned interactions including the phone extraction report and potential testimony derived from involuntary statements. The relief request in this motion is parallel to the relief requested on the Fifth Amendment suppression and the Fourth amendment suppression motions submitted by the Defense in this case.

9. **Oral Argument.** Defense requests oral argument.

[redacted] LARSON.JEFFRE Y.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:51:47 -04'00'

[redacted]J.M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (W)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS INVOLUNTARY STATEMENTS** 4 September 2020

1. **Nature of Motion.**

Pursuant to Mil. R. Evid. 304(b), UCMJ, and Article 31, UCMJ, the Government respectfully opposes the Defense Motion, requests that this Court DENY the Motion, and further requests that this Court find the Accused's statements ADMISSIBLE.

2. Summary of Facts.

a. For a summary of relevant facts, please see the government's summary of common facts attached as enclosure (1).

3. Discussion.

a. LT [redacted] was not required to advise the Accused of her Art. 31(b) warnings when he interviewed the Accused on 14 January 2020.

Article 31(b) of the Uniform Code of Military Justice requires that persons subject to the code provide an accused warnings prior to any official interrogation.[1] It is axiomatic that "only servicemembers suspected of a crime must be Article 31(b) warnings.[2] The test to determine whether someone is a suspect is whether, considering all of the facts and circumstances at the

[1] Art. 31(b), Uniform Code of Military Justice
[2] United States v. Kendig, 36 M.J. 291, 294 (C.A.A.F. 1993) citing United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982).

time of the interview, the government interrogator believed, or reasonably should have believed that the one interrogated committed an offense.[3]

While LT [redacted] is a person subject to the UCMJ, he was not required to provide the Accused with an Art. 31(b) warning in their 14 January interview. LT [redacted] requested the Accused come into the Trial Services Office to discuss the NCC [redacted] court martial as a witness.[4] There is no indication from LT [redacted] or Ms. [redacted] who was also present during the interview, that the trial counsel sought to interview the Accused for any purpose other than to discuss her observations as a witness in the NCC [redacted] case. The defense contention that LT [redacted] suspected the Accused of a crime is absent any evidence, other than what the defense refers to in their own motion as a "spurious claim" that the entire "Admin shop" was accused of obstructing justice or hiding evidence on the morning NCC [redacted] was arrested for driving under the influence.[5] The testimony supplied in support of this claim appears to focus on Chief [redacted] reluctance to testify out of fear that it may impact the Command Master Chief's professional opinion of Chief [redacted].[6] The testimony itself appears to be based on hearsay between multiple parties, and only mentions the Accused's name on a single occasion.[7]

There is further evidence that even after LT [redacted] knew about the text messages on the Accused's cell phones, he still viewed her as a witness to the NCC [redacted] court martial, and did not suspect her of violating the UCMJ. The first page of the CASS signed by Captain [redacted] says the government was seeking evidence *relevant to the NCC* [redacted] court martial.[8]

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[3] Id.
[4] Govt. Mot. Encl. 9
[5] Pg. 4, Defense motion to suppress involuntary statements
[6] Def. Mot. Encl. F.
[7] Id.
[8] Def. Mot. Encl. G

Despite the evidence being located on the Accused's cell phone(s), there is no indication the trial counsel suspected the Accused of committing any offense under the UCMJ. For these reasons, the government believes the trial counsel was not required to provide the Accused with an Art. 31(b) warning at any point during the interview on 14 January 2020.

b. <u>The CID investigators were not required to provide the Accused with her Art. 31(b) warnings.</u>

Similar to LT [redacted], the CID investigators are subject to the code, and required to provide an Art. 31(b) warning prior to any official interrogation. In this case, the investigators did not suspect the Accused of violating the UCMJ. As discussed in the government's response to the defense motion to suppress for lack of PC, the investigators had no prior knowledge of the NCC [redacted] case, and relied on the affidavit attached to the CASS when they executed the CASS on 31 January 2020. The affidavit and first page of the CASS expressly stated the evidence sought from LCDR Sims was related to the NCC [redacted] court martial.[9]

According to the investigators, they did not intend to ask the Accused any questions, and only sought to execute the CASS for evidence related to the NCC [redacted] case.[10] This likely changed once the Accused was apprehended by MA2 [redacted] and MACS [redacted] not for obstructing justice or hiding information as the defense claims in its motion,[11] rather for failing to comply with the CASS by providing her biometric data to the investigators. The investigators did not ask the Accused any questions while executing the CASS, and therefore could not illicit incriminating answers.[12]

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[9] Id.
[10] Govt. Mot. Encl. 6 and 7
[11] Pg. 4, Defense motion to suppress involuntary statements
[12] Gov. Mot. Encl. 6

c. <u>The statements made to Commander [redacted] were voluntary and are admissible.</u>

"A confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."[13]

To determine voluntariness, this Court must look at the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[14]

Factors to consider include "[1] the mental condition of the accused; his age, education, and intelligence; [2] the character of the detention, including the conditions of the questioning and rights warning; and [3] the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[15]

On 5 February 2020, Commander [redacted] was appointed as the invstigating officer into the Accused's alleged misconduct.[16] On 12 February 2020, the Accused provided CDR [redacted] with a three page, typed statement of her recollection of the events leading up to 31 January 2020, as well as the execution of the CASS on 31 January 2020.[17]

Looking at the totality of circumstances and discussed in *Shneckloth*, there is no indication the Accused's statement to CDR [redacted] was involuntary. the Accused is an intelligent individual, and an educated, career officer in the U.S. Navy. She took the time to type, edit, and sign the statement she provided to CDR [redacted] There is an absence of any evidence that she felt coerced to make the statement, or that it was made in a manner where the Accused

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[13] United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing Mil. R. Evid. 304); *see* Article 31(d), UCMJ.
[14] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Freeman, 65 M.J. at 453.
[15] United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005); United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).
[16] CDR [redacted] appointing letter
[17] Gov. Mot. Encl. 2

felt threatened or deceived. The statement, if anything else, appears to be the Accused's thorough explanation of her side of the events that took place on 31 January 2020. At the time the Accused provided the statement on 12 February she was represented by counsel, and at nearly every crucial juncture sought the assistance of her assigned counsel. the Accused sought counsel to file a motion to quash the subpoena, had counsel present during the hearing, requested her counsel when presented with the CASS, and refused to provide her biometric or passcode data without counsel present. The evidence is clear that the Accused was aware of her right to seek the advice of counsel, and was aware of her right to seek the advice of counsel before making any statements.

4. **Evidence and Burden of Proof.**

a. The burden is on the Government to prove by a preponderance of the evidence that LCDR Sims' statements were voluntary. Mil. R. Evid. 304(a) and (b)

Enclosure (2): Witness Interview Notes with LT [redacted]

Enclosure (6): investigator [redacted] Interview Notes

Enclosure (7): Investigator [redacted] Interview Notes

Enclosure (9): Ms. [redacted] Interview Notes

5. **Argument.** The Government respectfully requests oral argument on this motion.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel personally on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPRESS BASED ON PROTECTIONS OF THE FIFTH AMENDMENT** **31 AUG 20**

1. **Nature of Motion**. Pursuant to M.R.E 304, Defense moves to suppress all involuntary statements obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution. This motion is made in parallel to a separate motion on Article 31 involuntary statements.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

3. **Burden.** When the defense has made an appropriate motion or objection under this rule, the prosecution has the burden of establishing the admissibility of the evidence. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

4. **Law.**

There is perhaps no more well-known right in the US Constitution than the Fifth Amendment rule that "no person ... shall be compelled in any criminal case to be a witness against himself."[1] Precedent surrounding this rule has evolved to the present rule that where a person is placed in custodial interrogation the rights must be warned and the right to silence must be "scrupulously honored." [2] This is simply because "[t]he circumstances surrounding in custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[3]

In Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Supreme Court of the United States added a second prophylactic layer against potential law enforcement misconduct during suspect interviews.[4] Additionally, the right is reaffirmed in this jurisdiction when C.A.A.F ruled "once a suspect in custody has "expressed his desire to deal

[1] USCS Const. Amend. 5
[2] *See Michigan v. Mosley*, 423 U.S. 96, 103-04, 96 S. Ct. 321, 326 (1975).
[3] *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)
[4] See also United States v. Mitchell, 76 M.J. 413, 419 (C.A.A.F. 2017) (citations omitted).

APPELLATE EXHIBIT(V)
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with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication."[5]

This rule eliminates not only express questioning, "but also ... any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[6]

The rule concerning whether custodial interrogation exists in a given case involves "two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[7] This jurisdiction has ruled the determination on custody must necessarily answer the following: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred ...[;] (3) the length of the questioning ...[;] [(4)] the number of law enforcement officers present at the scene[;] and [(5)] the degree of physical restraint placed upon the suspect." [8]

In US v Mitchell the Court had to answer the question of whether eliciting a pin code during custodial interrogation constituted a 5th amendment violation in the circumstances where a service member has elected his rights to an attorney and his rights to remain silent. In that case a service member was ordered open his phone pursuant to a Command Authorized Search and Seizure. The CASS was issued after he elected his rights.[9] After getting the phone, agents asked the service member for his PIN.[10] He initially refused. The agents continued their advance by "getting Appellee to enter his passcode rather than verbally provide it [and] that request was part of the same basic effort to convince Appellee to provide the information necessary for the Government to access and search the contents of his phone."[11]

The court found that to be improper because the "answer ... which would furnish a link in the chain of evidence needed to prosecute" was provided, thereby giving direct access to evidence in question.[12]

The Court invoked the Supreme court cases of *United States v. Hubbell*, 530 U.S. 27, 38, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000) where a fifth amendment violation was the "testimony inherent in the act of producing those documents."[13]

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[5] *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017;) see also Mil. R. Evid. 305(e)(3).
[6] *Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017)
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See also Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951) (Where the Court found that "the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

5. **Argument**.

In this case LCDR Sims should have been afforded the protections of the Fifth Amendment three times through the course of the day and each time she unequivocally exerted her Fifth Amendment rights to remain silent and to be represented by her detailed attorney. Each time the government ignored her.

a. **The first invocation of her Fifth Amendment rights.**

On 31 January LCDR Sims was called in support of the government's motion for warrant of attachment against her.[14] This clearly falls in the auspices of the Fifth Amendment protections. In viewing the record of trial, it is clear that she invoked her rights during the question that ultimately elicited the answer that was used against her in the CASS.[15] If allowed to submit the CASS as evidence at trial, the current trial Counsel will effectively be admitting her own clearly compelled statements against her. While the Judge in [redacted] seemingly believed he was eliciting a non-incriminating statement by making her answer the questions, he was clearly incorrect and no facts as to why he came to this decision exist on the record sufficient to fulfill the edicts of M.R.E 301 (d). Defense in this case can not go back and relitigate that issue nor would it change anything since the subpoena was ultimately quashed. It seems unlikely the military Judge in that case expected the trial counsel to include testimony he compelled over her objection. However, to ensure that the 5th Amendment protections are scrupulously honored, Defense asks that the 5th amendment issue be litigated as it pertains to this case. Specifically, Defense request that if this issue is found to be a violation of her fifth amendment right to remain silent that the involuntary statements be suppressed from the CASS and from any further admission at this court martial.

The statement that was compelled by the judge was that she received a text and that text was in her phone.[16] That compelled statement was very clearly testimonial. That statement subjected her to the punitive effects of a warrant for attachment which are listed on the face of a standard subpoena form and include being taken into custody for purposes of trial and then potential facing the consequences of 30 days in confinement and a $1000 fine under 10 U.S.C. 848. [17]

b. **The second invocation of her Fifth Amendment rights.**

The second issue with regard to LCDR Sims 5th amendment rights revolve around her first period of custodial interrogation. This period lasted from approximately 1540 until her apprehension at approximately 1630.[18] This was in fact the second time she had exercised her rights that day. The salient facts to this motion are that LCDR Sims was subject to increasing police presence, starting with three and ultimately increasing to 5, plus three additional members

[14] Defense Exhibit (F) at 7
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Expected Testimony

APPELLATE EXHIBIT (V)
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of her command.[19] The encounter started in her office but continued after she was unquestionably apprehended and transported in handcuffs to CFAY Security Headquarters.[20] She was never free to leave. Not in actuality or in any reasonable perception, even after the phones were unquestionably relinquished. She exercised her rights loudly and unequivocally before during and after she was apprehended. While the CASS did indeed reference face or fingerprint, the operative part, and the part that CFAY Security seemed intent on was keeping the phones unlocked permanently. The order on the CASS was never relayed in its entirety during this period but the investigators did appear to want her to unlock the phones of her own volition. This required, in practicality, a PIN code to be entered multiple times. Additionally, one phone had no biometrics programed making an order to unlock using face or fingerprint impossible. No move was ever made when the investigators held the phones to unlock them on their own.[21]

c. The third period of custodial interrogation

After LCDR Sims was apprehended, she was transported to the interrogation room at CFAY Security headquarters.[22] She was not informed of her right to an attorney or to remain silent. Her detailed Defense counsel was not contacted and only by a chance encounter with the CNSWP SJA did he discover where she was. She was not informed of her rights nor was she freely allowed to exercise them until after she had unlocked her phones.[23]

Ultimately, LCDR Sims was required during this period of custodial interrogation by CFAY to enter her PIN code to unlock the phones, regardless of what the CASS actually said on its face. She was required to do this in the exact same fashion under very similar circumstances as the facts in U.S. v Mitchell. There are however some differences in the details between that case and this one. The verbal order in Mitchell did not appear to involve facial features or fingerprints but instead simply to unlock the phone.[24] In Mitchell the appellee was actually notified of his rights, in this case LCDR Sims was not.[25] However, In Mitchell the appellee was required to provide the pin pursuant to a CASS in the same manner as LCDR Sims; first through a request and then by affecting the unlocking herself.

While there are other distinguishing facts between the two cases those details are not relevant to the ultimate ruling of the court; which was that engaging a service member to open their phone using a pin code is not allowed while in custodial interrogation after she exercises her rights.[26]

It is important to note another feature in the present case that is only partially addressed in Mitchell. That is that the government did not know how each phone was unlocked. This led to the very natural next question by CFAY Security of how the phones were secured. This is a question that itself also falls into the same category of questions as the elicitation of the PIN in

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[19] *Id.*
[20] Defense Exhibit (I)
[21] Expected Testimony
[22] *Id.*
[23] *Id.*
[24] *United States v. Mitchell*, 76 M.J. 413, 416 (C.A.A.F. 2017)
[25] *Id.*
[26] *See United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), But see *United States v. Robinson*, 77 M.J. 303 (C.A.A.F. 2018) (where a consent base search does not invoke 5th amendment protections against providing a PIN code sufficient to open a phone.)

Mitchell.

In fact, the work phone did not have any other option but a PIN code, as that phone had no biometrics programed in. Also, while the personal phone had the Facial recognition feature enabled, that phone could not be permanently unlock without entry of a PIN code multiple times. This PIN code was compelled by CFAY security despite no PIN code being required in the Search authority and the compulsion of which clearly violates the law.

An additional difference between the cases is that in *Mitchell* he was completely unrepresented and simply pressured in to continuing to talk.[27] In the current case, LCDR Sims had detailed Counsel but was stopped from having meaningful interactions with him at the direction of RLSO Westpac representatives, who expressly stated that that she was exercising rights that she does not have.[28] Additionally, during the limited interactions that CFAY security allowed, they would not allow him to exert his client's right to remain silent during the entirety of the detainment and apprehension until nearly 1830, when she was finally presented with her Article 31 rights advisement.[29]

Mitchell does an important service with the reminder that "Edwards forbids interrogation following the invocation of the Miranda right to counsel, [and] not just interrogation that succeeds."[30] Therefore, "those who seek Edwards protection do not need to establish that the interrogation produced or sought a testimonial statement in order to establish a violation. Rather, only interrogation itself must be established."[31] The court continues that "once an Edward's violation has been established, whether the incriminating response or derivative evidence will be suppressed is a question of remedy, not wrong."[32] LCDR Sims in this case, just as much as the appellee in that case, had her rights violated "at the moment when interrogation occurred."[33] Her remedy is apparent "under the plain language of the Military Rules of Evidence, any evidence derived from a violation of Edwards must be suppressed."[34]

d. <u>The issues inherent in unlocking phones</u>

While this jurisdiction only decided *Mitchell* in 2017, the concept that PIN codes are testimonial and therefore protected under the auspices of the Fifth Amendment is well settled law. As open and shut as this analysis seems to be there is one further point that must be discussed. That is the inevitable government argument that an order to produce facial features or fingerprints is not unlawful under the line of cases that hold people ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints.[35] It is important to note those cases turn on the Fourth Amendment and do not preclude Fifth Amendment analysis on the same subjects.

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[27] See generally *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017)
[28] Defense Exhibit (H)
[29] Defense Exhibit (J)
[30] *Mitchell*, 76 M.J. 413, at 419
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S. Ct. 2000, 2003, 36 L. Ed. 2d 900 (1973); *United States v. Mara*, 410 U.S. 19, 21, 93 S. Ct. 774, 775, 35 L. Ed. 2d 99 (1973); *United States v. Dionisio*, 410 U.S.

However in consideration of the subject the court must also consider *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 1643 (1985), the Supreme court case that held that fingerprints are only searchable by law enforcement "if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."[36] It is worth observing that Hayes does not stand in opposition to the aforementioned line of cases, but it does invoke the requirement that a person must *be suspected of a crime* in a similar way as is required in Terry v Ohio.[37] In *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989), this jurisdiction considered the same question and distinguished that case from Hayes by calling out the fact that in Hayes there was "little specific information to tie petitioner . . . to the crime [and] forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes."[38] In *Fagan* the court holds that the fingerprinting was done in a

> Non-disruptive, non-humiliating, and nonintrusive manner in which these prints were initially sought separates this command action from those seizures described in Davis and Hayes. Appellant was not wrenched from his home or job and was not subjected to public or even private embarrassment. The prints were sought at reasonable times and in a reasonable manner. Appellant's place of duty temporarily became the NIS office during the brief interval necessary to accomplish the procedure. As a result of this brief reassignment, the flow of his pay and entitlements was not interrupted; his employment rights were not affected; the peace and security of his personal and family life were not disturbed; and the sanctity of his abode was left inviolate.[39]

In the current case in front of this court, LCDR Sims was compelled on what the government claims is no reasonable suspicion and subjected to custodial interrogation which humiliated and degraded her and ultimately culminated in her actual arrest.[40] Treating her as an accused subjected her to a wide range of collateral issues to her career.

It is worth noting that collecting biometric information is a fairly common practice for the military. The basis of the practice seems to normally be well nested in the aforementioned case law and, even in Hayes and Fagan, only because it is done to suspects, duly warned of their rights, or to non-detained service members, in the normal course of their administrative responsibilities for a none investigative reason. There is no case law anywhere that allows for this treatment to be visited on innocent third-party witnesses who are treated as accused only because of their proximity to a case.

This analysis really only needs to occur if this court is inclined to follow the government's logic that the aforementioned cases apply to opening all cell phones or computers at all. There is no case law on point to unlocking phones in this jurisdiction aside from US v

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[36] *Hayes v. Florida*, 470 U.S. 811, 817, 105 S. Ct. 1643, 1647 (1985)
[37] Id.
[38] *United States v. Fagan*, 28 M.J. 64, 67 (C.M.A. 1989)
[39] Id.
[40] Expected Testimony

Mitchell US v Robinson, and the related unpublished lower court decisions. The precedent that military security and investigators often rely on to affect these types of investigative actions on cell phones comes from federal circuit courts. While some do advance the theory that a person can be ordered to open their phones using biometrics without triggering Fifth Amendment protections, just as many do not. Take for example, *In re Search of a Residence in Oakland*, 354 F. Supp. 3d 1010. In that case the court addresses the question at issue. The court determined that "in this context, biometric features serve the same purpose of a passcode, which is to secure the owner's content, pragmatically rendering them functionally equivalent."[41] The court went on to rule that requiring someone "to affix their finger or thumb to a digital device is fundamentally different than requiring a suspect to submit to fingerprinting [because] the act concedes that the phone was in the possession and control of the suspect, and authenticates ownership or access to the phone and all of its digital contents."[42] Thus, the act of unlocking a phone with a finger or thumb scan far exceeds the "physical evidence" created when a suspect submits to fingerprinting to merely compare his fingerprints to existing physical evidence (another fingerprint) found at a crime scene, because there is no comparison or witness corroboration required to confirm a positive match."[43] The court went even further holding that a "biometric feature is analogous to the nonverbal, physiological responses elicited during a polygraph test, which are used to determine guilt or innocence, and are considered testimonial."[44]

This issue is covered by this motion, in this depth, primarily to highlight the fact that this is not a settled issue in the law. It is not even a settled issue in this jurisdiction. There is no case specifically on point to the issue of biometrics, despite the near universal custom throughout this organization of citing what is essentially none conforming precedent to justify a practice that defies logic and has yet to be challenged. Citing this case in particular is intended to highlight the reasons why the order in LCDR Sims case is so patently unreasonable where she was, at least by the statements of the government representatives at the time of the CASS, completely innocent and unsuspected of any offense.

6. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

A. Testimony LCDR Chanel Sims;
B. Testimony [redacted]
C. Testimony LT [redacted]
D. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
E. Defense Exhibit (B) – Text Messages
F. Defense Exhibit (C) – Emails Between LCDR Sims, LT [redacted] and [redacted]
G. Defense Exhibit (D) – Subpoena
H. Defense Exhibit (E) – Email from LT [redacted]
I. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
J. Defense Exhibit (G) – Command Authorized Search and Seizure
K. Defense Exhibit (H) – Report excerpt MA2 [redacted] Statement
L. Defense Exhibit (I) – Report of Arrest

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[41] In re Search of a Residence in Oakland, 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019)
[42] *Id.*
[43] *Id.*
[44] *Id.*

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M. Defense Exhibit (J) – Art 31 rights advisement form
N. Defense Exhibit (K) – Command Investigation appointment
O. Defense Exhibit (L) – Email from Judge Reyes in regard to Subpeona

7. **Relief Requested**. Defense request that all statements made by LCDR Sims during each period of custody by held involuntary and all derived evidence be suppressed. Additionally, Defense requests that the order to unlock the phone using biometrics be found unlawful under *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 1643 (1985), due to a lack of reasonable suspicion by the government at the time the order was issued. Defense further requests all derived statements and evidence collected be suppressed.

8. **Oral Argument.** Defense requests oral argument.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:52:47 -04'00'

[redacted]. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (V)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS BASED ON THE PROTECTIONS OF THE FIFTH AMENDMENT** 4 September 2020

1. Nature of Response.

This response is to the defense motion to suppress statements made by the Accused. The government respectfully requests the court DENY the defense motion to suppress, and further find the Accused's statements ADMISSIBLE.

2. Summary of Facts

a. For a summary of relevant facts, please see the government's summary of facts attached as enclosure (1)

3. Discussion

a. The Fifth Amendment and custodial interrogation.

The Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself."[1] The Fifth Amendment protections against self-incrimination generally apply to the accused's statements during a custodial interrogation.[2] The nature of a custodial interrogation can be daunting for anyone and the right of person to have counsel present is "indispensable to the protection of the Fifth Amendment privilege."[3] Precedent has

[1] USCS Const. Amend. 5
[2] Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).
[3] Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

long held that an accused's invocation of their right to counsel is a prophylactic, and once an accused has expressed the desire to have counsel present, all further interrogation shall cease.[4] When an accused has invoked their Fifth Amendment privilege, the prosecution must establish that the accused knowingly and voluntarily waived [her] Miranda rights.[5]

Whether a person is in custody for the privilege to apply is a matter that must also be addressed. To determine whether a person is in custody, the courts first consider the circumstances surrounding the interrogation, as well as whether a reasonable person would feel as though they would be permitted to terminate the interrogation and leave.[6] Other factors include: (1) whether the person appeared voluntarily; (2) the location and atmosphere of the place where the questioning occurred, and; (3) the length of the questioning.[7]

Prior to a custodial interrogation, a person must be provided with an advisement of their right to have counsel present. Military Rule of Evidence 305 requires persons subject to the code provide an Art. 31(b) rights warning prior to interrogation.[8] Article 31(b) of the Uniform Code of Military Justice further provides that "no person subject to this chapter may compel any person to incriminate himself."[9]

Despite the requirements of Mil. R. Evid. 305 and Art. 31(b), a witness testifying in a judicial proceeding is not required to be warned of their rights prior to, or during questioning. Notwithstanding the protections provided by the Fifth Amendment, the courts have determined

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[4] Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885 (1981)
[5] Id. See, Mil. R. Evid. 305(g)(1)
[6] Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).
[7] United States v. Chatfield, 67 M.J. 432, 438 (C.A.A.F. 2009), *See* Mathiason, 429 U.S. at 495.
[8] Mil. R. Evid. 305(c)
[9] Art. 31(b), Uniform Code of Military Justice

that Article 31(b) do not apply when a witness makes the decision to testify at trial.[10] This is articulated in the discussion of M.R.E. 301:

> A military judge is not required to provide Art. 31(b) warnings. If a witness who seems *uninformed* of the privileges under this rule appears likely to incriminate himself or herself, the military judge may advise the witness of the right to decline to make any answer that might tend to incriminate the witness....Failure to advise a witness does not make the testimony of the witness inadmissible.[11]

As the court stated in *United States v. Howard*, the decision that Art. 31(b) does not apply leaves the witness with the "right of free choice" to refuse to answer an otherwise incriminating question.[12]

The remaining Fifth Amendment privilege is contained within Mil. R. Evid 301, which provides that an "individual may claim their Fifth Amendment privilege...and the privilege applies to evidence of a testimonial or communicative nature."[13] The right of that person to exercise her Fifth Amendment privilege is one that is "personal" and can be exercised or waived at her discretion.[14] Finally, Mil. R. Evid. 301(e) indicates that when a witness answers an incriminating question without asserting the privilege, they may be required to answer questions relevant to disclosure.[15]

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[10] United States v. Howard, 17 C.M.R. 186, 189 (U.S. C.M.A. 1954). In view of the many difficulties which would be encountered in the trial of a case if a warning to a witness were demanded, we have no hesitancy in holding that Congress in enacting Article 31 intended to leave a witness protected only by his privilege against self-incrimination.
[11] Mil. R. Evid. 301, discussion.
[12] Howard. at 16.
[13] Mil. R. Evid. 301(a)
[14] Mil. R. Evid. 301(b)
[15] Mil. R. Evid. 301(e)

b. <u>The Accused waived her Fifth Amendment privilege at the 31 January Art. 39a hearing.</u>

The Art. 39a hearing on 31 January was not a custodial interrogation. Looking at the factors discussed in *Thompson* and *Chatfield*, the Accused attended the Art. 39a willingly and voluntarily. The trial counsel's motion indicated the government intended to call the Accused in support of its motion for a writ of attachment, and the Accused's own response to the motion indicated that she "requested to be heard." The situs of the hearing was an open courtroom, a public forum, where attendees are free to enter and leave at any point. The members present at the hearing that day included the military judge, trial counsel, NCC [redacted] defense counsel, and the Accused's defense counsel. None of the members were law enforcement agents. Finally, the questions posed of the Accused during the 39a were specifically relevant to the motion for a writ of attachment, and her motion to quash. The impartial military judge was present to oversee all questions asked by the trial counsel. Looking at the factors used in case law to determine a custodial interrogation, the Art. 39a hearing was not a custodial interrogation.

Once the Accused took the stand as a witness, she was not required to be provided with her Art. 31(b) warnings, and her answer to the trial counsel's questions waived her privilege. Cases such as *Howard* and *Bell,* and our own rules of evidence do not require a witness in a *judicial proceeding* be provided with their Art. 31(b) warnings.[16] As discussed in *Howard*, once the Accused took the stand to testify at the 39a, she was left with only her Fifth Amendment privilege against self-incrimination. We know the Accused was aware of her privilege because, when the trial counsel asked her whether she received text messages from NCC [redacted] on 7

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[16] United States v. Bell, 44 M.J. 403, 405 (C.A.A.F. 1996), citing United States v. Howard, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954). And See, Mil. R. Evid. 301 discussion.

October 2019, her response (twice) was "I plead the fifth," a clear invocation of her privilege against self-incrimination.[17] The military judge's response to the invocation indicated he was unaware of how the response could be incriminating. The military judge explains to the Accused that "the question doesn't illicit an incriminating statement," after the Accused invokes the second time. [18] The trial counsel resumed questioning and asks if the Accused received text messages on her personal or work cell phone, instead of invoking again, she waives, and chooses to answer the question and responds "personal."[19] The Accused's response to the question was a waiver of her privilege.

Finally, the Accused had the advantage of being represented by counsel at the Art. 39a. Prior to the NCC [redacted] Art. 39a hearing, the Accused sought the advice of defense counsel, and was detailed a defense counsel to represent her at the hearing.[20] The defense counsel assisted the Accused by drafting the motion to quash the government subpoena, and was present during the portion of the 39a where the Accused testified.[21] Based on the facts presented by the defense, the Accused sought legal counsel, obtained legal counsel, and at the Art. 39a hearing, she was represented by legal counsel.

When the Accused chose to testify, and specifically, when she chose to answer incriminating questions at the Art. 39a, she waived her privilege. Unlike an accused during a custodial interrogation, the Accused chose to testify at the 39a, in support of the motion filed by her defense counsel. When she took the stand to testify, she was most likely aware of the

[17] Def. Mot. Encl. F
[18] Id.
[19] Id.
[20] Defense Motion Common Facts 2(u) and 2(w).
[21] Defense Motion Common Facts 2(y) Note: the defense counsel can also be heard on a portion of the audio recording of the 31 January Art. 39a.

questions the trial counsel intended to ask her. Most importantly, the Accused was represented by counsel who was present at the Art. 39a hearing.

c. The execution of the CASS was not a custodial interrogation, and Art. 31(b) warnings were not required.

When the CID investigators entered the Accused's workspace to execute the CASS, it was not a custodial interrogation, and her Art. 31(b) warnings were not required. As previously discussed, the Fifth Amendment protections against self-incrimination generally apply to the accused's statements during a custodial interrogation.[22] A limited detention in order to execute a CASS is not a custodial interrogation. In *Michigan v. Summers*, the U.S. Supreme Court held that:

> [F]or Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while the search is conducted.[23]

In *United States v. Burns*, law enforcement detained the occupant of a home while executing a search warrant. During the detention, Burns made incriminating statements to one of the law enforcement officers. Afterward, Burns attempted to suppress the statements. The Court held that the detention pursuant to the execution of the warrant was not custodial, and therefore a *Miranda* advisory was unnecessary.[24]

The execution of the CASS on 31 January is analogous to *Burns*, and the investigators executing the CASS only detained the Accused for the necessary amount of time to do so. It is

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[22] Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).
[23] Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).
[24] Most detentions that occur during the execution of a search warrant, like most *Terry* stops, are "comparatively nonthreatening." They are often short in duration. Moreover, such detentions are "surely less intrusive than the search itself." United States v. Burns, 37 F.3d 276, 281 (7th Cir. 1994) citing *Summers*, 452 U.S. at 701, 101 S. Ct. at 2593.

accurate that the Accused was detained during the execution of the CASS, but a rights advisory was not required because the investigators executing the warrant did not ask her any questions with the intent to elicit an incriminating response. Furthermore, although she did make statements that were unbecoming, and in violation of Art. 133, the Accused did not make any incriminating statements to law enforcement in response to any questions they may have asked her.

In their motion, the defense argues that the Accused's detention during the execution of the CASS was a violation of her Fifth Amendment privilege, and that she was in custody, and therefore any statements made by the Accused should be suppressed. The facts do not support the defense contention. The execution of the CASS was slowed down by the Accused's demand to speak with her attorney and the events that followed. According to the investigators, the execution of the CASS took a little more than one hour.[25] Almost immediately upon serving the Accused with the CASS, she told the investigators that she wanted to speak with her defense attorney before giving them her phones. The investigators took the time to speak with the Accused's defense attorney, and read the CASS. The investigators also contacted their legal counsel, and spoke to the staff judge advocate who presented them with the CASS.[26] During the execution of the CASS there were multiple conversations between the Accused's defense counsel, the investigators, and the command staff judge advocate. These conversations took up a considerable amount of the time during the execution. Finally, after the Accused provided the investigators with her phones, she refused to provide the biometric data required to unlock the phones, which necessitated more time to complete the execution of the CASS. Her refusal to

[25] Govt. Mot. Encl. 6
[26] Id.

comply with the CASS during this period is what ultimately lead to her apprehension, and prolonged the amount of time necessary to execute the CASS.

The government assumes the defense is attempting to suppress statements made to law enforcement agents regarding her intent to violate a lawful order by not complying with the CASS, or to comply with lawful orders issued by military police officers in the execution of their duties, which form the basis for charged misconduct in this case. These statements were made prior to any apprehension and were not in response to any questions seeking incriminating answers. Accordingly the Fifth Amendment does not protect these statements.

d. Unlocking the phone was not a violation of LCDR Sims' Fifth Amendment rights.

In *United States v. Mitchell* the CAAF held that Army CID investigators violated Sergeant Mitchell's Fifth Amendment rights when he was asked to unlock his cell phone in the absence of counsel.[27] The salient facts are that Sergeant Mitchell was held as a suspect in a custodial interrogation, and was informed of his Art. 31(b) warnings. Subsequently, he invoked his right to counsel before making any further statements. After he was released back to his command, CID investigators obtained a verbal CASS for Sergeant Mitchell's cell phones, which the investigators had probable cause to believe contained evidence of a crime. The investigators met back up with Sergeant Mitchell in his company commander's office only two hours after the Sergeant asked for counsel. Pursuant to the CASS, the investigators asked Sergeant Mitchell for his cell phone, and he obliged. When the investigators realized the phone could only be unlocked with passcode, they asked Sergeant Mitchell to provide the code. He was initially reluctant, but ultimately gave into the investigators' request. At trial, the defense counsel filed motion to

[27] United States v. Mitchell, 76 M.J. 413, 415 (C.A.A.F. 2017).

suppress, and the judge agreed that the investigators' request to unlock the phone was a violation of Sergeant Mitchell's Fifth Amendment rights after he invoked those rights at his initial interrogation that morning.

In the present case the defense relies heavily on *Mitchell* in their motion to suppress, but there is a very clear distinction between *Mitchell* and this case; when the Accused unlocked her cell phones on 31 January her counsel was present in the room. The court's entire justification for suppressing the evidence in *Mitchell* was based on Sergeant Mitchell's request for counsel, and the investigators reinitiating an interrogation without counsel present. On 31 January when the CID investigators entered the Accused office space to execute the CASS, her first response was to contact her defense counsel. The defense counsel talked to the investigators, and to the command's staff judge advocate, as well as consulted with his client.[28] After the Accused refused to comply with the biometrics sought in the CASS, she was apprehended and taken to the military police headquarters building, and placed in an interrogation room.[29] the Accused remained in the interrogation room until her defense counsel arrived. She and her defense counsel were permitted to use MACS [redacted] office to speak in private away from the recording devices in the interrogation room.[30] Afterward, and most importantly, LCDR Sims was asked to unlock her phones and she complied upon the advise of her defense counsel.[31]

There is no doubt that after the Accused was apprehended and taken to the military police headquarters building, she was in custody. Yet, she was not forced, coerced or tricked into unlocking her phones. the Accused made an informed, voluntary decision to use her biometrics and ostensibly her passcode to unlock the phones and provide them to the CID investigators. The

[28] Govt. Mot. Encls. 6 and 8
[29] Govt. Mot. Encl. 6
[30] Govt. Mot. Encl. 5
[31] Id. and Govt. Mot. Encl. 3.

defense is attempting to retroactively invoke a right which was waived when the Accused unlocked her phones.

5. Burden of Proof and Evidence

a. Pursuant to Mil.R. Evid. 304(f)(6) the prosecution has the burden of establishing the admissibility of the evidence.

b. The government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (1): Government Statement of Facts

Enclosure (3): The Accused's 12 February Statement to the Investigating Officer

Enclosure (6): Interview notes with Investigator [redacted]

Enclosure (8): Interview notes with MACS [redacted]

Testimony of Ms. [redacted]

Testimony of LT [redacted]

Testimony of MA1 [redacted]

Testimony of MA1 [redacted]

6. Oral argument. The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION IN LIMINE TO DISMISS CHARGES II FOR UNREASONABLE MULTIPLICATION OF CHARGES** **31 AUG 20**

1. **Nature of Motion.**

This is a motion is to dismiss the sole Specification of Charge II or Charge III, and Charge IV Specification 1 and 2, or any combination thereof under RCM 907(b)(2)(E) and RCM 307(c)(3) for failure to state an offense and under RCM 907(b)(3)(B) because the specifications constitute an unreasonable multiplication of charges.

2. **Summary of Facts.**

LCDR Sims is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV. Charge Sheet dated 11 August 2020. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted], USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.

3. **Burden of Proof.**

The burden of proof is a preponderance of the evidence, and as the moving party the defense has the burden of persuasion pursuant to R.C.M. 905(c)(1)-(2).

4. **Discussion.**

Charge II, III and IV all constitutes an unreasonable multiplication of charges.

The distinction between multiplicity, unreasonable multiplication of charges for findings, and unreasonable multiplication of charges for sentencing was discussed by the Court of Appeals for the Armed Forces in.[1] The court clarified that "there is only one form of multiplicity, that

[1] *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012)

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which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis."[2] "As a matter of logic and law, if an offense is multiplicious for sentencing it must necessarily be multiplicious for findings as well."[3] *Blockburger* provides that when "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[4]

Here, the government has charged LCDR Sims with six different specifications under three UCMJ Articles, alleging three acts within a single course of conduct. Charge I, specification 1 (Failure to obey other lawful order) alleges that LCDR Sims failed to obey a Command Authorization for Search and Seizure of her personal and work cellular phones.[5] Charge I, specification 2 (Failure to obey other lawful order), and Charge IV, specification 2 (Conduct unbecoming an officer and a gentleman), allege that LCDR Sims failed to obey a lawful order issued by Master at Arms Senior Chief [redacted] to wit: "to turn around and not walk away."[6] Charge II, sole specification (Prevention of authorized seizure of property), Charge III, sole specification (Obstructing justice), and Charge IV, specification 1 (Conduct unbecoming an officer and a gentleman), allege that LCDR Sims removed or deleted from LCDR Sims' cellular phone text messages between Chief [redacted] and LCDR Sims.[7] Thus, Charge I, specification 2 and Charge IV, specification two target the same act. Likewise, Charge II, sole specification, Charge III, sole specification, and Charge IV, specification 2, all target the same act. These charges do not appear to be charged in the alternative as they each cover differing types of criminality and not simply alternatives of proof.

Regarding the alleged failure to obey an order from Master at Arms Senior Chief [redacted] the elements of Article 92 (Failure to obey other lawful order) require the government to prove (1) that a member of the armed forces issued a certain lawful order; (2) that the accused had knowledge of the order; (3) that the accused had a duty to obey the order; and (4) that the accused failed to obey the order.[8] The elements of Article 133 (Conduct unbecoming an officer and gentleman) require the government to prove (1) that the accused did or omitted to do a certain act; and (2) that, under the circumstances, the act or omission constituted conduct unbecoming an officer a gentleman.[9] However, "if the act charged as conduct unbecoming an officer and gentleman constitute a separate offense, the particular requirements of proof of such offense must be met to establish the charge."[10] Thus, to prove Charge IV, specification 2, the Government will be required to prove the exact elements of Charge II, specification 2. Furthermore, as charged, Charge II, specification 2, and Charge IV, specification 2, are identical, except for the additional words of Charge IV, specification 2, which state: "conduct which was

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[2] *Campbell*, 71 M.J. at 23 (referring to *Blockburger v. United States*, 284 U.S. 299 (1932), and *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)).
[3] *Campbell*, 71 M.J. at 23.
[4] *Blockburger*, 284 U.S. at 304.
[5] Charge Sheet dated 11 August 2020
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] *United States v. Gomes*, 2 U.S.C.M.A. 232, 237 (1953).

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unbecoming of an officer and a gentleman."[11] Because Charge IV, specification 2, contains every element of charge I, specification 2, these charges are multiplicious.

Regarding the alleged removal or deletion of text messages between LCDR Sims and Chief [redacted] the elements of Article 131e (Prevention of authorized seizure of property), sole specification, require the government to prove (1) that one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property; (2) that the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof; and (3) that the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property. The elements of Article 131b (Obstructing justice), require the government to prove (1) that the accused wrongfully did a certain act; (2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice. Finally, the elements of Article 133 (Conduct unbecoming an officer and a gentleman), specification 1, require the government to prove (1) that the accused did or omitted to do a certain act; and (2) that, under the circumstances, the act or omission constituted conduct unbecoming an officer a gentleman. As explained above, when the conduct alleged in an Article 133 charge "constitutes a separate offense, the particular requirements of proof of such offense must be met to establish the charge." *Gomes*, 2 U.S.C.M.A. at 237. In this case, Charge IV, specification 1, and Charge II, sole specification, are identical except for the additional words in Charge IV, specification 1, "conduct which was unbecoming an officer and a gentleman." Charge Sheet dated 11 August 2020. Because Charge IV, specification 1, contains every element of Charge II, sole specification, these charges are multiplicious.

Additionally, Charge III, sole specification, alleges the same wrongful act—removing or deleting text messages between LCDR Sims and Chief [redacted]—as Charge II, sole specification, and Charge IV, specification 1. The elements of Article 131b (Obstructing justice) require the government to prove (1) that the accused wrongfully did a certain act; (2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice. Thus, when comparing Charge III, sole specification, with Charge II, sole specification, and Charge IV, specification 1, a strict application of the *Blockburger* test may not result in multiplicity because the overlapping charges contain separate elements.

However, even where charges are not multiplicious in the sense of due process, "the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."[12] Rule for Courts–Marital (R.C.M.) 307(c)(4) is the regulatory expression of that prohibition, directing "[w]hat is substantially one transaction should not be made the basis for an **unreasonable multiplication of charges** against one person."[13]

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[11] Charge Sheet dated 11 August 2020.
[12] *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).
[13] R.C.M. 307(c)(4) (emphasis added)

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In *Campbell* and *Quiroz*, the court set forth four factors that a trial court should consider in determining whether charges and specifications have been unreasonably multiplied:

> (1) whether each charge and specification is aimed at distinctly separate acts, (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality, (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, **or** (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.[14]

The *Campbell/Quiroz* factors are not "all-inclusive," nor is any one or more factors a prerequisite.[15] Further, one or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching."[16] Ultimately, the question is whether the charges "unduly exaggerate the accused's criminality."[17]

The facts here raise the unreasonable multiplication problem of potential prosecutorial abuse that may occur when a single act is charged as multiple individual offenses. As explained above, five of the six specifications in this case address two distinct acts—disobeying an order and deleting text messages.[18] The elements of the charges as drafted support a finding of unreasonable multiplication of charges, and the *Quiroz/Campbell* test provides the analytical framework for determining as much. Accordingly, the analysis below applies the applicable factors of the *Quiroz/Campbell* test.

i. The three specifications addressing the removal or deletion of text messages charged here are not aimed at distinctly separate acts because they each allege the exact same act.

In *Campbell,* the appellant was charged with three specifications involving making a false official statement that aided in his unauthorized withdrawal of drugs from a Pyxis machine at the base hospital, larceny of the drugs taken from the machine, and possession of these drugs.[19] The trial judge determined the specifications addressed one event, and found that all three offenses "essentially arose out of this same transaction and were part of the same impulse."[20]

Here, the three specifications in question—Charge II, sole specification, Charge III, sole specification, and Charge IV, specification 1—address a single act. Each of these specifications allege that LCDR Sims removed or deleted text messages. These three specifications identify the same defendant, at the same place, on the same day, engaging in the same conduct. It is without question that each of these specifications "arose out of this same transaction and were

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[14] *Campbell*, 71 M.J. at 24; *Quiroz*, 55 M.J. at 338 (emphasis added).
[15] *Id*
[16] *Campbell*, 71 M.J. at 23 (quoting *Quiroz*, 55 M.J. at 338-39) (emphasis added).
[17] *Campbell*, 71 M.J. at 24.
[18] *Compare, United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984) ("When Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault.").
[19] 71 M.J. at 21
[20] *Id.* at 22

part of the same impulse."[21] Just as in *Campbell*, LCDR Sims' acts were not separated by time or location and were part of the same transaction. Thus, it would be improper to consider the charged specifications as distinct acts.

ii. The number of specifications misrepresent and exaggerate LCDR Sims' alleged criminality because they inaccurately reflect LCDR Sims' conduct.

In *U.S. v. Hanks*, the Army Court of Criminal Appeals held that a charge of maiming was not multiplicitous with a charge of aggravated assault in which grievous bodily harm was intentionally inflicted, even though both charges arose out of same conduct by the accused in intentionally placing the hands of his 22-month-old son in a container of boiling water.[22] The court noted that while the two distinct and separate charges "are based on the same act, together they accurately reflect appellant's criminality in a way that one charge standing alone would not."[23] .

Unlike *Hanks*, the three specifications here are not dependent on each other to reflect LCDR Sims' alleged criminality. A single specification of deleting the text messages here implicates the exact same criminal law interests, unlike the multiple interests implicated by the maiming and assault charges in *Hanks*. The court in *Hanks* correctly sought to address the distinct interests of permanent injury under maiming and the act of intentionally placing the hand of another in boiling water under assault.[24] Here, the alleged act of a single instance of deleting text messages does not raise distinct interests. Thus, the number of specifications charged here misrepresents and exaggerates LCDR Sims' conduct.

iii. The number of charges and specifications unreasonably increase the accused's punitive exposure

The maximum punishment that may be imposed for a violation of Article 131e (Prevention of authorized seizure of property) is a Dismissal, total forfeitures, and confinement for 5 years.[25] The maximum punishment that may be imposed for a violation of Article 131b (Obstructing justice) is a Dismissal, total forfeitures, and confinement for 5 years.[26] The maximum punishment that may be imposed for a violation of Article 133 (Conduct unbecoming an officer and gentleman) is Dismissal, total forfeitures, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.[27] In this case, the analogous offense is Article 131e (Prevention of authorized seizure of property), which, as previously stated, carries a maximum confinement time of 5 years.[28] Thus, multiplicious charges addressing the single act

[21] *Id.* at 22.
[22] *U.S. v. Hanks*, 74 M.J. 556, 559 (A. Ct. Crim. App. 2014).
[23] *Id.* at 560
[24] Id.
[25] Article 131e, UCMJ
[26] Article 131b, UCMJ
[27] Article 133, UCMJ
[28] Article 131e, UCMJ

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of deleting text messages triples LCDR Sims' punitive exposure from 5 to 15 years imprisonment, unreasonably increasing her punitive exposure.

iv. There is evidence of prosecutorial overreaching, and LCDR Sims punitive exposure is increased by the unreasonable multiplication of charges.

It appears that the charging scheme on its face seeks to use a single transaction to form the basis for a multiple charges in an unreasonable way. The single alleged course of action seemingly caused a spinoff of charges asserting different criminality where the aims of justice only require one. The traditional standard of reasonableness, analyzed through the *Campbell/Quiroz* four-factor test guides determinations of unreasonable multiplication of charges.[29] Here, the specifications in question arise from a single alleged transaction, limited in time and location. Further, the separate specifications serve to exaggerate LCDR Sim's alleged conduct and inaccurately reflect her alleged criminality.

According to *Campbell*, the existence of a single factor could be sufficiently compelling for the finding of unreasonable multiplication of charges.[30] Here, all four factors favor a finding of unreasonable multiplication. Accordingly, there is ample basis for the court to dismiss the sole specification of Charge II as an unreasonably multiplied specification of sexual assault.

5. **Relief Requested.**

For reasons explained above, the defense moves this court to dismiss the second specification of Charge I, the sole specification of Charge II, and the sole specification of Charge III under R.C.M. 907(b)(3)(B) because the specifications constitute an unreasonable multiplication of charges.

6. **Evidence Presented.** No evidence is submitted for the purpose of this motion.

7. **Oral Argument.** Defense requests no oral argument and intends to stand on this motion.

J. M. LARSON
LT, JAGC, USN
Defense Counsel

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[29] *Campbell*, 71 M.J. at 24; *Quiroz*, 55 M.J. at 338.
[30] *Campbell*, 71 M.J. at 23.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was electronically served on trial counsel on 31 August 2020.

[redacted]
LARSON.JEFFREY.MATTHEW.[redacted]
Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted]
Date: 2020.08.31 08:53:49 -04'00'

[redacted]J. M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VI)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO COMPEL DISCOVERY** **2 SEP 20**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(7), Defense requests that the Court compel the government to produce (1) Emails between LT [redacted] and the members of the [redacted] (2) Emails between the [redacted] SJA and Trial Counsel concerning the LCDR Sims case, (3) Messages (via Facebook messages) between Trial Counsel and the [redacted] SJA regarding LCDR Sims case, and (4) Messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS, which were requested by Defense in its discovery requests. Defense request that the court accept this untimely filing. Government provided late notice of the denial, and the timeline of the discovery denial leaves little option but to file after the deadline. There is no other motions hearing scheduled for this case.

2. **Facts**.

a. LCDR Chanel Sims, USN, is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV.[1]

b. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted] USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.[2]

c. Defense submitted an Initial Discovery Request to Trial Counsel, Kevin Estes, Capt., USMC, on 16 July 2020.[3]

d. On 25 August 2020, Capt. Estes sent an email to Defense Counsel explaining listing specific emails and text messages that were not being turned over in discovery: (1) Emails

[1] Charge Sheet dated 11 August 2020.
[2] *Id.*
[3] Initial Discovery Request dated 16 Jul 20.

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between LT [redacted] and the members of the [redacted] claiming privilege under MRE 502(a)(2)-(5); (2) Emails between the [redacted] SJA and Trial Counsel concerning the LCDR Sims case, claiming privilege under MRE 502(a)(4); (3) Text messages (via Facebook messages) between Trial Counsel and the [redacted] SJA regarding LCDR Sims case, claiming privilege under MRE 502(a)(4); (4) Messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS, claiming privilege under MRE 502(a)(4); (5) Text messages between LT [redacted] and the Command Services OIC, claiming privilege under MRE 502(a)(5); and (6) Emails between Trial Counsel and the advisory counsel at TCAP, claiming privilege under MRE 502(a)(5).[4]

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

4. **Law.**

a. A military accused derives his rights to discovery from the Constitution, the Uniform Code of Military Justice (UCMJ), and the Rules for Courts-Martial (R.C.M.). The Constitution imposes a duty on the government to refrain from suppressing evidence favorable to the defense, and to come forward with exculpatory matters.[5] Article 46, UCMJ, guarantees the defense equal opportunity to obtain evidence. Finally, R.C.M. 701 imposes specific obligations on both the government and the defense in matters of discovery. "Accordingly, Article 46 and these implementing rules provide a military accused statutory discovery rights that are greater than those afforded by the Constitution."[6]

b. Under R.C.M. 701(a)(2)(A), the defense is entitled to inspect books, papers, documents, etc., that are material to the preparation of the defense, or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belonged to the accused. This rule applies as much to material affecting the credibility of witnesses as it does to exculpatory evidence.[7] In *United States v. Williams*, the Court of Appeals for the Armed Forces stated, "As a general matter, evidence that could be used to impeach a government witness is subject to discovery."[8]

c. Military Rule of Evidence 502 establishes that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (1) between the client or the client's representative and the lawyer or the lawyer's representative; (2) between the lawyer and the lawyer's representative; (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest; (4) between representatives of the client or between the client and a representative of the client; or (5) between lawyers representing the

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[4] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.
[5] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[6] *United States v. Yates*, 2019 CCA LEXIS 391, 42 (2019)
[7] *See United States v. Bagley*, 473 U.S. 667, 678 (1985); *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993).
[8] 50 M.J. 436, 440 (C.A.A.F.1999).

client."[9] A lawyer may claim privilege on behalf of the client, and in the absence of evidence to the contrary, is presumed to have authority to do so.[10]

d. "CAAF has cautioned against expansively interpreting MIL. R. EVID. 501 to include privileges unenumerated by the President, notwithstanding the modest degree of flexibility in the application of federal common-law or constitutionally rooted privileges permitted by MIL. R. EVID. 501(a)(1) and 501(a)(4)."[11] "This approach to privileges in military jurisprudence reflects the United States Supreme Court's observation that 'whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"[12]

e. The Rules for Court-Martial dictate that "the prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process."[13] "Each party is entitled to the production of evidence which is relevant and necessary."[14]

5. **Argument**.

a. **The requested communications are relevant and necessary to the preparation of LCDR Sims' defense.**

The communications appear to be between the various government attorneys discussing the case as it is unfolding. The attorneys and everyone they are likely communicating with are witnesses to the alleged activity.

b. **The requested communications are not privileged.** Trial Counsel has asserted that the requested communications are not discoverable as they are privileged under MRE 502.[15] Defense consedes that the text messages between LT [redacted] and the Command Services OIC or the emails between Trial Counsel and advisory counsel at TCAP are likely privileged. However, the remaining communications requested are not protected by privilege under the rule.

c. **The emails between LT [redacted] and the members of the Naval Surface Group Western Pacific are not privileged.** Trial Counsel contends that the emails between LT [redacted] and the members of NSGWP "regarding this case or constituting legal advice are privileged

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[9] M.R.E. 502(a)(1)-(5).
[10] M.R.E. 502(c).
[11] *United States v. Wuterich*, 68 M.J. 511, 516 (CAAF 2009) (internal quotation omitted) (citing *United States v. Rodriguez*, 54 M.J. 156, 158 (CAAF 2000) and *United States v. Custis*, 65 M.J. 366, 370-71 (CAAF 2007)).
[12] *Wuterich*, 68 M.J. 511, 516 (CAAF 2009) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)); *See also Cheney* v. *United States*, 542 U.S. 367, 384 (2004) ("In light of the 'fundamental' and 'comprehensive' need for 'every man's evidence' in the criminal justice system . . . privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be 'expansively construed, for they are in derogation of the search for truth.") (quoting *Nixon*, 418 U.S. at 710 (1974)).
[13] R.C.M. 703(a).
[14] *Id.* at 703(e)(1).
[15] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.

under MRE 502(2)-(5)."[16] While communications between an SJA and her principal may be considered privileged, that privilege does not extend to communications with members of the command. Moreover, Trial Counsel does not even claim that all of the communications in question constitute legal advice. Still, Trial Counsel claims that emails simply "regarding this case" are still somehow privileged. MRE 502 does not stretch so far.

d. **The emails between the NSGWP SJA and Trial Counsel concerning the LCDR Sims case, the text messages (via Facebook messenger) between Trial Counsel and the NSGWP SJA, and the text messages (via Facebook messenger) between Trial Counsel and the CFAY SJA are not privileged.** Trial Counsel asserts that the communications requested are privileged under MRE 502(a)(4).[17] MRE 502(a)(4) establishes that "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client … between representatives of the client or between the client and a representative of the client" are privileged. Trial Counsel implies that the SJA and Trial Counsel are both representatives of the client. This is simply not the case. A quick review of MRE 502 indicates that the lawyer and the representative of the client are two distinct roles. The mere fact that both the SJA and Trial Counsel are government attorneys in no way creates a shared privilege. Nor has Trial Counsel explained how the communications in question were made for the purpose of providing legal advice to the client. Thus, the requested communications should be turned over to Defense.

6. **Evidence**.

Enclosure (1): Government denial of discovery, dated: 25 August

7. **Relief Requested**. Pursuant to Rule for Courts-Martial 906(b)(7), Defense requests that the Court compel the government to produce (1) Emails between LT [redacted] and the members of the Naval Surface Group Western Pacific, (2) Emails between the Naval Surface Group Western [redacted] SJA and Trial Counsel concerning the LCDR Sims case, (3) Text messages (via Facebook messages) between Trial Counsel and the Naval Surface Group Western Pacific SJA regarding LCDR Sims case, and (4) Text messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS.

[redacted]LARSON.JEFFR[redacted]EY.MATTHEW. Digitally signed by LARSON.JEFFREY.MATTHEW. Date: 2020.09.02 19:07:31 +09'00'

[redacted]J.M. LARSON
LT, JAGC, USN
Defense Counsel

[16] *Id.*
[17] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.

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

CERTIFICATE OF SERVICE

I hereby certify that on the *2nd* day of *September* 2020, a copy of this motion was served on Trial/Defense Counsel.

[redacted]LARSON.JEFFREY.MATTHEW[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW[redacted] Date: 2020.09.02 19:07:08 +09'00'

[redacted]J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VII)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO MOTION TO COMPEL PRODUCTION OF WITNESSES** 4 September 2020

1. Nature of Response

This response is to a defense motion to compel production of: (1) Captain [redacted] USN; (2) PSC [redacted] USN; (3) Captain [redacted], USN; and (4) NCC [redacted] USN.

2. Summary of Facts Relevant to the Motion

a. Lieutenant Commander Sims is charged with violating articles 92, 131b, 131e, and 133 of the Uniform Code of Military Justice.

b. The charges arise from her refusal to comply with a command authorization for search and seizure of her personal and work cellular phones, as well as her deleting or removing text messages from her phone(s).

c. On 25 August 2020, LCDR Sims defense counsel provided the trial counsel with a witness request.

d. On 28 August 2020, trial counsel responded to the defense witness request. The trial counsel denied [redacted].

3. Discussion

Rule for Courts-Martial (R.C.M.) 703(b) entitles each party to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary. Relevance is evaluated according to Military Rule of Evidence (M.R.E.) 401. 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," R.C.M. 703(b)(1), Discussion.

The defense cannot establish by a preponderance of the evidence why the testimony of the requested witnesses will be relevant and necessary.

a. NCC [redacted] The government intends to call NCC [redacted] as a witness in its case in chief.

b. CAPT [redacted]: Captain [redacted] is the convening authority in this case, but otherwise is not relevant to the alleged charged conduct. In the defense witness production request Captain [redacted] is requested because he was the convening authority of U.S. v. [redacted] and "participated in the issuance of the unlawful subpoena." Captain [redacted] role as the convening authority in another case is not relevant to the U.S. v. Sims case. The defense presented no evidence that Captain [redacted] "participated in the issuance of the unlawful subpoena." The government intends to call LT [redacted] and the defense intends to call Ms [redacted] Both witnesses have first-hand knowledge of the subpoena, and Ms. [redacted] is the affiant. The testimony of Ms. [redacted] and LT [redacted] would make cumulative any potential testimony Captain [redacted] might provide. Further, subpoena speaks for itself as to its nature and purpose, and was issued by the Trial Counsel. The Trial Counsel who

issued the subpoena, LT [redacted] can speak to the issuance of the subpoena and any conversations with the convening authority in granting LT [redacted] authority to issue the subpoena.

c. PSC [redacted] Chief [redacted] was denied because her testimony is not relevant to the charged misconduct. Chief [redacted] admitted that she worked with LCDR Sims and was present when U.S. Navy CID investigators arrived to execute the CASS on 31 January 2020. Chief [redacted] relevant testimony ends at that point, as she was asked to leave by the command legal officer, and was not a witness to any other substantive events that day.

d. CAPT [redacted] Captain [redacted] was denied because his testimony is not relevant to the charged misconduct. Captain [redacted] is the commanding officer of the Defense Services Office Pacific. By his own statement he was not a witness to any of the events that took place on 31 January 2020, aside from a phone call between LCDR Sims' defense counsel and another attorney, therefore his testimony is not relevant and unnecessary. According to the defense witness request Captain [redacted] may be able to provide testimony in regard to the issued subpoena, although without LCDR Sims' permission to breach the attorney-client privilege, Captain [redacted] testimony would not be admissible.

4. Relief Requested

The government respectfully requests that the military judge deny the defense motion to compel production of Captain [redacted], PSC [redacted], and Captain [redacted].

5. Burden of Proof and Evidence

a. The defense bears the burden of persuasion under R.C.M. 905(c)(2)(A). The standard of proof for the defense is a preponderance of evidence as provided by R.C.M. 905(c)(1).

b. The government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (10): Interview notes with CAPT [redacted]

Enclosure (11): Interview notes with PSC [redacted]

6. Oral argument The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES** **2 September 2020**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(7), Defense moves the Court to order the Government to physically produce the following witnesses to testify on the merits and interlocutory issues: Captain [redacted] USN; PSC [redacted] USN; Captain [redacted] USN; and NCC [redacted] USN. Defense request that the court accept this untimely filing. The timeline of the witness denial leaves little option but to file after the deadline. There is no other motions hearing scheduled for this case.

2. **Facts**.

a. LCDR Chanel Sims, USN, is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV.[1]

b. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted] USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.[2]

c. On 25 August 2020, Defense provided Government with an initial witness request.[3]

d. On 28 August 2020, the Government responded to the Defense's request for the production of witnesses and denied production of the following witnesses: (1) Captain [redacted] USN; (2) Chief [redacted] USN; (3) Captain [redacted], USN; and (4) Chief [redacted] USN.[4]

e. Additionally, Defense requests that the facts found in the Defense Motion Common Statement of Facts (submitted August 31 2020) be incorporated in to this motion.

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[1] Charge Sheet dated 11 August 2020.
[2] *Id.*
[3] Def Enclosure (1): Defense Counsel's Initial Witness Request dated 25 August 2020
[4] Def Enclosure (2): Government Response to Def Witness Request ltr of 28 August 2020

APPELLATE EXHIBIT (VIII)
PAGE 1 OF 4

3. **Burden.** As the moving party the Defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

4. **Law.**

a. "The military judge must decide any preliminary questions about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible."[5] "In so deciding, the military judge is not bound by evidence rules, except those on privilege."[6]

b. The Rules for Court-Martial dictate that "the prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process."[7]

c. 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.[8]

d. A party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.[9]

e. A witness is considered to be unavailable, if the witness: (1) is exempted from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies; (2) refuses to testify about the subject matter despite the military judge's order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under subdivision (b)(1) or (b)(5); (B) the declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (b)(3), or (b)(4); or (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.[10]

f. 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. A matter is not in

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[5] M.R.E. 104(a).
[6] *Id.*
[7] R.C.M. 703(a).
[8] *Id.* at 703(b).
[9] *Id.* at 703(b)(3).
[10] M.R.E. 804(a).

APPELLATE EXHIBIT (VIII)
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issue when it is stipulated as a fact.[11]

g. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f). Id. § 703(b)(2).

b. The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.[12]

a. Once the court determines the requested witnesses are relevant and necessary, it must ask if they are material. Witnesses are material when there is a "reasonable likelihood" that their testimony can affect the judgment of the factfinder.[13] Once "materiality has been shown, the Government must either produce the witness or abate the proceedings."[14]

b. If the court determines witnesses are cumulative, "only the defense may properly decide which of these witnesses will be utilized. To permit otherwise would be to tolerate someone other than the defense counsel making this legitimate and essential defense tactical decision."[15]

c. Although "military necessity" or various personal circumstances relating to a requested witness may be proper criteria to determine when his testimony can be presented, the sole factor for consideration in determining whether he will testify at all is the materiality of his testimony.[16] Once materiality has been shown the Government must either produce the witness or abate the proceedings.[17]

5. **Argument**.

a. **Captain [redacted] USN.** Captain [redacted] is a named victim in this case. The Command Authorized Search and Seizure was signed by him and the probable cause determination was made by him. In addition he was present at the office on 31 January 2020. His testimony on the merits and on interlocutory issues is relevant, material to the issue and not cumulative.

b. **Chief [redacted] USN.** Chief [redacted] is a direct witness of the LCDR Sims and CFAY Security's actions during the execution of the CASS. She can provide testimony on key issues that she observed in real time that have direct relation to the charged conduct. Additionally, she can provide impeachment testimony if necessary.

c. **Chief [redacted] USN.** Chief [redacted] is the subject and participant of the text messages at issue in this case. His testimony is relevant with regard to what is likely to be

[11] *Id.* Discussion.
[12] *Id.* at 403 (emphasis added).
[13] *See United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979).
[14] *United States v. Carpenter*, 1 M.J. 384, 385 (C.M.A. 1976).
[15] *United States v. Williams*, 3 M.J. 239, 242n. 9 (C.M.A. 1977) (emphasis in original).
[16] *United States v. Willis*, 3 M.J. 94, 96 (1977) (citing *United States v. Carpenter*, 1 M.J. 384 (1976); *United States v. Iturralde-Aponte*, 1 M.J. 196 (1975).
[17] *Id.* (citing *United States v. Daniels*, C.M.R. 655 (1974)).

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d. **Captain [redacted] USN.** Captain [redacted] was LCDR Sims's lawyer during the lead up to the 31 January. He was present on the line during the limited interactions with CFAY Security. He can provide impeachment testimony for CFAY Security.

6. Evidence

a. Enclosure (1): Defense production request, dated
b. Enclosure (2): Government response to Request, dated

a. **Relief Requested**.

Pursuant to Rule for Courts-Martial 906(b)(7), the Defense respectfully requests this Court compel the Government to produce the witnesses requested by the Defense.

The Defense requests oral argument on this motion or the opportunity to respond to the Government's response motion.

[redacted] LARSON.JEFFREY.MATTHEW. [redacted] Digitally signed by LARSON.JEFFREY.MATTHEW [redacted] Date: 2020.09.02 18:55:04 +09'00'

J.M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2020, a copy of this motion was served on Trial Counsel.

LARSON.JEFFREY.MATTHEW. [redacted] Digitally signed by LARSON.JEFFREY.MATTHEW [redacted] Date: 2020.09.02 19:03:57 +09'00'

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VIII)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS BASED ON THE PROTECTIONS OF THE FIFTH AMENDMENT** 4 September 2020

1. Nature of Response

The government herein responds to the defense motion to compel discovery, and requests that the Court **DENY** the motion.

2. Summary of Facts

a. The Accused, Lieutenant Commander Sims, is charged with violating articles 92, 131b, 131e, and 133 of the Uniform Code of Military Justice.

b. The charges arise from her refusal to comply with a command authorization for search and seizure of her personal and work cellular phones, as well as her deleting or removing text messages from her phone(s).

c. On 16 July 2020, the defense counsel submitted an initial discovery request to the trial counsel.

d. On 4 August 2020, the trial counsel provided a response to the initial discovery request.

e. On 25 August 2020, trial counsel sent an email clarifying and identifying requested items believed to be privileged under Mil. R. Evid. 502.

APPELLATE EXHIBIT (VII)a
PAGE 1 OF 5

3. Discussion of the Law.

Rule for Courts-Martial (R.C.M.) 703(f)(1) entitles each party to the production of evidence which is relevant and necessary. The specific facts of the case must show that the evidence is relevant and necessary.[1] Pursuant to Military Rule of Evidence (M.R.E.) 401, any evidence having 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 is relevant. Relevant evidence is necessary when it would contribute to a party's presentation of the case in some positive way on a matter in issue.[2] The Rules for Courts-Martial and the case law do not endorse or allow "blanket fishing expeditions,"[3]

The defense has failed to show why the requested items are either relevant or necessary. A general description of the material sought or a conclusory argument as to its materiality is insufficient. The defense's theories are "too speculative, and too insubstantial, to meet even a threshold requirement of relevance and necessity."[4] As a result, its motion to compel the government to produce the requested evidence should be denied.

4. Analysis.

In their motion the defense requests a number of communications between the staff judge advocate to the command; the convening authority and the trial counsel for the NCC [redacted] court martial; Facebook messages between trial counsel and the convening authority's staff judge advocate; and, Facebook messages between the trial counsel and the CFAY staff judge advocate.

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[1] See United States v. Franchia, 13 U.S.C.M.A. 315, 320 (C.M.A. 1962).
[2] See R.C.M. 703(f)(1), Discussion; United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987).
[3] United States v. Abrams, 50 M.J. 361, 362-63 (C.A.A.F. 1999); see also Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951); United States v. Briggs, 48 M.J. 143, 144 (C.A.A.F. 1998); Franchia, supra at 320-21.
[4] United States v. Briggs, 46 M.J. 699, 709 (A.F.C.C.A. 1996), aff'd, 48 M.J. 143 (C.A.A.F. 1998).

APPELLATE EXHIBIT (VIII)(9)
PAGE 2 OF 5

a. <u>Communications between the staff judge advocate and members of the command are privileged.</u>

Mil. R. Evid. 502(a)(1) provides that communication between a client and his lawyer is privileged when that communication is between the client or the client's representative and the lawyer or the lawyer's representative. Trial counsel believes this rule likely encompasses the communications sought by the defense. LT [redacted] was the staff judge advocate advising the command during the events in this case. The communications between LT [redacted] and the Commanding Officer are within the MRE 502 privilege.

The same rule defines "client" as a person, public officer, corporation, association, organization, association, or other entity, who receives professional legal services from a lawyer or who consults with the lawyer with a view to obtaining professional legal services.[5] The definition of client appears to also encompass not just the commanding officer, but members of the same command who seek or act on the legal advice of their staff judge advocate. This would include the commanding officer, executive officer or chief staff officer, legal officer, command master chief, etc. For this reason, the privilege protects the conversations the defense counsel seeks between the staff judge advocate and members of the command.

b. <u>Communications between trial counsel, the staff judge advocate, and members of the command are privileged.</u>

Mil. R. Evid. 502(a)(3) provides that communications between the client or the client's lawyer to a lawyer representing another in a matter of common interest are privileged. As discussed above, the definition of "client" extends to members of the same command who communicate with the staff judge advocate for the purpose of obtaining professional legal

[5] Mil. R. Evid. 502(b)(1)

APPELLATE EXHIBIT VIII(a)
PAGE 3 of 5

services. In this case, the defense requested communications between members of the command, the staff judge advocate, and the trial counsel. The trial counsel likely falls under the privilege defined under M.R.E. 502(a)(3), because he is a lawyer representing another, the United States government, in a matter of common interest. The trial counsel does represent the United States, but the common interest is that of prosecuting the matter he is discussing with the command and the staff judge advocate. While the trial counsel may have different opinions about the case, the rule does not require that privileged matter be of the "exact same" interest.

5. Burden of Proof

Pursuant to Rule for Court Martial 905(c), the burden is on the defense as the movant by a preponderance of the evidence.

6. Relief Requested The government requests that the court **DENY** the motion following a Rule for Courts-Martial 701(g)(2) in camera review of the communications.

7. Argument The government does not request oral argument and relies on the argument set forth in this motion.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT (VIII)a
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CERTIFICATE OF SERVICE

I, the undersigned, hereby attest that a copy of the foregoing was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT VIII
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UNITED STATES NAVY
SPECIAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT

UNITED STATES **v.** **CHANEL SIMS** **LCDR /O-4** **USN**	**DEFENSE MOTION FOR A FINDING OF NOT GUILTY UNDER RULE FOR COURTS-MARTIAL 917** **25 October 2020**

1. Nature of Motion

Pursuant to the Rule for Courts-Martial 917, the Defense respectfully requests that the military judge enter a finding of Not Guilty regarding Charge I and the sole specification, as well as Charge II and the sole specification, of which LCDR Sims was convicted.

2. Summary of Facts

a. On 8 October 2020, LCDR Sims was found Guilty of Charge I and the sole specification, a violation of Article 92 of the UCMJ, failure to follow an order, as well as Charge II and the sole specification, violating Article 131e, prevention of an authorized search.[1]

b. Charge I and the sole specification alleged that having knowledge of a Command Authorized Search and Seizure, she failed to obey it by "wrongfully refusing to provide her fingerprints and facial features to unlock her personal and work cellular phones."[2]

c. Charge II and the sole specification alleged that "with intent to prevent its seizure, remove or delete from Lieutenant Commander Sims' cellular phone text messages between Chief [redacted] U. S. Navy, and Lieutenant Commander Sims, property which, as Lieutenant Commander Chanel Sims then knew, persons authorized to make searches and seizures were endeavoring to seize." [3]

d. Ms. [redacted] testified to being present at a meeting on 14 January 2020 between LCDR Sims and the trial counsel in U.S. v [redacted]. The purpose of the meeting was to discuss potential testimony concerning events which took place on 07 October 2019.[4]

e. During that meeting LCDR Sims disclosed the existence of text messages between Chief [redacted] and LCDR Sims. Ms. [redacted] never saw the text messages in question.[5]

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[1] The record and recording of the Special Court-Martial of LCDR Sim.
[2] Charge Sheet
[3] Charge Sheet
[4] The record and recording of the Special Court-Martial of LCDR Sim.
[5] *Id.*

APPELLATE EXHIBIT LXVIII
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f. Ms. [redacted] testified that LCDR Sims had a new phone on 14 January 2020 and the phone that originally had the text messages in question in its local storage was not present at the meeting she testified to being present at.[6]

g. Ms. [redacted], the government expert on digital forensics, testified that encrypted data cannot be extracted from a digital device using the tool NCIS used to extract the phone image in this case. Furthermore, encrypted data was not extracted from LCDR Sims phone, evidenced by the fact that no data that was present from 7 October 2019 was extracted from her phone. Ms. [redacted] also testified that she searched for screen shots of the text messages.[7]

h. Ms. [redacted] also testified that ICloud data could be shared across devices.[8]

i. Ms. [redacted] was not present at the 14 January meeting or the original date that the extraction from LCDR Sims phone was created. She did not participate in the search or extraction which took place in February 2020.[9]

j. Mr. [redacted] testified to existence of screenshot on LCDR Sims IPad, depicting the text messages in question.[10]

k. SA [redacted] testified that she searched what she described as LCDR Sims' personal phone and did not find any text messages from Chief [redacted] from 07 October 2019.[11]

l. SA [redacted] did not testify that she viewed the ICloud settings of the phone or that she determined whether the phone had the ICloud enabled and password inputted.[12]

m. SA [redacted] never viewed the original phone or the phone that was present at the 14 January meeting between LCDR Sims and the Trial Counsel.[13]

n. SA [redacted] did not personally know the content of the text messages she was searching for or what application held them.[14]

o. The government did not admit any evidence as to the settings of the IPhone that was searched.[15]

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

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p. The government did not admit any evidence that the phone seized was physically the same phone that was present on 14 January at the meeting between LCDR Sims and the trial counsel.[16]

q. MA1 [redacted] testified that she was present when the LCDR Sims unlocked her IPhones.[17]

r. MA1 [redacted] testified that she first presented LCDR Sims her work phone to unlock at 1800 on 31 January 2020. [18]

s. LCDR [redacted] did not have a biometric lock on her work phone and it could only be unlocked with her PIN Code.[19]

t. The CASS which formed the basis for the order in Charge I did not include an order to unlock the phones in question with PIN codes and it only addressed "fingerprints and facial features to unlock her personal and work cellular phones." This constitutes the only order directed at LCDR Sims.[20]

u. MA1 [redacted] testified that she did not know the exact contents of the order in the CASS because she did not read it.[21]

v. MA1 [redacted] testified that initially LCDR Sims refused to unlock her work phone using a PIN code but did so after her attorney told her she was required to.[22]

w. MA1 [redacted] testified that shortly after LCDR Sims unlocked her work phone she was presented her personal phone and she unlocked it immediately. [23]

x. The government elicited no testimony from any witness which indicated anyone other that LCDR Sims' attorney ever told her that a biometric requirement was contained in the CASS.[24]

y. The government's witnesses established that LCDR Sims was never given a copy of the CASS.[25]

3. <u>Summary of the Law</u>

"The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

APPELLATE EXHIBIT XXV
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prior to the entry of judgement if the evidence is insufficient to sustain a conviction of the offense affected." [26]

Post-trial matters may be filed by either party or when directed by the military judge to address such matters as a motion to set aside one or more findings because the evidence is legally insufficient. [27]

The elements of an Article 92, Failure to obey other lawful order, offense are:

(1) That a member of the armed forces, namely, (state the name and rank or grade of the person alleged), issued a certain lawful order to (state the particular order or the specific portion thereof);

(2) That the accused had knowledge of the order;

(3) That the accused had a duty to obey the order; and

(4) That (state the time and place alleged), the accused failed to obey the order. [28]

The elements of an Article 131e, Prevention of authorized seizure of property, offense are:

(1) That (state the name(s) of the person(s) alleged), (a person) (persons) authorized to make searches and seizures (was) (were) seizing, about to seize, or endeavoring to seize certain property, to wit: (state the property alleged);

(2) That (state the time and place alleged), the accused (destroyed) (removed) (disposed of) (state the property alleged) with the intent to prevent its seizure; and

(3) That the accused then knew that (state the name(s) of the person(s) alleged) (was) (were) seizing, about to seize, or endeavoring to seize (state the property alleged). [29]

There is a requirement for an authorized search and seizure under MRE 315, or else some other exception to the warrant or search authority requirement before a person delineated in M.R.E 316 may seize property. [30]

In order to be guilty of a failure to follow a lawful order, the accused must have actual knowledge of the order. [31]

Property may be considered "destroyed" if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed. [32]

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[26] R.C.M. 917(a).
[27] R.C.M. 1104(b)(1)(B).
[28] U.C.M.J. Art. 92
[29] UCMJ Art 131
[30] M.R.E. 316
[31] MCM, pt. IV, 16c(2)(b); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); *United States v. Curtin*, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), aff'd, 34 M.J. 174 (C.M.A. 1992); *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building's entrance did not designate issuing authority).
[32] Military Judges Benchbook DA PAM 27–9 at 821, 01 January 2010

APPELLATE EXHIBIT XXIV
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4. Argument

Charge I

The record does not contain sufficient evidence that LCDR Sims failed to follow an order to present her facial features.

The Government charged LCDR Sims with failure to follow an order by refusing to provide her fingerprints and facial features. The requirement for this charge is actual knowledge. No evidence exists that she was actually ordered to present her face to the security personnel until 1800 on 31 January. The only evidence on the record which shows that a request for her facial features was actually made was the testimony of MA1 [redacted] According to MA1 [redacted] testimony she presented the phones, which were then seized, to LCDR Sims to unlock at 1800. Having not seen the CASS at that point, LCDR Sim was unaware of the additional order to present her fingerprints and facial features.

MA1 [redacted] actually acknowledges that she never read the CASS and therefore did not know that the requirement was for facial features or fingerprints. MA1 [redacted] also states that her request was not for facial features but to "unlock the phone," and her initial focus was on the work phone which could not be unlocked with a finger print or facial features. This actually required a PIN code to be entered, something that was not ordered by the CASS. Within moments of learning, from her lawyer, that the facial features were required by the CASS for her personal phone she complied. The government presented no evidence that the request for the PIN codes by MA1 [redacted] was a valid lawful order and, even if it was, that order was not basis for the charged offense. Furthermore, MA1 [redacted] is the only individual on the record to have spoken to LCDR Sims about unlocking the then seized phones, and because she never read the CASS, she could not have known what the order actually said and could not be the basis for LCDR Sims's actual knowledge of that part of the CASS.

Additionally, that part of the CASS is the only part of the document which constitutes an order to LCDR Sims. The rest of the CASS is an order to the person conducting the search. Unless or until LCDR Sims is ordered to provide her face to unlock a phone that can actually be unlocked with it, she cannot have been in violation of Article 92. She was given the opportunity, according to the evidence on the record, exactly one time. At that time, she complied instantly.

The Governments evidence on the record is therefore insufficient to sustain a conviction on Charge I.

Charge II

There is no evidence on the record that shows the government looked in the correct place for the text messages.

The CASS alone, based only on probable cause, is not enough to relieve the government of the requirement to prove it looked in the correct location, before any inferences can be reasonably based on an absence of the data. Ms. [redacted] testified that LCDR Sims had a new phone at the 14 January meeting she witnessed. The messages were originally sent on 7 October. Implicitly, that meant that the messages in question were never on the local storage of the phone LCDR Sims had on 14 of January. The expert testified that the extraction would not include

items that were encrypted. She also indicated that the only extracted portion she viewed was the database that contained locally stored data and did not include data stored on the ICloud. SA [redacted] testified that she only searched the text message application and did not indicate that she viewed photo stream, or any other application, in her physical search of the phone. She also indicated she did not know where the messages were located or what they said, as she never witnessed the original messages. Nobody who viewed the original messages on LCDR Sims phone ever testified in her trial. Additionally, Ms. [redacted] stated her search uncovered no data, either deleted or not deleted. She indicated that she searched the local photograph storage as well. She found no data, deleted or not in that location. She testified in her expert capacity that encrypted data, such as the data protected by a separate password or found in a separate app within the phones storage, would not be extracted. It appears from the record that the search efforts employed by the government were never focused anywhere beyond the locally stored messages found in the native messaging app, despite the fact that the messages in question were never likely to be in that location or in that form. To draw any reasonable inference as to the disposition of the data, the fact finder must be presented evidence that the correct location was accessible by the Government agents who conducted the search. There is no evidence on the record which shows this. The evidence is therefore insufficient to support a conviction on Charge II.

There is no evidence on the record that LCDR Sims deleted text messages.

No witness testified that they saw LCDR Sims delete text messages. No evidence was presented which showed the actual deletion of the text messages. SA [redacted] testified that the text messages did not appear in her search. However the messages were present on LCDR Sims' IPad, according to Mr. [redacted] testimony, in the form of a preserved screenshot. If LCDR Sims received the text message to her phone number, as Chief [redacted] testified, than the only way that the messages would also be present on her IPad is if the ICloud connected the two devices. In order to be present on LCDR Sims IPad months after the search, they had to have been present on her ICloud (and thus visible on her iPhone) in the same form. This shows that the messages were not deleted and in fact preserved. This is based on the expert testimony that deleting data on one device would likely delete across all devices if the settings linked them. Additionally, evidence of deletion was not present for either the text or the screenshot that was preserved. The government only implied that because the agent did not see them, LCDR Sims must have deleted them. This implication is unreasonable given the complete lack of any other evidence introduced and the testimony of the expert witness. The government cannot stand exclusively on an inability to locate the data involved, in order to prove that LCDR Sims, herself, deleted messages.

There is no evidence on the record that the phone that was seized was the phone sought by the CASS.

The Government did not introduce an actual description of the original phone or of the phone that was searched. There is no evidence on the record that indicates that the phone which was seized was the same phone on which the text messages were expected to be. That is because only Ms. [redacted] testified to having seen the original phone and she was not involved in the search or seizure. SA [redacted] searched the phone that was seized but she never saw the phone on 14 January. In fact, SA [redacted] did not even know that the phone she search was the phone that was

APPELLATE EXHIBIT (XVII)
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seized. There was no documents or testimony on the record which verified this. The finder of fact made an inference, without any evidence that LCDR Sims had the same phone in her office, the day the CAS was executed, as she had on 14 January in the RLSO space. The finder of fact also took for granted that CID provided the correct phones to SA [redacted] without any chain of custody documentation.

There is no evidence as to the time which the government claims the text messages were deleted.

Central to the elements of this charge is the requirement of an authorized seizure under MRE 315. These text messages could only have been seized after a probable cause determination was made and a Command Authorized Search and Seize was issued. Additionally, LCDR Sims must have actual knowledge at the time of that authorization. The very nature of this offense means that "the timing of the search is a critical element of the offense."[33] There is no evidence in this case as to the timing at all. The government did not even attempt to address this issue. The main thrust of the government's theory seemed to be that LCDR Sims should have known. There is no evidence that she did actually know until she was confronted by CID on 31 January. That a CASS is possible or that it was discussed in front of her is not enough for this element, as that would be constructive knowledge – if it meant anything at all. The government must have presented evidence that she destroyed property when someone authorized was endeavoring to seize and she had actual knowledge of that at the time. MRE 316 states that property may be used in evidence by a person in subdivision (d) if the person seizing is authorized to seize property or evidence by a search warrant or a search authorization under MRE 315.[34] It does not say that a seizure can be made by a person in subdivision (d) absent an authorization or exception. Additionally, M.R.E. 316 (a) holds that the seizure must conform to the rules of the Constitution of the United States. M.R.E. 315 states that only a commander, military Judge, or Magistrate may authorize a search authorization and only then upon a probable cause determination under M.R.E. 315 (f), or some other exception.

The Government in this case did not present any evidence that anyone was authorized to make searches and seizures on her property until approximately 1500 on 31 January. The government produced no evidence suggesting that the trial counsel in the U.S. v. [redacted] was ever authorized to search or seize prior to that point. Nor did the government admit any evidence that some exception applied to the fourth amendment warrant requirement. In fact, the government introduced evidence that the Judge in U.S. v [redacted] told the trial counsel he was specifically not authorized to search or seize without a search authorization. No evidence on the record is present that can even reasonably infer a date or time of deletion. The evidence is therefore insufficient to prove the element.

There is no evidence on the record that the property sought was removed or deleted with the intent to prevent its seizure.

The government presented no evidence that LCDR Sims had any intent to prevent the seizure of the text messages. The government implied that she had some malicious intent to aid Chief [redacted] Chief [redacted] testimony negated that argument. He stated he had no interactions

[33] United States v. Rogers, ARMY 20190032, 2019 CCA LEXIS 507, at 9 (Dec. 12, 2019).
[34] M.R.E. 316

APPELLATE EXHIBIT (XXI)
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with regard to his trial or the text messages in question. The government provided no reason that she had to prevent seizure of the text message. The Government also did not show that the inability for the government to locate the text messages in question had anything to do with LCDR Sims. The government called no witnesses nor did they provide any documentary evidence on which a finder of fact could make any logical inference that she specifically intended anything. That the messages were not found where the government thought they would be does not imply that she intended to prevent them from seizing them. As described above, the intent element is required to be found with regard to the CASS and not before. There is simply nothing on the record which suggest anything about LCDR Sims state of mind or intentions.

There is no evidence that the property sought was destroyed.

The property sought never resided on the IPhone's local storage. The physical destruction of the phone, had that been the case, would not even destroy the text messages since the messages resided elsewhere. No evidence was ever introduced that LCDR Sims took any action which would have removed them from where they resided or made them "useless for the purpose for which it was intended."[35] It is clear that the text messages were not removed or destroyed because evidence of their continued placement on the ICloud was introduced by defense. The element is not satisfied simply because the government did not find the data. It can only be met if the data was actually destroyed or removed from the location it was at. Since the government's case never addressed the proper physical location of the text messages or the form of the data it is impossible for the element to be met.

Additionally the property that was sought by this CASS was definitively not destroyed – evidenced by the fact that it was used in LCDR Sim' trial. It was still present in LCDR Sims' ICloud, but also on Chief [redacted] phone. The government's own evidence shows that the property was not "useless for the purpose it was intended."[36] As the Government failed to show the property was destroyed or removed, the evidence is insufficient to support the charge.

5. Burden

As the moving party, the Defense bears the burden.

6. Evidence

a. The record and recording of the Special Court-Martial of LCDR Sim.

[35] Military Judges Benchbook DA PAM 27–9 at 821, 01 January 2010
[36] *Id.*

APPELLATE EXHIBIT (XXI)
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7. **Relief Requested**

Pursuant to the Rule for Courts-Martial 917, the Defense respectfully requests that the military judge enter a finding of Not Guilty regarding Charge I and the sole specification, as well as Charge II and the sole specification, of which LCDR Sims was convicted.

Respectfully submitted,

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.10.25 07:46:41 +09'00'

J. M. LARSON
LT, JAGC, USN

****

CERTICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on trial counsel and the Court on 25 October 2020.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.10.25 07:47:01 +09'00'

J. M. LARSON
LT, JAGC, USN

APPELLATE EXHIBIT (XVII)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **CHANEL G. SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPRESS – EVIDENCE DERIVED FROM CASS DATED 31 JAN 20, BASED ON A LACK OF PROBABLE CAUSE** **31 AUG 20**

1. **Nature of Motion**. Defense moves to suppress all evidence obtained and derived from the Command Authorized Search and Seizure issued against LCDR Sims by CAPT [redacted] on 31 January 2020 on the grounds that it was unlawful pursuant to Military Rule Evidence (M.R.E.) 311. Defense also moves to suppress all evidence that flows from the CASS as fruit of the poisonous tree.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

3. **Burden.** Pursuant to M.R.E. 311 (d)(5) the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or else some valid exception applies. Parallel to Prosecution's burden and without supplanting it, Defense bears the burden to show knowing and intentional falsity or reckless disregard for the truth of specific facts, pursuant to M.R.E. 311(g)(2).

4. **Law.**

a. The General Rule Based on the Fourth Amendment of the U.S. Constitution

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized[1]. The "Purpose of the Fourth Amendment was to prevent use of governmental force to search man's house, his person, his papers or his effects and to prevent their seizure against his will."[2]

The military rules of evidence has codified the bulk of the fourth amendment precedent beginning with M.R.E 311 which states that, absent certain exception, "evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is

[1] USCS Const. Amend. 4
[2] *Love v. United States*, 170 F.2d 32, 1948 U.S. App. LEXIS 2540 (4th Cir. 1948), cert. denied, 336 U.S. 912, 69 S. Ct. 601, 93 L. Ed. 1076, 1949 U.S. LEXIS 2757 (1949).

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inadmissible against the accused."[3]. Probable cause is required for "evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization." [4]

b. Reasonable expectation of privacy applies.

While all people, accused or not, are covered by the protections of the fourth amendment, a warrant requirement or exigent circumstance exists where there is an expectation of privacy.[5] Whether there is an expectation of privacy is found turns "in part, on whether the person who is subject to the search has a subjective expectation of privacy in the object searched and that expectation is objectively reasonable"[6] Smart phones have been held in every jurisdiction, including this one, as having an expectation of privacy in both regards. [7]

Even Government issued computers, and by extension government cell phones, have the expectation of privacy, albeit limited to certain cases as there is a rebuttable presumption of no expectation of privacy in government property not issued for personal use.[8] In *United States v. Long* 64 M.J. 57 (2006) where the court ruled that the expectation of privacy turned on a totality of the circumstances and included such consideration as a warning banner, a private passcode and the number and degree other individuals had access to the device. While a warning that the device is subject to monitoring is a pertinent fact in determining the expectation of privacy it does not completely eliminate it.[9] In Long, a private passcode ensured privacy and only the IT administrator had reign on the stored communications. Where such circumstances warrant a reasonable expectation of privacy exists warrantless searches and seizures are prohibited.[10]

c. The requirement of a Probable Cause determination

Where an expectation of privacy exists the fourth amendment requires a warrant or, in the military, a Search Authorization.[11] An authorizing Commander (in place of an unbiased magistrate) must be able to determine from the face of the Search Authorization application and attached affidavits or relied upon oaths, that there is a "fair probability that ... evidence of a crime will be found in a particular place."[12]. That is to say that in order to be constitutionally valid, a Search authorization can only be issued "when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location."[13]. Normally searches pursuant to prior authorization are given deference, but upon review of a Commander's search authorization, a military judge "may conclude that the commander's probable cause

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[3] M.R.E. 311
[4] M.R.E. 315
[5] *See Katz v. United States*, 389 U.S. 347 (1967)
[6] *United States v. Wicks*, 73 M.J. 93, 98(2014) Citing Katz 389 U.S. 347.
[7] *See Id.* at 99
[8] MRE 314(d).
[9] *See United States v. Long* 64 M.J. 57, 63-63 (2006)
[10] *See Id.*
[11] See MRE 315
[12] *Illinois v. Gates*, 462 U.S. 213, 238 (1983)
[13] *United States v. Perkins*, 78 M.J. 550, 553 (N-M Ct. Crim. App. 2018)

determination "reflected an improper analysis of the totality of the circumstances."[14] A Commander must make an independent determination of probable cause and "his action cannot be a mere ratification of the bare conclusions of others."[15]

d. Bare conclusions may not be considered

Bare conclusions include conclusory allegations and factually unsupported statements by the affiant the search is likely to yield evidence or fruits of crime.[16]. Such inclusions in the basis for search are not sufficient to establish the requisite probable cause to believe that evidence or fruits of a crime will be found in the place to be searched.[17] Probable cause for searching a particular place exists in an affidavit only when the affidavit sets forth facts constituting a substantial basis for finding a fair probability that first, a crime has been committed, and second, the particular place may contain the fruits, instrumentalities or evidence of the crime committed.[18]

e. A probable cause determination must be based on evidence with a nexus to criminal activity and the affidavit must include as much.

If the CASS is not seeking fruits or instrumentalities of a crime, or contraband it must articulate at a minimum the reason why what is being sought constitutes evidence.[19]
This is not a new requirement. The Supreme court has long ago ruled that;

> the requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus -- automatically provided in the case of fruits, instrumentalities or contraband -- between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.[20]

f. A Commander issuing the CASS must be unbiased.

While search authorizations issued by commanders are permitted in the military there is the requirement "that a commanding officer stands in the same position as a federal magistrate issuing a search warrant and the military officer's decision to authorize a search on probable cause must be made with a magistrate's neutrality and detachment."[21]

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[14] Id.
[15] Id
[16] Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)
[17] Id.
[18] See Id. at 236, 238-239.
[19] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307, 87 S. Ct. 1642, 1650 (1967)
[20] Id.
[21] United States v. Rivera, 10 M.J. 55, 58 (C.M.A. 1980); United States v. Sam, 22 U.S.C.M.A. 124, 127, 46 C.M.R. 124, 127 (1973)

Furthermore, the commander may *not* become personally involved in the actual evidence-gathering process.[22]. If he does become "engaged in the often competitive enterprise of ferreting out crime, he thereby loses the objectivity and impartiality constitutionally required of an official who authorizes a search based on probable cause."[23] Additionally, in the analysis of bias the Commander's "pre-search involvement must be considered in tandem with his participation in and direction of the search itself."[24]

g. Factual predicate for a search or seizure may be challenged if the affiant included false statement knowingly and intentionally, or with reckless disregard for the truth.

One final consideration regarding the law on Search warrants and Command authorized Search and Seizures must be the Supreme Court case Franks v. Delaware, 438 U.S. 154 (1978). In that case the Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."[25] The Court goes on to rule that;

If established by a preponderance of the evidence such false information must be set aside and if the remaining material in the affidavit is insufficient to establish probable cause, the search warrant or CASS is voided. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. [26]

The Rules of Military Evidence have codified this standard by stating "the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth."[27]

5. **Argument**.

a. The General Rule Based on the Fourth Amendment of The U.S. Constitution

The search involved in the facts of this case unquestionably trigger a analysis under the fourth amendment of the U. S. Constitution. The CASS was issued by Captain [redacted] in order to retrieve purported evidence from LCDR Sims phones.[28]

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[22] *See Generally United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)
[23] *Johnson v. United States*, 333 U.S. 10 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948)
[24] United States v. Rivera, 10 M.J. 55, 61 (C.M.A. 1980)
[25] Franks v. Delaware, 438 U.S. 154, 155, 98 S. Ct. 2674, 2676 (1978)
[26] Id.
[27] M.R.E. 311(g)(2).
[28] Defense Exhibit (G)

b. Reasonable expectation of privacy applies.

The subject of the CASS is not in question and included LCDR Sims's personal and work phone.[29] The personal phone is undeniably subject to a reasonable expectation of privacy.[30]

In this case LCDR Sims had an expectation of privacy in her work phone as well. In US. v. Long the appellant had a government issued computer which she accessed personal email from. The administrator was the only one to have access to it and the computer and email service each had personal password and pin code associated. While the court found that routine administrative intrusions into the computer itself was allowed, a full search without probable cause on personal emails was not.[31] That was even though she was notified that the system was subject to routine monitoring. In this case LCDR Sims had a personal PIN code that no one else in her command had.[32] Additionally, the domain that the government wished to search was the iMessage app which connected to her personal iCloud account.[33] It was secured by an entirely separate password and authentication process.[34] No administrator had access to the phone on a routine basis as updates were handled by Apple.[35] No banner existed that warned of routine monitoring and routine monitoring was in fact never conducted.[36] While she would have to turn in her phone to her relief, a full wipe of the phones internal storage and the removal of her iCloud account would have to be conducted before any turn over occurred.[37] Based on these factors a reasonable expectation of privacy exists and probable cause is required in order to seize the phone or search for evidence. The presumption found in MRE 314(d) is unwarranted in this case.

c. The requirement of a Probable Cause determination

For the aforementioned reasons a probable cause determination is required for each phone seized. The totality of the circumstances in this case do not support the notion that any evidence was located in LCDR Sims's phones. The exchange that was viewed by LT [redacted] on 14 January did not reveal any objective facts that would constitute criminal activity. The fact that NCC [redacted] communicated with his boss about his arrival time or disclosed that security had picked him up at the gate does not objectively show, in the totality of the circumstances, that any evidence could be found on her phones. Even if it had no facts were included in the CASS or affidavit that would provide a basis for probable cause at all.

d. Bare conclusions may not be considered

As described in the above statement of law bare conclusions are not to be considered in

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[29] Id
[30] See Wicks, 73 M.J. 93, 98
[31] See Long 64 M.J. 57, 63-63
[32] Fact drawn from expected testimony
[33] Id.
[34] Id.
[35] Id.
[36] Id.
[37] Id.

the Probable cause determination.[38] In US v Morales the Army court of appeals considered this issue when determining if the lower court judge had abused her discretion by not suppressing evidence based on a motion by Defense. In that case the affidavit in support of the case included the request to search and seize "any depiction of SPC [AC] between the time/date group 0000, 9 F[e]b 14 and 0900, 25, 25 Feb 14."[39] While in that case there was presumably some indication of that evidence of a crime was present, the four corners of the affidavit failed to lay out any facts "—only the assertion that probable cause exists to believe evidence of indecent viewing, visual recording, or broadcasting is on appellant's phone."[40] The Court in that case found that the judge did indeed abuse her discretion.[41] Furthermore, the court found that where the "affidavit provided no factual predicate to establish its request" and the good faith exception could not be used to admit the evidence.[42]

In the CAAF Case United States v Perkins the NMCCA ruled on the issue. That case held the unsupported inference that the appellant "had used his cell phone while … engaged in sexual activity and that later he threatened to reveal pictures and videos" was a bare conclusion which led to an unlawful search of his house.[43] In that case the named victim had made the allegation to NCIS agents and those agents included it in the affidavit in support of the CASS.[44] While the court allowed the evidence based on good faith, that case stands for the precedent that the affiant must include something other than a conclusory allegation.

This case is a unique circumstance in that the affiant, who is the trial counsel, does not even attempt to include connective facts to the case he is prosecuting. Ms. [redacted] his paralegal and the applicant for the search does not attempt to address the link either. The issue of probable cause is simply bypassed in favor of stating the location of the text message that were sought.[45] In Morales, there was at least a reference to the criminal activity. The language, which failed in that case, provided a location that the agent though contained the evidence and the assertion that it was evidence. In this case, neither LT [redacted] description not the application on its face had any language describing why the text messages were connected to NCC [redacted] alleged alcohol consumption.[46] It simply assumed it existed. This is the very definition of a bare conclusion. In Perkins, the affiant included a statement from the victim which took for granted its own veracity without providing anything else to warrant a determination on its face.[47] The agent in that case seemingly used the position of the informant as the named victim in order to shore up any doubt. In this case the CASS fails to even make such a claim. In asserting only that evidence existed, the Trial Counsels position is invoked to grant unlimited authority to the governments aims.

A bare conclusion on its own does not give a substantial basis to a Search authority and is an improper consideration when evaluating probable cause.

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[38] Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)
[39] United States v. Morales, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017)
[40] Id.
[41] Id at 577.
[42] Id.
[43] United States v. Perkins, 78 M.J. 550, 557 (N-M Ct. Crim. App. 2018)
[44] Id.
[45] Defense Exhibit (G)
[46] Id.
[47] See generally Perkins, 78 M.J. 550, 557

e. A probable cause determination must be based on evidence with a nexus to criminal activity and the affidavit must include as much.

While related to the analysis of bare conclusions, the issue of a nexus to criminal activity stands on its own as critical analysis in this case. This is because the text messages in this case are in no way connected to the case of NCC [redacted] suspected criminal activities. There are seemingly about a separate issue that fails to rise to the level of criminal activity. Mainly the text messages appear to be about NCC [redacted] calling in late at 0730 and then explaining his additionally delay, an area that LCDR Sims unquestionably has the authority over.

The need for criminal nexus for the items sought in a CASS is of central focus in United *States v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017). In that case the search was for incriminating videos and photographs reportedly taken using a phone. Investigators seized a laptop pursuant to a warrant issued by a magistrate. On review the Court found that the "the magistrate did not independently establish a particularized nexus between (a) the crime the accused was alleged to have committed with his cell phone … and (b) the laptop."[48]

While the facts between this case and that one are dissimilar, the underlying issue is the same. The CASS in this case purportedly sought evidence, on both LCDR Sims's personal and work phone, of two UCMJ violations; an Article 92 and an Article 107 each related to drinking and driving.[49] Yet neither the affidavit nor the text of CASS relate why anything on her cell phones would relate to those offenses or any other. Expected testimony from both LT [redacted] and [redacted] will show that neither of them suspected her of failing to report an offense, despite the government's continued torturous treatment of her. LT [redacted] description of the text message indicates nothing unlawful nor do they indicate that any other messages in the phone are tied to the criminal conduct at issue – what was essentially drinking and driving. There is no indication anywhere that he ever admitted to his boss any pertinent facts.

Ultimately the Government seized her phone for nothing more than communicating with the accused in a Court Martial about his charges. Allowing this to stand would stretch the protections of the fourth amendment so thin that it would logically permit the government to seize the phones of everyone involved in a Court Martial simply for describing the charges in email or text message.

f. A Commander issuing the CASS must be unbiased.

This case is unique in that the CASS application, the supporting affidavit and the "informant" are essentially all the same person, LT [redacted] [redacted] LT [redacted] paralegal prepared a document which he seemingly dictated to her and then swore her to.[50] After which he provided it to the Command. Ms. [redacted] never spoke to Captain [redacted] and there is no indication that he explored any of the application in depth.[51] No one in the command opened any guidance or the Quickman checklist. The entire process, from inception to execution – including gaining support from CFAY security – took less than three hours.[52] The approval

[48] United States v. Nieto, 76 M.J. 101, 107 (C.A.A.F. 2017)
[49] Defense Exhibit (G)
[50] Id.
[51] Expected Testimony
[52] Id.

process appears to be simply reading and signing the CASS.[53] In addition, Captain [redacted] appears to have been participating in issuing the previous unlawful subpoena.[54]

This case involved no questioning of the affiant nor any exploration of the informant. This is likely because there is no distinguishable difference between Ms. [redacted] and LT [redacted]. Then, in reliance on the CASS LT [redacted] procured with his own observations, he proceeded to personally conduct the search. There is no case law on point to this because presumably no RLSO has ever tried this maneuver before.

A case that comes close is *U.S. v Washington*, 39 M.J. 1014 (A.C.M.R. 1994) an army appeals case which considers the concept of "rubber stamping" a CASS. In that case the search authority spent only two minutes reviewing the CASS.[55] He relied only on his SJAs and investigators view of facts and did not view the facts in any meaningful way.[56] Because of this he missed the important credibility and bias issues inherent in the informant's hearsay statements.[57] The court considered the fact that the commander did not open the CASS guide but "simply relied on his memory after having read the guide once or twice."[58] Ultimately the court held that "failing to ask to see the sworn statements [the investigator] referred to in his briefing, or to ask questions concerning the informant and his knowledge base, [the commander] demonstrated an uncritical approach to this important judicial duty assigned to commanders."[59] As such the probable cause determination was inappropriate and the evidence was suppressed.[60] Additionally, in that case the court determined good faith would not save the evidence because the circumstances showed the commander "did not qualify as an impartial individual."[61] That alone was enough to "indicate that investigators did not have a substantial basis for seeking to search the appellant's room and vehicle and did not act reasonably and in good faith."[62] The Court was openly critical of the Commander for relying on "highly exaggerated information to the commander that materially misrepresented the thrust of the informant's statement regarding the appellant."[63] The court concluded the issue by invoking the words of *Johnson*, and holding that the commander was "not provided with a substantial basis for a warrant, but only with the hurried leap of logic of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"[64]

In "rubber stamping" the CASS the Commander adopted the investigators bias. In this case, the "informant" is the Trial Counsel in the exact trial where evidence is sought by the CASS. Thus the informant is by nature a biased party. The applicant for the search warrant is Ms. [redacted] the trial counsel's paralegal. By nature she is just as inherently biased as her boss. Added to that equation is that she is apparently only parroting in her affidavit exactly what the Trial counsel is identifying. It is clear that Captain [redacted] did not rely on her in any

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[53] Id.
[54] Id.
[55] See United States v. Washington, 39 M.J. 1014, 1018 (A.C.M.R. 1994)
[56] Id.
[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] Id.
[64] Id.

substantive way. If he understood the bias inherent in the trial counsel's job, he certainly did not give any indication. He did not seem to acknowledge at all that LT [redacted] bias was inherent because he was at that very moment engaged in the often competitive enterprise of ferreting out and prosecuting crime. It may have been a forgone conclusion that the CASS was going to be executed because Captain [redacted] was himself involve in attempting to get at what was reportedly in LCDR Sims phone. In summary all of the same failures that existed in *Washington*, also exist here. That is in addition to the fact that he relied in an absurdly unquestionable degree on the opinion of a party to the court martial he was convening. He followed up by allowing the trial Counsel to search the phone indiscriminately without holding him to any identifiable measure.

These actions really have no precedent. To the extent that they may not have have been expressly disallowed by anything, they certainly call in to question the unbiased nature of this decision.

g. Factual predicate for a search or seizure may be challenged if the affiant included false statement knowingly and intentionally, or with reckless disregard for the truth.

As described above, this case is unique in that the CASS application, the supporting affidavit and the "informant" are all the same person. It is difficult to ascertain, because of this, whether the normal presumptions regarding the police officers and affidavits are apt here. There is, once again no case law on point. This is presumably because no Navy Trial Counsel has been this creative before.

The first issue relevant to this topic is the fact that the actual meaning of the text messages in question are in opposition to the portrayal in the CASS. Essentially, LT [redacted] cleaved away all the context leaving behind only the a few scraps of the original message that he felt was most convincing to his position. He then took the bold step of implying that those scraps indicated criminality without anything to back that up. He did so presumably because of his inherent and understandable bias toward winning his case.

The fact that a message was sent at 0730 stating he would be late is an innocent action based on the timing and context. The next message at approximately 1000 states: "[redacted][65] The next message by him is in response to LCDR Sims asking "[redacted][66] To which he responds [redacted][67] Her response to that was, "[redacted][68] There is nothing in this exchange, when taken in context, to suggest that anything having a criminal nexus is concealed in the phones. There is nothing that connects these messages to the criminality stated in the CASS, namely that Chief [redacted] failed to follow an order or lied about it. The purpose of the interview with LCDR Sims apparently concerned his lateness to work and whether he had prearranged something with LCDR Sims. A fact which innocent on its face. The very clear inference by the actual messages is a normal back and forth between boss and subordinate. However, when cut of

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[65] Defense Exhibit (B)
[66] Id.
[67] Id.
[68] Id.

all of their substance and left naked on the page, the words apparently seemed insidious to Captain [redacted] It is hard to believe this was not done on purpose. Whether motivated by malicious intent or not, the removal of that context fits neatly into the aims of LT [redacted] in his role as the Trial Counsel and shows a reckless disregard for the truth.

Furthermore, the calculation involved in this action is telling of LT [redacted] motivations. He avoided all possibility of being subject to review. Had he served it on Chief [redacted] or taken any other steps that subjected the CASS to review he would have been conflicted from trying the case because he would be a witness and an advocate in the same trial.

The second time LT [redacted] omitted information was with regard to the unlawful subpoena that had been quashed in court earlier that day. It was quashed because the subpoena intruded on communications stored in her phone where she clearly had an expectation of privacy. The Military Judge quashed the Subpoena. He even followed up with an email which was attached to the record stating "For the reasons I outlined at the 39A session the government's motion is denied and LCDR Sim's motion to quash the subpoena is granted."[69] The CASS includes the words: "On 17 January 2020, LCDR Sims was served a subpoena to provide copies of all text communications between herself and NCC [redacted] that occurred on 7 October 2019. The records were due on 21 January 2020. LCDR Sims has not responded to the subpoena or provided copies of the relevant text messages."[70] This seems to indicate that she had an obligation to provide the text. The affidavit was signed by Ms. [redacted] again with LT [redacted] as the person administering the oath, well after the subpoena was quashed. The statement is a reckless misrepresentation of the truth because it omits the fact that the subpoena was quashed because it violated the Constitution. It also fails to indicate that LCDR Sims invoked her fifth amendment rights on the stand – a subject that Defense covers in separate motion. Not only was it quashed but the Military Judge criticized LT [redacted] for having not thought about the 4th amendment prior to issuing the subpoena when he stated regarding the required fourth amendment analysis: "I think with respect to the subpoena for information; that was a question that could have been asked and answered prior to this hearing."[71] He followed by stating, "my ruling with respect to the writ of attachment is [the] one thing I need to look at, is whether the writ is--or the subpoena was lawful. I find as of right now that it was not a lawfully-issued subpoena for the content that you wanted."[72]

The fact that a subpoena was issued without including that it had been quashed in the affidavit was clearly something the Commander would want to know, as it reduces the credibility of the attorney asking for the CASS – LT [redacted]. The Command clearly did not, and may still not, understand the previous Constitutional violation. In fact, the expected testimony from the legal officer is that LT [redacted] relayed to the command the Military Judge told them to get the text by issuing a CASS on LCDR Sims. A fact which is false.

It is clear that these facts were omitted. Of course, the central part of the analysis must be the whether their omission was done with a reckless disregard for the truth. The answer to that question is, more likely than not, yes.

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[69] Defense Exhibit (L)
[70] Defense Exhibit (D)
[71] Defense Exhibit (F)
[72] Id.

6. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

A. Testimony LCDR Chanel Sims;
B. Testimony [redacted]
C. Testimony LT [redacted]
D. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
E. Defense Exhibit (B) – Text Messages
F. Defense Exhibit (C) – Emails Between LCDR Sims, LT [redacted] and [redacted]
G. Defense Exhibit (D) – Subpoena
H. Defense Exhibit (E) – Email from LT [redacted]
I. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
J. Defense Exhibit (G) – Command Authorized Search and Seizure
K. Defense Exhibit (H) – Report excerpt MA2 [redacted] Statement
L. Defense Exhibit (I) – Report of Arrest
M. Defense Exhibit (J) – Art 31 rights advisement form
N. Defense Exhibit (K) – Command Investigation appointment
O. Defense Exhibit (L) – Email from Judge Reyes in regard to Subpeona

7. **Relief Requested**. Defense request that the Command Authorized Search and Seizure be found unlawful and all evidence derived from it be suppress. Defense further request that the seizure of LCDR Sims person be found unlawful, as it was a result of this unlawful search, and all derived evidence from that seizure be likewise suppress.

8. **Oral Argument.** Defense requests oral argument.

[redacted]LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:50:38 -04'00'

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (II)
PAGE 11 OF 12

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

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (II)
PAGE 12 OF 12

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO MOTION TO SUPPRESS EVIDENCE DERIVED FROM CASS BASED ON LACK OF PROBABLE CAUSE** 4 September 2020

1. Nature of Response.

This response is to a defense motion to suppress evidence derived from the 31 January 2020 command authorization for search and seizure signed by Captain [redacted], USN. The government requests the court DENY the defense motion to suppress evidence derived from 31 January 2020 command authorization for search and seizure.

2. Summary of Facts

For a summary of relevant facts, please see the government's summary of common facts attached as enclosure (1).

3. Discussion

a. Fourth Amendment Protection from Unreasonable Search and Seizure

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.[1] The Fourth Amendment applies to search and seizure of cellular phones and contents of communications.[2] Cell phones

[1] USCS Const. Amend. 4
[2] United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014)

and their contents are not outside of the purview of the Fourth Amendment, and the same Fourth Amendment principles apply to cell phones and their contents.[3]

For these reasons, the government believes the Accused *did* have a reasonable expectation of privacy in her work and personal cellular phones.

b. Captain [redacted] relied on probable cause when he signed the command authorization for search and seizure.

Protecting against unreasonable searches and seizures, the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[4] Searches conducted pursuant to a warrant are presumed to be reasonable.[5]

Search authorizations in the military are akin to civilian warrants and, and have similar requirements. A military commander has authority to issue a search authorization based upon probable cause.[6] That commander's determination may be based on written or oral statements and may include hearsay statements in part or in whole.[7] Appellate courts have determined a commander is provided with a significant amount of discretion when deciding whether a substantial basis for probable cause exists.[8] In order to find a substantial basis, the commander must be presented with "sufficient information," and not a "mere ratification of the bare conclusions of others."[9] While the courts do not explicitly define "bare conclusions," examples include magistrates that sign search authorizations for cellular phones when the search

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[3] Id.
[4] USCS Const. Amend. 4
[5] Wicks at 99.
[6] Military Rule of Evidence 315
[7] Id.
[8] United States v. Perkins, 78 M.J. 550, 553 (N-M Ct. Crim. App. 2018).
[9] United States v. Hoffmann, 75 M.J. 120, 126 (C.A.A.F. 2016), citing Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2333 (1983)

authorization is clearly devoid of a link between the evidence sought and the alleged offense,[10] or where an authorization is based solely on a victim's unsworn statement without any link between the evidence sought and the alleged offense.[11]

Captain [redacted] authorization for search and seizure was based on probable cause. The affidavit for search authorization clearly lays out the trial counsel's belief that evidence related to the NCC [redacted] court martial was located on the Accused's cell phones. NCC [redacted] told the Accused that "they got me with the breathalyzer," and that he "can't believe this is happening."[12] Both statements are evidence that NCC [redacted] was stopped for driving under the influence on the morning of 7 October 2019.

The assertion that Captain [redacted] relied on "bare conclusions" is not accurate. On 31 January 2020, when Captain [redacted] signed the authorization to seize and search the Accused's cellular phones, Captain [redacted] based his probable cause determination on an affidavit signed and sworn by Ms. [redacted] the paralegal for the Trial Services Office, Yokosuka. Most of the affidavit is based on Ms. [redacted] direct observations from the 14 January interview with LCDR Sims and the follow on actions the TSO took to obtain the text messages from the Accused. At the interview on 14 January 2020 where the Accused showed the trial counsel the text messages. Ms. [redacted] observed the Accused show the messages to trial counsel, and

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[10] *See* *U.S. v. Morales*, where the investigating agent sought a CASS for the accused's cell phone. The agent was investigating an alleged sexual assault, and later found out the accused may have taken explicit photos of the victim. The agent believed explicit photos of the victim were located on the phone, but failed in her affidavit to establish a link between the photos and the alleged sexual assault, and omitted key statements in the affidavit. The magistrate based his probable cause determination solely on paperwork presented by the agent. United States v. Morales, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017).

[11] *See* *U.S. v. Perkins*. The station commanding officer signed an authorization to search the accused's home based solely on the investigating agent's recitation of the victim's unsworn allegation. No affidavit was presented to the commanding officer, and the victim's allegation was unsupported by any corroborating evidence. United States v. Perkins, 78 M.J. 550, 556 (N-M Ct. Crim. App. 2018).

[12] Def. Mot. Encl. B

subsequently sent emails to the Accused asking for the messages. In the email exchange between Ms. [redacted] and the Accused, the Accused acknowledges the messages exist, but admits she "does not feel comfortable" providing screenshots of the messages. Trial counsel copied Ms. [redacted] on his 16 January email to the Accused, and in the email the trial counsel specifically stated that he believed the messages between the Accused and NCC [redacted] are relevant and necessary to the NCC [redacted] court martial. Ms. [redacted] was not operating in a vacuum, closed off from the observations of the trial counsel or the facts she swore to in her affidavit, the facts were based on her direct observations and knowledge of the NCC [redacted] case, and interview with the Accused.

That Captain [redacted] relied on hearsay in the affidavit is irrelevant. Military Rule of Evidence 315(f) expressly permits a search authorization to be based on hearsay in the form of oral or written statements.

Captain [redacted] signed the authorization for search and seizure based on a sworn affidavit from someone with direct knowledge of the case and the evidence sought by the authorization. The affidavit clearly explained to Captain [redacted] why there was probable cause to believe the messages were on the phone, and why the messages were evidence of an offense under the UCMJ. For these reasons, the government believes there was probable cause, and the authorization for search and seizure was lawful.

c. <u>Even without probable cause, the good faith exception applies to evidence derived from the search authorization for the Accused's cellular phones.</u>

Evidence seized in violation of the Fourth Amendment is inadmissible under the exclusionary rule carved out by the Supreme Court in *Weeks v. United States*. The intent of the

Court was to deter law enforcement agents from abusing their great authority.[13] The Court has long held that the "good faith" exception applies to law enforcement officers who rely on a magistrate's probable cause determination of a warrant, and that reliance was "objectively reasonable."[14] When courts have considered whether the good faith exception applies, they generally look at the actions of the law enforcement agent(s), and the neutral and detached actions of the magistrate with no "stake in the outcome."[15]

The Military Rules of Evidence incorporate the "good faith" exception to evidence obtained as a result of an unlawful search and seizure.[16] The rule requires three elements be met in order for the exception to apply:

1. The search and seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d);
2. The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
3. The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

The government contends that even if the probable cause determination was insufficient, the good faith exception applies to the evidence seized by Investigators [redacted] and [redacted] and each of the MRE 315(d) requirements are met. The search and seizure of the phones was conducted pursuant to the CASS signed by Captain [redacted] The next requirement was

[13] Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 344 (1914).
[14] United States v. Leon, 468 U.S. 897, 920, 104 S. Ct. 3405, 3419 (1984).
[15] Id. at 917.
[16] Mil. R. Evid. 311(c)(3), Manual for Court Martial, 2019 ed.

discussed previously in this motion. The government believes Captain [redacted] had a substantial basis for the CASS, and relied on the sworn affidavit from Ms. [redacted] who had individual knowledge of the events in the affidavit.

The final requirement under MRE 315(d) is that the investigators acted reasonably, and in good faith. According to their statements, the CID investigators were contacted on 31 January 2020, just prior to execution of the CASS. The investigators were briefed on the affidavit and Captain [redacted] authorization shortly before walking into the Accused's office to execute the CASS. The CID investigators were able to review the CASS, and believed it was valid based on the Commanding Officer's signature and the attached affidavit. Furthermore, the investigators executed the CASS in a reasonable manner, and within the scope of the CASS. The CASS sought the Accused cell phones from a space under Captain [redacted] control, and the investigators remained within the scope of the CASS when they seized her phones from the Accused's workspace.

4. <u>Burden of Proof and Evidence</u>

a. Pursuant to M.R.E. 311(d)(5), when the defense makes an appropriate motion, the government has the burden of proving by a preponderance of the evidence that the evidence was not obtained as the result of an unlawful search and seizure, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of the authorization to search, seize, or apprehend.

b. In addition to the evidence provided in the defense motion, the government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (1): General Summary of Facts

Enclosure (6): Interview notes with MA1 [redacted] dtd 2 Sept 2020

Enclosure (7): Interview notes with MA1 [redacted] dtd 2 Sept 2020

Enclosure (8): Interview notes with MACS [redacted] dtd 16 Jun 2020

The government intends to call the following witnesses in support of its motion:

1. Ms. [redacted]
2. MA1 [redacted]
3. MA1 [redacted] (via telephone)

5. **Oral argument.** The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

****

Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 Sept 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPPRESS INVOLUNTARY STATEMENTS** **31 AUG 20**

1. **Nature of Motion**. Pursuant to 10 U.S.C. §31, Article 31, Uniform Code of Military Justice (U.C.M.J.), Rule for Courts-Martial (R.C.M.) 905(d)(3), and Military Rules of Evidence (Mil. R. Evid.) 304 and 305, the Defense moves to suppress all statements made by LCDR Chanel Sims that prosecution intends to submit.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

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

4. **Law**

Article 31 prohibits a person subject to the U.C.M.J. from interrogating or eliciting a statement from a servicemember accused or suspected of an offense without first (1) informing them of the nature of the accusation, (2) advising them that they have the right to remain silent, and (3) advising them that anything they say may be used against them later at court-martial.[1] These rights warnings are required when (1) a person subject to the U.C.M.J. (2) interrogates or requests any statement (3) from an accused or person suspected of an offense, and (4) the statements pertain to the offense of which the person is suspected or accused.[2] "No statement obtained from any person in violation of this Article [...] may be received in evidence against him in a trial by court-martial."[3] Military Rules of Evidence 304 and 305 implement the Code's prescription.

[1] 10 U.S.C. §31(b).
[2] *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).
[3] 10 U.S.C. §831(d).

APPELLATE EXHIBIT (N)
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For the purposes of Article 31 and Mil. R. Evid. 305, a "person subject to the code" means a "person subject to the Uniform Code of Military Justice" and "includes [...] a knowing agent of any such person or military unit."[4]

Military questioners are required to warn servicemembers under Article 31(b) if the servicemember is suspected of an offense and "the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry."[5] Whether a person is suspected of an offense is a question that "is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense."[6]

Courts must consider "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[7] Whether the questioner could reasonably be considered to be acting in a disciplinary capacity is "judged by reference to a reasonable man in the [suspect's] position."[8] (internal quotation marks omitted). Where there is a mixed purpose for questioning "the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was designed to evade the accused's constitutional or codal rights."[9]

An adequate rights advisement under Article 31(b) must include "informing the accused or suspect of the nature of the accusation."[10] The purpose of informing a suspect of the nature of the accusation "is to orient him to the transaction or incident in which he is allegedly involved."[11] While "technical nicety" is not required in this regard, the suspect "must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event."[12]

Among the factors to be considered in reviewing the sufficiency of this requirement are "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses.[13] "Necessarily, in questions of this type, each case must turn on its own facts."[14]

For example, in *Nitschke*, 12 U.S.C.M.A. 489, the accused was suspected of having caused a traffic accident resulting in the death of another. The court held that orientation to the traffic accident itself, even without notice that he was suspected of the homicide, was sufficient to orient the accused to the suspicion because it referred to the relevant transaction.[15]

Under Mil. R. Evid. 305, a "statement obtained from the accused in violation of an accused's rights under Article 31 is involuntary and is therefore inadmissible against the accused,"

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[4] Mil. R. Evid. 305; *see also* 10 U.S.C. §31(b)
[5] *Jones*, 73 M.J. at 361.
[6] *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted)
[7] *Id.*
[8] *Jones* 73, M.J. at 362
[9] *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006)
[10] Mil. R. Evid. 305(c)(1)(A).
[11] *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960)(internal citations omitted).
[12] *Simpson*, 54 M.J. at 284.
[13] *Id.*(internal citations omitted).
[14] *United States v. Pipkin*, 58 M.J. 358, 361(CA.A.F. 2003)(quoting *United States v. Nitschke*, 12 C.M.A. 489, 492 (1961)).
[15] *Id.*

APPELLATE EXHIBIT (IV)
PAGE 2 OF 6

subject to a handful of exceptions.[16] The Government bears the burden to establish compliance with the rights warning requirements by a preponderance of the evidence.[17]

5. **Argument**

At the time that LCDR Sims initially was approached by LT [redacted] and LT [redacted] both LT [redacted] and LT [redacted] were subject to the UCMJ. Additionally Senior Chief [redacted] MA1 [redacted] MA2 [redacted] and MA2 [redacted] were all subject to the UCMJ on 31 January. All individuals with whom LCDR Sims interacted in any capacity regarding the charged offenses have questioned her specifically about the text messages, her phone or the Chief [redacted] case. Each individual purported acted in a law enforcement capacity with regard specifically to the questions that were asked of her.

LT [redacted] at the time he interviewed LCDR Sims was there to collect evidence that he could use at trial against Chief [redacted] The interview seems to be affected by the sense that LT [redacted] was suspicious of LCDR Sims. He ended the meeting with a demand for the text messages that she had in her phone.[18] Despite claims otherwise forwarded by LT [redacted] that demand was never agreed to. Instead LCDR Sims agreed to testify.[19] Shortly before this interview, It appears that LT [redacted] began to suspect, at the trial of Chief [redacted] that a developing narrative that Chief [redacted] had walked his kids to school the morning of October 7th was false. This narrative that LT [redacted] believed was false was relayed on the record on 04 January during an Article 39 (a) hearing. During this hearing PSC [redacted] was called to testify about the potential that UCI would keep people from testifying in Chief [redacted] case. The relevant section of the record is:

[redacted]

[16] Mil. R. Evid. 305I(1

[17] Mil. R. Evid. 304I; *see also United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000).

[18] Expected Testimony

[19] Defense Exhibit (C)

[redacted]

LT [redacted] who was the lead Trial counsel for that exchange immediately set up a meeting to talk with LCDR Sims about the exact subject of that exchange.[21] That meeting took place on 14 January, just ten days after PSC [redacted] indicated that a member of the triad suspected her of colluding with Chief [redacted]. He then demanded to have text messages between LCDR Sims and Chief [redacted] messages that he thought related to the circumstance highlighted in the above record.[22] That exchange, which allegedly indicates that LCDR Sims has a target on her back because of the suspicion that she was hiding Chief [redacted] whereabouts between 0730 and 1000 on 07 October. As spurious as that claim may be, it seems unlikely that LT [redacted] was not looking for that connection. While he may have had other reasons for exploring that connection, the primary thrust seems to be this contention that LCDR Sims was hiding something, all the while denying that he suspected LCDR Sims of anything. LT [redacted] continued to engage her about the issue Chief [redacted] tardiness in a fairly consistent manner.[23] He then became aggressive by issuing a subpoena for the information, through his assistant defense counsel LT [redacted][24] He aggressively attempted to persuade her comply with that unlawful subpoena, at the behest of her CO, the C.A in the [redacted] case. LT [redacted] called her to the stand to testify in his warrant for attachment against her. At which time she pled the fifth because she was convinced he was coming after her. After the Subpoena was quashed he coopted CFAY Security to execute a CASS. Ultimately they arrested her for exactly what she was implicated with on 04 January at the Article 39(a) hearing. Shortly before her arrest Senior Chief [redacted] ordered her to speak with him about her phones

[20] Defense Exhibit (F)
[21] Expected Testimony
[22] Id.
[23] Id.
[24] Defense Exhibit (D)

APPELLATE EXHIBIT (IV)
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containing the suspicious text messages.[25] At the CFAY security interrogation room she was order to speak again.[26] Ultimately she did.

At no time during any of those interactions with LT [redacted] the Investigators, or Senior Chief [redacted] was she ever given her Article 31(b) rights advisement in any capacity. It wasn't until her attorney demanded, after she spoke, that she be released that MA2 [redacted] finally give her an advisement, which she promptly signed and declined to make a statement.[27]

It is important to highlight here that despite the constant verbal assurances to the contrary after the fact, every government actor that she has come in contact with has repeatedly treated her as though she was accused of wrongdoing. It would defy the logic of Article 31 if all that was needed to avoid a person's rights was to simply deny that they were suspected. That is essentially what happened in this case. While LCDR Sims continues to assert not only that she is innocent in the charged offenses but also that the supposed evidence that was sought was not evidence at all, LT [redacted] and CFAY security objectively acted like she was suspected of an offense from the very beginning. The reason for this is simple. They did suspect her. And now, the government seeks to admit every compelled and involuntary statement.

It is clear from "all the facts and circumstances at the time of the interview" that "the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense."[28] They should have issued her an advisement from the very first interaction.

While CDR [redacted] did advise LCDR Sims later of her rights, the taint of the previous involuntary statements persisted and no cleansing warnings were given. The impending destructive force of the previous unlawful actions by law enforcement continued throughout the subsequent investigation. Given the earlier result of attempting to assert her rights she did not feel comfortable doing so with him. The statement to him, although conducted in a less egregious manner, was still affected by and connected to the previous violations thus should be considered involuntary.

7. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

   b. Testimony LCDR Chanel Sims;
   c. Testimony [redacted]
   d. Testimony LT [redacted]
   e. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
   f. Defense Exhibit (B) – Text Messages
   g. Defense Exhibit (C) – Emails Between LCDR Sims, LT [redacted] and [redacted]
   h. Defense Exhibit (D) – Subpoena
   i. Defense Exhibit (E) – Email from LT [redacted]
   j. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
   k. Defense Exhibit (G) – Command Authorized Search and Seizure
   l. Defense Exhibit (H) – Report excerpt MA2 [redacted] Statement
   m. Defense Exhibit (I) – Report of Arrest
   n. Defense Exhibit (J) – Art 31 rights advisement form

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[25] Expect Testimony
[26] Expect Testimony
[27] Defense Exhibit (J)
[28] *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)(citations omitted).

o. Defense Exhibit (A) – Command Investigation appointment
p. Defense Exhibit (A) – Email from Judge Reyes in regard to Subpeona

8. **Relief Requested**. In accordance with Military Rule of Evidence 304(f), the Defense moves the Court to suppress all statements made by LCDR Sims between 04 January, 12 February to [redacted] as well as CDR [redacted]. All derivative evidence of any of the unwarned interactions including the phone extraction report and potential testimony derived from involuntary statements. The relief request in this motion is parallel to the relief requested on the Fifth Amendment suppression and the Fourth amendment suppression motions submitted by the Defense in this case.

9. **Oral Argument.** Defense requests oral argument.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:51:47 -04'00'

[redacted].M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (W)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS INVOLUNTARY STATEMENTS** 4 September 2020

1. **Nature of Motion.**

Pursuant to Mil. R. Evid. 304(b), UCMJ, and Article 31, UCMJ, the Government respectfully opposes the Defense Motion, requests that this Court DENY the Motion, and further requests that this Court find the Accused's statements ADMISSIBLE.

2. Summary of Facts.

a. For a summary of relevant facts, please see the government's summary of common facts attached as enclosure (1).

3. Discussion.

a. LT [redacted] was not required to advise the Accused of her Art. 31(b) warnings when he interviewed the Accused on 14 January 2020.

Article 31(b) of the Uniform Code of Military Justice requires that persons subject to the code provide an accused warnings prior to any official interrogation.[1] It is axiomatic that "only servicemembers suspected of a crime must be Article 31(b) warnings.[2] The test to determine whether someone is a suspect is whether, considering all of the facts and circumstances at the

[1] Art. 31(b), Uniform Code of Military Justice
[2] United States v. Kendig, 36 M.J. 291, 294 (C.A.A.F. 1993) citing United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982).

time of the interview, the government interrogator believed, or reasonably should have believed that the one interrogated committed an offense.[3]

While LT [redacted] is a person subject to the UCMJ, he was not required to provide the Accused with an Art. 31(b) warning in their 14 January interview. LT [redacted] requested the Accused come into the Trial Services Office to discuss the NCC [redacted] court martial as a witness.[4] There is no indication from LT [redacted] or Ms. [redacted] who was also present during the interview, that the trial counsel sought to interview the Accused for any purpose other than to discuss her observations as a witness in the NCC [redacted] case. The defense contention that LT [redacted] suspected the Accused of a crime is absent any evidence, other than what the defense refers to in their own motion as a "spurious claim" that the entire "Admin shop" was accused of obstructing justice or hiding evidence on the morning NCC [redacted] was arrested for driving under the influence.[5] The testimony supplied in support of this claim appears to focus on Chief [redacted] reluctance to testify out of fear that it may impact the Command Master Chief's professional opinion of Chief [redacted][6] The testimony itself appears to be based on hearsay between multiple parties, and only mentions the Accused's name on a single occasion.[7]

There is further evidence that even after LT [redacted] knew about the text messages on the Accused's cell phones, he still viewed her as a witness to the NCC [redacted] court martial, and did not suspect her of violating the UCMJ. The first page of the CASS signed by Captain [redacted] says the government was seeking evidence *relevant to the NCC* [redacted] court martial.[8]

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[3] Id.
[4] Govt. Mot. Encl. 9
[5] Pg. 4, Defense motion to suppress involuntary statements
[6] Def. Mot. Encl. F.
[7] Id.
[8] Def. Mot. Encl. G

Despite the evidence being located on the Accused's cell phone(s), there is no indication the trial counsel suspected the Accused of committing any offense under the UCMJ. For these reasons, the government believes the trial counsel was not required to provide the Accused with an Art. 31(b) warning at any point during the interview on 14 January 2020.

b. <u>The CID investigators were not required to provide the Accused with her Art. 31(b) warnings.</u>

Similar to LT [redacted], the CID investigators are subject to the code, and required to provide an Art. 31(b) warning prior to any official interrogation. In this case, the investigators did not suspect the Accused of violating the UCMJ. As discussed in the government's response to the defense motion to suppress for lack of PC, the investigators had no prior knowledge of the NCC [redacted] case, and relied on the affidavit attached to the CASS when they executed the CASS on 31 January 2020. The affidavit and first page of the CASS expressly stated the evidence sought from LCDR Sims was related to the NCC [redacted] court martial.[9]

According to the investigators, they did not intend to ask the Accused any questions, and only sought to execute the CASS for evidence related to the NCC [redacted] case.[10] This likely changed once the Accused was apprehended by MA2 [redacted] and MACS [redacted] not for obstructing justice or hiding information as the defense claims in its motion,[11] rather for failing to comply with the CASS by providing her biometric data to the investigators. The investigators did not ask the Accused any questions while executing the CASS, and therefore could not illicit incriminating answers.[12]

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[9] Id.
[10] Govt. Mot. Encl. 6 and 7
[11] Pg. 4, Defense motion to suppress involuntary statements
[12] Gov. Mot. Encl. 6

c. <u>The statements made to Commander [redacted] were voluntary and are admissible.</u>

"A confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."[13]

To determine voluntariness, this Court must look at the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[14]

Factors to consider include "[1] the mental condition of the accused; his age, education, and intelligence; [2] the character of the detention, including the conditions of the questioning and rights warning; and [3] the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[15]

On 5 February 2020, Commander [redacted] was appointed as the invstigating officer into the Accused's alleged misconduct.[16] On 12 February 2020, the Accused provided CDR [redacted] with a three page, typed statement of her recollection of the events leading up to 31 January 2020, as well as the execution of the CASS on 31 January 2020.[17]

Looking at the totality of circumstances and discussed in *Shneckloth*, there is no indication the Accused's statement to CDR [redacted] was involuntary. the Accused is an intelligent individual, and an educated, career officer in the U.S. Navy. She took the time to type, edit, and sign the statement she provided to CDR [redacted] There is an absence of any evidence that she felt coerced to make the statement, or that it was made in a manner where the Accused

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[13] United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing Mil. R. Evid. 304); *see* Article 31(d), UCMJ.
[14] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Freeman, 65 M.J. at 453.
[15] United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005); United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).
[16] CDR [redacted] appointing letter
[17] Gov. Mot. Encl. 2

felt threatened or deceived. The statement, if anything else, appears to be the Accused's thorough explanation of her side of the events that took place on 31 January 2020. At the time the Accused provided the statement on 12 February she was represented by counsel, and at nearly every crucial juncture sought the assistance of her assigned counsel. the Accused sought counsel to file a motion to quash the subpoena, had counsel present during the hearing, requested her counsel when presented with the CASS, and refused to provide her biometric or passcode data without counsel present. The evidence is clear that the Accused was aware of her right to seek the advice of counsel, and was aware of her right to seek the advice of counsel before making any statements.

4. **Evidence and Burden of Proof.**

a. The burden is on the Government to prove by a preponderance of the evidence that LCDR Sims' statements were voluntary. Mil. R. Evid. 304(a) and (b)

Enclosure (2): Witness Interview Notes with LT [redacted]

Enclosure (6): investigator [redacted] Interview Notes

Enclosure (7): Investigator [redacted] Interview Notes

Enclosure (9): Ms. [redacted] Interview Notes

5. **Argument.** The Government respectfully requests oral argument on this motion.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel personally on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO SUPRESS BASED ON PROTECTIONS OF THE FIFTH AMENDMENT** **31 AUG 20**

1. **Nature of Motion**. Pursuant to M.R.E 304, Defense moves to suppress all involuntary statements obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution. This motion is made in parallel to a separate motion on Article 31 involuntary statements.

2. **Facts**.

a. The facts of this motion are common to all motions filed on 31 August by defense and are filed by defense as defense enclosure (1).

3. **Burden.** When the defense has made an appropriate motion or objection under this rule, the prosecution has the burden of establishing the admissibility of the evidence. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

4. **Law.**

There is perhaps no more well-known right in the US Constitution than the Fifth Amendment rule that "no person ... shall be compelled in any criminal case to be a witness against himself."[1] Precedent surrounding this rule has evolved to the present rule that where a person is placed in custodial interrogation the rights must be warned and the right to silence must be "scrupulously honored." [2] This is simply because "[t]he circumstances surrounding in custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[3]

In Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Supreme Court of the United States added a second prophylactic layer against potential law enforcement misconduct during suspect interviews.[4] Additionally, the right is reaffirmed in this jurisdiction when C.A.A.F ruled "once a suspect in custody has "expressed his desire to deal

[1] USCS Const. Amend. 5
[2] *See Michigan v. Mosley*, 423 U.S. 96, 103-04, 96 S. Ct. 321, 326 (1975).
[3] *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)
[4] See also United States v. Mitchell, 76 M.J. 413, 419 (C.A.A.F. 2017) (citations omitted).

APPELLATE EXHIBIT (V)
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with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication."[5]

This rule eliminates not only express questioning, "but also ... any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[6]

The rule concerning whether custodial interrogation exists in a given case involves "two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[7] This jurisdiction has ruled the determination on custody must necessarily answer the following: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred ...[;] (3) the length of the questioning ...[;] [(4)] the number of law enforcement officers present at the scene[;] and [(5)] the degree of physical restraint placed upon the suspect." [8]

In US v Mitchell the Court had to answer the question of whether eliciting a pin code during custodial interrogation constituted a 5th amendment violation in the circumstances where a service member has elected his rights to an attorney and his rights to remain silent. In that case a service member was ordered open his phone pursuant to a Command Authorized Search and Seizure. The CASS was issued after he elected his rights.[9] After getting the phone, agents asked the service member for his PIN.[10] He initially refused. The agents continued their advance by "getting Appellee to enter his passcode rather than verbally provide it [and] that request was part of the same basic effort to convince Appellee to provide the information necessary for the Government to access and search the contents of his phone."[11]

The court found that to be improper because the "answer ... which would furnish a link in the chain of evidence needed to prosecute" was provided, thereby giving direct access to evidence in question.[12]

The Court invoked the Supreme court cases of *United States v. Hubbell*, 530 U.S. 27, 38, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000) where a fifth amendment violation was the "testimony inherent in the act of producing those documents."[13]

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[5] *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017;) see also Mil. R. Evid. 305(e)(3).
[6] *Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017)
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See also Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951) (Where the Court found that "the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

5. **Argument**.

In this case LCDR Sims should have been afforded the protections of the Fifth Amendment three times through the course of the day and each time she unequivocally exerted her Fifth Amendment rights to remain silent and to be represented by her detailed attorney. Each time the government ignored her.

a. **The first invocation of her Fifth Amendment rights.**

On 31 January LCDR Sims was called in support of the government's motion for warrant of attachment against her.[14] This clearly falls in the auspices of the Fifth Amendment protections. In viewing the record of trial, it is clear that she invoked her rights during the question that ultimately elicited the answer that was used against her in the CASS.[15] If allowed to submit the CASS as evidence at trial, the current trial Counsel will effectively be admitting her own clearly compelled statements against her. While the Judge in [redacted] seemingly believed he was eliciting a non-incriminating statement by making her answer the questions, he was clearly incorrect and no facts as to why he came to this decision exist on the record sufficient to fulfill the edicts of M.R.E 301 (d). Defense in this case can not go back and relitigate that issue nor would it change anything since the subpoena was ultimately quashed. It seems unlikely the military Judge in that case expected the trial counsel to include testimony he compelled over her objection. However, to ensure that the 5th Amendment protections are scrupulously honored, Defense asks that the 5th amendment issue be litigated as it pertains to this case. Specifically, Defense request that if this issue is found to be a violation of her fifth amendment right to remain silent that the involuntary statements be suppressed from the CASS and from any further admission at this court martial.

The statement that was compelled by the judge was that she received a text and that text was in her phone.[16] That compelled statement was very clearly testimonial. That statement subjected her to the punitive effects of a warrant for attachment which are listed on the face of a standard subpoena form and include being taken into custody for purposes of trial and then potential facing the consequences of 30 days in confinement and a $1000 fine under 10 U.S.C. 848. [17]

b. **The second invocation of her Fifth Amendment rights.**

The second issue with regard to LCDR Sims 5th amendment rights revolve around her first period of custodial interrogation. This period lasted from approximately 1540 until her apprehension at approximately 1630.[18] This was in fact the second time she had exercised her rights that day. The salient facts to this motion are that LCDR Sims was subject to increasing police presence, starting with three and ultimately increasing to 5, plus three additional members

[14] Defense Exhibit (F) at 7
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Expected Testimony

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of her command.[19] The encounter started in her office but continued after she was unquestionably apprehended and transported in handcuffs to CFAY Security Headquarters.[20] She was never free to leave. Not in actuality or in any reasonable perception, even after the phones were unquestionably relinquished. She exercised her rights loudly and unequivocally before during and after she was apprehended. While the CASS did indeed reference face or fingerprint, the operative part, and the part that CFAY Security seemed intent on was keeping the phones unlocked permanently. The order on the CASS was never relayed in its entirety during this period but the investigators did appear to want her to unlock the phones of her own volition. This required, in practicality, a PIN code to be entered multiple times. Additionally, one phone had no biometrics programed making an order to unlock using face or fingerprint impossible. No move was ever made when the investigators held the phones to unlock them on their own.[21]

c. The third period of custodial interrogation

After LCDR Sims was apprehended, she was transported to the interrogation room at CFAY Security headquarters.[22] She was not informed of her right to an attorney or to remain silent. Her detailed Defense counsel was not contacted and only by a chance encounter with the CNSWP SJA did he discover where she was. She was not informed of her rights nor was she freely allowed to exercise them until after she had unlocked her phones.[23]

Ultimately, LCDR Sims was required during this period of custodial interrogation by CFAY to enter her PIN code to unlock the phones, regardless of what the CASS actually said on its face. She was required to do this in the exact same fashion under very similar circumstances as the facts in U.S. v Mitchell. There are however some differences in the details between that case and this one. The verbal order in Mitchell did not appear to involve facial features or fingerprints but instead simply to unlock the phone.[24] In Mitchell the appellee was actually notified of his rights, in this case LCDR Sims was not.[25] However, In Mitchell the appellee was required to provide the pin pursuant to a CASS in the same manner as LCDR Sims; first through a request and then by affecting the unlocking herself.

While there are other distinguishing facts between the two cases those details are not relevant to the ultimate ruling of the court; which was that engaging a service member to open their phone using a pin code is not allowed while in custodial interrogation after she exercises her rights.[26]

It is important to note another feature in the present case that is only partially addressed in Mitchell. That is that the government did not know how each phone was unlocked. This led to the very natural next question by CFAY Security of how the phones were secured. This is a question that itself also falls into the same category of questions as the elicitation of the PIN in

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[19] *Id.*
[20] Defense Exhibit (I)
[21] Expected Testimony
[22] *Id.*
[23] *Id.*
[24] *United States v. Mitchell*, 76 M.J. 413, 416 (C.A.A.F. 2017)
[25] *Id.*
[26] *See United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), But see *United States v. Robinson*, 77 M.J. 303 (C.A.A.F. 2018) (where a consent base search does not invoke 5th amendment protections against providing a PIN code sufficient to open a phone.)

Mitchell.

In fact, the work phone did not have any other option but a PIN code, as that phone had no biometrics programed in. Also, while the personal phone had the Facial recognition feature enabled, that phone could not be permanently unlock without entry of a PIN code multiple times. This PIN code was compelled by CFAY security despite no PIN code being required in the Search authority and the compulsion of which clearly violates the law.

An additional difference between the cases is that in *Mitchell* he was completely unrepresented and simply pressured in to continuing to talk.[27] In the current case, LCDR Sims had detailed Counsel but was stopped from having meaningful interactions with him at the direction of RLSO Westpac representatives, who expressly stated that that she was exercising rights that she does not have.[28] Additionally, during the limited interactions that CFAY security allowed, they would not allow him to exert his client's right to remain silent during the entirety of the detainment and apprehension until nearly 1830, when she was finally presented with her Article 31 rights advisement.[29]

Mitchell does an important service with the reminder that "Edwards forbids interrogation following the invocation of the Miranda right to counsel, [and] not just interrogation that succeeds."[30] Therefore, "those who seek Edwards protection do not need to establish that the interrogation produced or sought a testimonial statement in order to establish a violation. Rather, only interrogation itself must be established."[31] The court continues that "once an Edward's violation has been established, whether the incriminating response or derivative evidence will be suppressed is a question of remedy, not wrong."[32] LCDR Sims in this case, just as much as the appellee in that case, had her rights violated "at the moment when interrogation occurred."[33] Her remedy is apparent "under the plain language of the Military Rules of Evidence, any evidence derived from a violation of Edwards must be suppressed."[34]

d. <u>The issues inherent in unlocking phones</u>

While this jurisdiction only decided *Mitchell* in 2017, the concept that PIN codes are testimonial and therefore protected under the auspices of the Fifth Amendment is well settled law. As open and shut as this analysis seems to be there is one further point that must be discussed. That is the inevitable government argument that an order to produce facial features or fingerprints is not unlawful under the line of cases that hold people ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints.[35] It is important to note those cases turn on the Fourth Amendment and do not preclude Fifth Amendment analysis on the same subjects.

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[27] See generally *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017)
[28] Defense Exhibit (H)
[29] Defense Exhibit (J)
[30] *Mitchell*, 76 M.J. 413, at 419
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S. Ct. 2000, 2003, 36 L. Ed. 2d 900 (1973); *United States v. Mara*, 410 U.S. 19, 21, 93 S. Ct. 774, 775, 35 L. Ed. 2d 99 (1973); *United States v. Dionisio*, 410 U.S.

However in consideration of the subject the court must also consider *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 1643 (1985), the Supreme court case that held that fingerprints are only searchable by law enforcement "if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."[36] It is worth observing that Hayes does not stand in opposition to the aforementioned line of cases, but it does invoke the requirement that a person must *be suspected of a crime* in a similar way as is required in Terry v Ohio.[37] In *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989), this jurisdiction considered the same question and distinguished that case from Hayes by calling out the fact that in Hayes there was "little specific information to tie petitioner . . . to the crime [and] forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes."[38] In *Fagan* the court holds that the fingerprinting was done in a

> Non-disruptive, non-humiliating, and nonintrusive manner in which these prints were initially sought separates this command action from those seizures described in Davis and Hayes. Appellant was not wrenched from his home or job and was not subjected to public or even private embarrassment. The prints were sought at reasonable times and in a reasonable manner. Appellant's place of duty temporarily became the NIS office during the brief interval necessary to accomplish the procedure. As a result of this brief reassignment, the flow of his pay and entitlements was not interrupted; his employment rights were not affected; the peace and security of his personal and family life were not disturbed; and the sanctity of his abode was left inviolate.[39]

In the current case in front of this court, LCDR Sims was compelled on what the government claims is no reasonable suspicion and subjected to custodial interrogation which humiliated and degraded her and ultimately culminated in her actual arrest.[40] Treating her as an accused subjected her to a wide range of collateral issues to her career.

It is worth noting that collecting biometric information is a fairly common practice for the military. The basis of the practice seems to normally be well nested in the aforementioned case law and, even in Hayes and Fagan, only because it is done to suspects, duly warned of their rights, or to non-detained service members, in the normal course of their administrative responsibilities for a none investigative reason. There is no case law anywhere that allows for this treatment to be visited on innocent third-party witnesses who are treated as accused only because of their proximity to a case.

This analysis really only needs to occur if this court is inclined to follow the government's logic that the aforementioned cases apply to opening all cell phones or computers at all. There is no case law on point to unlocking phones in this jurisdiction aside from US v

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[36] *Hayes v. Florida*, 470 U.S. 811, 817, 105 S. Ct. 1643, 1647 (1985)
[37] Id.
[38] *United States v. Fagan*, 28 M.J. 64, 67 (C.M.A. 1989)
[39] Id.
[40] Expected Testimony

Mitchell US v Robinson, and the related unpublished lower court decisions. The precedent that military security and investigators often rely on to affect these types of investigative actions on cell phones comes from federal circuit courts. While some do advance the theory that a person can be ordered to open their phones using biometrics without triggering Fifth Amendment protections, just as many do not. Take for example, *In re Search of a Residence in Oakland*, 354 F. Supp. 3d 1010. In that case the court addresses the question at issue. The court determined that "in this context, biometric features serve the same purpose of a passcode, which is to secure the owner's content, pragmatically rendering them functionally equivalent."[41] The court went on to rule that requiring someone "to affix their finger or thumb to a digital device is fundamentally different than requiring a suspect to submit to fingerprinting [because] the act concedes that the phone was in the possession and control of the suspect, and authenticates ownership or access to the phone and all of its digital contents."[42] Thus, the act of unlocking a phone with a finger or thumb scan far exceeds the "physical evidence" created when a suspect submits to fingerprinting to merely compare his fingerprints to existing physical evidence (another fingerprint) found at a crime scene, because there is no comparison or witness corroboration required to confirm a positive match."[43] The court went even further holding that a "biometric feature is analogous to the nonverbal, physiological responses elicited during a polygraph test, which are used to determine guilt or innocence, and are considered testimonial."[44]

This issue is covered by this motion, in this depth, primarily to highlight the fact that this is not a settled issue in the law. It is not even a settled issue in this jurisdiction. There is no case specifically on point to the issue of biometrics, despite the near universal custom throughout this organization of citing what is essentially none conforming precedent to justify a practice that defies logic and has yet to be challenged. Citing this case in particular is intended to highlight the reasons why the order in LCDR Sims case is so patently unreasonable where she was, at least by the statements of the government representatives at the time of the CASS, completely innocent and unsuspected of any offense.

6. **Evidence**. The evidence is common to each motion submitted on 31 August 2020.

A. Testimony LCDR Chanel Sims;
B. Testimony [redacted]
C. Testimony LT[redacted]
D. Defense Exhibit (A) – 03 January Record of Trial except, US v. [redacted]
E. Defense Exhibit (B) – Text Messages
F. Defense Exhibit (C) – Emails Between LCDR Sims, LT[redacted] and [redacted]
G. Defense Exhibit (D) – Subpoena
H. Defense Exhibit (E) – Email from LT[redacted]
I. Defense Exhibit (F) – Art 39(a) 31 Jan 2020
J. Defense Exhibit (G) – Command Authorized Search and Seizure
K. Defense Exhibit (H) – Report excerpt MA2[redacted]Statement
L. Defense Exhibit (I) – Report of Arrest

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[41] In re Search of a Residence in Oakland, 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019)
[42] *Id.*
[43] *Id.*
[44] *Id.*

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M. Defense Exhibit (J) – Art 31 rights advisement form
N. Defense Exhibit (K) – Command Investigation appointment
O. Defense Exhibit (L) – Email from Judge Reyes in regard to Subpeona

7. **Relief Requested**. Defense request that all statements made by LCDR Sims during each period of custody by held involuntary and all derived evidence be suppressed. Additionally, Defense requests that the order to unlock the phone using biometrics be found unlawful under *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 1643 (1985), due to a lack of reasonable suspicion by the government at the time the order was issued. Defense further requests all derived statements and evidence collected be suppressed.

8. **Oral Argument.** Defense requests oral argument.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.08.31 08:52:47 -04'00'

[redacted]M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *31*th day of *Aug* 2020, a copy of this motion was served on Trial/Defense Counsel.

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (V)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	)	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS BASED ON THE PROTECTIONS OF THE FIFTH AMENDMENT** 4 September 2020

1. Nature of Response.

This response is to the defense motion to suppress statements made by the Accused. The government respectfully requests the court DENY the defense motion to suppress, and further find the Accused's statements ADMISSIBLE.

2. Summary of Facts

a. For a summary of relevant facts, please see the government's summary of facts attached as enclosure (1)

3. Discussion

a. The Fifth Amendment and custodial interrogation.

The Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself."[1] The Fifth Amendment protections against self-incrimination generally apply to the accused's statements during a custodial interrogation.[2] The nature of a custodial interrogation can be daunting for anyone and the right of person to have counsel present is "indispensable to the protection of the Fifth Amendment privilege."[3] Precedent has

[1] USCS Const. Amend. 5
[2] Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).
[3] Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

long held that an accused's invocation of their right to counsel is a prophylactic, and once an accused has expressed the desire to have counsel present, all further interrogation shall cease.[4] When an accused has invoked their Fifth Amendment privilege, the prosecution must establish that the accused knowingly and voluntarily waived [her] Miranda rights.[5]

Whether a person is in custody for the privilege to apply is a matter that must also be addressed. To determine whether a person is in custody, the courts first consider the circumstances surrounding the interrogation, as well as whether a reasonable person would feel as though they would be permitted to terminate the interrogation and leave.[6] Other factors include: (1) whether the person appeared voluntarily; (2) the location and atmosphere of the place where the questioning occurred, and; (3) the length of the questioning.[7]

Prior to a custodial interrogation, a person must be provided with an advisement of their right to have counsel present. Military Rule of Evidence 305 requires persons subject to the code provide an Art. 31(b) rights warning prior to interrogation.[8] Article 31(b) of the Uniform Code of Military Justice further provides that "no person subject to this chapter may compel any person to incriminate himself."[9]

Despite the requirements of Mil. R. Evid. 305 and Art. 31(b), a witness testifying in a judicial proceeding is not required to be warned of their rights prior to, or during questioning. Notwithstanding the protections provided by the Fifth Amendment, the courts have determined

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[4] Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885 (1981)
[5] Id. See, Mil. R. Evid. 305(g)(1)
[6] Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).
[7] United States v. Chatfield, 67 M.J. 432, 438 (C.A.A.F. 2009), *See* Mathiason, 429 U.S. at 495.
[8] Mil. R. Evid. 305(c)
[9] Art. 31(b), Uniform Code of Military Justice

that Article 31(b) do not apply when a witness makes the decision to testify at trial.[10] This is articulated in the discussion of M.R.E. 301:

> A military judge is not required to provide Art. 31(b) warnings. If a witness who seems *uninformed* of the privileges under this rule appears likely to incriminate himself or herself, the military judge may advise the witness of the right to decline to make any answer that might tend to incriminate the witness....Failure to advise a witness does not make the testimony of the witness inadmissible.[11]

As the court stated in *United States v. Howard*, the decision that Art. 31(b) does not apply leaves the witness with the "right of free choice" to refuse to answer an otherwise incriminating question.[12]

The remaining Fifth Amendment privilege is contained within Mil. R. Evid 301, which provides that an "individual may claim their Fifth Amendment privilege...and the privilege applies to evidence of a testimonial or communicative nature."[13] The right of that person to exercise her Fifth Amendment privilege is one that is "personal" and can be exercised or waived at her discretion.[14] Finally, Mil. R. Evid. 301(e) indicates that when a witness answers an incriminating question without asserting the privilege, they may be required to answer questions relevant to disclosure.[15]

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[10] United States v. Howard, 17 C.M.R. 186, 189 (U.S. C.M.A. 1954). In view of the many difficulties which would be encountered in the trial of a case if a warning to a witness were demanded, we have no hesitancy in holding that Congress in enacting Article 31 intended to leave a witness protected only by his privilege against self-incrimination.
[11] Mil. R. Evid. 301, discussion.
[12] Howard. at 16.
[13] Mil. R. Evid. 301(a)
[14] Mil. R. Evid. 301(b)
[15] Mil. R. Evid. 301(e)

b. <u>The Accused waived her Fifth Amendment privilege at the 31 January Art. 39a hearing.</u>

The Art. 39a hearing on 31 January was not a custodial interrogation. Looking at the factors discussed in *Thompson* and *Chatfield*, the Accused attended the Art. 39a willingly and voluntarily. The trial counsel's motion indicated the government intended to call the Accused in support of its motion for a writ of attachment, and the Accused's own response to the motion indicated that she "requested to be heard." The situs of the hearing was an open courtroom, a public forum, where attendees are free to enter and leave at any point. The members present at the hearing that day included the military judge, trial counsel, NCC [redacted] defense counsel, and the Accused's defense counsel. None of the members were law enforcement agents. Finally, the questions posed of the Accused during the 39a were specifically relevant to the motion for a writ of attachment, and her motion to quash. The impartial military judge was present to oversee all questions asked by the trial counsel. Looking at the factors used in case law to determine a custodial interrogation, the Art. 39a hearing was not a custodial interrogation.

Once the Accused took the stand as a witness, she was not required to be provided with her Art. 31(b) warnings, and her answer to the trial counsel's questions waived her privilege. Cases such as *Howard* and *Bell,* and our own rules of evidence do not require a witness in a *judicial proceeding* be provided with their Art. 31(b) warnings.[16] As discussed in *Howard*, once the Accused took the stand to testify at the 39a, she was left with only her Fifth Amendment privilege against self-incrimination. We know the Accused was aware of her privilege because, when the trial counsel asked her whether she received text messages from NCC [redacted] on 7

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[16] United States v. Bell, 44 M.J. 403, 405 (C.A.A.F. 1996), citing United States v. Howard, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954). And See, Mil. R. Evid. 301 discussion.

October 2019, her response (twice) was "I plead the fifth," a clear invocation of her privilege against self-incrimination.[17] The military judge's response to the invocation indicated he was unaware of how the response could be incriminating. The military judge explains to the Accused that "the question doesn't illicit an incriminating statement," after the Accused invokes the second time. [18] The trial counsel resumed questioning and asks if the Accused received text messages on her personal or work cell phone, instead of invoking again, she waives, and chooses to answer the question and responds "personal."[19] The Accused's response to the question was a waiver of her privilege.

Finally, the Accused had the advantage of being represented by counsel at the Art. 39a. Prior to the NCC [redacted] Art. 39a hearing, the Accused sought the advice of defense counsel, and was detailed a defense counsel to represent her at the hearing.[20] The defense counsel assisted the Accused by drafting the motion to quash the government subpoena, and was present during the portion of the 39a where the Accused testified.[21] Based on the facts presented by the defense, the Accused sought legal counsel, obtained legal counsel, and at the Art. 39a hearing, she was represented by legal counsel.

When the Accused chose to testify, and specifically, when she chose to answer incriminating questions at the Art. 39a, she waived her privilege. Unlike an accused during a custodial interrogation, the Accused chose to testify at the 39a, in support of the motion filed by her defense counsel. When she took the stand to testify, she was most likely aware of the

[17] Def. Mot. Encl. F
[18] Id.
[19] Id.
[20] Defense Motion Common Facts 2(u) and 2(w).
[21] Defense Motion Common Facts 2(y) Note: the defense counsel can also be heard on a portion of the audio recording of the 31 January Art. 39a.

questions the trial counsel intended to ask her. Most importantly, the Accused was represented by counsel who was present at the Art. 39a hearing.

c. The execution of the CASS was not a custodial interrogation, and Art. 31(b) warnings were not required.

When the CID investigators entered the Accused's workspace to execute the CASS, it was not a custodial interrogation, and her Art. 31(b) warnings were not required. As previously discussed, the Fifth Amendment protections against self-incrimination generally apply to the accused's statements during a custodial interrogation.[22] A limited detention in order to execute a CASS is not a custodial interrogation. In *Michigan v. Summers*, the U.S. Supreme Court held that:

> [F]or Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while the search is conducted.[23]

In *United States v. Burns*, law enforcement detained the occupant of a home while executing a search warrant. During the detention, Burns made incriminating statements to one of the law enforcement officers. Afterward, Burns attempted to suppress the statements. The Court held that the detention pursuant to the execution of the warrant was not custodial, and therefore a *Miranda* advisory was unnecessary.[24]

The execution of the CASS on 31 January is analogous to *Burns*, and the investigators executing the CASS only detained the Accused for the necessary amount of time to do so. It is

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[22] Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).
[23] Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).
[24] Most detentions that occur during the execution of a search warrant, like most *Terry* stops, are "comparatively nonthreatening." They are often short in duration. Moreover, such detentions are "surely less intrusive than the search itself." United States v. Burns, 37 F.3d 276, 281 (7th Cir. 1994) citing *Summers*, 452 U.S. at 701, 101 S. Ct. at 2593.

accurate that the Accused was detained during the execution of the CASS, but a rights advisory was not required because the investigators executing the warrant did not ask her any questions with the intent to elicit an incriminating response. Furthermore, although she did make statements that were unbecoming, and in violation of Art. 133, the Accused did not make any incriminating statements to law enforcement in response to any questions they may have asked her.

In their motion, the defense argues that the Accused's detention during the execution of the CASS was a violation of her Fifth Amendment privilege, and that she was in custody, and therefore any statements made by the Accused should be suppressed. The facts do not support the defense contention. The execution of the CASS was slowed down by the Accused's demand to speak with her attorney and the events that followed. According to the investigators, the execution of the CASS took a little more than one hour.[25] Almost immediately upon serving the Accused with the CASS, she told the investigators that she wanted to speak with her defense attorney before giving them her phones. The investigators took the time to speak with the Accused's defense attorney, and read the CASS. The investigators also contacted their legal counsel, and spoke to the staff judge advocate who presented them with the CASS.[26] During the execution of the CASS there were multiple conversations between the Accused's defense counsel, the investigators, and the command staff judge advocate. These conversations took up a considerable amount of the time during the execution. Finally, after the Accused provided the investigators with her phones, she refused to provide the biometric data required to unlock the phones, which necessitated more time to complete the execution of the CASS. Her refusal to

[25] Govt. Mot. Encl. 6
[26] Id.

comply with the CASS during this period is what ultimately lead to her apprehension, and prolonged the amount of time necessary to execute the CASS.

The government assumes the defense is attempting to suppress statements made to law enforcement agents regarding her intent to violate a lawful order by not complying with the CASS, or to comply with lawful orders issued by military police officers in the execution of their duties, which form the basis for charged misconduct in this case. These statements were made prior to any apprehension and were not in response to any questions seeking incriminating answers. Accordingly the Fifth Amendment does not protect these statements.

d. Unlocking the phone was not a violation of LCDR Sims' Fifth Amendment rights.

In *United States v. Mitchell* the CAAF held that Army CID investigators violated Sergeant Mitchell's Fifth Amendment rights when he was asked to unlock his cell phone in the absence of counsel.[27] The salient facts are that Sergeant Mitchell was held as a suspect in a custodial interrogation, and was informed of his Art. 31(b) warnings. Subsequently, he invoked his right to counsel before making any further statements. After he was released back to his command, CID investigators obtained a verbal CASS for Sergeant Mitchell's cell phones, which the investigators had probable cause to believe contained evidence of a crime. The investigators met back up with Sergeant Mitchell in his company commander's office only two hours after the Sergeant asked for counsel. Pursuant to the CASS, the investigators asked Sergeant Mitchell for his cell phone, and he obliged. When the investigators realized the phone could only be unlocked with passcode, they asked Sergeant Mitchell to provide the code. He was initially reluctant, but ultimately gave into the investigators' request. At trial, the defense counsel filed motion to

[27] United States v. Mitchell, 76 M.J. 413, 415 (C.A.A.F. 2017).

suppress, and the judge agreed that the investigators' request to unlock the phone was a violation of Sergeant Mitchell's Fifth Amendment rights after he invoked those rights at his initial interrogation that morning.

In the present case the defense relies heavily on *Mitchell* in their motion to suppress, but there is a very clear distinction between *Mitchell* and this case; when the Accused unlocked her cell phones on 31 January her counsel was present in the room. The court's entire justification for suppressing the evidence in *Mitchell* was based on Sergeant Mitchell's request for counsel, and the investigators reinitiating an interrogation without counsel present. On 31 January when the CID investigators entered the Accused office space to execute the CASS, her first response was to contact her defense counsel. The defense counsel talked to the investigators, and to the command's staff judge advocate, as well as consulted with his client.[28] After the Accused refused to comply with the biometrics sought in the CASS, she was apprehended and taken to the military police headquarters building, and placed in an interrogation room.[29] the Accused remained in the interrogation room until her defense counsel arrived. She and her defense counsel were permitted to use MACS [redacted] office to speak in private away from the recording devices in the interrogation room.[30] Afterward, and most importantly, LCDR Sims was asked to unlock her phones and she complied upon the advise of her defense counsel.[31]

There is no doubt that after the Accused was apprehended and taken to the military police headquarters building, she was in custody. Yet, she was not forced, coerced or tricked into unlocking her phones. the Accused made an informed, voluntary decision to use her biometrics and ostensibly her passcode to unlock the phones and provide them to the CID investigators. The

[28] Govt. Mot. Encls. 6 and 8
[29] Govt. Mot. Encl. 6
[30] Govt. Mot. Encl. 5
[31] Id. and Govt. Mot. Encl. 3.

defense is attempting to retroactively invoke a right which was waived when the Accused unlocked her phones.

5. Burden of Proof and Evidence

a. Pursuant to Mil.R. Evid. 304(f)(6) the prosecution has the burden of establishing the admissibility of the evidence.

b. The government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (1): Government Statement of Facts

Enclosure (3): The Accused's 12 February Statement to the Investigating Officer

Enclosure (6): Interview notes with Investigator [redacted]

Enclosure (8): Interview notes with MACS [redacted]

Testimony of Ms. [redacted]

Testimony of LT [redacted]

Testimony of MA1 [redacted]

Testimony of MA1 [redacted]

6. Oral argument. The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION IN LIMINE TO DISMISS CHARGES II FOR UNREASONABLE MULTIPLICATION OF CHARGES** **31 AUG 20**

1. **Nature of Motion.**

This is a motion is to dismiss the sole Specification of Charge II or Charge III, and Charge IV Specification 1 and 2, or any combination thereof under RCM 907(b)(2)(E) and RCM 307(c)(3) for failure to state an offense and under RCM 907(b)(3)(B) because the specifications constitute an unreasonable multiplication of charges.

2. **Summary of Facts.**

LCDR Sims is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV. Charge Sheet dated 11 August 2020. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted], USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.

3. **Burden of Proof.**

The burden of proof is a preponderance of the evidence, and as the moving party the defense has the burden of persuasion pursuant to R.C.M. 905(c)(1)-(2).

4. **Discussion.**

Charge II, III and IV all constitutes an unreasonable multiplication of charges.

The distinction between multiplicity, unreasonable multiplication of charges for findings, and unreasonable multiplication of charges for sentencing was discussed by the Court of Appeals for the Armed Forces in.[1] The court clarified that "there is only one form of multiplicity, that

[1] *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012)

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which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis."[2] "As a matter of logic and law, if an offense is multiplicious for sentencing it must necessarily be multiplicious for findings as well."[3] *Blockburger* provides that when "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[4]

Here, the government has charged LCDR Sims with six different specifications under three UCMJ Articles, alleging three acts within a single course of conduct. Charge I, specification 1 (Failure to obey other lawful order) alleges that LCDR Sims failed to obey a Command Authorization for Search and Seizure of her personal and work cellular phones.[5] Charge I, specification 2 (Failure to obey other lawful order), and Charge IV, specification 2 (Conduct unbecoming an officer and a gentleman), allege that LCDR Sims failed to obey a lawful order issued by Master at Arms Senior Chief [redacted] to wit: "to turn around and not walk away."[6] Charge II, sole specification (Prevention of authorized seizure of property), Charge III, sole specification (Obstructing justice), and Charge IV, specification 1 (Conduct unbecoming an officer and a gentleman), allege that LCDR Sims removed or deleted from LCDR Sims' cellular phone text messages between Chief [redacted] and LCDR Sims.[7] Thus, Charge I, specification 2 and Charge IV, specification two target the same act. Likewise, Charge II, sole specification, Charge III, sole specification, and Charge IV, specification 2, all target the same act. These charges do not appear to be charged in the alternative as they each cover differing types of criminality and not simply alternatives of proof.

Regarding the alleged failure to obey an order from Master at Arms Senior Chief [redacted] the elements of Article 92 (Failure to obey other lawful order) require the government to prove (1) that a member of the armed forces issued a certain lawful order; (2) that the accused had knowledge of the order; (3) that the accused had a duty to obey the order; and (4) that the accused failed to obey the order.[8] The elements of Article 133 (Conduct unbecoming an officer and gentleman) require the government to prove (1) that the accused did or omitted to do a certain act; and (2) that, under the circumstances, the act or omission constituted conduct unbecoming an officer a gentleman.[9] However, "if the act charged as conduct unbecoming an officer and gentleman constitute a separate offense, the particular requirements of proof of such offense must be met to establish the charge."[10] Thus, to prove Charge IV, specification 2, the Government will be required to prove the exact elements of Charge II, specification 2. Furthermore, as charged, Charge II, specification 2, and Charge IV, specification 2, are identical, except for the additional words of Charge IV, specification 2, which state: "conduct which was

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[2] *Campbell*, 71 M.J. at 23 (referring to *Blockburger v. United States*, 284 U.S. 299 (1932), and *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)).
[3] *Campbell*, 71 M.J. at 23.
[4] *Blockburger*, 284 U.S. at 304.
[5] Charge Sheet dated 11 August 2020
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] *United States v. Gomes*, 2 U.S.C.M.A. 232, 237 (1953).

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unbecoming of an officer and a gentleman."[11] Because Charge IV, specification 2, contains every element of charge I, specification 2, these charges are multiplicious.

Regarding the alleged removal or deletion of text messages between LCDR Sims and Chief [redacted] the elements of Article 131e (Prevention of authorized seizure of property), sole specification, require the government to prove (1) that one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property; (2) that the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof; and (3) that the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property. The elements of Article 131b (Obstructing justice), require the government to prove (1) that the accused wrongfully did a certain act; (2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice. Finally, the elements of Article 133 (Conduct unbecoming an officer and a gentleman), specification 1, require the government to prove (1) that the accused did or omitted to do a certain act; and (2) that, under the circumstances, the act or omission constituted conduct unbecoming an officer a gentleman. As explained above, when the conduct alleged in an Article 133 charge "constitutes a separate offense, the particular requirements of proof of such offense must be met to establish the charge." *Gomes*, 2 U.S.C.M.A. at 237. In this case, Charge IV, specification 1, and Charge II, sole specification, are identical except for the additional words in Charge IV, specification 1, "conduct which was unbecoming an officer and a gentleman." Charge Sheet dated 11 August 2020. Because Charge IV, specification 1, contains every element of Charge II, sole specification, these charges are multiplicious.

Additionally, Charge III, sole specification, alleges the same wrongful act—removing or deleting text messages between LCDR Sims and Chief [redacted]—as Charge II, sole specification, and Charge IV, specification 1. The elements of Article 131b (Obstructing justice) require the government to prove (1) that the accused wrongfully did a certain act; (2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice. Thus, when comparing Charge III, sole specification, with Charge II, sole specification, and Charge IV, specification 1, a strict application of the *Blockburger* test may not result in multiplicity because the overlapping charges contain separate elements.

However, even where charges are not multiplicious in the sense of due process, "the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."[12] Rule for Courts–Marital (R.C.M.) 307(c)(4) is the regulatory expression of that prohibition, directing "[w]hat is substantially one transaction should not be made the basis for an **unreasonable multiplication of charges** against one person."[13]

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[11] Charge Sheet dated 11 August 2020.
[12] *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).
[13] R.C.M. 307(c)(4) (emphasis added)

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In *Campbell* and *Quiroz*, the court set forth four factors that a trial court should consider in determining whether charges and specifications have been unreasonably multiplied:

> (1) whether each charge and specification is aimed at distinctly separate acts, (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality, (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, **or** (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.[14]

The *Campbell/Quiroz* factors are not "all-inclusive," nor is any one or more factors a prerequisite.[15] Further, one or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching."[16] Ultimately, the question is whether the charges "unduly exaggerate the accused's criminality."[17]

The facts here raise the unreasonable multiplication problem of potential prosecutorial abuse that may occur when a single act is charged as multiple individual offenses. As explained above, five of the six specifications in this case address two distinct acts—disobeying an order and deleting text messages.[18] The elements of the charges as drafted support a finding of unreasonable multiplication of charges, and the *Quiroz/Campbell* test provides the analytical framework for determining as much. Accordingly, the analysis below applies the applicable factors of the *Quiroz/Campbell* test.

i. The three specifications addressing the removal or deletion of text messages charged here are not aimed at distinctly separate acts because they each allege the exact same act.

In *Campbell,* the appellant was charged with three specifications involving making a false official statement that aided in his unauthorized withdrawal of drugs from a Pyxis machine at the base hospital, larceny of the drugs taken from the machine, and possession of these drugs.[19] The trial judge determined the specifications addressed one event, and found that all three offenses "essentially arose out of this same transaction and were part of the same impulse."[20]

Here, the three specifications in question—Charge II, sole specification, Charge III, sole specification, and Charge IV, specification 1—address a single act. Each of these specifications allege that LCDR Sims removed or deleted text messages. These three specifications identify the same defendant, at the same place, on the same day, engaging in the same conduct. It is without question that each of these specifications "arose out of this same transaction and were

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[14] *Campbell*, 71 M.J. at 24; *Quiroz*, 55 M.J. at 338 (emphasis added).
[15] *Id*
[16] *Campbell*, 71 M.J. at 23 (quoting *Quiroz*, 55 M.J. at 338-39) (emphasis added).
[17] *Campbell*, 71 M.J. at 24.
[18] *Compare, United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984) ("When Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault.").
[19] 71 M.J. at 21
[20] *Id.* at 22

part of the same impulse."[21] Just as in *Campbell*, LCDR Sims' acts were not separated by time or location and were part of the same transaction. Thus, it would be improper to consider the charged specifications as distinct acts.

ii. The number of specifications misrepresent and exaggerate LCDR Sims' alleged criminality because they inaccurately reflect LCDR Sims' conduct.

In *U.S. v. Hanks*, the Army Court of Criminal Appeals held that a charge of maiming was not multiplicitous with a charge of aggravated assault in which grievous bodily harm was intentionally inflicted, even though both charges arose out of same conduct by the accused in intentionally placing the hands of his 22-month-old son in a container of boiling water.[22] The court noted that while the two distinct and separate charges "are based on the same act, together they accurately reflect appellant's criminality in a way that one charge standing alone would not."[23] .

Unlike *Hanks*, the three specifications here are not dependent on each other to reflect LCDR Sims' alleged criminality. A single specification of deleting the text messages here implicates the exact same criminal law interests, unlike the multiple interests implicated by the maiming and assault charges in *Hanks*. The court in *Hanks* correctly sought to address the distinct interests of permanent injury under maiming and the act of intentionally placing the hand of another in boiling water under assault.[24] Here, the alleged act of a single instance of deleting text messages does not raise distinct interests. Thus, the number of specifications charged here misrepresents and exaggerates LCDR Sims' conduct.

iii. The number of charges and specifications unreasonably increase the accused's punitive exposure

The maximum punishment that may be imposed for a violation of Article 131e (Prevention of authorized seizure of property) is a Dismissal, total forfeitures, and confinement for 5 years.[25] The maximum punishment that may be imposed for a violation of Article 131b (Obstructing justice) is a Dismissal, total forfeitures, and confinement for 5 years.[26] The maximum punishment that may be imposed for a violation of Article 133 (Conduct unbecoming an officer and gentleman) is Dismissal, total forfeitures, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.[27] In this case, the analogous offense is Article 131e (Prevention of authorized seizure of property), which, as previously stated, carries a maximum confinement time of 5 years.[28] Thus, multiplicious charges addressing the single act

[21] *Id.* at 22.
[22] *U.S. v. Hanks*, 74 M.J. 556, 559 (A. Ct. Crim. App. 2014).
[23] *Id.* at 560
[24] Id.
[25] Article 131e, UCMJ
[26] Article 131b, UCMJ
[27] Article 133, UCMJ
[28] Article 131e, UCMJ

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of deleting text messages triples LCDR Sims' punitive exposure from 5 to 15 years imprisonment, unreasonably increasing her punitive exposure.

iv. There is evidence of prosecutorial overreaching, and LCDR Sims punitive exposure is increased by the unreasonable multiplication of charges.

It appears that the charging scheme on its face seeks to use a single transaction to form the basis for a multiple charges in an unreasonable way. The single alleged course of action seemingly caused a spinoff of charges asserting different criminality where the aims of justice only require one. The traditional standard of reasonableness, analyzed through the *Campbell/Quiroz* four-factor test guides determinations of unreasonable multiplication of charges.[29] Here, the specifications in question arise from a single alleged transaction, limited in time and location. Further, the separate specifications serve to exaggerate LCDR Sim's alleged conduct and inaccurately reflect her alleged criminality.

According to *Campbell*, the existence of a single factor could be sufficiently compelling for the finding of unreasonable multiplication of charges.[30] Here, all four factors favor a finding of unreasonable multiplication. Accordingly, there is ample basis for the court to dismiss the sole specification of Charge II as an unreasonably multiplied specification of sexual assault.

5. **Relief Requested.**

For reasons explained above, the defense moves this court to dismiss the second specification of Charge I, the sole specification of Charge II, and the sole specification of Charge III under R.C.M. 907(b)(3)(B) because the specifications constitute an unreasonable multiplication of charges.

6. **Evidence Presented.** No evidence is submitted for the purpose of this motion.

7. **Oral Argument.** Defense requests no oral argument and intends to stand on this motion.

J. M. LARSON
LT, JAGC, USN
Defense Counsel

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[29] *Campbell*, 71 M.J. at 24; *Quiroz*, 55 M.J. at 338.
[30] *Campbell*, 71 M.J. at 23.

APPELLATE EXHIBIT (VI)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was electronically served on trial counsel on 31 August 2020.

[redacted]
LARSON.JEFFREY.MATTHEW.[redacted]
Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted]
Date: 2020.08.31 08:53:49 -04'00'

[redacted]J. M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VI)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO COMPEL DISCOVERY** **2 SEP 20**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(7), Defense requests that the Court compel the government to produce (1) Emails between LT [redacted] and the members of the [redacted], (2) Emails between the [redacted] SJA and Trial Counsel concerning the LCDR Sims case, (3) Messages (via Facebook messages) between Trial Counsel and the [redacted] SJA regarding LCDR Sims case, and (4) Messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS, which were requested by Defense in its discovery requests. Defense request that the court accept this untimely filing. Government provided late notice of the denial, and the timeline of the discovery denial leaves little option but to file after the deadline. There is no other motions hearing scheduled for this case.

2. **Facts**.

a. LCDR Chanel Sims, USN, is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV.[1]

b. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted] USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.[2]

c. Defense submitted an Initial Discovery Request to Trial Counsel, Kevin Estes, Capt., USMC, on 16 July 2020.[3]

d. On 25 August 2020, Capt. Estes sent an email to Defense Counsel explaining listing specific emails and text messages that were not being turned over in discovery: (1) Emails

[1] Charge Sheet dated 11 August 2020.
[2] *Id.*
[3] Initial Discovery Request dated 16 Jul 20.

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between LT [redacted] and the members of the [redacted] claiming privilege under MRE 502(a)(2)-(5); (2) Emails between the [redacted] SJA and Trial Counsel concerning the LCDR Sims case, claiming privilege under MRE 502(a)(4); (3) Text messages (via Facebook messages) between Trial Counsel and the [redacted] SJA regarding LCDR Sims case, claiming privilege under MRE 502(a)(4); (4) Messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS, claiming privilege under MRE 502(a)(4); (5) Text messages between LT [redacted] and the Command Services OIC, claiming privilege under MRE 502(a)(5); and (6) Emails between Trial Counsel and the advisory counsel at TCAP, claiming privilege under MRE 502(a)(5).[4]

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

4. **Law.**

a. A military accused derives his rights to discovery from the Constitution, the Uniform Code of Military Justice (UCMJ), and the Rules for Courts-Martial (R.C.M.). The Constitution imposes a duty on the government to refrain from suppressing evidence favorable to the defense, and to come forward with exculpatory matters.[5] Article 46, UCMJ, guarantees the defense equal opportunity to obtain evidence. Finally, R.C.M. 701 imposes specific obligations on both the government and the defense in matters of discovery. "Accordingly, Article 46 and these implementing rules provide a military accused statutory discovery rights that are greater than those afforded by the Constitution."[6]

b. Under R.C.M. 701(a)(2)(A), the defense is entitled to inspect books, papers, documents, etc., that are material to the preparation of the defense, or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belonged to the accused. This rule applies as much to material affecting the credibility of witnesses as it does to exculpatory evidence.[7] In *United States v. Williams*, the Court of Appeals for the Armed Forces stated, "As a general matter, evidence that could be used to impeach a government witness is subject to discovery."[8]

c. Military Rule of Evidence 502 establishes that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (1) between the client or the client's representative and the lawyer or the lawyer's representative; (2) between the lawyer and the lawyer's representative; (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest; (4) between representatives of the client or between the client and a representative of the client; or (5) between lawyers representing the

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[4] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.
[5] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[6] *United States v. Yates*, 2019 CCA LEXIS 391, 42 (2019)
[7] *See United States v. Bagley*, 473 U.S. 667, 678 (1985); *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993).
[8] 50 M.J. 436, 440 (C.A.A.F.1999).

client."[9] A lawyer may claim privilege on behalf of the client, and in the absence of evidence to the contrary, is presumed to have authority to do so.[10]

d. "CAAF has cautioned against expansively interpreting MIL. R. EVID. 501 to include privileges unenumerated by the President, notwithstanding the modest degree of flexibility in the application of federal common-law or constitutionally rooted privileges permitted by MIL. R. EVID. 501(a)(1) and 501(a)(4)."[11] "This approach to privileges in military jurisprudence reflects the United States Supreme Court's observation that 'whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"[12]

e. The Rules for Court-Martial dictate that "the prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process."[13] "Each party is entitled to the production of evidence which is relevant and necessary."[14]

5. **Argument**.

a. **The requested communications are relevant and necessary to the preparation of LCDR Sims' defense.**

The communications appear to be between the various government attorneys discussing the case as it is unfolding. The attorneys and everyone they are likely communicating with are witnesses to the alleged activity.

b. **The requested communications are not privileged.** Trial Counsel has asserted that the requested communications are not discoverable as they are privileged under MRE 502.[15] Defense consedes that the text messages between LT [redacted] and the Command Services OIC or the emails between Trial Counsel and advisory counsel at TCAP are likely privileged. However, the remaining communications requested are not protected by privilege under the rule.

c. **The emails between LT [redacted] and the members of the Naval Surface Group Western Pacific are not privileged.** Trial Counsel contends that the emails between LT [redacted] and the members of NSGWP "regarding this case or constituting legal advice are privileged

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[9] M.R.E. 502(a)(1)-(5).
[10] M.R.E. 502(c).
[11] *United States v. Wuterich*, 68 M.J. 511, 516 (CAAF 2009) (internal quotation omitted) (citing *United States v. Rodriguez*, 54 M.J. 156, 158 (CAAF 2000) and *United States v. Custis*, 65 M.J. 366, 370-71 (CAAF 2007)).
[12] *Wuterich*, 68 M.J. 511, 516 (CAAF 2009) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)); *See also Cheney* v. *United States*, 542 U.S. 367, 384 (2004) ("In light of the 'fundamental' and 'comprehensive' need for 'every man's evidence' in the criminal justice system . . . privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be 'expansively construed, for they are in derogation of the search for truth.") (quoting *Nixon*, 418 U.S. at 710 (1974)).
[13] R.C.M. 703(a).
[14] *Id.* at 703(e)(1).
[15] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.

under MRE 502(2)-(5)."[16] While communications between an SJA and her principal may be considered privileged, that privilege does not extend to communications with members of the command. Moreover, Trial Counsel does not even claim that all of the communications in question constitute legal advice. Still, Trial Counsel claims that emails simply "regarding this case" are still somehow privileged. MRE 502 does not stretch so far.

d. **The emails between the NSGWP SJA and Trial Counsel concerning the LCDR Sims case, the text messages (via Facebook messenger) between Trial Counsel and the NSGWP SJA, and the text messages (via Facebook messenger) between Trial Counsel and the CFAY SJA are not privileged.** Trial Counsel asserts that the communications requested are privileged under MRE 502(a)(4).[17] MRE 502(a)(4) establishes that "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client … between representatives of the client or between the client and a representative of the client" are privileged. Trial Counsel implies that the SJA and Trial Counsel are both representatives of the client. This is simply not the case. A quick review of MRE 502 indicates that the lawyer and the representative of the client are two distinct roles. The mere fact that both the SJA and Trial Counsel are government attorneys in no way creates a shared privilege. Nor has Trial Counsel explained how the communications in question were made for the purpose of providing legal advice to the client. Thus, the requested communications should be turned over to Defense.

6. **Evidence**.

Enclosure (1): Government denial of discovery, dated: 25 August

7. **Relief Requested**. Pursuant to Rule for Courts-Martial 906(b)(7), Defense requests that the Court compel the government to produce (1) Emails between LT [redacted] and the members of the Naval Surface Group Western Pacific, (2) Emails between the Naval Surface Group Western [redacted] SJA and Trial Counsel concerning the LCDR Sims case, (3) Text messages (via Facebook messages) between Trial Counsel and the Naval Surface Group Western Pacific SJA regarding LCDR Sims case, and (4) Text messages (via Facebook messenger) between Trial Counsel and the CFAY SJA regarding service of the CASS.

[redacted]LARSON.JEFFR[redacted]EY.MATTHEW. Digitally signed by LARSON.JEFFREY.MATTHEW. Date: 2020.09.02 19:07:31 +09'00'

[redacted].M. LARSON
LT, JAGC, USN
Defense Counsel

[16] *Id.*
[17] Email from Capt. Estes to Defense Counsel, dated 25 August 2020.

APPELLATE EXHIBIT (VIII)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

CERTIFICATE OF SERVICE

I hereby certify that on the *2nd* day of *September* 2020, a copy of this motion was served on Trial/Defense Counsel.

[redacted]LARSON.JEFFRE[redacted]Y.MATTHEW[redacted]
Digitally signed by LARSON.JEFFREY.MATTHEW[redacted]
Date: 2020.09.02 19:07:08 +09'00'

[redacted].M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VII)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS BASED ON THE PROTECTIONS OF THE FIFTH AMENDMENT** 4 September 2020

1. Nature of Response

The government herein responds to the defense motion to compel discovery, and requests that the Court **DENY** the motion.

2. Summary of Facts

a. The Accused, Lieutenant Commander Sims, is charged with violating articles 92, 131b, 131e, and 133 of the Uniform Code of Military Justice.

b. The charges arise from her refusal to comply with a command authorization for search and seizure of her personal and work cellular phones, as well as her deleting or removing text messages from her phone(s).

c. On 16 July 2020, the defense counsel submitted an initial discovery request to the trial counsel.

d. On 4 August 2020, the trial counsel provided a response to the initial discovery request.

e. On 25 August 2020, trial counsel sent an email clarifying and identifying requested items believed to be privileged under Mil. R. Evid. 502.

APPELLATE EXHIBIT (VII)a
PAGE 1 OF 5

3. Discussion of the Law.

Rule for Courts-Martial (R.C.M.) 703(f)(1) entitles each party to the production of evidence which is relevant and necessary. The specific facts of the case must show that the evidence is relevant and necessary.[1] Pursuant to Military Rule of Evidence (M.R.E.) 401, any evidence having 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 is relevant. Relevant evidence is necessary when it would contribute to a party's presentation of the case in some positive way on a matter in issue.[2] The Rules for Courts-Martial and the case law do not endorse or allow "blanket fishing expeditions,"[3]

The defense has failed to show why the requested items are either relevant or necessary. A general description of the material sought or a conclusory argument as to its materiality is insufficient. The defense's theories are "too speculative, and too insubstantial, to meet even a threshold requirement of relevance and necessity."[4] As a result, its motion to compel the government to produce the requested evidence should be denied.

4. Analysis.

In their motion the defense requests a number of communications between the staff judge advocate to the command; the convening authority and the trial counsel for the NCC [redacted] court martial; Facebook messages between trial counsel and the convening authority's staff judge advocate; and, Facebook messages between the trial counsel and the CFAY staff judge advocate.

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[1] See United States v. Franchia, 13 U.S.C.M.A. 315, 320 (C.M.A. 1962).
[2] See R.C.M. 703(f)(1), Discussion; United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987).
[3] United States v. Abrams, 50 M.J. 361, 362-63 (C.A.A.F. 1999); see also Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951); United States v. Briggs, 48 M.J. 143, 144 (C.A.A.F. 1998); Franchia, supra at 320-21.
[4] United States v. Briggs, 46 M.J. 699, 709 (A.F.C.C.A. 1996), aff'd, 48 M.J. 143 (C.A.A.F. 1998).

APPELLATE EXHIBIT (VIII)
PAGE 2 OF 5

a. Communications between the staff judge advocate and members of the command are privileged.

Mil. R. Evid. 502(a)(1) provides that communication between a client and his lawyer is privileged when that communication is between the client or the client's representative and the lawyer or the lawyer's representative. Trial counsel believes this rule likely encompasses the communications sought by the defense. LT [redacted] was the staff judge advocate advising the command during the events in this case. The communications between LT [redacted] and the Commanding Officer are within the MRE 502 privilege.

The same rule defines "client" as a person, public officer, corporation, association, organization, association, or other entity, who receives professional legal services from a lawyer or who consults with the lawyer with a view to obtaining professional legal services.[5] The definition of client appears to also encompass not just the commanding officer, but members of the same command who seek or act on the legal advice of their staff judge advocate. This would include the commanding officer, executive officer or chief staff officer, legal officer, command master chief, etc. For this reason, the privilege protects the conversations the defense counsel seeks between the staff judge advocate and members of the command.

b. Communications between trial counsel, the staff judge advocate, and members of the command are privileged.

Mil. R. Evid. 502(a)(3) provides that communications between the client or the client's lawyer to a lawyer representing another in a matter of common interest are privileged. As discussed above, the definition of "client" extends to members of the same command who communicate with the staff judge advocate for the purpose of obtaining professional legal

[5] Mil. R. Evid. 502(b)(1)

APPELLATE EXHIBIT VIII(a)
PAGE 3 of 5

services. In this case, the defense requested communications between members of the command, the staff judge advocate, and the trial counsel. The trial counsel likely falls under the privilege defined under M.R.E. 502(a)(3), because he is a lawyer representing another, the United States government, in a matter of common interest. The trial counsel does represent the United States, but the common interest is that of prosecuting the matter he is discussing with the command and the staff judge advocate. While the trial counsel may have different opinions about the case, the rule does not require that privileged matter be of the "exact same" interest.

5. Burden of Proof

Pursuant to Rule for Court Martial 905(c), the burden is on the defense as the movant by a preponderance of the evidence.

6. Relief Requested The government requests that the court **DENY** the motion following a Rule for Courts-Martial 701(g)(2) in camera review of the communications.

7. Argument The government does not request oral argument and relies on the argument set forth in this motion.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT (VIII)a
PAGE 4 OF 5

CERTIFICATE OF SERVICE

I, the undersigned, hereby attest that a copy of the foregoing was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT VIII
PAGE 5 OF 5

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR, USN**	**DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES** **2 September 2020**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(7), Defense moves the Court to order the Government to physically produce the following witnesses to testify on the merits and interlocutory issues: Captain [redacted] USN; PSC [redacted] USN; Captain [redacted] USN; and NCC [redacted] USN. Defense request that the court accept this untimely filing. The timeline of the witness denial leaves little option but to file after the deadline. There is no other motions hearing scheduled for this case.

2. **Facts**.

a. LCDR Chanel Sims, USN, is charged with two specifications of violating Article 92 (Failure to obey other lawful order), Uniform Code of Military Justice (UCMJ), in Charge I; one specification of violating Article 131e (Prevention of authorized seizure of property), UCMJ, in Charge II; one specification of violating Article 131b (Obstructing justice), UCMJ, in charge III; and two specifications of violating Article 133 (Conduct unbecoming an officer and a gentleman), UCMJ, in Charge IV.[1]

b. All charges stem from a single course of conduct on 31 January 2020 in which LCDR Sims is alleged to have deleted text messages between herself and Chief [redacted] USN, refused to unlock her phone when ordered to do so, and walking away from a military police officer in the execution of his duty.[2]

c. On 25 August 2020, Defense provided Government with an initial witness request.[3]

d. On 28 August 2020, the Government responded to the Defense's request for the production of witnesses and denied production of the following witnesses: (1) Captain [redacted] USN; (2) Chief [redacted] USN; (3) Captain [redacted] USN; and (4) Chief [redacted] USN.[4]

e. Additionally, Defense requests that the facts found in the Defense Motion Common Statement of Facts (submitted August 31 2020) be incorporated in to this motion.

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[1] Charge Sheet dated 11 August 2020.
[2] *Id.*
[3] Def Enclosure (1): Defense Counsel's Initial Witness Request dated 25 August 2020
[4] Def Enclosure (2): Government Response to Def Witness Request ltr of 28 August 2020

APPELLATE EXHIBIT (VIII)
PAGE 1 OF 4

3. **Burden.** As the moving party the Defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

4. **Law.**

a. "The military judge must decide any preliminary questions about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible."[5] "In so deciding, the military judge is not bound by evidence rules, except those on privilege."[6]

b. The Rules for Court-Martial dictate that "the prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process."[7]

c. 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.[8]

d. A party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.[9]

e. A witness is considered to be unavailable, if the witness: (1) is exempted from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies; (2) refuses to testify about the subject matter despite the military judge's order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under subdivision (b)(1) or (b)(5); (B) the declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (b)(3), or (b)(4); or (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.[10]

f. 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. A matter is not in

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[5] M.R.E. 104(a).
[6] *Id.*
[7] R.C.M. 703(a).
[8] *Id.* at 703(b).
[9] *Id.* at 703(b)(3).
[10] M.R.E. 804(a).

APPELLATE EXHIBIT (VIII)
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issue when it is stipulated as a fact.[11]

g. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f). Id. § 703(b)(2).

b. The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.[12]

a. Once the court determines the requested witnesses are relevant and necessary, it must ask if they are material. Witnesses are material when there is a "reasonable likelihood" that their testimony can affect the judgment of the factfinder.[13] Once "materiality has been shown, the Government must either produce the witness or abate the proceedings."[14]

b. If the court determines witnesses are cumulative, "only the defense may properly decide which of these witnesses will be utilized. To permit otherwise would be to tolerate someone other than the defense counsel making this legitimate and essential defense tactical decision."[15]

c. Although "military necessity" or various personal circumstances relating to a requested witness may be proper criteria to determine when his testimony can be presented, the sole factor for consideration in determining whether he will testify at all is the materiality of his testimony.[16] Once materiality has been shown the Government must either produce the witness or abate the proceedings.[17]

5. **Argument**.

a. **Captain [redacted] USN.** Captain [redacted] is a named victim in this case. The Command Authorized Search and Seizure was signed by him and the probable cause determination was made by him. In addition he was present at the office on 31 January 2020. His testimony on the merits and on interlocutory issues is relevant, material to the issue and not cumulative.

b. **Chief [redacted] USN.** Chief [redacted] is a direct witness of the LCDR Sims and CFAY Security's actions during the execution of the CASS. She can provide testimony on key issues that she observed in real time that have direct relation to the charged conduct. Additionally, she can provide impeachment testimony if necessary.

c. **Chief [redacted] USN.** Chief [redacted] is the subject and participant of the text messages at issue in this case. His testimony is relevant with regard to what is likely to be

[11] *Id.* Discussion.
[12] *Id.* at 403 (emphasis added).
[13] *See United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979).
[14] *United States v. Carpenter*, 1 M.J. 384, 385 (C.M.A. 1976).
[15] *United States v. Williams*, 3 M.J. 239, 242n. 9 (C.M.A. 1977) (emphasis in original).
[16] *United States v. Willis*, 3 M.J. 94, 96 (1977) (citing *United States v. Carpenter*, 1 M.J. 384 (1976); *United States v. Iturralde-Aponte*, 1 M.J. 196 (1975).
[17] *Id.* (citing *United States v. Daniels*, C.M.R. 655 (1974)).

APPELLATE EXHIBIT (VIII)
PAGE 3 OF 4

d. **Captain [redacted] USN.** Captain [redacted] was LCDR Sims's lawyer during the lead up to the 31 January. He was present on the line during the limited interactions with CFAY Security. He can provide impeachment testimony for CFAY Security.

6. Evidence

a. Enclosure (1): Defense production request, dated
b. Enclosure (2): Government response to Request, dated

a. **Relief Requested**.

Pursuant to Rule for Courts-Martial 906(b)(7), the Defense respectfully requests this Court compel the Government to produce the witnesses requested by the Defense.

The Defense requests oral argument on this motion or the opportunity to respond to the Government's response motion.

[redacted] LARSON.JEFFREY.MATTHEW. [redacted] Digitally signed by LARSON.JEFFREY.MATTHEW [redacted] Date: 2020.09.02 18:55:04 +09'00'

[redacted].M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2020, a copy of this motion was served on Trial Counsel.

LARSON.JEFFREY.MATTHEW. [redacted] Digitally signed by LARSON.JEFFREY.MATTHEW [redacted] Date: 2020.09.02 19:03:57 +09'00'

J.M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (VIII)
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHANEL G. SIMS LIEUTENANT COMMANDER U.S. Navy	SPECIAL COURT-MARTIAL **GOVERNMENT RESPONSE TO MOTION TO COMPEL PRODUCTION OF WITNESSES** 4 September 2020

1. Nature of Response

This response is to a defense motion to compel production of: (1) Captain [redacted]

2. Summary of Facts Relevant to the Motion

a. Lieutenant Commander Sims is charged with violating articles 92, 131b, 131e, and 133 of the Uniform Code of Military Justice.

b. The charges arise from her refusal to comply with a command authorization for search and seizure of her personal and work cellular phones, as well as her deleting or removing text messages from her phone(s).

c. On 25 August 2020, LCDR Sims defense counsel provided the trial counsel with a witness request.

d. On 28 August 2020, trial counsel responded to the defense witness request. The trial counsel denied [redacted]

3. Discussion

Rule for Courts-Martial (R.C.M.) 703(b) entitles each party to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary. Relevance is evaluated according to Military Rule of Evidence (M.R.E.) 401. 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," R.C.M. 703(b)(1), Discussion.

The defense cannot establish by a preponderance of the evidence why the testimony of the requested witnesses will be relevant and necessary.

a. NCC [redacted]: The government intends to call NCC [redacted] as a witness in its case in chief.

b. CAPT [redacted]: Captain [redacted] is the convening authority in this case, but otherwise is not relevant to the alleged charged conduct. In the defense witness production request Captain [redacted] is requested because he was the convening authority of U.S. v. [redacted] and "participated in the issuance of the unlawful subpoena." Captain [redacted] role as the convening authority in another case is not relevant to the U.S. v. Sims case. The defense presented no evidence that Captain [redacted] "participated in the issuance of the unlawful subpoena." The government intends to call LT [redacted] and the defense intends to call Ms [redacted] Both witnesses have first-hand knowledge of the subpoena, and Ms. [redacted] is the affiant. The testimony of Ms. [redacted] and LT [redacted] would make cumulative any potential testimony Captain [redacted] might provide. Further, subpoena speaks for itself as to its nature and purpose, and was issued by the Trial Counsel. The Trial Counsel who

issued the subpoena, LT [redacted] can speak to the issuance of the subpoena and any conversations with the convening authority in granting LT [redacted] authority to issue the subpoena.

c. PSC [redacted] Chief [redacted] was denied because her testimony is not relevant to the charged misconduct. Chief [redacted] admitted that she worked with LCDR Sims and was present when U.S. Navy CID investigators arrived to execute the CASS on 31 January 2020. Chief [redacted] relevant testimony ends at that point, as she was asked to leave by the command legal officer, and was not a witness to any other substantive events that day.

d. CAPT [redacted] Captain [redacted] was denied because his testimony is not relevant to the charged misconduct. Captain [redacted] is the commanding officer of the Defense Services Office Pacific. By his own statement he was not a witness to any of the events that took place on 31 January 2020, aside from a phone call between LCDR Sims' defense counsel and another attorney, therefore his testimony is not relevant and unnecessary. According to the defense witness request Captain [redacted] may be able to provide testimony in regard to the issued subpoena, although without LCDR Sims' permission to breach the attorney-client privilege, Captain [redacted] testimony would not be admissible.

4. Relief Requested

The government respectfully requests that the military judge deny the defense motion to compel production of [redacted].

5. Burden of Proof and Evidence

a. The defense bears the burden of persuasion under R.C.M. 905(c)(2)(A). The standard of proof for the defense is a preponderance of evidence as provided by R.C.M. 905(c)(1).

b. The government offers the following items of documentary evidence for the purposes of this motion:

Enclosure (10): Interview notes with CAPT [redacted]

Enclosure (11): Interview notes with PSC [redacted]

6. Oral argument The Government respectfully requests oral argument.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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Motion Response

Certificate of Service

I hereby attest that a copy of the foregoing motion response was served on the court and opposing counsel via electronic mail on 4 September 2020.

[redacted]

K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR /O-4** **USN**	**DEFENSE MOTION FOR A FINDING OF NOT GUILTY UNDER RULE FOR COURTS-MARTIAL 917** **25 October 2020**

1. Nature of Motion

Pursuant to the Rule for Courts-Martial 917, the Defense respectfully requests that the military judge enter a finding of Not Guilty regarding Charge I and the sole specification, as well as Charge II and the sole specification, of which LCDR Sims was convicted.

2. Summary of Facts

a. On 8 October 2020, LCDR Sims was found Guilty of Charge I and the sole specification, a violation of Article 92 of the UCMJ, failure to follow an order, as well as Charge II and the sole specification, violating Article 131e, prevention of an authorized search.[1]

b. Charge I and the sole specification alleged that having knowledge of a Command Authorized Search and Seizure, she failed to obey it by "wrongfully refusing to provide her fingerprints and facial features to unlock her personal and work cellular phones."[2]

c. Charge II and the sole specification alleged that "with intent to prevent its seizure, remove or delete from Lieutenant Commander Sims' cellular phone text messages between Chief [redacted] U. S. Navy, and Lieutenant Commander Sims, property which, as Lieutenant Commander Chanel Sims then knew, persons authorized to make searches and seizures were endeavoring to seize." [3]

d. Ms. [redacted] testified to being present at a meeting on 14 January 2020 between LCDR Sims and the trial counsel in U.S. v. [redacted] The purpose of the meeting was to discuss potential testimony concerning events which took place on 07 October 2019.[4]

e. During that meeting LCDR Sims disclosed the existence of text messages between Chief [redacted] and LCDR Sims. Ms. [redacted] never saw the text messages in question.[5]

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[1] The record and recording of the Special Court-Martial of LCDR Sim.
[2] Charge Sheet
[3] Charge Sheet
[4] The record and recording of the Special Court-Martial of LCDR Sim.
[5] *Id.*

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f. Ms. [redacted] testified that LCDR Sims had a new phone on 14 January 2020 and the phone that originally had the text messages in question in its local storage was not present at the meeting she testified to being present at.[6]

g. Ms. [redacted], the government expert on digital forensics, testified that encrypted data cannot be extracted from a digital device using the tool NCIS used to extract the phone image in this case. Furthermore, encrypted data was not extracted from LCDR Sims phone, evidenced by the fact that no data that was present from 7 October 2019 was extracted from her phone. Ms. [redacted] also testified that she searched for screen shots of the text messages.[7]

h. Ms. [redacted] also testified that ICloud data could be shared across devices.[8]

i. Ms. [redacted] was not present at the 14 January meeting or the original date that the extraction from LCDR Sims phone was created. She did not participate in the search or extraction which took place in February 2020.[9]

j. Mr. [redacted] testified to existence of screenshot on LCDR Sims IPad, depicting the text messages in question.[10]

k. SA [redacted] testified that she searched what she described as LCDR Sims' personal phone and did not find any text messages from Chief [redacted] from 07 October 2019.[11]

l. SA [redacted] did not testify that she viewed the ICloud settings of the phone or that she determined whether the phone had the ICloud enabled and password inputted.[12]

m. SA [redacted] never viewed the original phone or the phone that was present at the 14 January meeting between LCDR Sims and the Trial Counsel.[13]

n. SA [redacted] did not personally know the content of the text messages she was searching for or what application held them.[14]

o. The government did not admit any evidence as to the settings of the IPhone that was searched.[15]

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

APPELLATE EXHIBIT (XVII)
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p. The government did not admit any evidence that the phone seized was physically the same phone that was present on 14 January at the meeting between LCDR Sims and the trial counsel.[16]

q. MA1 [redacted] testified that she was present when the LCDR Sims unlocked her IPhones.[17]

r. MA1 [redacted] testified that she first presented LCDR Sims her work phone to unlock at 1800 on 31 January 2020. [18]

s. LCDR [redacted] did not have a biometric lock on her work phone and it could only be unlocked with her PIN Code.[19]

t. The CASS which formed the basis for the order in Charge I did not include an order to unlock the phones in question with PIN codes and it only addressed "fingerprints and facial features to unlock her personal and work cellular phones." This constitutes the only order directed at LCDR Sims.[20]

u. MA1 [redacted] testified that she did not know the exact contents of the order in the CASS because she did not read it.[21]

v. MA1 [redacted] testified that initially LCDR Sims refused to unlock her work phone using a PIN code but did so after her attorney told her she was required to.[22]

w. MA1 [redacted] testified that shortly after LCDR Sims unlocked her work phone she was presented her personal phone and she unlocked it immediately. [23]

x. The government elicited no testimony from any witness which indicated anyone other that LCDR Sims' attorney ever told her that a biometric requirement was contained in the CASS.[24]

y. The government's witnesses established that LCDR Sims was never given a copy of the CASS.[25]

3. <u>Summary of the Law</u>

"The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

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prior to the entry of judgement if the evidence is insufficient to sustain a conviction of the offense affected." [26]

Post-trial matters may be filed by either party or when directed by the military judge to address such matters as a motion to set aside one or more findings because the evidence is legally insufficient. [27]

The elements of an Article 92, Failure to obey other lawful order, offense are:

(1) That a member of the armed forces, namely, (state the name and rank or grade of the person alleged), issued a certain lawful order to (state the particular order or the specific portion thereof);

(2) That the accused had knowledge of the order;

(3) That the accused had a duty to obey the order; and

(4) That (state the time and place alleged), the accused failed to obey the order. [28]

The elements of an Article 131e, Prevention of authorized seizure of property, offense are:

(1) That (state the name(s) of the person(s) alleged), (a person) (persons) authorized to make searches and seizures (was) (were) seizing, about to seize, or endeavoring to seize certain property, to wit: (state the property alleged);

(2) That (state the time and place alleged), the accused (destroyed) (removed) (disposed of) (state the property alleged) with the intent to prevent its seizure; and

(3) That the accused then knew that (state the name(s) of the person(s) alleged) (was) (were) seizing, about to seize, or endeavoring to seize (state the property alleged). [29]

There is a requirement for an authorized search and seizure under MRE 315, or else some other exception to the warrant or search authority requirement before a person delineated in M.R.E 316 may seize property. [30]

In order to be guilty of a failure to follow a lawful order, the accused must have actual knowledge of the order. [31]

Property may be considered "destroyed" if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed. [32]

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[26] R.C.M. 917(a).
[27] R.C.M. 1104(b)(1)(B).
[28] U.C.M.J. Art. 92
[29] UCMJ Art 131
[30] M.R.E. 316
[31] MCM, pt. IV, 16c(2)(b); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); *United States v. Curtin*, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), aff'd, 34 M.J. 174 (C.M.A. 1992); *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building's entrance did not designate issuing authority).
[32] Military Judges Benchbook DA PAM 27–9 at 821, 01 January 2010

4. Argument

Charge I

The record does not contain sufficient evidence that LCDR Sims failed to follow an order to present her facial features.

The Government charged LCDR Sims with failure to follow an order by refusing to provide her fingerprints and facial features. The requirement for this charge is actual knowledge. No evidence exists that she was actually ordered to present her face to the security personnel until 1800 on 31 January. The only evidence on the record which shows that a request for her facial features was actually made was the testimony of MA1 [redacted] According to MA1 [redacted] testimony she presented the phones, which were then seized, to LCDR Sims to unlock at 1800. Having not seen the CASS at that point, LCDR Sim was unaware of the additional order to present her fingerprints and facial features.

MA1 [redacted] actually acknowledges that she never read the CASS and therefore did not know that the requirement was for facial features or fingerprints. MA1 [redacted] also states that her request was not for facial features but to "unlock the phone," and her initial focus was on the work phone which could not be unlocked with a finger print or facial features. This actually required a PIN code to be entered, something that was not ordered by the CASS. Within moments of learning, from her lawyer, that the facial features were required by the CASS for her personal phone she complied. The government presented no evidence that the request for the PIN codes by MA1 [redacted] was a valid lawful order and, even if it was, that order was not basis for the charged offense. Furthermore, MA1 [redacted] is the only individual on the record to have spoken to LCDR Sims about unlocking the then seized phones, and because she never read the CASS, she could not have known what the order actually said and could not be the basis for LCDR Sims's actual knowledge of that part of the CASS.

Additionally, that part of the CASS is the only part of the document which constitutes an order to LCDR Sims. The rest of the CASS is an order to the person conducting the search. Unless or until LCDR Sims is ordered to provide her face to unlock a phone that can actually be unlocked with it, she cannot have been in violation of Article 92. She was given the opportunity, according to the evidence on the record, exactly one time. At that time, she complied instantly.

The Governments evidence on the record is therefore insufficient to sustain a conviction on Charge I.

Charge II

There is no evidence on the record that shows the government looked in the correct place for the text messages.

The CASS alone, based only on probable cause, is not enough to relieve the government of the requirement to prove it looked in the correct location, before any inferences can be reasonably based on an absence of the data. Ms. [redacted] testified that LCDR Sims had a new phone at the 14 January meeting she witnessed. The messages were originally sent on 7 October. Implicitly, that meant that the messages in question were never on the local storage of the phone LCDR Sims had on 14 of January. The expert testified that the extraction would not include

items that were encrypted. She also indicated that the only extracted portion she viewed was the database that contained locally stored data and did not include data stored on the ICloud. SA [redacted] testified that she only searched the text message application and did not indicate that she viewed photo stream, or any other application, in her physical search of the phone. She also indicated she did not know where the messages were located or what they said, as she never witnessed the original messages. Nobody who viewed the original messages on LCDR Sims phone ever testified in her trial. Additionally, Ms. [redacted] stated her search uncovered no data, either deleted or not deleted. She indicated that she searched the local photograph storage as well. She found no data, deleted or not in that location. She testified in her expert capacity that encrypted data, such as the data protected by a separate password or found in a separate app within the phones storage, would not be extracted. It appears from the record that the search efforts employed by the government were never focused anywhere beyond the locally stored messages found in the native messaging app, despite the fact that the messages in question were never likely to be in that location or in that form. To draw any reasonable inference as to the disposition of the data, the fact finder must be presented evidence that the correct location was accessible by the Government agents who conducted the search. There is no evidence on the record which shows this. The evidence is therefore insufficient to support a conviction on Charge II.

There is no evidence on the record that LCDR Sims deleted text messages.

No witness testified that they saw LCDR Sims delete text messages. No evidence was presented which showed the actual deletion of the text messages. SA [redacted] testified that the text messages did not appear in her search. However the messages were present on LCDR Sims' IPad, according to Mr. [redacted] testimony, in the form of a preserved screenshot. If LCDR Sims received the text message to her phone number, as Chief [redacted] testified, than the only way that the messages would also be present on her IPad is if the ICloud connected the two devices. In order to be present on LCDR Sims IPad months after the search, they had to have been present on her ICloud (and thus visible on her iPhone) in the same form. This shows that the messages were not deleted and in fact preserved. This is based on the expert testimony that deleting data on one device would likely delete across all devices if the settings linked them. Additionally, evidence of deletion was not present for either the text or the screenshot that was preserved. The government only implied that because the agent did not see them, LCDR Sims must have deleted them. This implication is unreasonable given the complete lack of any other evidence introduced and the testimony of the expert witness. The government cannot stand exclusively on an inability to locate the data involved, in order to prove that LCDR Sims, herself, deleted messages.

There is no evidence on the record that the phone that was seized was the phone sought by the CASS.

The Government did not introduce an actual description of the original phone or of the phone that was searched. There is no evidence on the record that indicates that the phone which was seized was the same phone on which the text messages were expected to be. That is because only Ms. [redacted] testified to having seen the original phone and she was not involved in the search or seizure. SA [redacted] searched the phone that was seized but she never saw the phone on 14 January. In fact, SA [redacted] did not even know that the phone she search was the phone that was

APPELLATE EXHIBIT (XVII)
PAGE 6 OF 9

seized. There was no documents or testimony on the record which verified this. The finder of fact made an inference, without any evidence that LCDR Sims had the same phone in her office, the day the CAS was executed, as she had on 14 January in the RLSO space. The finder of fact also took for granted that CID provided the correct phones to SA [redacted] without any chain of custody documentation.

There is no evidence as to the time which the government claims the text messages were deleted.

Central to the elements of this charge is the requirement of an authorized seizure under MRE 315. These text messages could only have been seized after a probable cause determination was made and a Command Authorized Search and Seize was issued. Additionally, LCDR Sims must have actual knowledge at the time of that authorization. The very nature of this offense means that "the timing of the search is a critical element of the offense."[33] There is no evidence in this case as to the timing at all. The government did not even attempt to address this issue. The main thrust of the government's theory seemed to be that LCDR Sims should have known. There is no evidence that she did actually know until she was confronted by CID on 31 January. That a CASS is possible or that it was discussed in front of her is not enough for this element, as that would be constructive knowledge – if it meant anything at all. The government must have presented evidence that she destroyed property when someone authorized was endeavoring to seize and she had actual knowledge of that at the time. MRE 316 states that property may be used in evidence by a person in subdivision (d) if the person seizing is authorized to seize property or evidence by a search warrant or a search authorization under MRE 315.[34] It does not say that a seizure can be made by a person in subdivision (d) absent an authorization or exception. Additionally, M.R.E. 316 (a) holds that the seizure must conform to the rules of the Constitution of the United States. M.R.E. 315 states that only a commander, military Judge, or Magistrate may authorize a search authorization and only then upon a probable cause determination under M.R.E. 315 (f), or some other exception.

The Government in this case did not present any evidence that anyone was authorized to make searches and seizures on her property until approximately 1500 on 31 January. The government produced no evidence suggesting that the trial counsel in the U.S. v. [redacted] was ever authorized to search or seize prior to that point. Nor did the government admit any evidence that some exception applied to the fourth amendment warrant requirement. In fact, the government introduced evidence that the Judge in U.S. v [redacted] told the trial counsel he was specifically not authorized to search or seize without a search authorization. No evidence on the record is present that can even reasonably infer a date or time of deletion. The evidence is therefore insufficient to prove the element.

There is no evidence on the record that the property sought was removed or deleted with the intent to prevent its seizure.

The government presented no evidence that LCDR Sims had any intent to prevent the seizure of the text messages. The government implied that she had some malicious intent to aid Chief [redacted] Chief [redacted] testimony negated that argument. He stated he had no interactions

[33] United States v. Rogers, ARMY 20190032, 2019 CCA LEXIS 507, at 9 (Dec. 12, 2019).
[34] M.R.E. 316

APPELLATE EXHIBIT (XXI)
PAGE 7 OF 9

with regard to his trial or the text messages in question. The government provided no reason that she had to prevent seizure of the text message. The Government also did not show that the inability for the government to locate the text messages in question had anything to do with LCDR Sims. The government called no witnesses nor did they provide any documentary evidence on which a finder of fact could make any logical inference that she specifically intended anything. That the messages were not found where the government thought they would be does not imply that she intended to prevent them from seizing them. As described above, the intent element is required to be found with regard to the CASS and not before. There is simply nothing on the record which suggest anything about LCDR Sims state of mind or intentions.

There is no evidence that the property sought was destroyed.

The property sought never resided on the IPhone's local storage. The physical destruction of the phone, had that been the case, would not even destroy the text messages since the messages resided elsewhere. No evidence was ever introduced that LCDR Sims took any action which would have removed them from where they resided or made them "useless for the purpose for which it was intended."[35] It is clear that the text messages were not removed or destroyed because evidence of their continued placement on the ICloud was introduced by defense. The element is not satisfied simply because the government did not find the data. It can only be met if the data was actually destroyed or removed from the location it was at. Since the government's case never addressed the proper physical location of the text messages or the form of the data it is impossible for the element to be met.

Additionally the property that was sought by this CASS was definitively not destroyed – evidenced by the fact that it was used in LCDR Sim' trial. It was still present in LCDR Sims' ICloud, but also on Chief [redacted] phone. The government's own evidence shows that the property was not "useless for the purpose it was intended."[36] As the Government failed to show the property was destroyed or removed, the evidence is insufficient to support the charge.

5. Burden

As the moving party, the Defense bears the burden.

6. Evidence

a. The record and recording of the Special Court-Martial of LCDR Sim.

[35] Military Judges Benchbook DA PAM 27–9 at 821, 01 January 2010
[36] *Id.*

APPELLATE EXHIBIT (XXI)
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7. **Relief Requested**

Pursuant to the Rule for Courts-Martial 917, the Defense respectfully requests that the military judge enter a finding of Not Guilty regarding Charge I and the sole specification, as well as Charge II and the sole specification, of which LCDR Sims was convicted.

Respectfully submitted,

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.10.25 07:46:41 +09'00'

J. M. LARSON
LT, JAGC, USN

****

CERTICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on trial counsel and the Court on 25 October 2020.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW.[redacted] Date: 2020.10.25 07:47:01 +09'00'

J. M. LARSON
LT, JAGC, USN

APPELLATE EXHIBIT (XVII)
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REQUESTS

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

UNITED STATES **v.** **CHANEL SIMS** **LCDR USN**	**DEFENSE FORUM REQUEST** **30 SEP 2020**

1. **Forum Election**. LCDR Chanel Sims, USN, through counsel, previously elected trial by a court composed of members. LCDR Sims now respectfully requests a trial by Military Judge alone.

[redacted]
J. M. LARSON
LT, JAGC, USN
Detailed Defense Counsel

[redacted]
C.G. SIMS
LCDR, USN

Certificate of Service

I hereby attest that a copy of the foregoing forum selection was electronically served on the Court and trial counsel on 30 September 2020.

[redacted]
J. M. LARSON
LT, JAGC, USN
Detailed Defense Counsel

APPELLATE EXHIBIT (XIII)(a)

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES	)	
	)	
v.	)	**GOVERNMENT'S REQUESTED JUDICIAL NOTICE**
	)	
Chanel G. Sims	)	
Lieutenant Commander	)	**25 SEP 2020**
U.S. Navy	)	

1. Nature of Request. In accordance with M.R.E. 201, the Government respectfully requests that the Court take judicial notice of the following in the subject named case:

a. The Accused is currently on active duty in the United States Navy and was an active duty on or about 31 January 2020. The Accused has been on continuous active duty since 8 December 2005, and he has never been discharged or released from service.

b. The Accused's Designator is 1110.

[redacted]
K. S. ESTES
Captain, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT (XVI)
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ENCLOSURE (5)

NOTICES

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

UNITED STATES **v.** **CHANEL G. SIMS** **LCDR, USN**	**DEFENSE NOTICE OF PLEAS AND FORUM** **18 SEP 2020**

1. **Forum Election.** Pursuant to Rule for Courts-Martial 903(b) and in accordance with the trial management order, LCDR Chanel Sims, USN, through counsel, elects trial by a court composed of members.

2. **Entry of Pleas.** Pursuant to Rule for Courts-Martial 910 and in accordance with the trial management order, LCDR Chanel Sims, USN, through counsel, intends to enter the following pleas: To all Charges and Specifications thereunder: NOT GUILTY.

[redacted] LARSON.JEFFREY.MATTHEW[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW[redacted] Date: 2020.09.18 16:37:17 +09'00'

J.M. LARSON
LT, USN
Detailed Defense Counsel

APPELLATE EXHIBIT XXI()
PAGE 1 OF 2

Certificate of Service

I hereby attest that a copy of the foregoing witness list was electronically served on the Court and trial counsel on 18 September 2020.

[redacted] LARSON.JEFFREY.MATTHEW.[redacted] Digitally signed by LARSON.JEFFREY.MATTHEW[redacted] Date: 2020.09.18 16:37:35 +09'00'

J.M. LARSON
LT, USN
Detailed Defense Counsel

APPELLATE EXHIBIT (XIII)
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

U N I T E D S T A T E S **v.** **CHANEL SIMS** **LCDR/O-4, USN**	**DEFENSE NOTICE OF INTENT TO USE SMART COURTROOM TECHNOLOGY** **25 Sep 20**

Pursuant to the Technology Supplement of the Western Pacific Judicial Circuit Rules of Court, the Defense gives notice and respectfully requests to use the following electronic media to display evidence in this court-martial:

1. Image projector and video monitors to display electronic files (including PowerPoint) during various phases of the trial; and

2. Speaker or "speaker-phone" technology to enable the telephonic remote live testimony of witnesses.

3. The Microsoft "hub" computer in order to use communication applications for witness testimony.

[redacted]
J. M. LARSON
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the *25* day of September 2020, a copy of this motion was served on Trial Counsel.

[redacted]
J. M. LARSON
LT, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT (XV)(A)
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COURT RULINGS & ORDERS

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

UNITED STATES v. **CHANEL G. SIMS** **LCDR, USN**	**RULING – DEFENSE MOTION TO SUPPRESS – LACK OF PROBABLE CAUSE** 27 SEP 2020

1. Statement of the Case.

The Accused is charged with three specifications in violation of Articles 92, 131e, and 133. The maximum punishment authorized is the special court-martial jurisdictional maximum for an officer: a reprimand, forfeiture of two-thirds pay and allowances for twelve months, a fine, and restriction for no more than two months.

The charges were referred on 11 August 2020; the Accused was arraigned on 15 September 2020. The Defense filed a Motion to Suppress evidence derived from a Command Authorized Search and Seizure (CASS) issued on 31 January 2020.[1] The Government responded on 4 September 2020.[2] An Article 39(a)[3] session was held at Commander, [redacted] (CFAY) on 15 and 16 September 2020. Six witnesses testified: the Accused; [redacted] Convening Authority; [redacted] was called as a witness but did not testify.[4] The Defense and Government also provided documentary evidence in support of their motions.[5]

2. Issues

a. Did CAPT [redacted] have a substantial basis to determine there was probable cause to search and seize the Accused's personal and work cell phones on 31 January 2020?

b. Did CAPT [redacted] lose his impartiality by becoming personally involved in the evidence-gathering or investigative process before approving the CASS on 31 January 2020?

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[1] AE III.
[2] AE III(a).
[3] UCMJ (2019).
[4] At the beginning of the Article 39(a) session on 15 September 2020, the Defense notified the Court that the Commanding Officer, [redacted] had filed a complaint with the Rules Counsel against LT [redacted]
[5] AE IX and X respectively.

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c. Did LT [redacted] knowingly and intentionally included a false statement or act with reckless disregard for the truth in his 31 January 2020 application for a CASS?

3. Findings of Fact.

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

a. The Accused was the Manning and Administration Officer (N-1) for Naval Surface Group Western Pacific (NAVSURGRU WESTPAC) in the October 2019 to February 2020 time period. She commissioned in the Navy in December 2005 through Naval Reserve Officer Training Corps (NROTC). During her career she earned her Surface Warfare Officer (SWO) qualification in less than a year; earned a Master's of Business Administration (MBA) while pregnant and serving in a Staff job; earned her Engineering Officer of the Watch (EOW) qualification; and had been selected for promotion to the rank of Commander.

b. At the relevant times, the Accused had personal and work cell phones, both of which were Apple iPhones. The Accused used her Apple ID on both phones, as they both required an Apple ID to operate correctly. The Apple ID allowed her iMessages,[6] and other information maintained in her iCloud account, to sync on both phones. The Apple ID was paired with a passcode known only to the Accused.[7] Both phones were set to lock when not being actively used. The Accused's personal phone was unlocked using FaceID and her work phone was unlocked using a passcode.[8] No one at her command knew the passcode for her work phone. The Accused had no expectation either her work or personal phones or her iCloud account would be reviewed by her command. In fact, her work phone was never collected for review by NAVSURGRU WESTPAC.

c. On 7 October 2019, NCC [redacted] a member of her Department, sent the Accused a text message at 0734 stating "Going t[sic] be a little late this morning." At 0947, he again texted the Accused, "I've been stuck with security. They got me with the breathalyzer and taking me to main base. I'll talk to you when I get there." NCC [redacted] did not respond to her question, "As in blew over the limit?" When the Accused texted him "How are you?" at 1613, he responded "In the dumps. Just can't believe this happened."[9]

d. As a result of the 7 October 2019 incident, charges against NCC [redacted] were referred to a special court-martial by Commander, Naval Surface Group Western Pacific

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[6] iMessage is Apple's proprietary text messaging application. Though the company refers to the communications sent through this application as "iMessages," the Court will use the term "text messages" to avoid confusion.
[7] As used in this ruling, "passcode" and "password" could be used interchangeably to identify a serious of numbers and/or letters used to secure an electronic device.
[8] FaceID is a Apple security feature that uses facial recognition software to unlock the user's iPhone. It is used in place of a passcode or a fingerprint scan, otherwise known as TouchID. The Accused keeps the passcode for her work phone on a piece of paper kept with the phone because she would change the passcode every 30 days when her Outlook Web Access (OWA) password had to be changed.
[9] These text messages are found in Enclosure B of AE IX.

(COMNAVSURGRU WESTPAC).[10] In late-December 2019 or early-January 2020, the Accused met with [redacted] Defense Counsel. During that meeting, The Accused showed NCC [redacted] Defense Counsel the 7 October 2019 text messages on her phone. Subsequently, NCC [redacted] Defense Counsel requested the Government produce the Accused as a witness at trial, proffering that her testimony could "provide context to NCC [redacted] *pre-planned* late arrival to work that day."[11] The Government denied the request to produce the Accused. In its subsequent motion to compel the production of the Accused and other witnesses, NCC [redacted] Defense Counsel argued the Accused was a relevant and necessary witness. The Defense Counsel claimed the Accused would testify NCC [redacted] often needed to arrive late to work so he could drop his daughters off at school and "this was not a last minute revelation … [The Accused] knew about NCC [redacted] late arrival in advance."

e. To prepare for their written response to NCC [redacted] motion to compel witness production and the court-martial, the Trial Counsel and the civilian paralegal from Region Legal Service Office Western Pacific (RLSO WESTPAC), LT [redacted] and Ms. [redacted] respectively, met with the Accused on 14 January 2020.[12] When she arrived at the meeting, the Accused did not know why she was being interviewed, but did not believe she was suspected of a crime. LT [redacted] explained that they wanted to meet with her because she was on the Defense witness list and then asked her about NCC [redacted] late arrival on 7 October 2019. In response, the Accused told LT [redacted] and Ms. [redacted] about the 7 October 2019 text messages. The Accused allowed LT [redacted] to hold her phone and view the text messages. LT [redacted] gave the phone back to the Accused when she told him there were no text messages concerning 7 October 2019. During the remainder of the meeting, LT [redacted] told the Accused multiple times that he would like to have screenshots of the text messages. The Accused did not respond to these statements and his multiple requests struck her as "sketchy."[13] As the meeting wrapped up, LT [redacted] again asked the Accused if she would give the Government screenshots of the text messages. She told LT [redacted] and Ms. [redacted] she didn't know how to take screenshots with her personal cell phone because it was new. LT [redacted] told Ms. [redacted] about the contents of the text messages after the meeting.

f. Ms. [redacted] sent a follow-up email to the Accused after the meeting seeking to confirm what they discussed and asking the Accused to provide "screenshots of all the text messages between [her] and NCC [redacted] on October 7, 2019 and any other texts between the two of [them] pertaining to this case."[14] The email asked the Accused to make changes to her summary of the meeting. The summary addressed five points discussed during the meeting.

g. The Accused responded to the email on 15 January 2020 and confirmed that three of the five points were "correct." Of note, the Accused confirmed she did not receive advance notice of NCC [redacted] late arrival to work on 7 October other than a text message at about 0730. For the other two points, she further explained the specifics from the paralegal's email, but gave no

[10] NCC [redacted] was charged with an Article 92 and Article 107.
[11] Emphasis added.
[12] Another Trial Counsel, moved in and out of the meeting as it progressed, but did not participate substantively.
[13] At the 15 September Article 39(a) hearing, The Accused confirmed Defense Counsel's characterization of LT [redacted] "directing" her to take screenshots as opposed to "requesting" she take screenshots.
[14] This was a standard practice to ensure the Government had correctly summarized the meeting and to have evidence for any potential Article 39(a) hearing on a motion to compel witnesses.

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indication that Ms. [redacted] summary was wrong. The Accused indicated she did "not feel comfortable" providing screenshots of her text messages with NCC [redacted]

h. The Accused testified that she believed the email was misworded and made her feel like the text messages would be misconstrued. As a result, the Accused changed her schedule so she would be available to testify at the court-martial.

i. LT [redacted] emailed the Accused on 16 January and explained that the text messages she had shown him were relevant and necessary evidence in the NCC [redacted] court-martial and reiterated his request that she provide screenshots of the requested text messages. He indicated he would issue a subpoena for the text messages if she did not provide them voluntarily. The Accused sought legal counsel from the Commanding Officer, [redacted]

j. On 17 January 2020, a RLSO WESTPAC Trial Counsel issued a subpoena for "[c]opies of all text communications between [NCC] [redacted] and [the Accused] that occurred 7 October 2019, located on your work and/or personal phones, in your possession as of 1100, 16 January 2020." The subpoena indicated the text messages should be produced no later than 21 January 2020. An unidentified Legalman Petty Officer Second Class (LN2) served the subpoena on the Accused in her office on 17 January; she signed the certificate of service. Though she read the subpoena before she signed it, the Accused testified she did not realize it was a subpoena because she did not understand the language. She did not send the text messages to the Government.

k. Eleven days later, and seven days after the due date on the subpoena, LT [redacted] emailed the Accused and asked her to send the requested text messages in accordance with the subpoena or he would pursue a warrant of attachment from a military judge. The Accused again sought the advice of the [redacted] who detailed Defense Counsel to represent her regarding the Government's attempt to secure the text messages.[15] In that capacity, Defense Counsel filed a motion to quash the Government's subpoena.[16]

l. LT [redacted] and Ms. [redacted] discussed applying for a CASS on 30 January 2020 because they were unsure of how the upcoming Article 39(a) hearing would turn out. LT [redacted] and Ms. [redacted] discussed talked about the text messages importance to show that NCC [redacted] had not pre-arranged being late to work that day as proffered by his defense counsel.

m. An Article 39(a) session was held to litigate the Government's request for a warrant of attachment and the Accused's request to quash the subpoena on 31 January 2020. That morning the NAVSURGRU WESTPAC Chief Staff Officer (CSO) notified the Accused she was required to attend the Article 39(a) hearing. Before going to the courtroom, the Accused met with her Defense Counsel in his office. The Government called the Accused to testify at the Article 39(a) without objection. On direct examination, she confirmed that she had received communications

[15] This same Defense Counsel represents the Accused in this court-martial.
[16] In his motion to quash the subpoena, Defense Counsel states the Government "must utilize a Command Authorized Search" to search the Accused's phones.

APPELLATE EXHIBIT CIII(b)
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from NCC [redacted] the morning of 7 October 2019. When asked the format of the communications, she twice exercised her 5th Amendment right. After the Military Judge stated that the question would not elicit an incriminating response, the Accused believed she was required to testify and testified that she received text messages from NCC [redacted] on her personal cell phone.[17] She further testified she freely and voluntarily showed Trial Counsel the text messages during their 14 January 2020 meeting.[18] The Military Judge denied the Government's request for a warrant of attachment and granted the Accused's motion to quash the subpoena, finding that while the Government was not precluded from the information sought, a subpoena was not the appropriate mechanism for the Government to reach the evidence.[19] The Military Judge indicated the Government had other means, such as a command authorization for search and seizure (CASS), at their disposal.[20] As the Military Judge moved on to the next issue before the Court, Defense Counsel made his presence known to the Court and asked if the Accused was dismissed and permitted to resume her normal duties. When the Military Judge indicated she was, the Accused and her Defense Counsel returned to his office to talk.

n. After the 31 January hearing, Ms. [redacted] drafted an affidavit to support a CASS application. The draft was based on her memory of the 14 January meeting with the Accused, that day's Article 39(a) hearing, and her previous conversations with LT [redacted] She showed the affidavit to LT [redacted] who direct her to include information about NCC [redacted] court-martial. LT [redacted] suggested no changes to the affidavit concerning the meeting with the Accused or the text messages. Once the changes were made, Ms. [redacted] was sworn and she signed the affidavit.

o. In the affidavit, Ms. [redacted] provided a brief background of the NCC [redacted] case and explained the purpose of Trial Counsel's meeting with the Accused. Specifically, the affidavit states the Government sought to determine if NCC [redacted] had given her advanced notice of his late arrival to work on 7 October 2019. According to the affidavit, the Accused said she had received a text message from NCC [redacted] but could not remember what it said. After opening her phones using biometrics and a passcode, the Accused reviewed the messages and showed LT [redacted] three text messages from 7 October 2020. She would not show LT [redacted] any other messages. The text messages were summarized in the affidavit as follows:

> 1. Around 0730, NCC [redacted] sent a message that he would be late; 2. NCC [redacted] messaged that '[they] got me with the breathalyzer' – or words to that effect; 3. NCC [redacted] sent another message stating that he 'can't believe that this is happening' or words to that effect.[21]

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[17] On cross-examination at the Article 39(a) hearing, the Accused testified that she did not know if the Military Judge's order was lawful.

[18] Though Trial Counsel stated at the Article 39(a) hearing that the meeting was on 15 January, the other evidence before the Court clearly demonstrates the meeting was in fact on 14 January.

[19] At the Article 39(a) hearing on this motion, the Accused testified that the Military Judge had questioned the relevance of the text messages.

[20] The Accused testified at the Article 39(a) hearing that the Military Judge gave no indication that anything else would follow concerning the text messages and she believed the Government would not make any further attempts to get the text messages.

[21] In its 17 January 2020 response to NCC [redacted] motion to compel witness production, LT [redacted] told the court that the Government was "unable to use the exact language of the messages or the exact time they were sent to

APPELLATE EXHIBIT CLXVI
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The remainder of the affidavit detailed the steps the Government took to try and secure the three text messages from The Accused.

p. With Ms. [redacted] affidavit, LT [redacted] applied for, and received, a CASS from COMNAVSURGRU WESTPAC. The CASS application requested permission to search the Accused's personal and work cell phones for "all messages with NCC [redacted] on 7 October 2019, and regarding NCC [redacted] stop at a sobriety checkpoint on 7 October 2910, which is evidence of NCC [redacted] crimes of making a false official statement [] and an orders violation."

q. COMNAVSURGRU WESTPAC, CAPT [redacted] had previously been in command four times; three times as a ship's CO and once as a Commodore. Accordingly, he had been through the command training pipeline four times, to include legal training, where he was exposed to the JAGMAN and QUICKMAN. Over the course of his career, he has convened at least ten courts-martial. As COMNAVSURAGRAU WESTPAC he was the Convening Authority for NCC [redacted] court-martial. Accordingly, he had considered the charges against NCC [redacted] and made the decision to refer based on the evidence provided to him at the time. He views his role as the Convening Authority is to initiate the charges, but it is up to the court-martial to determine guilt or innocence.

r. CAPT [redacted] determined there was probable cause to issue the CASS. When making his decision whether to approve the CASS, CAPT [redacted] relied on Ms. [redacted] affidavit, his previous discussions with LT [redacted] to include LT [redacted] assertion that the text messages were relevant and necessary for the NCC [redacted] court-martial, his knowledge of the NCC [redacted] case, and consultation with his SJA. When the COMNAVSURGRU WESTPAC received the CASS application NCC [redacted] charges were in his mind. CAPT [redacted] had discussed the information on the Accused's phones with LT [redacted] before he received the CASS application and knew it was requested for the trial.[22] CAPT [redacted] also knew LT [redacted] had issued a subpoena for the text messages, but that it was not sufficient to get the text messages because of the Accused's rights. Based on his conversations with LT [redacted] CAPT [redacted] believed the text messages would be relevant and necessary. He relied on LT [redacted] assertions as a trial counsel. CAPT [redacted] discussed the CASS application with his SJA and received advice from the SJA about the CASS approval process.[23] CAPT [redacted] knew that Ms. [redacted] had not personally seen the text messages and that she was relaying that information from LT [redacted]. CAPT [redacted] considered the text message NCC [redacted] sent saying they "got him" with the breathalyzer had a criminal nexus because it indicated NCC [redacted] had been drinking. CAPT [redacted] took the portion of the affidavit which discussed the subpoena to mean the Accused had been asked for text messages and had not provided them. He did not, however, believe the subpoena obligated her to provide the text messages. The SJA told CAPT [redacted] how the Accused's 4th Amendment rights applied to a cell phone. Considering all that, CAPT [redacted] determined there was probable cause that evidence of a crime, the text messages, would be found on the Accused's phones and approved the CASS.

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support [its] response" because the Accused would not provide those messages.

[22] CAPT [redacted] could not remember if that discussion occurred on or before 31 January 2020.

[23] CAPT [redacted] could not remember the name of his SJA at the time due to the frequent turnover in that position.

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s. The CASS was issued for "text communications between [the Accused] and NCC [] [redacted] on 7 October 2019 [] regarding NCC [redacted] stop at a sobriety checkpoint on 7 Octobrer 2910, which is evidence of NCC [redacted] crimes of making a false official statement [] and an orders violation." Three investigators from Commander, Fleet Activities [redacted] Security Department attempted to execute the CASS at approximately 1515, 31 January 2020.

4. Statement of Law.

A military judge does not abuse their discretion in denying a motion to suppress, where the authorizing official had a "substantial basis" for determining that probable cause existed.[24] "A substantial basis exists 'when, based on the totality of the circumstances, a common-sense judgement would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified locations.'"[25] The facts known to the authorizing official at the time of the decision should be examined before analyzing how those facts became known to the authorizing official when determining if there was a substantial basis for probable cause.[26] "Resolution of doubtful or marginal cases should be largely determined by the preference for warrants, and close calls will be resolved in favor of sustaining the search authority's decision."[27]

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Military Rules of Evidence (M.R.E.) 311-317 implement the protection of the Fourth Amendment for military members.[28]

An unlawful search or seizure is one that violates the Constitution of the United States or M.R.E.s 312-317.[29] Absent a recognized exception,[30] evidence gained from an unlawful search or seizure is inadmissible at court-martial where "(1) the accused makes a timely motion to suppress …; (2) the accused had a reasonable expectation of privacy in the person, place, or property searched …; and (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches and seizures and the benefits of such deterrence outweigh the costs to the justice system."[31]

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[24] *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007); *see United States v. Perkins*, 78 M.J. 550, 555-556 (N.M.C.C.A. 2018) ("[W]e give great deference to" the commander's probable cause determination.)
[25] *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017); *quoting United States v. Rogers*, 67 M.J. 162, 164-164 (C.A.A.F. 2009); *citing Illinois v. Gates*, 462 U.S. 213, 238 (1983).
[26] *Leedy*, 65 M.J. at 213-214.
[27] *United States v. Eppes*, 77 M.J. 339, 345 (C.A.A.F. 2018); *citing Nieto*, 76 M.J. at 105; *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010); *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009); and *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000).
[28] *Nieto*, 76 M.J. at 106; *citing United States v. Hoffman*, 120, 123 (C.A.A.F. 2016).
[29] M.R.E. 311(b)(1).
[30] *See generally* M.R.E. 311(c) and M.R.E. 311(d)(5)(A).
[31] M.R.E. 311.

Data stored within a cell phone falls within the Fourth Amendment's protections.[32] "Therefore, cell phones may not be searched without probable cause and a warrant unless the search and seizure falls within one of the recognized exceptions to the warrant requirement."[33] As such, evidence obtained from a Government search of cell phone data generally will be inadmissible unless (1) the search was conducted pursuant to a search authorization or warrant, or (2) a recognized exception applies.

A "search authorization" is "express permission, written or oral, issued by competent authority to search a person or an area for specified property or evidence . . . and to seize such property, [or] evidence . . . ."[34] A military commander may authorize a search when they have "control over the place where the property or person to be searched is situated or found ..."[35] When a search authorization has been granted, any commissioned officer, petty officer, or criminal investigator may conduct the search.[36] Evidence may also be lawfully seized if, during the course of otherwise lawful activity, to include executing a search authorization based on probable cause, a government agent observes in a reasonable fashion property or evidence that the person has probable cause to seize.[37]

Searches and seizures conducted pursuant to search authorizations that are based on probable cause are lawful. Probable cause exists when there is a reasonable belief that evidence of a crime is located in the place, or on the person, to be searched.[38] Under M.R.E. 315, the military commander's task is "simply to make a practical, common-sense decision whether ... there is a fair probability that contraband or evidence of a crime will be found in a particular place."[39]

Probable cause "is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.'"[40] Such determinations are "inherently contextual, dependent upon the specific circumstances ... [P]robable cause is founded ... upon the overall effect or weight of all factors presented to the [commander]."[41]

"A search authorization may be based upon hearsay evidence in whole or in part."[42] The military commander's probable cause determination should be "based upon any or all of the following: (A) written statements communicated to the authorizing official; (B) oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or (C) such information as may be known by the authorizing official . . . ."[43]

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[32] *Riley v. California*, 573 U.S. 373, 401–03 (2014). *See also United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014).
[33] *Wicks*, 73 M.J. at 99.
[34] M.R.E. 315(b)(1).
[35] M.R.E. 315(d)(1).
[36] M.R.E. 315(e)(1).
[37] M.R.E. 316(c)(5)(C).
[38] M.R.E. 315(f)(2); M.R.E. 316(c)(1).
[39] *Gates*, 462 U.S. at 238.
[40] *Leedy*, 65 M.J. at 213; *quoting Brinegar v. United States*, 338 U.S. 160, 175 (1949).
[41] *Leedy*, 65 M.J. at 213.
[42] M.R.E. 315(f)(2).
[43] *Id.*

"Probable cause requires more than bare suspicion, but something less than a preponderance of evidence. Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false . . . there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present."[44]

For probable cause to be established "a sufficient nexus must be shown to exist between the alleged crime and the specific time to be seized."[45] That nexus "may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept."[46] "Reviewing courts may read the affidavit and warrant to include inferences the [military commander] reasonably could have made."[47]

"A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution."[48] This includes the requirement that "the place to be searched, and the persons or things to be seized" must be described particularly.[49] The "manifest purpose of this particularity requirement ... ensures that the search will be carefully tailored to its justification, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."[50] A search authorization must "describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings."[51] A "temporal limitation is one possible method of tailoring a search authorization, [but] it is by no means a requirement."[52] Another possible method of tailoring a search authorization is by limiting "the search to evidence of specific federal crimes or specific types of material."[53]

The military commander's responsibilities require them to perform various duties. "These include the concomitant authority to enforce the law, authorize prosecutions for offenses allegedly committed, maintain discipline, investigate crimes, authorize searches and seizures, as well as train and fashion those under [their] command into a cohesive fighting unit."[54] When authorizing searches and seizures, military commanders "stand[] in the same position as a federal magistrate issuing a search warrant."[55] Therefore, their probable cause determination must be

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[44] *Leedy*, 65 M.J. at 213; *citing United States v. Burrell*, 963 F. 2d 976, 986 (7th Cir. 1992) and *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005).
[45] *Nieto*, 76 M.J. at 105; *citing Rogers*, 67 M.J. at 166 and *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001).
[46] *Nieto*, 76 M.J. at 106; *quoting Clayton*, 68 M.J. at 424 (internal quotations omitted).
[47] *Eppes*, 77 M.J. at 345; *citing United States v. Williams*, 544 F. 3d 683, 686-87 (6th Cir. 2008).
[48] *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017) (quoting U.S. CONST. amend. IV).
[49] *Id.*
[50] *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).
[51] *Richards*, 76 M.J. at 369; *quoting United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999).
[52] *Richards*, 76 M.J. at 370.
[53] *Id.* ("They were entitled to search Appellant's electronic media for any communication that related to his possible violation of the Florida statute in his relationship with AP.")
[54] *United States v. Ezell*, 6 M.J. 307, 317-318 (C.MA. 1979)(internal citations omitted).
[55] *United States v. Rivera*, 10 M.J. 55, 58 (C.M.A. 1980); *quoting United States v. Sam*, 22 U.S.C.M.A. 124, 127 (1973).

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made with "a magistrate' neutrality and detachment."[56] However, a commander loses their impartiality if they "become personally involved in the actual evidence-gathering process" or otherwise "engaged in the often competitive enterprise of ferreting out crime."[57]

Where the defense challenges the probable cause of a search authorization, "the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer."[58] When the defense makes a claim that the person applying for the search authorization knowingly and intentionally included a false statement or acted with reckless disregard for the truth in their application, the defense must first establish the allegation by a preponderance of the evidence.[59] Such an allegation would necessarily include evidence not presented to or otherwise known by the authorizing officer.

To trigger the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system."[60] "[A]dmittedly drastic and socially costly," the exclusionary rule should only be applied where "needed to deter police from violations of constitutional and statutory protections."[61] The exclusionary "rule's sole purpose . . . is to deter future Fourth Amendment violations."[62] As such, its use is limited "to situations in which this purpose is thought most efficaciously served."[63] "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh [the rule's] heavy costs."[64]

5. Analysis and Conclusions of Law.

The Accused had reasonable expectation of privacy in both her personal and work cell phones. Based on the totality of the circumstances, the Accused's subjective expectation of privacy was objectively reasonable.[65] The Accused was required to use her personal Apple ID to operate the work cell phone. Her Apple ID was paired with a passcode that was known only to her. The work cell phone was locked using a unique passcode also known only to her. Not only did the Accused have no expectation that her work cell phone would ever be reviewed by members of her command, it, in fact, was never taken and reviewed before 31 January 2020. Since she had a reasonable expectation of privacy in both phones, the Government was required to obtain CASS before it could seize and search either phone. The questions before this Court are therefore focused on CAPT [redacted] probable cause determination when he approved the CASS on 31 January 2020.

a. CAPT [redacted] had a substantial basis to determine there was probable cause to

[56] *Id.*
[57] *Rivera*, 10 M.J. at 61; *citing Ezell*, 6 M.J. 307 and *quoting Johnson v. United States*, 333 U.S. 10 (1948).
[58] M.R.E. 311(d)(4)(A).
[59] M.R.E. 311(d)(4)(B).
[60] *Herring v. United States*, 555 U.S. 135, 147 (2009). *See also Wicks*, 73 M.J. at 104 ("The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs.").
[61] *Nix v. Williams*, 467 U.S. 431, 442–43 (1984).
[62] *Davis v. United States*, 564 U.S. 229, 236–37 (2011).
[63] *Id.* at 237.
[64] *Id.*
[65] The Government conceded this issue in its response to the Defense motion. *See United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006).

search and seize the Accused's personal and work cell phones.

CAPT [redacted] was the Convening Authority for NCC [redacted] court-martial. As such, he was aware of the charges in that case when he received the CASS application on 31 January. He was also aware LT [redacted] the Trial Counsel in that case, believed the text messages on the Accused's phone were relevant and necessary for the Government's case, having previously discussed the issue with LT [redacted] Ms. [redacted] affidavit detailed the meeting with the Accused where the Accused told both Ms. [redacted] and LT [redacted] about the text messages and what LT [redacted] told her he had seen on the Accused's phone. Further, the affidavit clearly states that the Accused confirmed in court, under oath, she had received text messages from NCC [redacted] on her phone and had shown them to LT [redacted] Based on the totality of circumstances, which includes the Accused's in-court testimony, CAPT [redacted] made the common-sense judgement there was a fair probability that the text messages the Trial Counsel sought for trial were on the Accused's phone.[66]

The information presented to CAPT [redacted] along with the information he already knew about the NCC [redacted] case, established a nexus between NCC [redacted] criminal activity and the text messages on the Accused's phone.[67] However, there does not need to be a "prima facie showing" only the probability of criminal activity.[68] The criminal nexus "may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept."[69] The Court may also "read the affidavit and warrant to include inferences the [military commander] reasonably could have made."[70] The evidence sought need not be the fruits or instrumentalities of a crime, or itself contraband. There must only be a "cause to believe that the evidence sought will *aid in* a particular apprehension or conviction."[71]

CAPT [redacted] discussed the text messages with LT [redacted] before he received the CASS application and knew the Trial Counsel believed they were relevant and necessary for NCC [redacted] court-martial, thus aiding in the Government's attempt to gain a conviction.[72] While relying on LT [redacted] expertise, CAPT [redacted] did not act as a rubber stamp and merely ratify the trial counsel's conclusions.[73] Upon reading the summary of the text messages in the affidavit, and applying the knowledge he had of the NCC [redacted] case, CAPT [redacted] made his own independent determination that the text messages showed criminality. [74] Specifically, CAPT [redacted] believed NCC [redacted] text message saying they "got him" with the breathalyzer indicated NCC [redacted] had been drinking. Having previously discussed the text

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[66] *See Nieto*, 76 M.J. at 105.
[67] *Nieto*, 76 M.J. at 105 ("[A] sufficient nexus must be shown to exist between the alleged crime and the specific time to be seized."); *citing Rogers*, 67 M.J. at 166 and *Gallo*, 55 M.J. at 421.
[68] *Gates*, 462 U.S. at 235; *quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969).
[69] *Nieto*, 76 M.J. at 106; *quoting Clayton*, 68 M.J. at 424 (internal quotations omitted).
[70] *Eppes*, 77 M.J. at 345; *citing Williams*, 544 F. 3d at 686-87.
[71] *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).
[72] The fact that the text messages were ultimately not used by either the Government, nor the Defense, in the court-martial has no bearing on the Court's analysis.
[73] *Perkins*, 78 M.J. at 556 (A commander "may rely on the expertise and experience of a law enforcement officer."); *citing United States v. Leon*, 468 U.S. 897, 915 (1984).
[74] *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)(The Fourth Amendment requires that the neutral and detached commander make "the usual inferences which reasonable men draw from evidence.").

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messages and Article 39(a) hearing with LT [redacted] reviewing the affidavit, and the Accused's rights and the CASS approval process with his SJA, CAPT [redacted] made his own practical, common-sense decision that the text messages might aid in convicting NCC [redacted] and would be found on the Accused's phones.

b. CAPT [redacted] did not lose his impartiality nor did he become personally involved in the evidence-gathering or investigative process before approving the CASS.

CAPT [redacted] acted as a neutral and detached magistrate when making his probable cause determination. As stated above, he reviewed the information presented to him, made permissible inferences based on what he already knew, and discussed the approval process with his SJA. At no point did he "become personally involved in the actual evidence-gathering process" or otherwise "engaged in the often competitive enterprise of ferreting out crime."[75] The fact that the CASS was for a case he had referred to court-martial does not void his neutrality or detachment.[76] The evidence before this Court shows that CAPT [redacted] was not an active participant in the gathering of evidence.[77] Nor did his actions in making a probable cause determination demonstrate any personal bias or involvement in the investigative or prosecutorial process.[78] When LT [redacted] requested the CASS to secure evidence he believed was relevant and necessary to the Government's case, CAPT [redacted] applied a deliberate process of reviewing the information before him, relying on what he already knew as the Convening Authority and from previous conversations, discussing the CASS approval with his SJA, and forming his own opinion when he made his decision. At no point did CAPT [redacted] act in a biased manner that showed he was intent on gaining a certain result against NCC [redacted] or finding evidence of a crime by the Accused.[79]

c. The Defense has not established that LT [redacted] knowingly and intentionally included a false statement or act with reckless disregard for the truth in his CASS application.

The Defense has failed to establish by a preponderance of the evidence that LT [redacted] knowing or intentionally included a false statement or showed reckless disregard for the truth in his CASS application. It is clear from the evidence that LT [redacted] and Ms. [redacted] summarized the text messages based on LT [redacted] short opportunity to review them during the 14 January 2020 meeting. In the Government's response to NCC [redacted] motion to compel witnesses, LT [redacted] even apologized to the Court for not being able to directly quote the text messages because he did not have a copy to review.[80] Considering the circumstances, the summary of the text messages in the affidavit is reasonably close to the actual text messages. The portion of the text messages not in the summary does not provided any context which would have had any discernable effect on [redacted] Probable Cause decision.

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[75] *Rivera*, 10 M.J. at 61; *citing Ezell*, 6 M.J. 307 and *quoting Johnson v. United States*, 333 U.S. 10 (1948).
[76] *Rivera*, 10 M.J. at 61; *citing United States v. Staggs*, 48 C.M.R. 672 (1974) and *United States v. Guerette*, 49 C.M.R. 530 (1975).
[77] *See Ezell*, 6 M.J. 307.
[78] *Id.*
[79] CAPT [redacted] testified that though he initiated charges as the Convening Authority, he left it to the court-martial to determine whether the accused was guilty or not guilty.
[80] The summary in the reply and the affidavit are strikingly similar.

The affidavit accurately summarizes the events that occurred after the 14 January 2020: Ms. [redacted] followed up with an email; the Accused declined to provide screenshots of the text messages; a subpoena was sent to the Accused; the Accused did not provide screenshots or otherwise respond to the subpoena; and the Accused testified at the 31 January 2020 Article 39(a) that she received text messages from NCC [redacted] and showed them to LT [redacted] CAPT [redacted] did not read the affidavit to mean the Accused had a legal obligation to comply with subpoena. While the affidavit does not mention the results of the hearing, it does not support the Defense's allegation for two reasons. First, LT [redacted] informed the Convening Authority that the Military Judge had indicated the subpoena was not sufficient to get the text messages. Second, that fact has no bearing on the probable cause determination of whether evidence with a nexus to NCC [redacted] crimes was on the Accused's phone. Accordingly, the Defense has failed to establish its allegation by a preponderance of the evidence.

6. Ruling.

The Defense Motion to Suppress is **DENIED**.

[redacted]

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

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

UNITED STATES v. CHANEL G. SIMS LCDR, USN	**RULING – DEFENSE MOTION TO SUPPRESS – VIOLATIONS OF THE 5TH AMENDMENT AND ARTICLE 31(b)** **30 SEP 2020**

1. Statement of the Case.

The Accused is charged with three specifications in violation of Articles 92, 131e, and 133. The maximum punishment authorized is the special court-martial jurisdictional maximum for an officer: a reprimand, forfeiture of two-thirds pay and allowances per month for twelve months, a fine, and restriction for no more than two months.

The charges were referred on 11 August 2020; the Accused was arraigned on 15 September 2020. The Defense filed two Motions to Suppress the Accused's statements.[1] The Government responded on 4 September 2020.[2] An Article 39(a)[3] session was held at Commander, Fleet Activities [redacted] on 15 and 16 September 2020. Six witnesses testified: the Accused; CAPT [redacted], the Convening Authority; MA1 [redacted]; PSC [redacted]; Ms. [redacted] and MA1 [redacted] LT [redacted] was called as a witness but did not testify.[4] The Defense and Government also provided documentary evidence in support of their motions.[5] The Court has chosen to address both motions in a single ruling since the findings of fact are the same and the legal analysis for each statement is focused on her status as a suspect.

2. Issues

a. Were the Accused's statements during her 14 January 2020 interview with the Government involuntary?

b. Were the Accused's statements during her testimony at the 31 January 2020 Article 39(a) hearing involuntary?

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[1] AE IV and V.
[2] AE IV(a) and V(a).
[3] UCMJ (2019).
[4] At the Article 39(a) session on 15 September 2020, the Defense notified the Court that the Commanding Officer, [redacted] had filed a complaint against LT [redacted] with the Rules Counsel.
[5] AE IX and X respectively.

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c. Are the Accused's statements to CID Investigators in her office on 31 January 2020 involuntary?

d. Were the Accused's statement to MA1 [redacted] at the Security office on 31 January 2020 involuntary?

e. Were the Accused's statement to the Investigating Officer on 11 and 12 February 2020 involuntary?

3. Findings of Fact.

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court incorporates its findings of fact from AE III(b) and makes the following additional findings of fact:[6]

a. The Accused was the Manning and Administration Officer (N-1) for Naval Surface Group Western Pacific (NAVSURGRU WESTPAC) in the October 2019 to February 2020 time period. She commissioned in the Navy in December 2005 through Naval Reserve Officer Training Corps (NROTC). During her career she earned: her Surface Warfare Officer (SWO) qualification in less than a year; a Master's of Business Administration (MBA) while pregnant and serving in a Staff job; and her Engineering Officer of the Watch (EOW) qualification. She had been selected for promotion to the rank of Commander and had orders to be an Executive Officer (XO).

b. On 7 October 2019, NCC [redacted] a member of her Department, sent the Accused a text message at 0734 stating "Going t[sic] be a little late this morning." At 0947, he again texted the Accused, "I've been stuck with security. They got me with the breathalyzer and taking me to main base. I'll talk to you when I get there." NCC [redacted] did not respond to her question, "As in blew over the limit?" When the Accused texted him "How are you?" at 1613, he responded "In the dumps. Just can't believe this happened."[7]

c. As a result of the 7 October 2019 incident, charges against NCC [redacted] were referred to a special court-martial by Commander, Naval Surface Group Western Pacific (COMNAVSURGRU WESTPAC).[8] In late-December 2019 or early-January 2020, the Accused met with NCC [redacted] Defense Counsel. During that meeting, the Accused showed NCC [redacted] Defense Counsel the 7 October 2019 text messages on her phone. Subsequently, NCC [redacted] Defense Counsel requested the Government produce the Accused as a witness at trial, proffering that her testimony could "provide context to NCC [redacted] *pre-planned* late arrival to work that day."[9] The Government denied the request to produce the Accused. In its subsequent motion to compel the production of the Accused and other witnesses, NCC

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[6] Findings of fact from AE III(b) that are of particular importance to this ruling are repeated here.
[7] These text messages are found in AE IX, Enclosure B.
[8] NCC [redacted] was charged with violations of Article 92 and Article 107.
[9] Emphasis added.

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[redacted] Defense Counsel argued the Accused was a relevant and necessary witness. The Defense Counsel claimed the Accused would testify NCC [redacted] often needed to arrive late to work so he could drop his daughters off at school and "this was not a last minute revelation … [The Accused] knew about NCC [redacted] late arrival in advance."

d. To prepare for their written response to NCC [redacted] motion to compel witness production and the court-martial, the Trial Counsel civilian paralegal from Region Legal Service Office Western Pacific (RLSO WESTPAC), LT [redacted] and Ms. [redacted] respectively, met with the Accused on 14 January 2020.[10] When she arrived at the meeting, the Accused did not know why she was being interviewed, but did not believe she was suspected of a crime. To begin the meeting, LT [redacted] explained they wanted to meet with her because she was on the Defense witness list and then asked her about NCC [redacted] late arrival on 7 October 2019. In response, the Accused told LT [redacted] and Ms. [redacted] about the 7 October 2019 text messages. The Accused allowed LT [redacted] to hold her phone and view the text messages. LT [redacted] gave the phone back to the Accused when she told him there were no text messages concerning 7 October 2019. During the remainder of the meeting, LT [redacted] told the Accused multiple times that he would like to have screenshots of the text messages. The Accused did not respond to these statements; his multiple requests struck her as "sketchy."[11] As the meeting wrapped up, LT [redacted] again asked the Accused if she would give the Government screenshots of the text messages. She told LT [redacted] and Ms. [redacted] she didn't know how to take screenshots with her personal cell phone because it was new. LT [redacted] told Ms. [redacted] what the text messages said after the meeting.

e. Ms. [redacted] sent a follow-up email to the Accused after the meeting seeking to confirm what they discussed and asking the Accused to provide "screenshots of all the text messages between [her] and NCC [redacted] on October 7, 2019 and any other texts between the two of [them] pertaining to this case."[12] The email asked the Accused to make changes to her summary of the meeting. The summary addressed five points discussed during the meeting.

f. The Accused responded to the email on 15 January 2020 and confirmed that three of the five points were "correct." Of note, the Accused confirmed she did not receive advance notice of NCC [redacted] late arrival to work on 7 October other than a text message at about 0730. The Accused indicated she did "not feel comfortable" providing screenshots of her text messages with NCC [redacted]

g. LT [redacted] emailed the Accused on 16 January and explained the text messages she had shown him were relevant and necessary evidence in the NCC [redacted] court-martial and reiterated his request that she provide screenshots of the requested text messages. He indicated he would issue a subpoena for the text messages if she did not provide them voluntarily. The Accused sought legal counsel [redacted]

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[10] Another Trial Counsel, moved in and out of the meeting as it progressed, but did not participate substantively.
[11] At the 15 September Article 39(a) hearing, the Accused confirmed Defense Counsel's characterization of LT [redacted] "directing" her to take screenshots as opposed to "requesting" she take screenshots.
[12] This was a standard practice to ensure the Government had correctly summarized the meeting and to have evidence for any potential Article 39(a) hearing on a motion to compel witnesses.

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h. On 17 January 2020, a RLSO WESTPAC Trial Counsel issued a subpoena for "[c]opies of all text communications between [NCC] [redacted] and [the Accused] that occurred 7 October 2019, located on your work and/or personal phones, in your possession as of 1100, 16 January 2020." The subpoena indicated the text messages should be produced no later than 21 January 2020. She did not send the text messages to the Government.

i. Eleven days later, and seven days after the due date listed on the subpoena, LT [redacted] emailed the Accused and asked her to send the requested text messages in accordance with the subpoena or he would pursue a warrant of attachment from a military judge. The Accused again sought the advice of the CO, DSO WESTPAC, who detailed Defense Counsel to represent her regarding the Government's attempt to secure the text messages.[13] In that capacity, Defense Counsel filed a motion to quash the Government's subpoena.[14]

j. An Article 39(a) session was held to litigate the Government's request for a warrant of attachment and the Accused's request to quash the subpoena on 31 January 2020. That morning the NAVSURGRU WESTPAC Chief Staff Officer (CSO) notified the Accused she was required to attend the Article 39(a) hearing. Before going to the courtroom, the Accused met with her Defense Counsel in his office. The Government called the Accused to testify at the Article 39(a); her Defense Counsel made no objection. On direct examination, she confirmed that she had received communications from NCC [redacted] the morning of 7 October 2019. When asked the format of the communications, she twice exercised her 5th Amendment right. After the Military Judge stated that the question would not elicit an incriminating response, the Accused believed she was required to testify and testified that she received text messages from NCC [redacted] on her personal cell phone. She also testified she freely and voluntarily showed Trial Counsel the text messages during their 14 January 2020 meeting. The Military Judge denied the Government's request for a warrant of attachment and granted the Accused's motion to quash the subpoena. As the Military Judge moved on to the next issue before the Court, Defense Counsel made his presence known to the Court and asked if the Accused was dismissed and permitted to resume her normal duties. When the Military Judge indicated she was, the Accused and her Defense Counsel returned to his office to talk.

k. LT [redacted] applied for, and received, a CASS from COMNAVSURGRU WESTPAC. The CASS was issued for "text communications between [the Accused] and NCC [] [redacted] on 7 October 2019 [] regarding NCC [redacted] stop at a sobriety checkpoint on 7 October 2019, which is evidence of NCC [redacted] crimes of making a false official statement [] and an orders violation." The CASS was based upon probable cause.[15]

l. In an undated text message to LT [redacted], LT [redacted] a RLSO WESTPAC SJA who advised COMNAVSURGRU WESTPAC and other tenant commands, said "There has to be something incriminating in there, I can't imagine any attorney advising her that failing to comply would be a good idea."[16]

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[13] This same Defense Counsel represents the Accused in this court-martial.
[14] In his Motion to Quash, Defense Counsel states the Government "must utilize a Command Authorized Search" to search the Accused's phones.
[15] AE III(b).
[16] This text message was produced to the Defense pursuant to AE II(b) and the Court's ruling on the record on 16

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m. At approximately 1500, the COMNAVSURGRU WESTPAC Legal Officer asked the Accused to not leave because the Commander wanted to talk to her. She returned to her office, logged onto her work computer, and began working. As she had been preparing to go home, the Accused was wearing civilian clothes.[17] COMNAVSURGRU WESTPAC never talked to the Accused that day, or at any other time, about the text messages on her phone or the CASS.

n. Trial Counsel requested assistance from the CFAY Security Department to execute the CASS. As a result, three Criminal Investigative Division (CID) investigators from CFAY Security were employed to serve the CASS on the Accused at her office.[18] The investigators met with the COMNAVSURGRU Legal Officer and LT [redacted] at 1515. LT [redacted] gave the investigators the CASS and advised them it was for the Accused's personal and government cell phones and the biometrics/passcodes for each phone. They were told the Accused was not a suspect, merely a witnesses, but not given any facts about the NCC [redacted] case. The brief was between five and ten minutes long.

o. The investigators were wearing civilian clothes and carried their credentials, which identified them as investigators with CFAY Security Department, in their wallets. MA1 [redacted] had her badge displayed on her belt where it would be visible to anyone standing in front of her. None of the investigators were armed.

p. The COMNAVSURGRU Legal Officer and the three investigators went upstairs and entered the Accused's office. MA1 [redacted] introduced the investigators, giving their names and explaining who they were, while all three displayed their credentials. The Legal Officer asked PSC [redacted] the Accused's office mate, to leave the office.[19] None of the investigators provided the Accused with her Article 31(b) rights as they did not suspect her of any offense. At this point, the investigators were standing next to the Accused's desk. Both the Accused's personal and work cell phones were on her desk where the investigators could see them. During the remainder of the afternoon, if the investigators were in the Accused's office with her, they stayed within six to eight feet of her desk to ensure she did not attempt to improperly manipulate her cell phones.

q. MA1 [redacted] told the Accused they were there to execute a CASS for her phones. When he began reading the CASS the Accused stopped him, asked him if he had spoken to her attorney, and informed him she was going to contact her Defense Counsel. MA1 [redacted] stopped reading the CASS. The Accused called her Defense Counsel using the speaker phone on a desk phone in the office. At Defense Counsel's request, MA1 [redacted] read the entire CASS to Defense Counsel over the phone. Defense Counsel told MA1 [redacted] the CASS was "illegal" and the investigators would go to jail if they seized the phones.

r. Based on Defense Counsel's statements, MA1 [redacted] sought further legal advice and was advised by LT [redacted], the Base SJA, that the investigators should seize the phones. MA1

September 2020.

[17] This included a "work shirt," workout pants, socks, and shoes.

[18] The investigators were [redacted]

[19] PSC [redacted] left the office after she sought, and received, permission from the Accused.

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[redacted] was concerned that their attempt to execute the CASS might result in an altercation, which the investigators wanted to avoid.

s. At some point, MA1 [redacted] told the Accused to place both phones on airplane mode.[20] She did so by opening the phones and changing the settings herself. The Accused unlocked her personal cell phone using FaceID and a passcode on her work cell phone. It was at this point that the Accused claims she first understood the investigators wanted her phone.

t. During the conversation with MA1 [redacted], Defense Counsel requested the investigators bring him a copy of the CASS before the Accused would comply. MA1 [redacted] remained in the room with the Accused while MA1 [redacted] and MA1 [redacted] went downstairs to update LT [redacted]. The Accused had not given the investigators her passcodes at this time. LT [redacted] told the investigators they did not have to take a copy of the CASS to Defense Counsel because the Accused was not a suspect and did not have a right to an attorney.

u. After some time elapsed, the Accused called Defense Counsel again and was told he was still waiting on the CASS. Defense Counsel and the Accused were then informed that LT [redacted] had advised the investigators not to provide Defense Counsel a copy of the CASS. When Defense Counsel requested an opportunity to contact the Circuit Military Judge, the investigators agreed to give Defense Counsel that opportunity.[21]

v. After some period of time, Defense Counsel told the investigators that the Circuit Military Judge said he had no jurisdiction over the CASS. The Defense Counsel then told the Accused, again over speaker phone, to give the cell phones to the investigators, which she did. MA1 [redacted] seized the phones. When Defense Counsel asked to speak to the Accused privately, all three investigators left the room. The investigators then left her office without asking her for her biometric data or passcodes. From the time the investigators entered her office until she handed over the phones, the investigators did not ask the Accused any questions, to include asking her for her passcodes. However, they had directed her to place her phone on airplane mode.

w. MA1 [redacted] went in a room across the passageway, placed both phones in an electronic boundary bag[22] and prepared the chain of custody documents. MA1 [redacted] and MA1 [redacted] remained in the passageway. The investigators did not feel their mission was complete because they did not have the Accused's passcodes. However, they could not get the passcodes at that time because the Accused was speaking with Defense Counsel in her office.

x. During the phone call, the Accused asked Defense Counsel to come to her office to discuss what had occurred and what was next.

y. At this point, MACS [redacted] the supervisor for all three investigators, arrived at the building to check on them because serving the CASS was taking longer than he expected. MA1 [redacted] told him she had the phones, but not the passcodes, and the Accused was talking privately

[20] This direction was given to prevent the phones from being remotely accessed and altered.
[21] The Circuit Military Judge had presided over the Article 39(a) hearing earlier that morning.
[22] Also known as a Faraday bag.

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with her attorney in her office. MACS [redacted] left the room to speak with MA1 [redacted] and MA1 [redacted] in the passageway. MACS [redacted] was wearing either khakis or NWUs.[23]

z. After the Accused finished speaking with Defense Counsel, she chose to wait for him to come meet her in her office.[24] At approximately 1640, bout 10-15 minutes after the phones had been seized and the investigators had left her office, the Accused walked out of her office to microwave a bag of popcorn to eat while she waited on her Defense Counsel. There were approximately ten people in the passageway to include MA1 [redacted] and MA1 [redacted]. When she entered the passageway, MACS [redacted] introduced himself, tried to get her to stop walking away at least twice, and explained that she need to provide her biometric data for the phones. MACS [redacted] voice was authoritative, but he did not yell. The Accused told MACS [redacted] that he should address her properly as an officer. When MACS [redacted] again told the Accused she needed to provide her biometric data, the Accused said she would not provide her biometric data. At this point, MACS [redacted] directed MA2 [redacted] o apprehend the Accused. MA2 [redacted] was wearing his "full gear," to include body armor and sidearm. As she was being arrested, the Accused tensed up, to which MA2 [redacted] told her to relax or he would put her on the ground. The Accused relaxed. She was not provided a rights advisement pursuant to Article 31(b) or *Miranda* nor did anyone asked her any questions after she was apprehended. Approximately 90 minutes elapsed from the time the investigators were briefed until the Accused was apprehended.

aa. Once she was placed in handcuffs, the Accused was taken to her office to retrieve her military ID and then escorted downstairs, out of the building, and into a security vehicle. She was then driven approximately one block to the CFAY Security building. MA1 [redacted] accompanied the Accused and MA2 [redacted] to fulfill the requirement for a same-sex escort.[25] The Accused was placed in an interview room. During the 45 to 60 minutes she was in the interview room, no one spoke to her, except an individual who offered, and brought her, a bottle of water. She was not provided a rights advisement pursuant Article 31(b) or *Miranda*.

bb. When Defense Counsel arrived at CFYA Security, MACS [redacted] allowed him to meet with the Accused in his office. When Defense Counsel and the Accused were done meeting, they went to the interview room. Leaving the meeting with her Defense Counsel, the Accused believed she need to do what was best for her because Defense Counsel had advised her that things were not progressing as "normal."

cc. At approximately1800, MA1 [redacted] entered the room with both phones and told the Accused, in the presence of Defense Counsel, to unlock both phones. The Accused understood this as a direction to unlock the phones, not as a request for the passcodes and initially refused. At the direction of Defense Counsel, the Accused used the passcode written on a piece of paper to unlock her work phone and used FaceID to open her personal phone. When the Accused handed the unlocked phones back to MA1 [redacted], the investigator returned them to the Accused and told her to change the settings so they would not lock. MA1 [redacted] did not ask the Accused for the passcodes to either phone; she directed the Accused to make theses changes to her

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[23] Each uniform has a gold badge on its right breast pocket, a metal badge on the khakis and an embroidered badge on the NWUs.

[24] The Accused had already canceled her plans to celebrate her daughter's [redacted] with her that evening.

[25] Both the Accused and MA1 [redacted] are female.

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phones. The Accused used FaceID and the passcode twice on her personal phone and the passcode on her work phone to change the settings to ensure the phones remained unlocked.

dd. At 1835, MA1 [redacted] returned to the interview room, and using a Suspects Acknowledgement and Waiver of Rights form, advised the Accused of her Article 31(b) and *Miranda* rights, to include notifying her she was suspected of failure to obey an order or regulation, obstructing justice, wrongful interference with adverse administrative proceedings, and conduct unbecoming. These charges were based on the Accused's failure to comply with the CASS that afternoon. Defense Counsel was present during this warning. The Accused invoked her right to remain silent.

ee. On 3 February 2020, MA1 [redacted] met with Special Agent (SA) [redacted] Naval Criminal Investigative Service (NCIS), and LT [redacted]. Using [redacted], SA [redacted] extracted the subject data from the Accused's cell phones and provided the report to MA1 [redacted] She included the extraction report in the CID investigative report. When LT [redacted] reviewed the extraction report, he determined the 7 October 2019 text messages he viewed on the Accused's personal cell phone had been deleted.

ff. On 5 February 2020, COMNAVSURGRU WESTPAC appointed an Investigating Officer (IO) to investigate the Accused's alleged misconduct. The IO contacted Defense Counsel and asked if he could interview the Accused. The Accused and her Defense Counsel met with the IO for an in-person interview on 11 February 2020 in the DSO [redacted] conference room. The IO provided the Accused with a standard Suspect's Rights Acknowledgement/Statement which indicated she was suspected of violating Articles 92, 131b, 131g, and 133. This document did not include a cleansing warning. The Accused agreed to answer the IO's questions. After the interview, the Accused sent a three-page written statement to the IO. Her Defense Counsel reviewed the statement before she signed and submitted it. In the statement, dated 12 February 2020, the Accused claimed she retained counsel because LT [redacted] had threatened and harassed her even though she "was only a witness in the case."

gg. Further facts necessary for the resolution of this ruling are developed below.

4. Principles of Law.

In response to a timely-made defense objection to the introduction of an accused's statement, the Government must demonstrate by a preponderance of the evidence that the accused made the statement voluntarily before it may be received into evidence.[26]

An "involuntary statement" is a statement "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."[27] Whether a statement is involuntary depends on the "the totality of all the surrounding circumstances

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. (M.R.E.) 304(f)(6) and (7) (2019); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013).
[27] M.R.E. 304(a)(1)(A).

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- both the characteristics of the accused and the details of the interrogation."[28] In examining the totality of the circumstances, "the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker," as opposed to the product of someone whose "will was overborne and his capacity for self-determination critically impaired . . ."[29] Factors to be considered in this regard include "rights warnings, the length of the interrogation, the characteristics of the individual, including age and education, and the nature of the police conduct, including threats, physical abuse, and incommunicado detention."[30] "Other factors include an earlier violation of Article 31(b), whether the admission was made as a result of the questioner's using earlier, unlawful interrogations, and 'the presence of a 'cleansing warning,' however, the absence of such is not fatal to a finding of voluntariness.'"[31] "The fact that a suspect chooses to speak after being informed of [their] rights, is of course, highly probative."[32]

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against [themselves]."[33] In *Miranda v. Arizona,* the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney.[34] These prophylactic measures were adopted to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation.[35] "Once a suspect in custody has 'expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.'"[36] M.R.E. 305(c)(2) codifies this right in the military, stating "[i]f a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible."

The Fifth Amendment's protection against self-incrimination "addresses 'real and appreciable, and not merely imaginary and unsubstantial, hazards of self-incrimination.'"[37] "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled."[38]

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[28] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).
[29] *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) (citations omitted).
[30] *United States v. Sojfer*, 47 M.J. 425, 429-30 (C.A.A.F. 1998).
[31] *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019); *citing United States v. Byers*, 26 M.J. 132, 135 (C.MA. 1988) and *United States v. Phillips*, 32 M.J. 76, 80-81 (C.M.A. 1991); and *quoting United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006).
[32] *Lewis*, 78 M.J. at 453; *quoting Oregon v. Elstad*, 470 U.S. 298, 318 (1985).
[33] U.S. Const., Amend. V.
[34] 384 U.S. 436 (1966).
[35] *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).
[36] *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017); *quoting Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *citing* M.R.E. 305(e)(3).
[37] *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015); *quoting Marchetti v. United States*, 390 U.S. 39, 48 (1968).
[38] *Castillo*, 74 M.J. at 165; *quoting Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 189 (2004).

Article 31(b), a statutory precursor to *Miranda*, implements the Article 31(a) privilege against self-incrimination.[39] Article 31(b) requires:

> No person subject to this chapter may interrogate, or request any statement from, an accused or person suspected of an offense without first informing [them] of the nature of the accusation and advising [them] that [they do] not have to make any statement regarding the offense of which [they are] accused or suspected and that any statement made by [them] may be used as evidence against [them] in a trial by court-martial.[40]

"Article 31(b) warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected."[41] More specifically, "Article 31(b) requires rights' warnings if: (1) the person being interrogated is as suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry."[42]

"Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense."[43]

An "interrogation" is any "formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."[44] While interrogation is typically viewed as directing questioning of the Accused, it also includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[45]

"[A]n accused need not be warned of his rights under Article 31 of the Code as a condition presedent[sic] to a lawful search."[46] "Evidence obtained as a result of a lawful search is not inadmissible because the accused is not first warned of his rights under

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[39] *United States v. Evans*, 75 M.J. 302, 304-305 (C.A.A.F. 2016).
[40] U.C.M.J (2019).
[41] *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014); *citing United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).
[42] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *citing United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996).
[43] *Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *quoting United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).
[44] M.R.E. 305(b)(2).
[45] *Mitchell*, 76 M.J. at 418; *quoting Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).
[46] *United States v. Bradley*, 50 C.M.R. 608, 619 (N.C.M.R. 1975); *citing United States v. Insani*, 18 C.M.R. 85 (1959)("[T]here can be an interrogation without a search, and conversely, a search without an interrogation. Where there is either an interrogation or a search, the admissibility of evidence obtained therefrom is ordinarily tested by the principles applicable to the one or the other … but not both."

Article 31."[47] A request for a consent to search is not an interrogation and therefore "does not infringe upon Article 31 or Fifth Amendment safeguards against self-incrimination because … the consent given is ordinarily not a statement."[48]

5. Analysis and Conclusions of Law.

a. **The Accused's statements during her 14 January 2020 interview with the Government were voluntary and are admissible.**

The Accused was asked to come to the Government's office for an interview on 14 January 2020 because NCC [redacted] Defense Counsel had requested that she be produced to testify at NCC [redacted] court-martial. To support the production request, the Defense Counsel proffered that the Accused would testify NCC [redacted] often needed to arrive late to work and the Accused knew about his late arrival in advance, "this was not a last minute revelation." LT [redacted] did not suspect the Accused of committing an offense nor should he have reasonably believed she committed an offense based on the facts and circumstances at the time. At this point an investigation had been completed as to NCC [redacted] offenses on 7 October 2019. As a result, charges were referred to a special court-martial. Despite her position as the Accused's Department Head, the Accused was not a Government witness. In fact, LT [redacted] denied NCC [redacted] Defense Counsel's initial request to produce the Accused because he did not believe she was relevant and necessary, based on his knowledge of the case and the Defense Counsel's proffer.

PSC [redacted] testimony in early January 2020 does not demonstrate that LT [redacted] should have reasonably believed the Accused committed an offense. Her testimony that Admin "had a target on its back" was merely what she thought the Command Mater Chief thought, based on her second-hand conversation with a retired Master Chief. On cross-examination at that hearing, LT [redacted] elicited testimony from PSC [redacted] that the Command Master Chief never said anything to her about the NCC [redacted] case. Further, no one in Admin was investigated for, or otherwise in trouble from, the NCC [redacted] case. This does create a circumstance where LT [redacted] should have reasonably believed the Accused committed an offense.

LT [redacted] continued efforts to try and obtain screenshots of the text messages with NCC [redacted] do not indicate he suspected her of an offense and was attempting to gather evidence of that offense. The evidence before this Court quite clearly shows that LT [redacted] wanted to secure screenshots of those text messages because of their potential impact on the NCC [redacted] case. NCC [redacted] Defense Counsel said it intended to put on evidence that NCC [redacted] arrival late at work on 7 October "was not a last minute revelation." LT [redacted] believed the text messages would contradict that defense tactic. While his attempt to use a subpoena may have exposed his inexperience in dealing with a witness who refused to provide

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[47] *United States v. Cuthbert*, 29 C.M.R. 88 (1960). *See United States v. Rehm*, 42 C.M.R. 161, 163 (C.MA. 1970); *Untied States v. Coakley*, 40 C.M.R. 223 (1969); *United States v. Rushing*, 38 C.M.R. 96 (1967).

[48] *United States v. Robinson*, 77 M.J. 303, 306 (C.A.A.F. 2018)(The investigator's subsequent request for the passcode "for the sole purpose of effectuating the search … was merely a natural and logical extension of the first permissible inquiry.")

relevant and necessary evidence, it does not demonstrate that he suspected the Accused committed an offense and he was seeking evidence to support his suspicion.

The Accused was asked to come to LT [redacted] office for an interview and came voluntarily. LT [redacted] did not believe she had committed an offense and should not have reasonably believed so. In fact, the Accused herself did not believe she was suspected of an offense. Given these circumstances, LT [redacted] was not required to provide the Accused with an Article 31(b) rights advisement.

Any statements made by the Accused during the 14 January 2020 meeting are admissible, notwithstanding any other evidentiary objections.

b. **The Accused's statements during her testimony at the 31 January 2020 Article 39(a) hearing were voluntary and are admissible.**

At the 31 January 2020 Article 39(a) hearing in the NCC [redacted] case, the Government called the Accused to testify by the Government in support of its motion for a warrant of attachment. There was no objection by her Defense Counsel, who had filed a Motion to Quash the subpoena, had talked with her in his office before the hearing, and was present in the courtroom. When she took the stand, she confirmed that she had received communications from NCC [redacted] the morning of 7 October 2019. When asked the format of the communications, she twice exercised her 5th Amendment right. The Military Judge determined that the question would not elicit an incriminatingly response and directed her to testify. The Military Judge had sufficient evidence during that Article 39(a) hearing to find that the facts and circumstance were such that no answer the Accused might make would tend to incriminate her.[49] Though the question was asked twice, and the Military Judge indicated the answer would not elicit an incriminating response, Defense Counsel made no objection or any other attempt to assert his client's Fifth Amendment right. The lack of objection, taken with Defense Counsel's filing of a Motion to Quash and his pre-hearing consultation with the Accused, confirm this Court's decision that on 31 January, there was no expectation that the question asked would elicit an incriminating response.

Accordingly, the statements made by the Accused are admissible, notwithstanding any other evidentiary objections. The Court's finding does not affect the previous determination that CASS issued by CAPT [redacted] on 31 January 2020 was based on probable cause and the evidence seized as a result of the CASS is admissible, notwithstanding any other evidentiary objections.[50]

c. **The Accused's statements to CID Investigators in her office on 31 January 2020 were voluntary and are admissible.**

The three CID investigators arrived at LCDR Sims' office at approximately 1520 on 31 January 2020. What followed was a search pursuant to lawful search authorization issued based upon probable cause.[51] Since it was a search and not an interrogation, the investigators were not

[49] M.R.E. 301(d).
[50] *See* AE III(b).
[51] *Id.*

required to provide the Accused an Article 31(b) rights warning before they attempted to execute the CASS.[52]

Additionally, the CID investigators did not believe nor should they reasonably have believed that the Accused committed an offense when they entered her office. The investigators were provided the CASS which clearly indicated it was for the case of United States v. NCC [redacted] and that the evidence sought was in connection with the offenses committed by NCC [redacted] In their briefing, they were specifically told by LT [redacted] that the Accused was not a suspect, merely a witness. LT [redacted] text message to LT [redacted] indicates she believed the Accused may have had something incriminating on her phone based on Defense Counsel's advice. However, it was not enough, especially in light of the other facts available, to form a suspicion that the Accused committed an offense. "The fact that there is 'a hunch' that a crime has been committed does not trigger Article 31(b)."[53]

The Defense argues that the Accused attempted to exercise her right to an attorney and her request was ignored by the investigators in violation of the 5th Amendment. The facts, however, show the investigators acted with the utmost respect for the Accused's right to counsel. As soon as MA1 [redacted] began to read the CASS, the Accused stopped him, asked him if he had spoken to her attorney, and then said she was going to call her attorney. While not an outright request for her attorney, the investigators treated it as a request to work through her Defense Counsel.[54] MA1 [redacted] ceased reading the CASS and allowed the Accused to call her attorney. The investigators then read the CASS out loud to Defense Counsel, agreed to bring Defense Counsel a copy of the CASS when asked,[55] and gave Defense Counsel time to seek an audience with the Circuit Military Judge. The investigators did not seize the Accused's phones, which were in plain view on her desk, until Defense Counsel advised the Accused to turn them over. Then, at Defense Counsel's request, the investigators left the room so he could speak with his client, even though they had not completed executing the CASS. Where the Accused made it known she wanted to deal with the investigators through her attorney, they complied.

These same facts, illustrating the Accused's desire to deal with the investigators through her Defense Counsel, also demonstrate that her actions were not involuntary. Her actions were the product of an essentially free choice, her will was not overborne.[56] The Accused's interactions with investigators were relatively brief. While they were at her office for approximately 90 minutes, the investigators dealt almost exclusively with her Defense Counsel while she continued to work at her desk. The Accused had been selected for O5 and screened for an Executive Officer billet, accomplishments that are not surprising given her educational background and previous success in the Surface Warfare community. Her interaction with MACS [redacted] at the end of the afternoon demonstrated that her capacity for self-determination had not been critically impaired[57]

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[52] *Bradley*, 50 C.M.R. at 619; *citing Insani*, 18 C.M.R. 85.
[53] *United States v. Meeks*, 41 M.J. 150, 161 (C.A.A.F. 1994).
[54] *Mitchell*, 76 M.J. at 417; *quoting Edwards*, 451 U.S. at 484-85; *citing* M.R.E. 305(e)(3).
[55] The investigators did not bring the CASS to Defense Counsel because of conflicting legal advice they received from LT [redacted]
[56] *Bubonics*, 45 M.J. at 95 (citations omitted).
[57] *Id.*

Most importantly, from the time the investigators entered her office at approximately 1515 until they left at approximately 1630, they did not ask her a single question. This is mostly as a result of the Accused stopping the execution of the CASS and asking to speak to her Defense Counsel. Regardless, the investigators did not conduct any formal or informal questioning which might have resulted in an incriminating response.[58] Without an interrogation, there is no requirement for either Article 31(b) or *Miranda* rights warnings.

Any statements made by the Accused in her office on 31 January 2020, or evidence derived therein, is admissible, notwithstanding any other evidentiary objection.

d. **The Accused's statement to MA1 [redacted] in the Security Office on 31 January 2020 were voluntary and are admissible.**

It is undisputed that the Accused was in custody when MA1 [redacted] approached her in the interview room at 1800 and told her to unlock her phones.[59] The Accused had been apprehended by MA2 [redacted] placed in handcuffs, and transported in a security vehicle to the CFAY Security building. Once there she was placed into the interview room, where she remained until Defense Counsel arrived. She was not released until a command representative signed her out. The Court's inquiry now turns to the circumstances of the Accused's interaction with MA1 [redacted] when MA1 [redacted] directed the Accused to unlock her phones and change the settings so the phones would remain unlocked.

MA1 [redacted] interaction with the Accused and her Defense Counsel at approximately 1800 at CFAY Security was a search, not an interrogation. Her direction to unlock the phones and change the settings so they remained unlocked was equivalent to a request for administrative information to complete the execution of a legally issued CASS based upon probable cause.[60] In plain language, it was an order for the Accused to take action that would comply with the CASS. While actions may be incriminating, and thus afforded protections, that is not the circumstance here as the Accused was not a suspect in regards to the CASS. Neither MA1 [redacted] nor anyone else involved in the development of the CASS, believed or reasonably should have believed that the information sought on the Accused's phones would incriminate her.[61] Since this was a lawful search based upon probable cause there was no requirement for MA1 [redacted] to provide the Accused rights warnings pursuant to Article 31(b) or *Miranda*.

The facts here are comparable to those in *Bradley*.[62] There, a Sailor was suspected of selling drugs when an informant reported him to the Chief Master-at-Arms. The Chief Master-at-Arms set up a controlled buy, giving the informant a $20 bill to use, after recording its serial number. After the informant reported that he had made the controlled buy and gave the Chief Master-at-Arms the drugs he purchased, the Chief Master-at-Arms requested, and received, authorization

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[58] M.R.E. 305(b)(2).
[59] *See California v. Beheler*, 463 U.S. 1121, 1125 (1983)([T]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.")
[60] *See* AE III(b).
[61] *Meeks*, 41 M.J. at 161("The fact that there is 'a hunch' that a crime has been committed does not trigger Article 31(b).").
[62] *United States v. Bradley*, 50 C.M.R. 608 (N.M.C.R. 1975).

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from the Executive Officer to search Bradley, his personal effects, locker, and work spaces.[63] Bradley was brought to the ship's library and asked if he had money on his person. When he said he did, Bradley was told to place the money on the table, which included the $20 bill the Chief Master-of-Arms had provided the informant. The N.C.M.R. found the Assistant Master-at-Arms, who conducted the search, was not required to have provided Bradley with his Article 31(b) rights because "the questions asked and the directions given ... were but an integral part of the lawful search conducted upon probable cause."[64] The Accused "was not directed to do anything but comply with the terms of the search."[65]

Setting aside the fact that this case, and those cited by the Defense, involved someone suspected of a crime, they support the conclusion, MA1 [redacted] did not have to warn the Accused of either her Fifth Amendment or Article 31(b) rights. Her direction to unlock the phones and change the settings so they stayed unlocked was not an interrogation. Here, the Accused "was not required to do anything but comply with the terms of" a lawful search authorization based upon probable cause.[66] Neither MA1 [redacted] direction nor the Accused's responses were the reason why the Accused was required to unlock her phone using her passcode and biometrics. The reason was the CASS issued earlier that afternoon.[67] MA1 [redacted] request to unlock, and change the settings on, the phone "were but an integral part of the lawful search conducted upon probable cause."[68]

This case is distinguishable from *Mitchell*[69] in two important respects. First, C.A.A.F. determined that Mitchell was subject to an interrogation as the Government, "by asking [Mitchell] to enter his passcode ... was seeking an 'answer[]... which would furnish a link in the chain of evidence needed to prosecute.'"[70] Here, as discussed above, the Accused was not a suspect in connection to the evidence on her phones. The text messages were not sought to prosecute, or take any other disciplinary action, against the Accused; they were potential impeachment evidence in the NCC [redacted] court-martial. By entering her passcode in her phones, the Accused was not furnishing a link in the chain of evidence needed to prosecute her. Therefore, the direction to unlock her phones and change the settings was a search and not an interrogation.

Second, *Mitchell* clearly states that the Government violated his Fifth Amendment rights "when agents asked him *in the absence of counsel* to enter the phone's passcode."[71] When the Accused stopped MA1 [redacted] from reading the CASS and stated she wanted to call her

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[63] It has no bearing on this ruling, why N.M.C.R. found the XO could authorize the search.
[64] *Bradley*, 50 C.M.R. at 621.
[65] *United States v. Cuthbert*, 29 C.M.R. 88, 90 (C.M.A. 1960)(The accused's Captain, believing he had stolen mail and placed it in his jacket's pockets, instructed the accused to empty is pockets. The accused produced several letters that did not belong to him.)
[66] *Bradley*, 50 C.M.R. at 619-620. *See Cuthbert*, 29 C.M.R. 88 (Article 31(b) rights advisement when commanding officer ordered Cuthbert to empty is pockets based on his suspicion that Cuthbert was hiding another person's mail on his person.)
[67] *Bradley*, 50 C.M.R. at 620-621.
[68] *Bradley*, 50 C.M.R. at 621.
[69] 76 M.J. 413 (C.A.A.F. 2017).
[70] *Mitchell*, 76 M.J. at 418; *citing Hoffman v. United States*, 341 U.S. 479 (1951); and *United States v. Hubbell*, 530 U.S. 27 (2000).
[71] *Mitchell*, 76 M.J. at 415 (emphasis added).

Defense Counsel, the CID investigator's respected this as an indication she only wanted to deal with them through her Defense Counsel. Their respect for her reqeust continued through her apprehension. When she was apprehended, she was asked no questions and brought directly to CFAY Security. There she was still asked no questions, other than if she wanted water. Once Defense Counsel arrived, she was given the opportunity to meet with him in MACS [redacted] office. It was only after the Accused and Defense Counsel were in the interview room that MA1 [redacted] attempted to execute the CASS. When the Accused followed MA1 [redacted] directions, she did so after her Defense Counsel advised her to. The actions of the investigators, to include MA1 [redacted] indicate an abiding respect for the Accused's rights, which therefore ensured her actions were voluntary.

The evidence retrieved from the Accused's phones was not gathered in violation of her 5th Amendment rights, her Article 31(b) rights, nor was it otherwise involuntary and is therefore admissible, notwithstanding any other evidentiary objections.

e. **The Accused's statement to the Investigating Officer on 11 and 12 February 2020 were voluntary.**

When the IO interviewed the Accused on 11 February 2020, he did suspect her of an offense based on her failure to comply with the CASS on 31 January 2020 and the results of the search of her phones on 5 February 2020. The IO asked Defense Counsel if the Accused would meet with him and went to the DSO conference room for the meeting. There he provide the Accused with a form that detailed her rights under Article 31(b) and the offenses she was suspected of committing. No cleansing warning was necessary as the previous statements were not taken in violation of her rights. Even if a cleansing warning were necessary, the lack of one is not detrimental to the admissibility of the statement; it is only a factor to consider.[72]

Considering the totality of the circumstances, the Accused's interview with the IO on 11 February and her written statement to him on 12 February were voluntary. The meeting occurred with Defense Counsel present, in his office's conference room, providing the Accused a comfortable environment. As stated above, the Accused is an educated and accomplished officer. Not only did the Accused agree to answer the IO's questions, she chose to follow the interview up with a written statement. This statement was reviewed by her Defense Counsel before she submitted it to the IO. The evidence clearly shows she made a free and unconstrained choice, after consultation with her Defense Counsel to submit to the IO's questioning.

The Accused's oral and written statements are admissible, notwithstanding any other evidentiary objections.

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[72] *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019); *citing United States v. Byers*, 26 M.J. 132, 135 (C.MA. 1988) and *United States v. Phillips*, 32 M.J. 76, 80-81 (C.M.A. 1991); and *quoting United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006).

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6. **Ruling**.

The Defense Motion to Suppress is **DENIED**.

[redacted]

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

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

UNITED STATES v. CHANEL G. SIMS LCDR, USN	**RULING – DEFENSE MOTION TO RECONSIDER – FINDING OF NOT GUILTY UNDER RULE FOR COURTS-MARTIAL 917** **28 OCT 2020**

1. Statement of the Case.

The Accused was charged with three specifications in violation of Articles 92, 131e, and 133. The maximum punishment authorized was the special court-martial jurisdictional maximum for an officer: a reprimand, forfeiture of two-thirds pay and allowances per month for twelve months, a fine, and restriction for no more than two months.

The charges were referred on 11 August 2020; the Accused was arraigned on 15 September 2020. On 30 September 2020, the Accused requested trial by Military Judge Alone. Trial on the merits began on 6 October 2020.

2. Issues

a. Should the Court enter a finding of Not Guilty to Charge I, Specification 1 and Charge II, the sole Specification?

3. Findings of Fact.

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

a. On 15 September 2020, the Government withdrew Charge I, Specification 2, Charge III, the sole Specification, and Charge IV, Specification 1.

b. The Accused's court-martial began on 6 October 2020. The Government called nine witness in its case on the merits, to include: [redacted] Prosecution Exhibits 1, 2, 3, 4, and 6 were admitted into evidence.

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c. After the Government rested, the Defense made an oral motion pursuant to Rule for Courts-Martial (R.C.M.) 917. The Court denied the Defense motion.

d. The Defense called five witnesses in its case on the merits, to include: [redacted]. Defense Exhibits A through O were admitted into evidence.

e. On 8 October 2020, this Court found the Accused Guilty of Charge I, Specification 1, and Charge II, the sole Specification and Not Guilty of Charge IV, Specification II. The Court sentenced the Accused to no further punishment.

f. The Statement of Trial Results was signed on 8 October 2020.

g. On 25 October 2020, the Defense filed a motion requesting the Court enter a finding of Not Guilty to Charge I, Specification 1 and Charge II, the sole Specification.

h. The Entry of Judgement has not been signed in this case.

4. Principles of Law.

R.C.M. 917 states "[t]he military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty … at any time after the evidence on either side is closed but prior to entry of judgement if the evidence is insufficient to sustain a conviction of the offense affected."[1] A finding of not guilty should be entered "only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged."[2]

R.C.M. 1104(b)(1)(B) allows either party to submit a "motion to set aside one or more findings because the evidence is legally insufficient." Such a motion "shall be filed not later than 14 days after defense counsel receives the Statement of Trial Results."[3]

The findings of a court-martial "may be based on direct or circumstantial evidence."[4] "A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt."[5] "A reasonable doubt is a doubt based on reason and common sense … it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case."[6]

This Court denied the Defense's R.C.M. 917 motion at trial, finding the Government had introduced sufficient evidence to support a conviction of each offense then before the Court.[7] The Court then found, after the Defense case on the merits and argument by both parties, that the

[1] R.C.M. 917(a) (emphasis in original).
[2] R.C.M. 917(d).
[3] R.C.M. 1104(b)(2)(A).
[4] R.C.M. 918(c).
[5] *Id.*
[6] Discussion, R.C.M. 918(c).
[7] The Court's ruling at trial included Charge IV, Specification 1.

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Government had proved the Accused's guilt, beyond a reasonable doubt, of Charge I, Specification 1, and Charge II, the sole Specification. The Court now determines that the evidence introduce at this court-martial is legally sufficient to sustain a conviction for both Charge I, Specification 1, and Charge II, the sole Specification

5. Ruling.

The Defense motion is **DENIED**.

[redacted]

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

APPELLATE EXHIBIT XXIX
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES v. **CHANEL G. SIMS** **LCDR, USN**	**RULING – DEFENSE MOTION TO SUPPRESS – LACK OF PROBABLE CAUSE** 27 SEP 2020

1. Statement of the Case.

The Accused is charged with three specifications in violation of Articles 92, 131e, and 133. The maximum punishment authorized is the special court-martial jurisdictional maximum for an officer: a reprimand, forfeiture of two-thirds pay and allowances for twelve months, a fine, and restriction for no more than two months.

The charges were referred on 11 August 2020; the Accused was arraigned on 15 September 2020. The Defense filed a Motion to Suppress evidence derived from a Command Authorized Search and Seizure (CASS) issued on 31 January 2020.[1] The Government responded on 4 September 2020.[2] An Article 39(a)[3] session was held at Commander, [redacted] (CFAY) on 15 and 16 September 2020. Six witnesses testified: the Accused; [redacted] Convening Authority; [redacted] was called as a witness but did not testify.[4] The Defense and Government also provided documentary evidence in support of their motions.[5]

2. Issues

a. Did CAPT [redacted] have a substantial basis to determine there was probable cause to search and seize the Accused's personal and work cell phones on 31 January 2020?

b. Did CAPT [redacted] lose his impartiality by becoming personally involved in the evidence-gathering or investigative process before approving the CASS on 31 January 2020?

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[1] AE III.
[2] AE III(a).
[3] UCMJ (2019).
[4] At the beginning of the Article 39(a) session on 15 September 2020, the Defense notified the Court that the Commanding Officer, [redacted] had filed a complaint with the Rules Counsel against LT [redacted]
[5] AE IX and X respectively.

APPELLATE EXHIBIT 01)b
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c. Did LT [redacted] knowingly and intentionally included a false statement or act with reckless disregard for the truth in his 31 January 2020 application for a CASS?

3. Findings of Fact.

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

a. The Accused was the Manning and Administration Officer (N-1) for Naval Surface Group Western Pacific (NAVSURGRU WESTPAC) in the October 2019 to February 2020 time period. She commissioned in the Navy in December 2005 through Naval Reserve Officer Training Corps (NROTC). During her career she earned her Surface Warfare Officer (SWO) qualification in less than a year; earned a Master's of Business Administration (MBA) while pregnant and serving in a Staff job; earned her Engineering Officer of the Watch (EOW) qualification; and had been selected for promotion to the rank of Commander.

b. At the relevant times, the Accused had personal and work cell phones, both of which were Apple iPhones. The Accused used her Apple ID on both phones, as they both required an Apple ID to operate correctly. The Apple ID allowed her iMessages,[6] and other information maintained in her iCloud account, to sync on both phones. The Apple ID was paired with a passcode known only to the Accused.[7] Both phones were set to lock when not being actively used. The Accused's personal phone was unlocked using FaceID and her work phone was unlocked using a passcode.[8] No one at her command knew the passcode for her work phone. The Accused had no expectation either her work or personal phones or her iCloud account would be reviewed by her command. In fact, her work phone was never collected for review by NAVSURGRU WESTPAC.

c. On 7 October 2019, NCC [redacted] a member of her Department, sent the Accused a text message at 0734 stating "Going t[sic] be a little late this morning." At 0947, he again texted the Accused, "I've been stuck with security. They got me with the breathalyzer and taking me to main base. I'll talk to you when I get there." NCC [redacted] did not respond to her question, "As in blew over the limit?" When the Accused texted him "How are you?" at 1613, he responded "In the dumps. Just can't believe this happened."[9]

d. As a result of the 7 October 2019 incident, charges against NCC [redacted] were referred to a special court-martial by Commander, Naval Surface Group Western Pacific

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[6] iMessage is Apple's proprietary text messaging application. Though the company refers to the communications sent through this application as "iMessages," the Court will use the term "text messages" to avoid confusion.
[7] As used in this ruling, "passcode" and "password" could be used interchangeably to identify a serious of numbers and/or letters used to secure an electronic device.
[8] FaceID is a Apple security feature that uses facial recognition software to unlock the user's iPhone. It is used in place of a passcode or a fingerprint scan, otherwise known as TouchID. The Accused keeps the passcode for her work phone on a piece of paper kept with the phone because she would change the passcode every 30 days when her Outlook Web Access (OWA) password had to be changed.
[9] These text messages are found in Enclosure B of AE IX.

(COMNAVSURGRU WESTPAC).[10] In late-December 2019 or early-January 2020, the Accused met with [redacted]. During that meeting, The Accused showed NCC [redacted] Defense Counsel the 7 October 2019 text messages on her phone. Subsequently, NCC [redacted] Defense Counsel requested the Government produce the Accused as a witness at trial, proffering that her testimony could "provide context to NCC [redacted] *pre-planned* late arrival to work that day."[11] The Government denied the request to produce the Accused. In its subsequent motion to compel the production of the Accused and other witnesses, NCC [redacted] Defense Counsel argued the Accused was a relevant and necessary witness. The Defense Counsel claimed the Accused would testify NCC [redacted] often needed to arrive late to work so he could drop his daughters off at school and "this was not a last minute revelation … [The Accused] knew about NCC [redacted] late arrival in advance."

e. To prepare for their written response to NCC [redacted] motion to compel witness production and the court-martial, the Trial Counsel and the civilian paralegal from Region Legal Service Office Western Pacific (RLSO WESTPAC), [redacted] respectively, met with the Accused on 14 January 2020.[12] When she arrived at the meeting, the Accused did not know why she was being interviewed, but did not believe she was suspected of a crime. LT [redacted] explained that they wanted to meet with her because she was on the Defense witness list and then asked her about NCC [redacted] late arrival on 7 October 2019. In response, the Accused told LT [redacted] and Ms. [redacted] about the 7 October 2019 text messages. The Accused allowed LT [redacted] to hold her phone and view the text messages. LT [redacted] gave the phone back to the Accused when she told him there were no text messages concerning 7 October 2019. During the remainder of the meeting, LT [redacted] told the Accused multiple times that he would like to have screenshots of the text messages. The Accused did not respond to these statements and his multiple requests struck her as "sketchy."[13] As the meeting wrapped up, LT [redacted] again asked the Accused if she would give the Government screenshots of the text messages. She told LT [redacted] and Ms. [redacted] she didn't know how to take screenshots with her personal cell phone because it was new. LT [redacted] told Ms. [redacted] about the contents of the text messages after the meeting.

f. Ms. [redacted] sent a follow-up email to the Accused after the meeting seeking to confirm what they discussed and asking the Accused to provide "screenshots of all the text messages between [her] and NCC [redacted] on October 7, 2019 and any other texts between the two of [them] pertaining to this case."[14] The email asked the Accused to make changes to her summary of the meeting. The summary addressed five points discussed during the meeting.

g. The Accused responded to the email on 15 January 2020 and confirmed that three of the five points were "correct." Of note, the Accused confirmed she did not receive advance notice of NCC [redacted] late arrival to work on 7 October other than a text message at about 0730. For the other two points, she further explained the specifics from the paralegal's email, but gave no

[10] NCC [redacted] was charged with an Article 92 and Article 107.
[11] Emphasis added.
[12] Another Trial Counsel, moved in and out of the meeting as it progressed, but did not participate substantively.
[13] At the 15 September Article 39(a) hearing, The Accused confirmed Defense Counsel's characterization of LT [redacted] "directing" her to take screenshots as opposed to "requesting" she take screenshots.
[14] This was a standard practice to ensure the Government had correctly summarized the meeting and to have evidence for any potential Article 39(a) hearing on a motion to compel witnesses.

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indication that Ms. [redacted] summary was wrong. The Accused indicated she did "not feel comfortable" providing screenshots of her text messages with NCC [redacted]

h. The Accused testified that she believed the email was misworded and made her feel like the text messages would be misconstrued. As a result, the Accused changed her schedule so she would be available to testify at the court-martial.

i. LT [redacted] emailed the Accused on 16 January and explained that the text messages she had shown him were relevant and necessary evidence in the NCC [redacted] court-martial and reiterated his request that she provide screenshots of the requested text messages. He indicated he would issue a subpoena for the text messages if she did not provide them voluntarily. The Accused sought legal counsel from the Commanding Officer, [redacted]

j. On 17 January 2020, a RLSO WESTPAC Trial Counsel issued a subpoena for "[c]opies of all text communications between [NCC] [redacted] and [the Accused] that occurred 7 October 2019, located on your work and/or personal phones, in your possession as of 1100, 16 January 2020." The subpoena indicated the text messages should be produced no later than 21 January 2020. An unidentified Legalman Petty Officer Second Class (LN2) served the subpoena on the Accused in her office on 17 January; she signed the certificate of service. Though she read the subpoena before she signed it, the Accused testified she did not realize it was a subpoena because she did not understand the language. She did not send the text messages to the Government.

k. Eleven days later, and seven days after the due date on the subpoena, LT [redacted] emailed the Accused and asked her to send the requested text messages in accordance with the subpoena or he would pursue a warrant of attachment from a military judge. The Accused again sought the advice of the [redacted] who detailed Defense Counsel to represent her regarding the Government's attempt to secure the text messages.[15] In that capacity, Defense Counsel filed a motion to quash the Government's subpoena.[16]

l. LT [redacted] and Ms. [redacted] discussed applying for a CASS on 30 January 2020 because they were unsure of how the upcoming Article 39(a) hearing would turn out. LT [redacted] and Ms. [redacted] discussed talked about the text messages importance to show that NCC [redacted] had not pre-arranged being late to work that day as proffered by his defense counsel.

m. An Article 39(a) session was held to litigate the Government's request for a warrant of attachment and the Accused's request to quash the subpoena on 31 January 2020. That morning the NAVSURGRU WESTPAC Chief Staff Officer (CSO) notified the Accused she was required to attend the Article 39(a) hearing. Before going to the courtroom, the Accused met with her Defense Counsel in his office. The Government called the Accused to testify at the Article 39(a) without objection. On direct examination, she confirmed that she had received communications

[15] This same Defense Counsel represents the Accused in this court-martial.
[16] In his motion to quash the subpoena, Defense Counsel states the Government "must utilize a Command Authorized Search" to search the Accused's phones.

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from NCC [redacted] the morning of 7 October 2019. When asked the format of the communications, she twice exercised her 5th Amendment right. After the Military Judge stated that the question would not elicit an incriminating response, the Accused believed she was required to testify and testified that she received text messages from NCC [redacted] on her personal cell phone.[17] She further testified she freely and voluntarily showed Trial Counsel the text messages during their 14 January 2020 meeting.[18] The Military Judge denied the Government's request for a warrant of attachment and granted the Accused's motion to quash the subpoena, finding that while the Government was not precluded from the information sought, a subpoena was not the appropriate mechanism for the Government to reach the evidence.[19] The Military Judge indicated the Government had other means, such as a command authorization for search and seizure (CASS), at their disposal.[20] As the Military Judge moved on to the next issue before the Court, Defense Counsel made his presence known to the Court and asked if the Accused was dismissed and permitted to resume her normal duties. When the Military Judge indicated she was, the Accused and her Defense Counsel returned to his office to talk.

n. After the 31 January hearing, Ms. [redacted] drafted an affidavit to support a CASS application. The draft was based on her memory of the 14 January meeting with the Accused, that day's Article 39(a) hearing, and her previous conversations with LT [redacted] She showed the affidavit to LT [redacted] who direct her to include information about NCC [redacted] court-martial. LT [redacted] suggested no changes to the affidavit concerning the meeting with the Accused or the text messages. Once the changes were made, Ms. [redacted] was sworn and she signed the affidavit.

o. In the affidavit, Ms. [redacted] provided a brief background of the NCC [redacted] case and explained the purpose of Trial Counsel's meeting with the Accused. Specifically, the affidavit states the Government sought to determine if NCC [redacted] had given her advanced notice of his late arrival to work on 7 October 2019. According to the affidavit, the Accused said she had received a text message from NCC [redacted] but could not remember what it said. After opening her phones using biometrics and a passcode, the Accused reviewed the messages and showed LT [redacted] three text messages from 7 October 2020. She would not show LT [redacted] any other messages. The text messages were summarized in the affidavit as follows:

> 1. Around 0730, NCC [redacted] sent a message that he would be late; 2. NCC [redacted] messaged that '[they] got me with the breathalyzer' – or words to that effect; 3. NCC [redacted] sent another message stating that he 'can't believe that this is happening' or words to that effect.[21]

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[17] On cross-examination at the Article 39(a) hearing, the Accused testified that she did not know if the Military Judge's order was lawful.

[18] Though Trial Counsel stated at the Article 39(a) hearing that the meeting was on 15 January, the other evidence before the Court clearly demonstrates the meeting was in fact on 14 January.

[19] At the Article 39(a) hearing on this motion, the Accused testified that the Military Judge had questioned the relevance of the text messages.

[20] The Accused testified at the Article 39(a) hearing that the Military Judge gave no indication that anything else would follow concerning the text messages and she believed the Government would not make any further attempts to get the text messages.

[21] In its 17 January 2020 response to NCC [redacted] motion to compel witness production, LT [redacted] told the court that the Government was "unable to use the exact language of the messages or the exact time they were sent to

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The remainder of the affidavit detailed the steps the Government took to try and secure the three text messages from The Accused.

p. With Ms. [redacted] affidavit, LT [redacted] applied for, and received, a CASS from COMNAVSURGRU WESTPAC. The CASS application requested permission to search the Accused's personal and work cell phones for "all messages with NCC [redacted] on 7 October 2019, and regarding NCC [redacted] stop at a sobriety checkpoint on 7 October 2910, which is evidence of NCC [redacted] crimes of making a false official statement [] and an orders violation."

q. COMNAVSURGRU WESTPAC, CAPT [redacted] had previously been in command four times; three times as a ship's CO and once as a Commodore. Accordingly, he had been through the command training pipeline four times, to include legal training, where he was exposed to the JAGMAN and QUICKMAN. Over the course of his career, he has convened at least ten courts-martial. As COMNAVSURAGRAU WESTPAC he was the Convening Authority for NCC [redacted] court-martial. Accordingly, he had considered the charges against NCC [redacted] and made the decision to refer based on the evidence provided to him at the time. He views his role as the Convening Authority is to initiate the charges, but it is up to the court-martial to determine guilt or innocence.

r. CAPT [redacted] determined there was probable cause to issue the CASS. When making his decision whether to approve the CASS, CAPT [redacted] relied on Ms. [redacted] affidavit, his previous discussions with LT [redacted] to include LT [redacted] assertion that the text messages were relevant and necessary for the NCC [redacted] court-martial, his knowledge of the NCC [redacted] case, and consultation with his SJA. When the COMNAVSURGRU WESTPAC received the CASS application NCC [redacted] charges were in his mind. CAPT [redacted] had discussed the information on the Accused's phones with LT [redacted] before he received the CASS application and knew it was requested for the trial.[22] CAPT [redacted] also knew LT [redacted] had issued a subpoena for the text messages, but that it was not sufficient to get the text messages because of the Accused's rights. Based on his conversations with LT [redacted] CAPT [redacted] believed the text messages would be relevant and necessary. He relied on LT [redacted] assertions as a trial counsel. CAPT [redacted] discussed the CASS application with his SJA and received advice from the SJA about the CASS approval process.[23] CAPT [redacted] knew that Ms. [redacted] had not personally seen the text messages and that she was relaying that information from LT [redacted] CAPT [redacted] considered the text message NCC [redacted] sent saying they "got him" with the breathalyzer had a criminal nexus because it indicated NCC [redacted] had been drinking. CAPT [redacted] took the portion of the affidavit which discussed the subpoena to mean the Accused had been asked for text messages and had not provided them. He did not, however, believe the subpoena obligated her to provide the text messages. The SJA told CAPT [redacted] how the Accused's 4th Amendment rights applied to a cell phone. Considering all that, CAPT [redacted] determined there was probable cause that evidence of a crime, the text messages, would be found on the Accused's phones and approved the CASS.

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support [its] response" because the Accused would not provide those messages.

[22] CAPT [redacted] could not remember if that discussion occurred on or before 31 January 2020.

[23] CAPT [redacted] could not remember the name of his SJA at the time due to the frequent turnover in that position.

s. The CASS was issued for "text communications between [the Accused] and NCC [] [redacted] on 7 October 2019 [] regarding NCC [redacted] stop at a sobriety checkpoint on 7 Octobrer 2910, which is evidence of NCC [redacted] crimes of making a false official statement [] and an orders violation." Three investigators from Commander, Fleet Activities [redacted] Security Department attempted to execute the CASS at approximately 1515, 31 January 2020.

4. Statement of Law.

A military judge does not abuse their discretion in denying a motion to suppress, where the authorizing official had a "substantial basis" for determining that probable cause existed.[24] "A substantial basis exists 'when, based on the totality of the circumstances, a common-sense judgement would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified locations.'"[25] The facts known to the authorizing official at the time of the decision should be examined before analyzing how those facts became known to the authorizing official when determining if there was a substantial basis for probable cause.[26] "Resolution of doubtful or marginal cases should be largely determined by the preference for warrants, and close calls will be resolved in favor of sustaining the search authority's decision."[27]

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Military Rules of Evidence (M.R.E.) 311-317 implement the protection of the Fourth Amendment for military members.[28]

An unlawful search or seizure is one that violates the Constitution of the United States or M.R.E.s 312-317.[29] Absent a recognized exception,[30] evidence gained from an unlawful search or seizure is inadmissible at court-martial where "(1) the accused makes a timely motion to suppress …; (2) the accused had a reasonable expectation of privacy in the person, place, or property searched …; and (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches and seizures and the benefits of such deterrence outweigh the costs to the justice system."[31]

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[24] *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007); *see United States v. Perkins*, 78 M.J. 550, 555-556 (N.M.C.C.A. 2018) ("[W]e give great deference to" the commander's probable cause determination.)
[25] *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017); *quoting United States v. Rogers*, 67 M.J. 162, 164-164 (C.A.A.F. 2009); *citing Illinois v. Gates*, 462 U.S. 213, 238 (1983).
[26] *Leedy*, 65 M.J. at 213-214.
[27] *United States v. Eppes*, 77 M.J. 339, 345 (C.A.A.F. 2018); *citing Nieto*, 76 M.J. at 105; *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010); *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009); and *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000).
[28] *Nieto*, 76 M.J. at 106; *citing United States v. Hoffman*, 120, 123 (C.A.A.F. 2016).
[29] M.R.E. 311(b)(1).
[30] *See generally* M.R.E. 311(c) and M.R.E. 311(d)(5)(A).
[31] M.R.E. 311.

Data stored within a cell phone falls within the Fourth Amendment's protections.[32] "Therefore, cell phones may not be searched without probable cause and a warrant unless the search and seizure falls within one of the recognized exceptions to the warrant requirement."[33] As such, evidence obtained from a Government search of cell phone data generally will be inadmissible unless (1) the search was conducted pursuant to a search authorization or warrant, or (2) a recognized exception applies.

A "search authorization" is "express permission, written or oral, issued by competent authority to search a person or an area for specified property or evidence . . . and to seize such property, [or] evidence . . . ."[34] A military commander may authorize a search when they have "control over the place where the property or person to be searched is situated or found ..."[35] When a search authorization has been granted, any commissioned officer, petty officer, or criminal investigator may conduct the search.[36] Evidence may also be lawfully seized if, during the course of otherwise lawful activity, to include executing a search authorization based on probable cause, a government agent observes in a reasonable fashion property or evidence that the person has probable cause to seize.[37]

Searches and seizures conducted pursuant to search authorizations that are based on probable cause are lawful. Probable cause exists when there is a reasonable belief that evidence of a crime is located in the place, or on the person, to be searched.[38] Under M.R.E. 315, the military commander's task is "simply to make a practical, common-sense decision whether ... there is a fair probability that contraband or evidence of a crime will be found in a particular place."[39]

Probable cause "is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.'"[40] Such determinations are "inherently contextual, dependent upon the specific circumstances ... [P]robable cause is founded ... upon the overall effect or weight of all factors presented to the [commander]."[41]

"A search authorization may be based upon hearsay evidence in whole or in part."[42] The military commander's probable cause determination should be "based upon any or all of the following: (A) written statements communicated to the authorizing official; (B) oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or (C) such information as may be known by the authorizing official . . . ."[43]

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[32] *Riley v. California*, 573 U.S. 373, 401–03 (2014). *See also United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014).
[33] *Wicks*, 73 M.J. at 99.
[34] M.R.E. 315(b)(1).
[35] M.R.E. 315(d)(1).
[36] M.R.E. 315(e)(1).
[37] M.R.E. 316(c)(5)(C).
[38] M.R.E. 315(f)(2); M.R.E. 316(c)(1).
[39] *Gates*, 462 U.S. at 238.
[40] *Leedy*, 65 M.J. at 213; *quoting Brinegar v. United States*, 338 U.S. 160, 175 (1949).
[41] *Leedy*, 65 M.J. at 213.
[42] M.R.E. 315(f)(2).
[43] *Id.*

"Probable cause requires more than bare suspicion, but something less than a preponderance of evidence. Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false . . . there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present."[44]

For probable cause to be established "a sufficient nexus must be shown to exist between the alleged crime and the specific time to be seized."[45] That nexus "may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept."[46] "Reviewing courts may read the affidavit and warrant to include inferences the [military commander] reasonably could have made."[47]

"A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution."[48] This includes the requirement that "the place to be searched, and the persons or things to be seized" must be described particularly.[49] The "manifest purpose of this particularity requirement ... ensures that the search will be carefully tailored to its justification, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."[50] A search authorization must "describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings."[51] A "temporal limitation is one possible method of tailoring a search authorization, [but] it is by no means a requirement."[52] Another possible method of tailoring a search authorization is by limiting "the search to evidence of specific federal crimes or specific types of material."[53]

The military commander's responsibilities require them to perform various duties. "These include the concomitant authority to enforce the law, authorize prosecutions for offenses allegedly committed, maintain discipline, investigate crimes, authorize searches and seizures, as well as train and fashion those under [their] command into a cohesive fighting unit."[54] When authorizing searches and seizures, military commanders "stand[] in the same position as a federal magistrate issuing a search warrant."[55] Therefore, their probable cause determination must be

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[44] *Leedy*, 65 M.J. at 213; *citing United States v. Burrell*, 963 F. 2d 976, 986 (7th Cir. 1992) and *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005).
[45] *Nieto*, 76 M.J. at 105; *citing Rogers*, 67 M.J. at 166 and *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001).
[46] *Nieto*, 76 M.J. at 106; *quoting Clayton*, 68 M.J. at 424 (internal quotations omitted).
[47] *Eppes*, 77 M.J. at 345; *citing United States v. Williams*, 544 F. 3d 683, 686-87 (6th Cir. 2008).
[48] *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017) (quoting U.S. CONST. amend. IV).
[49] *Id.*
[50] *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).
[51] *Richards*, 76 M.J. at 369; *quoting United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999).
[52] *Richards*, 76 M.J. at 370.
[53] *Id.* ("They were entitled to search Appellant's electronic media for any communication that related to his possible violation of the Florida statute in his relationship with AP.")
[54] *United States v. Ezell*, 6 M.J. 307, 317-318 (C.MA. 1979)(internal citations omitted).
[55] *United States v. Rivera*, 10 M.J. 55, 58 (C.M.A. 1980); *quoting United States v. Sam*, 22 U.S.C.M.A. 124, 127 (1973).

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made with "a magistrate' neutrality and detachment."[56] However, a commander loses their impartiality if they "become personally involved in the actual evidence-gathering process" or otherwise "engaged in the often competitive enterprise of ferreting out crime."[57]

Where the defense challenges the probable cause of a search authorization, "the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer."[58] When the defense makes a claim that the person applying for the search authorization knowingly and intentionally included a false statement or acted with reckless disregard for the truth in their application, the defense must first establish the allegation by a preponderance of the evidence.[59] Such an allegation would necessarily include evidence not presented to or otherwise known by the authorizing officer.

To trigger the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system."[60] "[A]dmittedly drastic and socially costly," the exclusionary rule should only be applied where "needed to deter police from violations of constitutional and statutory protections."[61] The exclusionary "rule's sole purpose . . . is to deter future Fourth Amendment violations."[62] As such, its use is limited "to situations in which this purpose is thought most efficaciously served."[63] "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh [the rule's] heavy costs."[64]

5. Analysis and Conclusions of Law.

The Accused had reasonable expectation of privacy in both her personal and work cell phones. Based on the totality of the circumstances, the Accused's subjective expectation of privacy was objectively reasonable.[65] The Accused was required to use her personal Apple ID to operate the work cell phone. Her Apple ID was paired with a passcode that was known only to her. The work cell phone was locked using a unique passcode also known only to her. Not only did the Accused have no expectation that her work cell phone would ever be reviewed by members of her command, it, in fact, was never taken and reviewed before 31 January 2020. Since she had a reasonable expectation of privacy in both phones, the Government was required to obtain CASS before it could seize and search either phone. The questions before this Court are therefore focused on CAPT [redacted] probable cause determination when he approved the CASS on 31 January 2020.

a. CAPT [redacted] had a substantial basis to determine there was probable cause to

[56] *Id.*
[57] *Rivera*, 10 M.J. at 61; *citing Ezell*, 6 M.J. 307 and *quoting Johnson v. United States*, 333 U.S. 10 (1948).
[58] M.R.E. 311(d)(4)(A).
[59] M.R.E. 311(d)(4)(B).
[60] *Herring v. United States*, 555 U.S. 135, 147 (2009). *See also Wicks*, 73 M.J. at 104 ("The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs.").
[61] *Nix v. Williams*, 467 U.S. 431, 442–43 (1984).
[62] *Davis v. United States*, 564 U.S. 229, 236–37 (2011).
[63] *Id.* at 237.
[64] *Id.*
[65] The Government conceded this issue in its response to the Defense motion. *See United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006).

search and seize the Accused's personal and work cell phones.

CAPT [redacted] was the Convening Authority for NCC [redacted] court-martial. As such, he was aware of the charges in that case when he received the CASS application on 31 January. He was also aware LT [redacted] the Trial Counsel in that case, believed the text messages on the Accused's phone were relevant and necessary for the Government's case, having previously discussed the issue with LT [redacted] Ms. [redacted] affidavit detailed the meeting with the Accused where the Accused told both Ms. [redacted] and LT [redacted] about the text messages and what LT [redacted] told her he had seen on the Accused's phone. Further, the affidavit clearly states that the Accused confirmed in court, under oath, she had received text messages from NCC [redacted] on her phone and had shown them to LT [redacted] Based on the totality of circumstances, which includes the Accused's in-court testimony, CAPT [redacted] made the common-sense judgement there was a fair probability that the text messages the Trial Counsel sought for trial were on the Accused's phone.[66]

The information presented to CAPT [redacted] along with the information he already knew about the NCC [redacted] case, established a nexus between NCC [redacted] criminal activity and the text messages on the Accused's phone.[67] However, there does not need to be a "prima facie showing" only the probability of criminal activity.[68] The criminal nexus "may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept."[69] The Court may also "read the affidavit and warrant to include inferences the [military commander] reasonably could have made."[70] The evidence sought need not be the fruits or instrumentalities of a crime, or itself contraband. There must only be a "cause to believe that the evidence sought will *aid in* a particular apprehension or conviction."[71]

CAPT [redacted] discussed the text messages with LT [redacted] before he received the CASS application and knew the Trial Counsel believed they were relevant and necessary for NCC [redacted] court-martial, thus aiding in the Government's attempt to gain a conviction.[72] While relying on LT [redacted] expertise, CAPT [redacted] did not act as a rubber stamp and merely ratify the trial counsel's conclusions.[73] Upon reading the summary of the text messages in the affidavit, and applying the knowledge he had of the NCC [redacted] case, CAPT [redacted] made his own independent determination that the text messages showed criminality. [74] Specifically, CAPT [redacted] believed NCC [redacted] text message saying they "got him" with the breathalyzer indicated NCC [redacted] had been drinking. Having previously discussed the text

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[66] *See Nieto*, 76 M.J. at 105.
[67] *Nieto*, 76 M.J. at 105 ("[A] sufficient nexus must be shown to exist between the alleged crime and the specific time to be seized."); *citing Rogers*, 67 M.J. at 166 and *Gallo*, 55 M.J. at 421.
[68] *Gates*, 462 U.S. at 235; *quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969).
[69] *Nieto*, 76 M.J. at 106; *quoting Clayton*, 68 M.J. at 424 (internal quotations omitted).
[70] *Eppes*, 77 M.J. at 345; *citing Williams*, 544 F. 3d at 686-87.
[71] *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).
[72] The fact that the text messages were ultimately not used by either the Government, nor the Defense, in the court-martial has no bearing on the Court's analysis.
[73] *Perkins*, 78 M.J. at 556 (A commander "may rely on the expertise and experience of a law enforcement officer."); *citing United States v. Leon*, 468 U.S. 897, 915 (1984).
[74] *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)(The Fourth Amendment requires that the neutral and detached commander make "the usual inferences which reasonable men draw from evidence.").

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messages and Article 39(a) hearing with LT [redacted] reviewing the affidavit, and the Accused's rights and the CASS approval process with his SJA, CAPT [redacted] made his own practical, common-sense decision that the text messages might aid in convicting NCC [redacted] and would be found on the Accused's phones.

b. CAPT [redacted] did not lose his impartiality nor did he become personally involved in the evidence-gathering or investigative process before approving the CASS.

CAPT [redacted] acted as a neutral and detached magistrate when making his probable cause determination. As stated above, he reviewed the information presented to him, made permissible inferences based on what he already knew, and discussed the approval process with his SJA. At no point did he "become personally involved in the actual evidence-gathering process" or otherwise "engaged in the often competitive enterprise of ferreting out crime."[75] The fact that the CASS was for a case he had referred to court-martial does not void his neutrality or detachment.[76] The evidence before this Court shows that CAPT [redacted] was not an active participant in the gathering of evidence.[77] Nor did his actions in making a probable cause determination demonstrate any personal bias or involvement in the investigative or prosecutorial process.[78] When LT [redacted] requested the CASS to secure evidence he believed was relevant and necessary to the Government's case, CAPT [redacted] applied a deliberate process of reviewing the information before him, relying on what he already knew as the Convening Authority and from previous conversations, discussing the CASS approval with his SJA, and forming his own opinion when he made his decision. At no point did CAPT [redacted] act in a biased manner that showed he was intent on gaining a certain result against NCC [redacted] or finding evidence of a crime by the Accused.[79]

c. The Defense has not established that LT [redacted] knowingly and intentionally included a false statement or act with reckless disregard for the truth in his CASS application.

The Defense has failed to establish by a preponderance of the evidence that LT [redacted] knowing or intentionally included a false statement or showed reckless disregard for the truth in his CASS application. It is clear from the evidence that LT [redacted] and Ms. [redacted] summarized the text messages based on LT [redacted] short opportunity to review them during the 14 January 2020 meeting. In the Government's response to NCC [redacted] motion to compel witnesses, LT [redacted] even apologized to the Court for not being able to directly quote the text messages because he did not have a copy to review.[80] Considering the circumstances, the summary of the text messages in the affidavit is reasonably close to the actual text messages. The portion of the text messages not in the summary does not provided any context which would have had any discernable effect on [redacted] Probable Cause decision.

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[75] *Rivera*, 10 M.J. at 61; *citing Ezell*, 6 M.J. 307 and *quoting Johnson v. United States*, 333 U.S. 10 (1948).
[76] *Rivera*, 10 M.J. at 61; *citing United States v. Staggs*, 48 C.M.R. 672 (1974) and *United States v. Guerette*, 49 C.M.R. 530 (1975).
[77] *See Ezell*, 6 M.J. 307.
[78] *Id.*
[79] CAPT [redacted] testified that though he initiated charges as the Convening Authority, he left it to the court-martial to determine whether the accused was guilty or not guilty.
[80] The summary in the reply and the affidavit are strikingly similar.

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The affidavit accurately summarizes the events that occurred after the 14 January 2020: Ms. [redacted] followed up with an email; the Accused declined to provide screenshots of the text messages; a subpoena was sent to the Accused; the Accused did not provide screenshots or otherwise respond to the subpoena; and the Accused testified at the 31 January 2020 Article 39(a) that she received text messages from NCC [redacted] and showed them to LT [redacted]. CAPT [redacted] did not read the affidavit to mean the Accused had a legal obligation to comply with subpoena. While the affidavit does not mention the results of the hearing, it does not support the Defense's allegation for two reasons. First, LT [redacted] informed the Convening Authority that the Military Judge had indicated the subpoena was not sufficient to get the text messages. Second, that fact has no bearing on the probable cause determination of whether evidence with a nexus to NCC [redacted] crimes was on the Accused's phone. Accordingly, the Defense has failed to establish its allegation by a preponderance of the evidence.

6. Ruling.

The Defense Motion to Suppress is **DENIED**.

[redacted]

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

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

UNITED STATES v. **CHANEL G. SIMS** **LCDR** **USN**	**COURT ORDER REGARDING COVID-19 MITIGATION MEASURES FOR A CONTESTED COURT-MARTIAL** **26 SEP 2020**

1. **Nature of Order**. The subject case is currently docketed for a contested member's trial in the Courtroom of Building [redacted], Commander, Fleet Activities [redacted] for 5-9 October 2020. In order to mitigate COVID-19 health risks to all court-martial 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 court-martial of the subject case. These mitigation measures address only those measures that will be taken within the Courtroom of Building [redacted] the judicial chambers, and members' deliberation room. In addition to these measures, any other measures imposed by Commander, Fleet Activities [redacted] and Commander, Naval Forces [redacted] will also be observed. 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 Courtroom of Building [redacted] the judicial chambers, and members' deliberations room during the proceedings conducted in the Special Court-Martial of United States v. LCDR Chanel G. Sims, U.S. Navy.**

3. **Measures related to courtroom spaces.**

a. Absent good cause, all sessions of court will be held from 0900-1600 each day.

b. Prior to the commencement of any session of court, all tables, podiums, chairs, and surfaces within the courtroom and deliberation rooms will be cleaned with appropriate cleaning agents. These spaces and items will be cleaned 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 and fans should be used to the greatest extent possible to maximize fresh air flow within the courtroom.

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d. In order to maximize social distancing, the Court is limiting the number of spectators[1] allowed in the courtroom to seven individuals. Trial Counsel is directed to designate seating in the spectators' box 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.

4. **Measures related to counsel**. All counsel will wear face masks at all times while within the Courtroom of Building [redacted] unless granted specific permission by the Court to remove their mask. Should the Court grant counsel permission to remove their mask, counsel will maintain at least six feet distances 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 Defense 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. Defense Counsel may use technology to communicate with the Accused during trial. However, the Defense must brief the Court, orally or in writing, on what technology it will use and how it will use it no later than three business days before trial is scheduled to begin.

6. **Measures related to members**.

a. As currently convened, the court panel venire is comprised of nine members. To mitigate the increased chance of exposure that may occur with a large venire, the Court will submit all questions intended for the panel in general *voir dire* via a written form.[2] The questions will constitute a supplemental questionnaire as permitted by Rule for Courts-Martial 912 and will include the court's preliminary instructions to members as required by Rule for Courts-Martial 801.

b. Subsequently, all members will be questioned in individual *voir dire*. Once the members report to Building [redacted] at 0930 on 4 October 2020, the Bailiff will direct them to report back to Building [redacted] on a schedule that has one member reporting on each hourly increment at 1000, 1100, 1200, 1400, 1500, and 1600 on 5 October 2020 and at 0900, 1000, and 1100 on 6 October 2020. 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 of their facial expressions.

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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 family members and supporters, members of the press, Government and Defense trial team support staff, and supervisory counsel.

[2] The Court will consider including those questions requested by counsel for group voir dire in their pretrial matters.

c. At all other times, members are required to wear a face mask while within the Courtroom of Building [redacted] The empaneled member will wear masks during the trial. They should be seated in the members' box to maximize social distancing.

d. During deliberations, members may, but are not required 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 of Building [redacted]

b. The Court directs the appointment of a bailiff and an assistant bailiff. The assistant bailiff will assist the bailiff in monitoring and assisting the members in complying with the Court's mitigation measures during recesses and back-and-forth to the alternate deliberation room. Both bailiff and assistant bailiff are required to wear a face mask at all times within the Courtroom of Building [redacted]. While the bailiff should be senior to the Accused, there is no such requirement for the assistant bailiff.

c. Witnesses are required to wear a face mask when entering and exiting the Courtroom of Building [redacted]. 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 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.[3] 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 of Building [redacted] Any spectator who fails to wear a mask will not be permitted to enter the courtroom.

So **ORDERED,** this 26th Day of September 2020.

[redacted]

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

[3] Counsel are encouraged to use courtroom technology already available in the courtroom to display exhibits to the witnesses and members.

APPELLATE EXHIBIT (XIII)
PAGE 3 OF 3

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

UNITED STATES v. CHANEL G. SIMS LCDR, USN	**RULING – DEFENSE MOTION TO RECONSIDER – FINDING OF NOT GUILTY UNDER RULE FOR COURTS-MARTIAL 917** **28 OCT 2020**

1. Statement of the Case.

The Accused was charged with three specifications in violation of Articles 92, 131e, and 133. The maximum punishment authorized was the special court-martial jurisdictional maximum for an officer: a reprimand, forfeiture of two-thirds pay and allowances per month for twelve months, a fine, and restriction for no more than two months.

The charges were referred on 11 August 2020; the Accused was arraigned on 15 September 2020. On 30 September 2020, the Accused requested trial by Military Judge Alone. Trial on the merits began on 6 October 2020.

2. Issues

a. Should the Court enter a finding of Not Guilty to Charge I, Specification 1 and Charge II, the sole Specification?

3. Findings of Fact.

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

a. On 15 September 2020, the Government withdrew Charge I, Specification 2, Charge III, the sole Specification, and Charge IV, Specification 1.

b. The Accused's court-martial began on 6 October 2020. The Government called nine witness in its case on the merits, to include: [redacted] Prosecution Exhibits 1, 2, 3, 4, and 6 were admitted into evidence.

APPELLATE EXHIBIT XXIX
PAGE 1 OF 3

c. After the Government rested, the Defense made an oral motion pursuant to Rule for Courts-Martial (R.C.M.) 917. The Court denied the Defense motion.

d. The Defense called five witnesses in its case on the merits, to include: [redacted] Defense Exhibits A through O were admitted into evidence.

e. On 8 October 2020, this Court found the Accused Guilty of Charge I, Specification 1, and Charge II, the sole Specification and Not Guilty of Charge IV, Specification II. The Court sentenced the Accused to no further punishment.

f. The Statement of Trial Results was signed on 8 October 2020.

g. On 25 October 2020, the Defense filed a motion requesting the Court enter a finding of Not Guilty to Charge I, Specification 1 and Charge II, the sole Specification.

h. The Entry of Judgement has not been signed in this case.

4. Principles of Law.

R.C.M. 917 states "[t]he military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty … at any time after the evidence on either side is closed but prior to entry of judgement if the evidence is insufficient to sustain a conviction of the offense affected."[1] A finding of not guilty should be entered "only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged."[2]

R.C.M. 1104(b)(1)(B) allows either party to submit a "motion to set aside one or more findings because the evidence is legally insufficient." Such a motion "shall be filed not later than 14 days after defense counsel receives the Statement of Trial Results."[3]

The findings of a court-martial "may be based on direct or circumstantial evidence."[4] "A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt."[5] "A reasonable doubt is a doubt based on reason and common sense … it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case."[6]

This Court denied the Defense's R.C.M. 917 motion at trial, finding the Government had introduced sufficient evidence to support a conviction of each offense then before the Court.[7] The Court then found, after the Defense case on the merits and argument by both parties, that the

[1] R.C.M. 917(a) (emphasis in original).
[2] R.C.M. 917(d).
[3] R.C.M. 1104(b)(2)(A).
[4] R.C.M. 918(c).
[5] *Id.*
[6] Discussion, R.C.M. 918(c).
[7] The Court's ruling at trial included Charge IV, Specification 1.

APPELLATE EXHIBIT XVIII A
PAGE 2 OF 3

Government had proved the Accused's guilt, beyond a reasonable doubt, of Charge I, Specification 1, and Charge II, the sole Specification. The Court now determines that the evidence introduce at this court-martial is legally sufficient to sustain a conviction for both Charge I, Specification 1, and Charge II, the sole Specification

5. Ruling.

The Defense motion is **DENIED**.

[redacted]

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

APPELLATE EXHIBIT XXIX
PAGE 3 OF 3

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
SIMS, CHANEL, G.	Navy	O-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
[redacted]	Special	Judge Alone - MJA16	Oct 8, 2020

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Not adjudged	N/A	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
N/A	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
ROBERTSON, BENJAMIN, C.	Navy	O-5	Oct 8, 2020	[redacted]

37. NOTES

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I	92	Specification 1:	**Not Guilty**	Guilty			092-B-
		Offense description	Failure to obey other lawful order				
		Specification 2:	**Not Guilty**	Withdrawn			092-B-
		Offense description	Failure to obey other lawful order				
		Withdrawn and Dismissed					
Charge II	131e	Specification:	**Not Guilty**	Guilty			134-V2
		Offense description	Prevention of authorized seizure of property				
Charge III	131b	Specification:	**Not Guilty**	Withdrawn			134-U2
		Offense description	Obstructing justice				
		Withdrawn and Dismissed					
Charge IV	133	Specification 1:	**Not Guilty**	Withdrawn			133-D-
		Offense description	Conduct unbecoming generally				
		Withdrawn and Dismissed					
		Specification 2:	**Not Guilty**	Not Guilty			133-D-
		Offense description	Conduct unbecoming generally				

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
Charge II	Specification:	N/A	N/A	N/A	N/A
Charge III	Specification:	N/A	N/A	N/A	N/A
Charge IV	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
SIMS, Chanel G.	O4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	12AUG05	INDEF

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
[redacted]	Special	Judge Alone - MJA16	08-Oct-2020

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.

On 15 October 2020, the accused, by and through counsel, submitted matters for review by the Convening Authority. The accused did not request action by the convening authority.

See continuation on page 3.

24. Convening Authority Name/Title	25. SJA Name
CAPT [redacted] USN	LCDR [redacted] JAGC, USN

26. SJA signature	27. Date
[redacted]	Oct 28, 2020

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

No action is taken on the findings or sentence.

Pursuant to JAGMAN Section 0158, the certified Record of Trial is forwarded to the Force Judge Advocate, Commander, Naval Surface Forces Pacific for review under Article 65, UCMJ.

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]	28 OCT 2020

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

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
SIMS, Chanel G.	O4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	12AUG05	INDEF

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
[redacted]	Special	Judge Alone - MJA16	08-Oct-2020

SECTION B - ENTRY OF JUDGMENT

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

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

Charge I: Violation of Article 92, Uniform Code of Military Justice 10 U.S.C. § 892
Plea: Not Guilty
Finding: Guilty

Specification 1: Failure to obey other lawful order on or about 31 January 2020
Plea: Not Guilty
Finding: Guilty

Specification 2: Failure to obey other lawful order on or about 31 January 2020
Plea: Not Guilty
Finding: Withdrawn

Charge II: Violation of Article 131e, Uniform Code of Military Justice 10 U.S.C. § 931e
Plea: Not Guilty
Finding: Guilty

Specification: Prevention of authorized seizure of property on or about 31 January 2020
Plea: Not Guilty
Finding: Guilty

Charge III: Violation of Article 131b, Uniform Code of Military Justice 10 U.S.C. § 931b
Plea: Not Guilty
Finding: Withdrawn

Specification: Obstructing justice on or about 31 January 2020
Plea: Not Guilty
Finding: Withdrawn

12. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

On 8 Oct 2020, a military judge sentence the Accused to:

No further punishment.

13. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

On 15 October 2020, the Accused through counsel, submitted matters for review by the Convening Authority. The Accused did not request deferment or wavier.

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

N/A

15. Judge's signature:	16. Date judgment entered:
ROBERTSON.BENJAMIN.CROSS.[redacted] Digitally signed by ROBERTSON.BENJAMIN.CROSS.[redacted] DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=ROBERTSON.BENJAMIN.CROSS.[redacted] Date: 2021.01.07 11:17:19 +09'00'	Jan 7, 2021

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

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

11. Findings (Continued)

Charge IV: Violation of Article 133, Uniform Code of Military Justice 10 U.S.C. § 933
Plea: Not Guilty
Finding: Not Guilty

Specification 1: Conduct unbecoming an officer and a gentleman on or about 31 January 2020
Plea: Not Guilty
Finding: Withdrawn

Specification 2: Conduct unbecoming an officer and a gentleman on or about 31 January 2020
Plea: Not Guilty
Finding: Not Guilty

Before the announcement of the sentence, the military judge correctly indicated that the only offenses then before the court were Charge I, Specification 1; Charge II, the Sole Specification thereunder; and Charge IV, Specification 2. This announcement was consistent with the amendments to the charge sheet on 15 September 2020. However, the military judge incorrectly announced a finding of guilty to "Charge III, the Sole Specification thereunder" instead of "Charge II, the Sole Specification thereunder." This error caused no confusion among any of the parties as to what the court's findings were. Additionally, the Statement of Trial Results correctly reflects the court's findings.

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW