[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Suarez	Joseph	D	[redacted]	Cpl
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

3d Battalion, 3d Marines	USMC	MCBH
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Major General J. M. Bargeron, Commanding General

(Title of Convening Authority)

[redacted]

(Unit/Command of Convening Authority)

Tried at

MCBH	On	18 Oct 22
(Place or Places of Trial)		*(Date or Dates of Trial)*

Companion and other cases None

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

[redacted]

CONVENING ORDER

THERE IS NO CONVENING ORDER:

Referred for trial to the General Court-Martial to be tried by judge alone pursuant to Article 16(c)(2)(A) UCMJ.

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
SUAREZ, JOSEPH D.	[redacted]	CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
3D BATTALION, 3D MARINES	25 MAR 19	4 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,515.80	NONE	$2,515.80	PTC	11 JAN 22 - CURRENT

II. CHARGES AND SPECIFICATIONS

10.

CHARGE I: Violation of the UCMJ, Article 112a

Specification 1 ***(Wrongful use)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on divers occasions between on or about ~~1 October 2021~~ *1 August 2021* and on or about 11 January 2022, wrongfully use ***some amount of*** cocaine.

Specification 2 ***(Wrongful introduction)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on divers occasions between on or about ~~1 October 2021~~ *1 August 2021* and on or about 11 January 2022, wrongfully introduce ***some amount of*** cocaine onto an installation used by the armed forces or under control of the armed forces, to wit:

a. Marine Corps Base Hawaii; and
b. Schofield Army Barracks,

with the intent to distribute the said cocaine.

(See Supplemental Page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-7/GySgt	HQBN, MCBH, KANEOHE BAY
[redacted]		e. DATE: 20220203

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 3rd day of February, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

B. S. LEGENS
Typed Name of Officer

FIRST LIEUTENANT, U.S. MARINE CORPS
Grade and Service

[redacted]

HQBN, MCBH, KANEOHE BAY, HI
Organization of Officer

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

ORIGINAL

12. On 8 FEBRUARY, 20 22, 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

O-1, U.S. MARINE CORPS
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0900 hours, 8 FEBRUARY 20 22 at [redacted]
Designation of Command or

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

FOR THE[1] COMMANDING OFFICER

[redacted]
Typed Name of Officer

LEGAL OFFICER
Official Capacity of Officer Signing

O-1, U.S. MARINE CORPS
Grade

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	24 APR 2022

Referred for trial to the GENERAL court-martial convened by GCMCO 1-21

dated 15 NOV 20 21, subject to the following instructions:[2] NONE.

By _____ of _____
Command or Order

J. M. BARGERON
Typed Name of Officer

COMMANDING OFFICER
Official Capacity of Officer Signing

MAJOR GENERAL, U.S. MARINE CORPS
Grade

[redacted]

15. On 25 APRIL, 20 22, I (caused to be) served a copy hereof on (~~each of~~) the above named accused.

B. S. LEGENS
Typed Name of Trial Counsel

FIRST LIEUTENANT, U.S. MARINE CORPS
Grade or Rank of Trial Counsel

[redacted]

FOOTNOTES

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

DD Form 458 Reverse

ORIGINAL

Accused: Cpl Suarez, Joseph D.
EDIPI: [redacted]

CHARGE I: Violation of the UCMJ, Article 112a

Specification 3 ***(Wrongful distribution)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on divers occasions between on or about ~~1 October 2021~~ *1 August 2021* and on or about 11 January 2022, wrongfully distribute *some amount of* cocaine.

Specification 4 ***(Wrongful distribution)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on divers occasions between on or about ~~1 October 2021~~ *1 August 2021* and on or about 11 January 2022, wrongfully distribute *some amount of*:

a. 3,4-Methylenedioxymethamphetamine;
b. Lysergic Acid Diethylamide; *and*
c. Psilocybin Mushrooms; ~~and~~
d. ~~Tetrahydrocannabinol,~~

a Schedule I controlled substances.

Specification 5 ***(Wrongful distribution)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on divers occasions between on or about ~~1 October 2021~~ *1 August 2021* and on or about 11 January 2022, wrongfully distribute *some amount of:*

a. Amphetamine; and
b. Hydrocodone,

a Schedule II controlled substances.

CHARGE II: Violation of the UCMJ, Article 80

Specification ***(Attempt of prostitution)*****:** In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on or about 6 January 2022, attempt to wrongfully engage in prostitution.

(AND NO OTHERS)

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
SUAREZ, JOSEPH D.	[redacted]	CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
3D BATTALION, 3D MARINE LITTORAL REGIMENT, [redacted]	25 MAR 19	4 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,652.00	NONE	$2,652.00	PTC	11 JAN 22 - CURRENT

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE: Violation of the UCMJ, Article 81

Specification (*Conspiracy*): In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, between on or about 1 October 2021 and on or about 11 January 2022, conspire with Private [redacted] U.S. Marine Corps, Private [redacted] U.S. Marine Corps, Private First Class [redacted] U.S. Marine Corps, Lance Corporal [redacted] U.S. Marine Corps, and Corporal [redacted] U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: UCMJ, Article 112a, the wrongful distribution of cocaine, and in order to effect the object of the conspiracy the said Cpl Suarez did:

a) meet with Pvt [redacted] Pvt [redacted] PFC [redacted], LCpl [redacted] and Cpl [redacted]
b) purchase cocaine; and
c) request Provost Marshal Office security information from Pvt [redacted]

(*AND NO OTHERS*)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-6/SSgt	HQBN, MCBH, KANEOHE BAY

d. SIGNATURE OF	e. DATE
[redacted]	20220406

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 6 day of APRIL, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

A. B. HILL
Typed Name of Officer

CAPTAIN, U.S. MARINE CORPS

[redacted]
Signature

HQBN, MCBH, KANEOHE BAY, HI
Organization of Officer

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

ORIGINAL

12. On 7 APRIL, 20 22, 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

3D BATTALION, 3D MARINES
Organization of Immediate Commander

O-1, U.S. MARINE CORPS

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0800 hours, 7 APRIL 20 22 at 3D BATTALION, 3D MARINES
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

[redacted]
Typed Name of Officer

FOR THE[1] COMMANDING OFFICER
LEGAL OFFICER
Official Capacity of Officer Signing

O-1, U.S. MARINE CORPS

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	24APR2022

Referred for trial to the GENERAL court-martial convened by GCMCO 1-21.

dated 15 NOV 20 21, subject to the following instructions:[2] To be tried in conjunction with the charges preferred on 3 February 2022.

By COMMAND of
Command or Order

J. M. BARGERON
Typed Name of Officer

COMMANDING OFFICER
Official Capacity of Officer Signing

MAJOR GENERAL, U.S. MARINE CORPS
Grade

[redacted]

15. On 25 APRIL, 20 22, I (caused to be) served a copy hereof on (~~each of~~) the above named accused.

B. S. LEGENS
Typed Name of Trial Counsel

FIRST LIEUTENANT, U.S. MARINE CORPS
Grade or Rank of Trial Counsel

[redacted]

FOOTNOTES

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

DD Form 458 Reverse

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
SUAREZ, JOSEPH D.	[redacted]	CPL	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
3D BATTALION, 3D MARINE LITTORAL REGIMENT, [redacted]	25 MAR 19	4 YRS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,652.00	NONE	$2,652.00	PTC	11 JAN 22 - CURRENT

II. CHARGES AND SPECIFICATIONS

10.

SECOND ADDITIONAL CHARGE: Violation of the UCMJ, Article 82

Specification (*Solicitation*): In that Corporal Joseph D. Suarez, U.S. Marine Corps, while on active duty, did, on the island of Oahu, Hawaii, between on or about 11 January 2022 and on or about 7 February 2022, wrongfully solicit Private [redacted] U.S. Marine Corps, to wrongfully distribute cocaine in violation of the UCMJ, by requesting that Private [redacted] remain in Hawaii after being released from confinement to assist the said Cpl Suarez distribute cocaine.

(*AND NO OTHERS*)

[redacted]

III. PREFERRAL

[redacted]	b. GRADE	c. ORGANIZATION OF ACCUSER
	E-6/SSgt	HQBN, MCBH, KANEOHE BAY
[redacted]		e. DATE
		20220418

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 18th day of APRIL, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

A. B. HILL	HQBN, MCBH, KANEOHE BAY, HI
Typed Name of Officer	*Organization of Officer*
CAPTAIN, U.S. MARINE CORPS	TRIAL COUNSEL
Grade and Service	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*
[redacted]	

ORIGINAL

12. On 19 APRIL , 20 22 , 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.)*

2NDLT [redacted]
Typed Name of Immediate Commander

3D BATTALION, 3D MARINES
Organization of Immediate Commander

O-1 , U.S. MARINE CORPS

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0900 hours, 19 APRIL 20 22 at 3D BATTALION, 3D MARINES
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] COMMANDING OFFICER

2NDLT [redacted]
Typed Name of Officer

LEGAL OFFICER
Official Capacity of Officer Signing

O-1 , U.S. MARINE CORPS

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	24 APR 2022

Referred for trial to the GENERAL court-martial convened by GCMCO 1-21

dated 15 NOV 20 21 , subject to the following instructions:[2] To be tried in conjunction with the charges preferred on 3 February 2022.

By COMMAND of
Command or Order

J. M. BARGERON
Typed Name of Officer

COMMANDING OFFICER
Official Capacity of Officer Signing

MAJOR GENERAL, U.S. MARINE CORPS
Grade

[redacted]
Signature

15. On 25 April , 20 22 , I (caused to be) served a copy hereof on (~~each of~~) the above named accused.

A. B. HILL
[redacted]
Counsel

CAPTAIN, U.S. MARINE CORPS
Grade or Rank of Trial Counsel

FOOTNOTES

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

DD Form 458 Reverse

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT MOTION IN LIMINE: ADMISSIBILITY OF ACCUSED'S STATEMENTS** **Date: 31 May 2022**

1. Nature of Motion.

Pursuant to Rules for Courts-Martial (hereinafter "R.C.M.") 906(b)(13) and 104(a), the Government seeks a preliminary ruling on the admissibility of the Accused's statements made via text message, Snapchat, and Signal to various individuals. Specifically, the Government requests that this court rule that the Accused's text message, Snapchat, and Signal conversations with [redacted] Lance Corporal [redacted] and other unnamed Snapchat users can be properly authenticated, are made up of non-hearsay statements, are relevant, and are therefore admissible.

2. Summary of Facts.

a. The Accused is charged with violating Articles 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. *See* Encl. 1, 2, and 3.

b. On or about 1 August 2021, the Accused began using cocaine. *See* Encl. 5.

c. On 22 December 2021, a Cooperating Witness (hereinafter "CW") reported to NCIS that the Accused regularly purchased cocaine for both personal use and to distribute to Marines onboard Marine Corps Base Hawaii. The CW informed NCIS that the Accused employed several Marines as middlemen distributors and his drug sales resulted in a large group of Marines from 3D Marine Littoral Regiment to test positive for cocaine. A majority, if not all of the Marines that tested positive for cocaine purchased cocaine from the Accused or his middlemen distributors. *See* Encl. 5.

d. The Accused's middlemen distributors included Lance Corporal [redacted] and Private [redacted] *See* Encl. 5.

e. On 6 January 2022, the Accused tested positive for cocaine during a random command urinalysis. *See* Encl. 6.

f. On 11 January 2022, pursuant to a Command Authorization for Search and Seizure (hereinafter "CASS"), the Accused was apprehended. The Accused's cell phone was located and seized from his pocket. The Accused was placed in pretrial confinement. *See* Encl. 7.

g. On 11 January 2022, pursuant to a CASS, the Accused's barracks room was searched by NCIS. NCIS located controlled substances, drug paraphernalia, an additional cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. *See* Encl. 8.

h. On 11 January 2022, Lance Corporal [redacted] informed NCIS that the Accused, his roommate, bragged about selling and using cocaine and other controlled substances. *See* Encl. 9.

i. On 19 January 2022, Private [redacted] informed NCIS that the Accused used "a lot of cocaine," that the Accused was the source of cocaine for most of 3D Battalion, 3D Regiment, and that Pvt [redacted] had personally received cocaine from the Accused. *See* Encl. 10.

j. On 28 January 2022, Private [redacted] informed NCIS that the Accused was the "kingpin" narcotics dealer onboard Marine Corps Base Hawaii, and he had personally purchased cocaine from the Accused on at least four separate occasions. *See* Encl. 11.

k. On 1 February 2022, Private [redacted] informed NCIS that the Accused requested and received PMO base security information from him to assist in transporting narcotics onto Marine Corps Base Hawaii. *See* Encl. 12.

l. On 3 February 2022, Lance Corporal [redacted] informed NCIS that the Accused supplied everyone in his battalion with cocaine and had personally purchased cocaine from the Accused. *See* Encl. 13.

m. From 14 January 2022 to 2 February 2022, NCIS reviewed the Accused's cell phone. The Accused's cell phone contained a number of text messages related to the purchase, sale, and distribution of narcotics. *See* Encl. 14.

n. On 24 February 2022, NCIS Digital Forensic Examiner [redacted] conducted an extraction of the Accused's cell phone. A cellebrite report was generated using GrayKey, a tool used to display the Accused's text messages, Snapchat messages, and Signal messages. *See* Encl. 15.

o. On 24 February 2022, the contents of the Accused's cell phone extraction were reviewed pursuant to a CASS. A number of text messages, Snapchat messages, and Signal messages were discovered that described the purchase, sale, and distribution of controlled substances. *See* Encl. 16.

p. Relevant portions of the Accused's communication are included in Enclosures 14 -20.

q. On 17 December 2021, the Accused exchanged text messages with [redacted] regarding the purchase and distribution of cocaine. The Accused requested a price breakdown for different quantities of cocaine. In this exchange [redacted] asked the Accused if he sells cocaine. The Accused responded, "I'm laying low and only selling off my base because of situations that arose. So it's hard to have customers." *See* Encl. 14.

r. On 26 December 2021, the Accused and "[redacted] communicated via the social media application "Signal" about the sale of controlled substances. Specifically, the Accused requested the prices for a variety of drugs and stated that he needed the drugs to support his "business." *See* Encl. 17.

s. On 28 December 2021, the Accused exchanged text messages with an individual named [redacted]" to discuss the purchase of cocaine. The Accused provided a detailed description of the different quantities of cocaine he sold and how much cocaine would need to be purchased for a single use or user. *See* Encl. 14.

t. On 5 January 2022, the Accused sent a snapchat message to [redacted] stating, "I only sell coke." *See* Encl. 18.

u. On 5 January 2022, the Accused sent a number of Snapchat messages describing the prices for his prostitution services. *See* Encl. 19.

v. On 6 January 2022, the Accused informed [redacted] via Snapchat that he had cocaine if he wanted to purchase any and then listed prices for various quantities of cocaine. *See* Encl. 16.

w. On 6 January 2022, the Accused exchanged Snapchat messages with LCpl [redacted] regarding the conspiracy to distribute cocaine. Specifically, the Accused said, "Alright

man, you have a lot of dirt on me and I do on you too. We did it all together. But I'll take it man." *See* Encl. 14.

x. Between 7 January 2022 and 10 January 2022, the Accused communicated with [redacted] via Snapchat about the sale of controlled substances. The Accused specifically outlined the controlled substances he purchased, how much of each he purchased, and how much he charged individuals for the controlled substances. *See* Encl. 20.

y. On 8 January 2022, the Accused communicated with [redacted] via text message about the distribution of cocaine. The Accused and [redacted] went on to discuss the Accused's prostitution business. Specifically, the Accused described his meetings with women as "business meetings." *See* Encl. 14.

3. **Discussion.**

The Government requests that this court rule that the Accused's text message, Snapchat, and Signal conversations with [redacted] Lance Corporal [redacted] and other unknown Snapchat users can be properly authenticated, are made up of non-hearsay statements, are relevant to the charged offenses, and are therefore admissible.

a. The Accused's statements can be authenticated by the Special Agent that seized the Accused's phone and the Digital Forensic Examiner that extracted the messages from the Accused's phone.

The Accused's statements can be authenticated by the Special Agent that seized the Accused phone, reviewed the phone, and viewed the communication on the Accused's phone. The Accused's statements can also be authenticated by the Digital Forensic Examiner that extracted the messages from the Accused's phone. Specifically, the Digital Forensic Examiner can explain the process she used to extract the Accused's statements from his cell phone and the methods used to verify that the data extracted was the data from the Accused's cell phone.

MRE 901(a) states that in order "to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." MRE 901(b) "provides a non-exhaustive list of examples of authenticating evidence." *United States v. Tso*, 2016 CCA LEXIS 114 (N-M. Ct. Crim. Apps. Feb. 29, 2016). "First among them is 'Testimony of a Witness with Knowledge.'

Id. (citing Mil. R. Evid. 901(b)(1)). "A witness who can demonstrate the requisite knowledge may authenticate an item of evidence by testifying that it is what it purports to be." *Id.* Another example is MRE 901(b)(4) which allows for evidence to be authenticated through the unique "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Pursuant to MRE 901(b)(9), evidence can be authenticated through testimony describing a process or system and showing that it produces accurate results.

1) Special Agent [redacted] seized and reviewed the Accused's cell phone and can testify to the fact that the Accused's communication is what the Government purports it to be.

In the present case, the Accused's cell phone was seized by Special Agent [redacted] on 11 January 2022. From 14 January 2022 to 24 February 2022, Special Agent [redacted] reviewed the Accused cell phone and located a number of text messages, Snapchat messages, and Signal messages from the Accused related to the purchase, sale, and distribution of cocaine. Special Agent [redacted] was able to analyze the distinctive characteristics of the Accused's statements as they relate to other evidence of the Accused's narcotics distribution. He was able to match the Accused's phone number and social media usernames to the communication on the Accused's cell phone. Special Agent [redacted] personal observation of the Accused's communication on the Accused's cell phone, along with the communication's distinctive characteristics meets the authentication requirements of MRE 901(b).

In *Tso*, the Government similarly used the testimony of a NCIS special agent to authenticate Skype communication located on an Accused's electronic devices. *Tso*, 2016 CCA LEXIS 114 at *12. The Special Agent testified to the seizure, handling, and review of the Accused's cell phone. Additionally, the military judge found that the content of the conversations on the Accused's electronic devices were "both distinctive and consistent" with testimony from witnesses about the Accused's misconduct. *Id.* at *15. The Navy-Marine Corps Court of Criminal Appeals held that the military judge did not abuse his discretion in ruling that the Government properly laid the foundation for and authenticated the Accused's skype communication. In the present case, the Government will use the testimony of Special Agent [redacted] to authenticate the Accused's statements.

2) Ms. [redacted] can authenticate the Accused's communication by explaining the collection process used to retrieve the data.

The Government can also lay the foundation for and authenticate the Accused's statements through the testimony of Ms. [redacted] the NCIS Digital Forensic Examiner that extracted the Accused's communication from his cell phone. In *United States v. Lubich*, 72 M.J. 170 (C.A.A.F. 2013), the Court of Appeals for the Armed Forces held that a Digital Forensic Examiner may lay the foundation for and authenticate digital evidence discovered on an Accused's cell phone by explaining the "collection process that retrieved the data." *United States v. Lubich*, 72 M.J. 170, 171 (C.A.A.F. 2013).

In *Lubich*, the Government sought to admit the Accused's internet activity, including internet search history, usernames, and passwords discovered on his computer. To lay the foundation for this evidence, the Digital Forensic Examiner that extracted the information from the Accused's computer testified to the "collection process that retrieved the data," answered the military judge's and counsel's questions about the process, and explained that he verified the results of the extraction against the data on the Accused's computer. *Id.* at 173. The Court held that the Digital Forensic Examiner's testimony "made a prima facie showing of authenticity by presenting evidence sufficient to allow a reasonable juror to find that the data… was from [the Accused's] internet accounts." *Id.* at 174.

The Court in *Lubich* noted that any question as to the accuracy of the data would have affected only the weight of the data, not its admissibility. *Id.* at 174 (citing *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000)). The court then reiterated that several aspects of MRE 901(b) were satisfied through the Digital Forensic Examiner's testimony stating that, "the Government also met several of the illustrative criteria of MRE 901(b): MRE 901(b)(1) – 'Testimony of witness with knowledge' was satisfied through familiarity with the NCMI procedures; MRE 901(b)(4) – 'Distinctive characteristics and the like' was satisfied as the computer data contained numerous reference to Lubich's personal computer information; MRE 901(b)(9) – 'Process or system' was satisfied by discussion regarding the NMCI process." *Id.* at 175.

Similarly, in the present case the Government will use the testimony of Ms. [redacted] to the lay foundation for and authenticate the Accused's statements made via text message, Snapchat, and Signal. In Enclosures 15 and 16 to this motion, Ms. [redacted] explains the process she used to extract the Accused's communication from his cell phone. She provides each

step she took from the receipt of search authorization to the generation of the Cellebrite report used to display the Accused's communication. This evidence and the testimony of Ms. [redacted] is sufficient to lay the foundation for and authenticate the Accused's statements.

b. The Accused's statements are non-hearsay statements pursuant to MRE 801(d)(2)(A). Statements made by the other individuals communicating with the Accused are not being offered to prove the truth of the matters asserted.

The communication the Government seeks a ruling on are made up of statements made by the Accused and various other individuals. These statements are non-hearsay statements. The Accused's statements are statements offered against an opposing party and made by the party in an individual capacity pursuant to MRE 801(d)(2)(A). The statements made by the various individuals communicating with the Accused are not being offered to prove the truth of the matters asserted, but rather are offered to provide proper context to the Accused's statements and to show the effect they had on the Accused.

MRE 802 provides that hearsay is generally inadmissible, unless an exception to the rules against hearsay applies. Hearsay is defined in MRE 801 as an out of court statement offered for the truth of the matter asserted. MRE 801(d) outlines several types of statements considered non-hearsay statements. MRE 801(d)(2)(A) states that an opposing party's statements made in an individual capacity, offered against that opposing party are non-hearsay statements and are therefore admissible at trial. Moreover, out-of-court statements only amount to hearsay when they are offered to prove the truth of the matter asserted in those statements. MRE 801(c)(2). Out-of-court statements offered for other purposes, such as their effect on the listener to provide context, may be admitted as non-hearsay statements. *Id.*

1) <u>The Accused's statements are non-hearsay statements pursuant to MRE 801(d)(2)(A).</u>

In this case, the statements offered by the Government were made by the Accused freely and voluntarily to a number of individuals. The statements are being used against the Accused by an opposing party, the Government, and are therefore admissible non-hearsay statements.

2) <u>Statements made by other individuals are not being offered for the truth of the matters asserted.</u>

This communication is not limited to messages sent by the Accused. The communication consists of conversations between the Accused and a number of individuals. The messages sent

by individuals other than the Accused are admissible as non-hearsay statements because they are not being offered to prove the truth of the matter asserted. Instead they are being offered to provide context to the Accused's statements. They are also being offered to show the effect they had on the Accused. For these reasons the statements contained in the text message, Snapchat, and Signal communications between the Accused and other individuals are admissible non-hearsay statements.

c. The Accused's statements are relevant to prove that the Accused engaged in the purchase, sale, and distribution of narcotics and prostitution.

The Accused's statements via text message, Snapchat, and Signal are relevant because they directly relate to the charged offenses and in many cases are the charged offenses. The Accused's statements relate to the purchase, sale, and distribution of narcotics and the Accused selling sexual services.

Statements made by the Accused, even though deemed non-hearsay statements under the Military Rules of Evidence, must still be relevant to be admissible. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401, Manual for Courts-Martial, United States (2019 e.d.). Relevant evidence is admissible. Mil. R. Evid. 402. The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Mil. R. Evid. 403, Manual for Courts-Martial, United States (2019 e.d.).

The individual statements the Government requests a ruling on, along with their relevance to the charged offenses, are outlined below.

1) <u>The Accused's conversations with</u> [redacted]

On 17 December 2021, the Accused exchanged text messages with [redacted] regarding the purchase and distribution of cocaine. *See* Encl. 14. Specifically, the Accused requested a price breakdown for different quantities of cocaine being sold by Mr. [redacted] *Id.* Mr. [redacted] also asked the Accused about his cocaine distribution business. The specific statements made by the Accused and Mr. [redacted] are located in paragraph 4, on page 2, of Enclosure 14.

The Accused is being charged with introduction and distribution of cocaine. The Accused's statements regarding the sale and distribution of cocaine are directly related to these charged offenses. The Accused specifically told Mr. [redacted] "I'm laying low and only selling off

my base because of situations that arose." *See* Encl. 14. This statement along with the entirety of the Accused's communication with Mr. [redacted] is evidence of the Accused's distribution and introduction of cocaine on Marine Corps Base Hawaii.

2) The Accused's conversations with [redacted]

On 26 December 2021, the Accused and [redacted] discussed the sale of controlled substances via the social media application Signal. Specifically, the Accused requested the prices for a variety of drugs and stated that he needed the drugs to support his "business." *See* Encl. 17.

The Accused initially reaches out to [redacted] to request prices for controlled substances. *Id.* [redacted] requests that the Accused first verify who he is due to the illegal nature of their communication. *Id.* The Accused's responds, "Thanks man, I understand completely because I run a business." *Id.* at 3. Once [redacted] is able to verify the Accused's identity the Accused requests the price for "an 8 ball of MDMA." *Id.* at 6. The Accused reengages with [redacted] on 29 December 2021 about the purchase of additional controlled substances. *Id.* at 9. The Accused informs [redacted] that he is going to "see if others want in too," referring to the sale of controlled substances. *Id.* The Accused goes onto state that he is probably going to purchase LSD too. *Id.* at 10.

The Accused's entire communication with [redacted] is relevant to the charged offenses. The Accused's statements regarding the purchase and sale of controlled substances, including listing drugs by name, noting that he will purchase them, and that he plans to distribute them, cuts to the heart of this case.

3) The Accused's conversations with [redacted]

On 28 December 2021, the Accused exchanged text messages with [redacted] to discuss the purchase of cocaine. *See* Encl. 14. Specifically, [redacted] requested to purchase five grams of cocaine from the Accused. *Id.* The Accused's responds, "Okay bring it in cash tho. Let me know when you are coming thru." *Id.* This evidence is relevant to prove whether the Accused distributed cocaine, in fact it is the charged offense. This communication is one of many examples of the Accused selling cocaine to others. *Id.*

4) The Accused's conversations with [redacted]

On 5 January 2022, the Accused sent a message to [redacted] via Snapchat. The message stated, "I only sell coke." *See* Encl. 18. This message is relevant to whether the Accused distributed cocaine.

5) The Accused's conversations with unnamed Snapchat users

On 5 January 2022, the Accused sent a number of Snapchat messages to unnamed Snapchat users describing his prostitution services. *See* Encl. 19. Specifically, the Accused outlines the price he charges to have sexual intercourse with women. *Id.* at 1. He explains the services he offers, including the sale of drugs along with his sexual services. *Id.* at 5. During this conversation a Snapchat user asks the Accused, "I was wondering, do you party? Do you offer other things with the hookup? I'll pay well baby." *Id.* at 5. The Accused states, "What products are you looking for? And can I see what you look like, so that I can study your body and figure out the best way to please you." *Id.* at 6. The Accused goes on to send elicit pictures of himself and schedule times for the solicited prostitution to occur.

The Accused is being charged with violating Article 80 (Attempt of prostitution) of the UCMJ. The conversations outlined in Enclosure 19 directly relates to this charged offense. The Accused is messaging potential customers to schedule times to engage in prostitution. This communication is the overt act to engage in prostitution and is therefore relevant.

6) The Accused's conversations with [redacted]

On 6 January 2022, the Accused informed [redacted] that he is selling cocaine and then lists the prices for the various quantities of cocaine he is distributing. *See* Encl. 16. Specifically, the Accused says, "Yo, I'm up on snow. Let me know if you want some. 120/g. 340/ball." *Id. at 2.* This evidence is relevant to prove that the Accused distributed narcotics. The Accused's statement is an attempt to sell cocaine.

7) The Accused's conversations with LCpl [redacted]

On 6 January 2022, the Accused communicated with LCpl [redacted] via Snapchat regarding the distribution of cocaine. *See* Encl. 14. Specifically, the Accused said, "Alright man, you have a lot of dirt on me and I do on you too. We did it all together. But I'll take it man." *Id.*

The Accused is being charged with violating Article 81 (Conspiracy) of the UCMJ. LCpl [redacted] is a named conspirator in the charged offense. The Accused's conversation with LCpl [redacted] regarding the distribution of narcotics is directly related to the conspiracy being charged. It is relevant to prove that the Accused and LCpl [redacted] conspired with one another to distribute drugs.

8) The Accused's conversations with [redacted]

Between 7 January 2022 and 10 January 2022, the Accused communicated with the Snapchat user [redacted] regarding the sale of controlled substances. *See* Encl. 20. During this conversation the Accused stated that he is holding onto an 8-ball of cocaine "to sell it." *Id.* at 8. The Accused outlines the prices of cocaine stating, "8.5 – 250, ¼ oz – 260,… because I still owe 260 from the quarter you fronted." *Id.* at 10. And the Accused outlines to [redacted] the individuals he has recently distributed cocaine to and how much money they still owe him. *Id.* at 12-15.

This evidence is relevant to whether the Accused distributed cocaine. The Accused's statements contained in Enclosure 20 are the most detailed communication related to how much cocaine the Accused sold, to whom he sold it, how much he charged for drugs, and how much money his customers owed him. There is no more relevant evidence than the Accused's own detailed account of his cocaine distribution operation via text message to a fellow narcotics dealer.

4. **Relief Requested.**

The Government respectfully requests that this court rule that the Accused's statements made to [redacted] LCpl [redacted] " and other unnamed Snapchat users are admissible.

5. **Burden of Proof.**

The Government, as the moving party, bears the burden of proof. R.C.M. 905(c)(2), Manual for Courts-Martial, United States (2019 e.d.). The burden of proof is a preponderance of the evidence. R.C.M. 905(c)(2), Manual for Courts-Martial, United States (2019 e.d.).

6. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1 – Original Charge Sheet
b. Enclosure 2 – Additional Charge Sheet
c. Enclosure 3 – Second Additional Charge Sheet
d. Enclosure 4 – Accused's 3270
e. Enclosure 5 – Drug Test Results

f. Enclosure 6 – CW Statement
g. Enclosure 7 – Apprehension of Accused
h. Enclosure 8 – Search of Accused's Barracks Room
i. Enclosure 9 – Results of Interview with LCpl [redacted]
j. Enclosure 10 – Results of Interview with Pvt [redacted]
k. Enclosure 11 – Results of Interview with Pvt [redacted]
l. Enclosure 12 – Results of Interview with Pvt [redacted]
m. Enclosure 13 – Results of Interview with LCpl [redacted]
n. Enclosure 14 – Review of Accused's Cell Phone
o. Enclosure 15 – Results of First Cellular Extraction
p. Enclosure 16 – Results of Second Cellular Extraction
q. Enclosure 17 – Communications with [redacted]
r. Enclosure 18 – Communications with [redacted]
s. Enclosure 19 – Communications regarding Prostitution
t. Enclosure 20 – Communications with [redacted]

7. **Argument.**

The Government does request oral argument.

[redacted]_____
A. B. HILL
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 via email on 31 May 2022.

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

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION TO DISMISS –** **Unlawful Command Influence** **31 MAY 22**

1. **Nature of Motion**. Pursuant to Article 37 of the Uniform Code of Military Justice (UCMJ) and Rules for Court-Marital (R.C.M.) 104 and 907, due to unlawful command influence committed by Lieutenant Colonel [redacted] the 3d Battalion, 3d Marine Regiment Commanding Officer, and Sergeant Major [redacted] the 3d Battalion, 3d Marine Regiment Sergeant Major, the Defense respectfully requests this Court dismiss all charges and specifications with prejudice.

2. **Facts**

a. Corporal Joseph D. Suarez, the accused, is charged with five specifications of Article 112a, two specifications of Article 80, and one specification of Article 81.[1]

Corporal Suarez's Arrest

b. On 10 January 2022, Lieutenant Colonel [redacted] Sergeant Major [redacted] Major [redacted] (Battalion Executive Officer), and Special Agent [redacted] agreed to arrest Corporal Suarez at 0800 at a company event on 11 January 2022.[2]

c. On 11 January 2022, around 0730, Special Agent [redacted] and two NCIS agents[3] arrived at the unit command deck.

d. At 0800 on 11 January 2022, Lieutenant Colonel [redacted] began a command climate debrief with company personnel in "Classroom 7" aboard Marine Corps Base Hawaii. Classroom 7 is an auditorium approximately the size of a basketball court capable of seating approximately 200 people in bleachers.[4]

e. Approximately 5-20 minutes into the debrief, Corporal Suarez arrives at the classroom. When Corporal Suarez arrived, he was led into the classroom by Lieutenant [redacted] Lieutenant

[1] *See* Charge Sheet referred on 10 Jun 2021.
[2] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[3] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[4] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).

[redacted] then texted Sergeant Major [redacted] that Corporal Suarez had arrived.[5]

f. Upon receiving confirmation that Corporal Suarez was present, Sergeant Major [redacted] and Master Gunnery Sergeant [redacted] escorted Special Agent [redacted] and the two other Special Agents into the classroom.[6]

g. Upon entering the classroom, Sergeant Major [redacted] called out for Corporal Suarez to identify himself. Lieutenant Colonel [redacted] pointed out Corporal Suarez to the Special Agents.[7]

h. Corporal Suarez was standing towards the left and front of the bleachers at the time he was pointed out by Lieutenant Colonel [redacted]

i. Special Agent [redacted] and the other special agents quickly approached Corporal Suarez and arrested him in front of the entire Company. Corporal Suarez was faced toward the company while he was handcuffed.[9]

j. As Corporal Suarez was arrested and taken out of the classroom, Lieutenant Colonel [redacted] addressed the company declaring, "That's the guy selling cocaine in my barracks."[10] Lieutenant Colonel [redacted] also said he would "crush anyone that was even suspected of selling drugs in his barracks."[11]

k. Lieutenant Colonel [redacted] referred to Corporal Suarez as "the drug kingpin."[12]

l. Sergeant Major [redacted] referred to Corporal Suarez and stated, "This piece of crap drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it."[13]

m. At some point during or immediately following the arrest of Corporal Suarez, Lieutenant Colonel [redacted] used the racial slur "spic."[14]

n. Lieutenant Colonel [redacted] authorized a Command Authorized Search and Seizure for the contents of Corporal Suarez's person, vehicle, workspace, barracks room, and phone.[15]

o. Lieutenant Colonel [redacted] language at the time of Corporal Suarez's apprehension

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[5] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[6] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[7] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[8] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[9] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[10] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[11] Enclosure 2 – Inspector General Complaint – Case [redacted] dtd 19 Jan 22.
[12] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[13] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[14] Enclosure 1 – Inspector General Complaint Investigation (without enclosures); Enclosure 2 – Inspector General Complaint – Case [redacted] dtd 19 Jan 22.
[15] Enclosure 3 – NCIS Report of Investigation ICO Corporal Suarez (Case No. [redacted]).

followed him into the brig. For example, Corporal Saurez's nickname with the brig staff is "kingpin" and Private [redacted] used similar language during his NCIS interview.[16]

Inspector General Complaint

p. On 19 January 2022, a complaint about the manner of the arrest was received by the inspector general.[17]

q. On 28 January 2022, an investigation was conducted into the circumstances of the complaint. Lieutenant Colonel [redacted] was appointed as the investigating officer.[18]

r. On 8 March 2022, the investigating officer, Lieutenant Colonel [redacted] completed the investigation. The investigation not only includes details of Corporal Suarez's arrest, but also includes multiple other complaints and allegations against Lieutenant Colonel [redacted] and Sergeant Major [redacted]

s. On 7 April 2022, the Commanding General, Major General Jay Bargeron endorsed the investigation. The endorsement states that Major General Bargeron has lost confidence in Lieutenant Colonel [redacted] and Sergeant Major [redacted] ability to serve in command leadership positions and that they are relieved of their leadership positions.

t. On 4 May 2022, the Defense submitted a Freedom of Information Act request for "the Inspector General report related to LtCol [redacted], all enclosures, and any documents, emails, witness statements, or other records collected as part of the investigation, created as part of the investigation, or reviewed by the investigators as part of the investigation."[20]

u. On 6 May 2022, the Defense was informed that their Freedom of Information Act request had been forwarded to the [redacted] for response.[21]

v. On 7 May 2022, the Government provided the investigation to the Defense. However, the investigation did not contain the enclosures, nor any of the statements from various members of the command that were present at the time of the arrest.[22]

w. On 10 May 2022, the Defense received a "courtesy call" from Captain [redacted] USN, Fleet Judge Advocate, U.S. Pacific Fleet, that their Freedom of Information Act request would be denied.

x. On 23 May 2022, the Defense requested the enclosures to the inspector general

[16] Enclosure 4 – Results of Proffer Interview of Pvt [redacted] USMC.
[17] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[18]
[19] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
[20] Enclosure 5 – FOIA Request [redacted]
[21] Enclosure 6 – Notice Regarding FOIA Request dated 6 May 2022.
[22] Enclosure 7 – Government Notice of Discovery dated 6 May 2022.

investigation, as well as any other document in the government's possession relating to the unlawful command influence against Corporal Suarez.[23]

y. As of the date of the submission of this Motion, no formal response to the Defense's Freedom of Information Act request has been received. The FOIA online submission lists the Final Disposition as "Undetermined" and the description states: "The description of this request is under agency review".[24]

z. No response to the 23 May 2022 supplemental discovery request has been provided to the Defense, nor has the Defense been able to procure any witness statements or other enclosures related to Lieutenant Colonel [redacted] investigation aside from the initial complaint.

Media Interest

aa. On 5 April 2022, Task and Purpose published an article reporting that Lieutenant Colonel [redacted] and Sergeant Major [redacted] were relieved of command due to a loss of trust and confidence in their abilities to [redacted]ue leading in their assigned duties.[25]

bb. The Task and Purpose article mentions that an investigation prompted by anonymous inspector general complaints informed the Commanding General's decision.[26]

cc. On 6 May 2022, after receiving a redacted copy of the investigation under the Freedom of Information Act, Task and Purpose published a follow up article. The article discusses how Corporal Suarez's arrest occurred and noted the similarity to another public arrest conducted in 2019 in California.[27]

dd. Lieutenant Colonel [redacted] and Sergeant Major [redacted] relief was widely covered in the media, with articles published in Stars and Stripes[28], Marine Times[29], Coffee or Die Magazine[30], and C4ISRNET[31]. The Marine Corps' loss of confidence in Lieutenant Colonel [redacted] and Sergeant Major [redacted] was even reported in European news sources.[32]

Pre-Trial Confinement

ee. After Corporal Suarez was arrested, he was placed in pretrial confinement.[33]

[23] Enclosure 8 – Defense Request for Discovery dated 23 May 2022.
[24] Enclosure 9 – Screenshot of FOIAonline [redacted] Request Details on 31 May 2022.
[25] Enclosure 10 – Task and Purpose Article dated 5 April 2022.
[26] Enclosure 10 – Task and Purpose Article dated 5 April 2022.
[27] Enclosure 11 – Task and Purpose Article dated 6 May 2022.
[28] Enclosure 12 – Stars and Stripes dated 7 Apr 2022.
[29] Enclosure 13 – Marine Times dated 11 Apr 2022.
[30] Enclosure 14 – Coffee or Die Magazine dated 6 May 2022.
[31] Enclosure 15 – C4ISRNET dated 11 Apr 2022.
[32] Enclosure 16 – Darik News dated 6 Apr 2022.
[33] Enclosure 1 – Inspector General Complaint Investigation (without enclosures).

ff. An Initial Review Officer hearing was held on 17 January 2022. During the hearing, the command failed to articulate any belief that Corporal Suarez would fail to appear at trial, nor present any evidence that Corporal Suarez would engage in serious misconduct if released from pre-trial confinement. Instead, the command noted that another individual involved in the case had threatened witnesses and that it was possible that, if released, Corporal Suarez might tamper with witnesses or destroy evidence.[34]

gg. The Initial Review Officer found for the command based, in part, on the Command's belief that "the Cpl's release will negatively impact good order and discipline (further)."[35]

hh. On 11 March 2022, the Defense requested a reconsideration of Corporal Suarez's continuing pre-trial confinement before a new Initial Review Officer.[36]

ii. On 20 March 2022, the Defense was forwarded an email denying their request for an Initial Review Officer reconsideration of Corporal Suarez's pre-trial confinement. No explanation was provided in the denial message.[37]

jj. Corporal Suarez's ongoing pre-trial confinement creates significant barriers to the Defense in preparing its case. Communication between Corporal Suarez and his Defense counsel must be coordinated with the brig. Additionally, the brig has required the Defense complete chain of custody paperwork when providing documents to Corporal Suarez and arranging three-way calls with Corporal Suarez and both Defense counsel.[38]

kk. Because of Corporal Suarez's ongoing pre-trial confinement, he appeared at his Article 32 hearing in a uniform which did not fit him.

ll. Because of Corporal Suarez's ongoing pre-trial confinement, he has been unable to review the recorded evidence against him, including Private [redacted] and Private [redacted] NCIS interviews.

mm. On 26 May 2022, the Defense contacted Trial Counsel requesting Corporal Suarez be transported to the Joint Base Pearl Harbor-Hickam Navy Defense Service Office.[39] As of the date of the submission of this motion, no response has been received from Trial Counsel, Corporal Suarez's command, or the brig.

3. **Burden.** The defense has the initial burden of presenting "some evidence" that raises the issue of unlawful command influence.[40] The burden then shifts to the government to prove beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute

[34] Enclosure 17 – IRO Findings ICO Cpl Suarez dated 17 January 2022.
[35] Enclosure 17 – IRO Findings ICO Cpl Suarez dated 17 January 2022.
[36] Enclosure 18 – IRO Reconsideration Request ICO Cpl Suarez.
[37] Enclosure 19 – FW: IRO Reconsideration Request ICO Cpl Suarez.
[38] Enclosure 20 – Brig Chain of Custody Form; Enclosure 21 - Documentation of Phonecall w/ Cpl Suarez.
[39] Enclosure 22 - Meeting w/ Cpl Suarez at DSO Office.
[40] *United States* v. *Biagase,* 50 M.J. 143, 150-151 (C.A.A.F. 1999); *United States* v. *Lewis,* 63 M.J. 405, 413 (C.A.A.F. 2006).

unlawful command influence; or (3) the unlawful command influence will not prejudice the proceedings.[41]

4. **Law**

Anyone subject to the Uniform Code of Military Justice is prohibited from attempting to coerce or improperly influence a court-martial or members, or a convening, reviewing, or approving authority in respect to their judicial acts.[42] "It has long been a canon of this Court's jurisprudence that ' [unlawful] [c]ommand influence is the mortal enemy of military justice.'" [43] Our courts are dedicated to protecting the court-martial process from improper influence from non-command sources, in order to foster public confidence in the fairness of our system of justice.[44] In the military justice system, two types of unlawful command influence can arise: (1) actual unlawful command influence, and (2) the appearance of unlawful command influence.[45]

a. Actual Unlawful Command Influence

"From the outset, actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case."[46]

Courts have held that when commands bring attention or publicize a service member's arrest, it is deemed unlawful punishment. Indeed, courts have "unequivocally condemned conduct by those in positions of authority which result in needless military degradation, or public denunciation or humiliation of an accused."[47]

Additionally, Article 13 of the Uniform Code of Military Justice proscribes that punishment which may be given to an accused awaiting trial. Article 13 provides that:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for

[41] *Biagase*, 50 M.J. at 151.
[42] Art. 37(a); R.C.M. 104(a)(2). *See also Chessani v. Folsum*, NMCCA 200800299; *United States v. Salyer*, 72 M.J. 415 (CAAF 2012). 3 United States v. Biagase, 50 M.J. 143 (1999).
[43] *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (*citing United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).
[44] *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018) (internal citations omitted).
[45] *Id*. at 247; *See also United States v. Biagase*, 50 M.J. 143 (1999).
[46] *Barry*, 78 M.J. at 78; *See United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991); *see also United States v. Allen*, 31 M.J. 572, 584 (N.M.C.M.R. 1990) ("Unlawful command influence ... is impermissible command control.").
[47] *United States v. Latta*, 34 M.J. 596, 597 (A.C.M.R. 1992) (holding that accused was subjected to unlawful pretrial punishment by being called to front of unit formation by First Sergeant and referred to as his favorite AWOL case) (*citing United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987; *United States v. Villamil-Perez*, 32 M.J. 341 (C.M.A. 1991) (holding that public posting of report of suspected drug offenses constituted pre-trial punishment); *United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991); *United States v. Hatchell*, 33 M.J. 839 (A.C.M.R. 1991).

infractions of discipline.[48]

Punishment of pretrial detainees in excess of that provided by Article 13 of the UCMJ is illegal pretrial punishment. In determining whether actions by an accused's command amount to illegal pretrial punishment a two-pronged test is applied.[49] The first prong pertains to whether or not the actions that the accused has complained of were done with the intent to punish him.[50] The second prong seeks to determine if, in the absence of a punitive intent, the actions furthered a legitimate government interest.[51] In *United States v. McCarthy*, the court stated that to violate the first prong, there had to be a purpose or intent to punish pretrial.[52] The court pointed out that to violate the second prong, the pretrial punishment must be of such a nature as to give rise to an inference of punishment or constitute actual punishment.[53]

b. Apparent Unlawful Command Influence

"Unlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. Rather, the prejudice involved in the latter instance is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused."[54] It is sufficient for an accused to demonstrate the following factors in support of a claim of an appearance of unlawful command influence: (a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[55]

Congress amended Art 37 of the UCMJ in the National Defense Authorization Act for FY 2020, by adding Art 37(c).[56] The new provision states:

> (c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.[57]

In *United States v. Gattis*, the Navy-Marine Corps Court of Criminal Appeals held that the change to Article 37 required a demonstration of material prejudice. Otherwise, the Court was "statutorily barred from holding the findings or sentence…to be incorrect on the grounds of

[48] UCMJ Art 13.
[49] *United States v. Washington*, 42 M.J. 547, 562 (A. F. Ct. Crim. App. 1995).
[50] *United States v. Washington*, 42 M.J. 547, 562 (A. F. Ct. Crim. App. 1995).
[51] Id. at 562
[52] *United States v. McCarthy*, 47 M.J. 330 (1997)
[53] *McCarthy*, 4 7 M.J. 3 30 (1997).
[54] *Boyce*, 76 M.J. at 248-49.
[55] *Lewis*, 63 M.J. at 413.
[56] National Defense Authorization Act of FY 2020, Pul. L. 116-92 (Dec. 2019).
[57] Art. 37(c), U.C.M.J.

apparent UCI."[58] Thus, the statutory change to Art. 37 has shifted the previous precedent analysis necessary to address claims of apparent unlawful command influence.[59]

c. Procedure

The following process begins when the defense asserts there is an appearance of unlawful command influence. The defense initially must show "some evidence" that unlawful command influence occurred.[60] This burden on the defense is low, but the evidence presented must consist of more than "mere allegation or speculation."[61]

After the defense presents "some evidence" of unlawful command influence, the burden shifts to the government to rebut the allegation by persuading the court beyond a reasonable doubt that (l) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.[62]

If the government does not meet its burden of rebutting the allegation at this initial stage, the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place "an intolerable strain" upon the public's perception of the military justice system and that "an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding."[63] If the government meets its evidentiary burden at this stage of the analysis, then the accused merits no relief on the grounds that there was an appearance of unlawful command influence.[64] If the government does not meet its evidentiary burden, however, the court should fashion an appropriate remedy.[65] Courts apply the same unlawful command influence test regardless of whether a military member accused of unlawful command influence acted with or without the mantle of authority.[66]

d. Remedy

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[58] 2021 CCA LEXIS 431, 18 (N.M.C.C.A. 2021).
[59] *See United States v. Boyce*, 76 M.J. 242 at 248-49 (C.A.A.F. 2017) (Court held that "[u]nlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. Rather, the prejudice involved in the latter instance is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.").
[60] *United States v. Stoneman*, 57 M.J. 35, 41 (internal quotation marks omitted) (citation omitted); *see also United States v. Ayala*, 43 M.J. 296,300 (C.A.A.F. 1995) ("The quantum of evidence necessary to raise unlawful command influence is the same as that required to submit a factual issue to the trier of fact" *i.e.* some evidence).
[61] *United States v. Salyer*, 72 M.J. 415,423 (C.A.A.F. 2013); *see also Allen*, 33 M.J. at 212 ("Proof of [command influence] in the air, so to speak, will not do." (internal quotation marks omitted) (citation omitted)).
[62] *Salyer*, 72 M.J. at 424 (emphasis added).
[63] *Id*. at 423 (quoting *Lewis*, 63 M.J. at 415).
[64] *See, e.g., United States v. Villareal*, 52 M.J. 27, 30-31 (C.A.A.F. 1999) (C.A.A.F. affirming the decision of the court below after finding that any appearance of unlawful command influence was cured by the military judge's actions at court-martial).
[65] *Lewis*, 63 M.J. at 416.
[66] *Barry*, 78 M.J. at 78 (C.A.A.F. 2018).

Once unlawful command influence is discovered, a military judge can intervene and protect a court-martial from the effects of unlawful command influence.[67] The Court of Appeals for the Armed Forces (CAAF) has "looked with favor on military judges taking proactive, curative steps to remove the taint of [unlawful command influence] and ensure a fair trial."[68]

If the Government fails to show that an accused's case was not affected by unlawful command influence, the military courts have an affirmative duty to take all necessary appropriate remedial and corrective actions to curb any possible prejudice the accused may have suffered.[69] The military judge is the last sentinel to protect the court-martial from unlawful command influence and it is "'incumbent on the military judge to act in the spirit of the [UCMJ] by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.'"[70]

While dismissal is a drastic remedy, courts "have not shied away from endorsing this drastic measure in actual unlawful influence cases when warranted.[71] '[D]ismissal of charges is warranted 'when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.'"[72] A presumption of prejudice to the accused is created once unlawful command influence is raised.[73] Lastly, "[d]ismissal of charges with prejudice … is an appropriate remedy where the error cannot be rendered harmless."[74]

5. **Argument**

The unlawful influence that was perpetrated by Lieutenant Colonel [redacted] and Sergeant Major [redacted] has permeated through the [redacted] across Marine Corps Base Hawaii, and across the Marine Corps to which no remedy, other than a dismissal of all charges, is warranted.

a. Actual Command Influence

The circumstances and conduct of Corporal Suarez's arrest is a clear indication of unlawful command influence. Lieutenant Colonel [redacted] comments branded Corporal Suarez as a "drug kingpin" among all members in the unit. Any member of the command who would have come forward to speak positively about Corporal Suarez has been influenced to keep silent. Sergeant Major [redacted] commented on the arrest and berated the Marines in the unit for not reporting Corporal Suarez. Sergeant Major [redacted] inappropriately and negatively influenced the perception of members of the command—prejudice that cannot be undone.

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[67] *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).
[68] *Id*.
[69] *Thomas*, 22 M.J. at 400.
[70] *Gore*, 60 M.J. at 186 (quoting *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002))(internal citation omitted).
[71] *Barry*, 78 M.J. at 79; *See United States v. Gore*, 60 M.J. 178, 189 (C.A.A.F. 2004) (holding that a military judge did not abuse his discretion by dismissing charges with prejudice).
[72] *Barry*, 78 M.J. at 79 (quoting *Gore*, 60 M.J. at 187 (internal citation omitted)).
[73] *Biagase*, 50 M.J. at 150.
[74] *Lewis*, 63 M.J. at 416 (internal citation omitted).

Moreover, Corporal Suarez was subjected to an extremely public and humiliating arrest. While at a unit event, Corporal Suarez was clearly called out of the crowd by Sergeant Major [redacted] and was arrested by an NCIS agent. At the time Corporal Suarez was handcuffed, he was in front of the bleachers and was faced toward the Company. During the arrest, Lieutenant Colonel [redacted] made comments that Corporal Suarez was a "Kingpin" and "the guy selling cocaine in my barracks." The CO continued to berate the company for not reporting Corporal Suarez to authorities or the Command. Corporal Suarez was then taken away by NCIS in front of hundreds of Marines. During this event, the CO also used the racial slur "spics."

The CO's comment's and Corporal Suarez's public arrest has already prevented him from receiving a fair trial. The CO's language has been echoed by witnesses during NCIS interviews and continues to be used by Joint Base Pearl Harbor-Hickam brig staff, indicating that it has become common knowledge across the island of Oahu. The widespread media coverage in local, national, and even foreign, news outlets makes clear that the nature of Corporal Suarez's arrest precludes any chance that he receive a fair trial.

Lieutenant Colonel [redacted] comments demonstrate, at best, a reckless disregard for Corporal Suarez's constitutional rights. His comments negatively influenced potential witnesses that would have testified on behalf of Corporal Suarez. Further, Lt. Col. [redacted] comments publicly undermined Corporal Suarez's presumption of innocence. While Lieutenant Colonel [redacted] and Sergeant Major [redacted] have been removed from their roles in the command, their influence remains in the officers that they mentored. Most disturbingly the chilling effect of their comments to the unit during Corporal Suarez's arrest is ongoing.

Though Lieutenant Colonel [redacted] has been removed from Corporal Suarez's chain of command and replaced as the convening authority on this case, his influence continues to be felt. The decision to place Corporal Suarez in pre-trial confinement, and to continue that confinement, has prejudiced his ability to receive a fair trial. Because of his ongoing confinement, he has been unable to review all the evidence against him and effectively assist his defense. His Defense counsel has been forced to spend additional time conforming to the brig's procedures when communicating with Corporal Suarez. Corporal Suarez has also been made to appear before a Military Judge in an ill-fitting uniform.

Additionally, Lieutenant Colonel [redacted] authorized the search which resulted in the collection of the evidence to be used against Corporal Suarez.

Finally, Corporal Suarez's chain of command continues to display an animosity to him which has negatively impacted his ability to defend himself against the charges against him. Specifically, his command refused his request for reconsideration of his pre-trial confinement without explanation. Additionally, at the time of this motion, his command has failed to respond to Defense counsel's request for the enclosures to Lieutenant Colonel [redacted] investigation which the Defense intended to submit in support of this Motion.

nn. Apparent Unlawful Command Influence

The actions of the command team, even if they were not purposefully perpetrated to

influence the judicial proceeding, would cause a disinterested and objective observer to seriously doubt the fairness of the military proceeding. A disinterested observer would believe that a court-martial proceeding is little more than a confirmation of a commanding officer's accusations. Lieutenant Colonel [redacted] at the time the allegations were made, was so prolific in his influence that very few of the officers would give statements opposing his interest to the investigating officer. Despite the relief of command, Lieutenant Colonel [redacted] statements continue to bias the officers and enlisted who would serve as members. The improper influence, whether actual or apparent, results in a fundamentally unfair trial. The only appropriate remedy is dismissal with prejudice.

Some have recommended that a showing of prejudice to a substantial right is required in order to find actual or apparent unlawful command influence in this case, this is incorrect. The new provision to Art. 37 requires prejudice to a substantial right of the accused in order to overturn the findings or sentence of a court-martial. With this motion the defense is not requesting the Court to overturn findings or a sentence, such a request would not be ripe.

6. Evidence and Enclosures

Enclosure 1 – Inspector General Complaint Investigation (without enclosures).
Enclosure 2 – Inspector General Complaint – Case [redacted] dtd 19 Jan 22.
Enclosure 3 – NCIS Report of Investigation ICO Corporal Suarez (Case No. [redacted]).
Enclosure 4 – Results of Proffer Interview of Pvt [redacted] USMC.
Enclosure 5 – FOIA Request [redacted]
Enclosure 6 – Notice Regarding FOIA Request dated 6 May 2022.
Enclosure 7 – Government Notice of Discovery dated 6 May 2022.
Enclosure 8 – Defense Request for Discovery dated 23 May 2022.
Enclosure 9 – Screenshot of FOIAonline [redacted] Request Details on 31 May 2022.
Enclosure 10 – Task and Purpose Article dated 5 April 2022.
Enclosure 11 – Task and Purpose Article dated 6 May 2022.
Enclosure 12 – Stars and Stripes dated 7 Apr 2022.
Enclosure 13 – Marine Times dated 11 Apr 2022.
Enclosure 14 – Coffee or Die Magazine dated 6 May 2022.
Enclosure 15 – C4ISRNET dated 11 Apr 2022.
Enclosure 16 – Darik News dated 6 Apr 2022.
Enclosure 17 – IRO Findings ICO Cpl Suarez dated 17 January 2022.
Enclosure 18 – IRO Reconsideration Request ICO Cpl Suarez.
Enclosure 19 – FW: IRO Reconsideration Request ICO Cpl Suarez.
Enclosure 20 – Brig Chain of Custody Form
Enclosure 21 - Documentation of Phonecall w/ Cpl Suarez.
Enclosure 22 - Meeting w/ Cpl Suarez at DSO Office.

The Defense requests the Government produce the following witnesses:

a. Special Agent [redacted]

b. Capt [redacted]
c. LT [redacted]
d. 1stSgt [redacted]
e. GySgt [redacted]
f. SSgt [redacted]
g. SSgt [redacted]
h. Sgt [redacted]
i. Sgt [redacted]
j. Sgt [redacted]
k. Sgt [redacted]
l. Sgt [redacted]
m. Sgt [redacted]
n. Sgt [redacted]
o. Cpl [redacted]
p. LCpl [redacted]

7. Relief Requested. Defense respectfully requests that the Military Judge grant this motion and dismiss all charges and specifications with prejudice due to the prejudice created by Lieutenant Colonel [redacted] and Sergeant Major [redacted] actual and apparent unlawful command influence. The defense respectfully requests an Article 39(a), UCMJ, hearing for presentation of evidence and oral argument on this motion.

ROGERS.NICHOLAS.KARL.[redacted] Digitally signed by ROGERS.NICHOLAS.KARL [redacted] Date: 2022.06.01 17:31:55 +09'00'

N. K. ROGERS
Captain, USMC
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May 2022, a copy of this motion was served on Trial Counsel.

ROGERS.NICHOLAS.KARL.[redacted] Digitally signed by ROGERS.NICHOLAS.KARL [redacted] Date: 2022.06.01 17:35:03 +09'00'

N. K. ROGERS
Captain, USMC
Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (UNLAWFUL COMMAND INFLUENCE)** **Date: 10 June 2022**

1. Nature of Motion.

Corporal Joseph D. Suarez is charged with orchestrating a massive drug distribution conspiracy targeting servicemembers aboard Marine Corps Base Hawaii, in the course of which he employed several Marines as distributors, bribed PMO officers to turn a blind eye, and snuck suspected prostitutes on base to support his marketing efforts. Cpl Suarez's distribution network was so prolific, it led to nearly three dozen positive drug tests in the 3D Marine Littoral Regiment alone, virtually wiping out the entire command's military readiness.

The Defense motions this Court for dismissal of the case on the basis of unlawful command influence (UCI). The Motion should be denied. The Defense has failed to show any evidence of actual or apparent unlawful UCI. With regard to actual UCI, the case was swiftly removed from the commanding officer whose conduct is at issue, and not a single witness has expressed reticence of testifying under the command's current leadership. With regard to apparent UCI, given the harsh professional ramifications for the Commanding Officer and the Sergeant Major responsible for the alleged UCI, the facts in their totality don't undermine the credibility of the military justice system, they speak to its commitment to fairness. Even if the court does find actual or apparent UCI, the Accused fails to show why this Court should resort to dismissal when there are many less drastic and more appropriate remedies available.

For the reasons stated herein, the Accused's Motion for Dismissal should be denied.

2. Summary of Facts.

Narcotics Distribution Network

a. The Accused is charged with violating Articles 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. *See* Encl. 1, 2, and 3.

b. The Accused began using cocaine on or about 1 August 2021. *See* Encl. 4 and 5.

c. Shortly thereafter, the Accused began purchasing cocaine for both personal use and distribution. The Accused targeted his drug sales at service members on Marine Corps Base Hawaii and other military installations on the island of Oahu, Hawaii. *See* Encl. 5.

d. As the Accused's drug distribution network grew, he hired several Marines as narcotics dealers, as "runners" to assist in the purchase of drugs so his sales could not be traced back to him, and as "muscle" to protect the Accused as he purchased drugs from a number of prominent civilian drug dealers. The Accused held parties in the barrack rooms with Marines and "barracks bunnies," likely prostitutes, to entice Marines to purchase and use cocaine. The Accused set up lines of cocaine throughout the parties for Marines to use or purchase. The Accused marketed his drugs by providing Marines free lines of cocaine until they were "hooked." *See* Encl. 5, 9, 10, and 11.

e. The Accused's drug sales resulted in a large group of Marines from 3D Marine Littoral Regiment testing positive for cocaine. A majority, if not all, of the Marines that tested positive for cocaine purchased the cocaine from the Accused or his middlemen distributors. *See* Encl. 5.

f. The Accused paid several PMO Marines to provide him information about MCBH security measures, base gate schedules, anti-terrorism measures, and other law enforcement sensitive information to assist with bringing drugs onto base without detection. And he employed Staff Non-Commissioned Officers to warn him of random urinalysis inspections. *See* Encl. 7.

g. If any of the Accused's employed PMO Marines attempted to exit the conspiracy he or his hired "muscle" would threaten the Marines. *See* Encl. 7.

h. The Accused was so confident of his control over base security and his distribution operations that on at least one occasion, the Accused pulled over on the side of the road just outside of MCBH, called base security to brief them that he was bringing drugs on

base, and then proceeded to snort a line of cocaine and drive onto base with drugs in his vehicle. *See* Encl. 7.

i. On 6 January 2022, the Accused tested positive for cocaine during a random command urinalysis. *See* Encl. 4.

j. Pursuant to a CASS, the Accused's barracks room was searched and NCIS agents located controlled substances, drug paraphernalia, an additional cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. *See* Encl. 6.

k. The Accused was placed in pre-trial confinement. While in the Brig, the Accused admitted to nearly all of the misconduct listed above to parties otherwise unaware of the Accused's narcotics distribution network. The Accused bragged that his distribution network continued to operate while he was in the Brig and even invited another inmate to remain in Hawaii after his sentence to assist him in selling drugs in Hawaii. *See* Encl. 9.

The Accused's Arrest

a. On 10 January 2022, Special Agent [redacted] NCIS, contacted LtCol [redacted] to coordinate the arrest of the Accused. SA [redacted] specified that he wanted the arrest to be a surprise in order to preserve evidence that may be contained on the Accused's phone. SA [redacted] requested the Accused be arrested that day; however, LtCol [redacted] informed SA [redacted] that the Accused had been released early from work. SA [redacted] requested the Accused be located so they could make the arrest that day. *See* Encl. 13.

b. SgtMaj [redacted] and LtCol [redacted] attempted to locate the Accused in order to coordinate his arrest that day. SgtMaj [redacted] walked around the barracks to see if he could locate the Accused, but could not find him. LtCol [redacted] called SA [redacted] to inform him that Cpl Suarez was no longer at work or at the barracks, but that he could recall him to work to make the arrest. SA [redacted] asked LtCol [redacted] to wait until the following day. LtCol [redacted] agreed to have Cpl Suarez arrested at his next appointed place of duty, which was the command climate debrief at 0800 on 11 January 2022. *See* Encl. 15.

c. The command climate debrief was already scheduled to take place at 0800 on 11 January 2022, before any plan was made to arrest the Accused. The debrief was scheduled to last several hours, allotting time for each of LtCol [redacted] five companies to be debriefed

separately, for 30-45 minutes each, with 15 minute breaks in between each debrief. *See* Encl. 15.

d. On 11 January 2022 at 0730, SA [redacted] arrived at classroom 7 on Marine Corps Base Hawaii in order to arrest the Accused prior to the start of the command climate debrief. SA [redacted] coordinated with LtCol [redacted] and SgtMaj [redacted] to have one of them point out the Accused so that SA [redacted] knew who to apprehend. *See* Encl. 13.

e. The Accused arrived at the command climate debrief late, approximately 20 minutes into the 30 minute meeting. LtCol [redacted] had already begun the meeting and was speaking to Headquarters and Service Company. *See* Encl. 13, 14, and 15.

f. SgtMaj [redacted] notified SA [redacted] when the Accused arrived and brought SA [redacted] to classroom 7. SA [redacted] arrested the Accused near a hatch at the entrance of the classroom and quickly exited the classroom out of that same hatch. *See* Encl. 13 and 14.

g. As SA [redacted] and the Accused exited the classroom, LtCol [redacted] stated, "That's the guy selling cocaine in my barracks." Sergeant Major [redacted] noted that H&S Company Marines lacked the "testicular fortitude" to come forward and report misconduct like drug dealing in the barracks. The Accused had already been taken out of classroom 7 when LtCol [redacted] and SgtMaj [redacted] made these comments. *See* Encl. 13, 14, and 15.

h. LtCol [redacted] and SgtMaj [redacted] continued the debrief as planned and did not reference the Accused's criminal proceedings, court-martial process, or deter any Marines from assisting the Accused during these proceedings. *See* Encl. 13, 14, 15, and 16.

i. On 11 January 2022, the Accused was placed in pretrial confinement. *See* Encl. 1.

<u>Aftermath of the Accused's Arrest</u>

a. On 19 January 2022, an Inspector General (IG) complaint was filed regarding the manner in which the Accused was arrested. *See* Encl. 16.

b. Immediately upon receipt of the IG complaint, the Staff Judge Advocate of [redacted] determined that the Accused case should be handled by Colonel [redacted] Commanding Officer of 3D Marine Regiment, instead of LtCol [redacted] *See* Encl. 17.

c. On 19 January 2022, the Trial Services Office was notified of Col [redacted] decision to personally handle the Accused's case and remove LtCol [redacted] from oversight of the case. *See* Encl. 17 and 18.

d. From 19 January 2022 to present, neither LtCol [redacted], nor any member of his command, has had any involvement in the Accused's criminal proceedings or court-martial process. Prior to 19 January 2022, the Accused was not charged with a crime. *See* Encl. 17 and 18.

e. On 28 January 2022, MajGen Bargeron appointed LtCol [redacted] the investigating officer to investigate LtCol [redacted] and the Accused's arrest. *See* Encl. 19.

f. LtCol [redacted] interviewed fifty-five (55) Marines during the course of the command investigation. Fifty-five Marines provided LtCol [redacted] statements and only one of those Marines, 1stSgt [redacted] stated that he feared retaliation. *See* Encl. 20 and 24.

g. 1stSgt [redacted] was interviewed by the Trial Services Office on 10 June 2022. During that interview 1stSgt [redacted] stated that, as soon as SgtMaj [redacted] was relieved from his leadership position, he no longer felt intimidated to speak about what occurred. 1stSgt [redacted] went onto state that he worked closely with the Accused, that the Accused was a phenomenal Marine, and that he would be willing to provide that testimony in court without fear of retaliation. 1stSgt [redacted] noted several times during the interview that as soon as SgtMaj [redacted] was relieved from command any fear he had to discuss the matter disappeared. 1stSgt [redacted] stated that his junior Marines would also feel comfortable discussing the Accused's arrest and the Accused's character in court and that it was likely many of the Accused's peers would have positive things to say about him. *See* Encl. 24.

h. On 8 March 2022, LtCol [redacted] completed the command investigation into LtCol [redacted] alleged misconduct. LtCol [redacted] opined that there was insufficient evidence to conclude that LtCol [redacted] engaged in harassment by conducting the Accused's arrest at the command climate debrief and/or by his subsequent comment about the Accused dealing cocaine in the barracks. Furthermore, LtCol [redacted] determined that there was insufficient evidence to conclude that the conduct of LtCol [redacted] would be considered unwelcoming or offensive to a reasonable person or that the conduct created an intimidating, hostile, or offensive environment. However, LtCol [redacted] noted that LtCol [redacted] should have identified a less public forum to effectuate the Accused's arrest. LtCol [redacted] recommended the Commanding General, [redacted] take appropriate administrative action against LtCol [redacted] *See* Encl. 20.

i. On 7 April 2022, MajGen Bargeron endorsed LtCol [redacted] command investigation and concurred with the investigating officer's findings of fact, opinions, and recommendations, except as to the IO's recommendation to informally counsel Sergeant Major [redacted] *See* Encl. 20.

j. On 7 April 2022, LtCol [redacted] and SgtMaj [redacted] were removed from their leadership positions. *See* Encl. 20.

k. On 15 April 2022, MajGen Bargeron issued a report of substandard performance of duty in the case of LtCol [redacted] The stated circumstances giving rise to the report include LtCol [redacted] arrest of the Accused during a command climate debrief. *See* Encl. 21.

l. From 5 April 2022 to present, a number of media outlets have published news articles related to LtCol [redacted] and SgtMaj [redacted] being relieved of command due to a loss of trust and confidence in their abilities to lead. These articles specifically reference the fact that LtCol [redacted] and SgtMaj [redacted] were relieved for their actions on 11 January 2022. *See* Encl. 22 and 23.

3. Law

a. Explanation of Unlawful Command Influence

Unlawful Command Influence (UCI) involves the improper use, or perception of such use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, Court-Martial Procedure § 18-28.00 (4th ed. 2015).

Both Article 37, UCMJ, 10 U.S.C. § 87, and Rule for Courts-Martial (R.C.M.) 104(a), prohibit UCI. Specifically, Article 37(a), UCMJ, states:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts . . . .

Similarly, R.C.M. 104(a) states that:

> (1) *Convening Authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or any member, military judge, or counsel thereof with respect to the findings or sentence adjudged by the court-martial…, or with respect to any other exercise of the functions of the court-martial… or such persons in the conduct of the proceedings.
>
> (2) *All persons subject to the code.* No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

In light of its impact on the fairness of the military justice system, military judges are charged with serving as "sentinels" to identify and address any instances of UCI that come to their attention. *United States v. Boyce*, 76 M.J. 242, 253 n.9 (C.A.A.F. 2017) (citations omitted).

b. Actual Unlawful Command Influence

There are two types of UCI that can arise in the military justice system: "Actual unlawful command influence and the appearance of unlawful command influence." *Boyce*, 76 M.J. at 247. "Actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id.* Actual UCI requires a showing of some prejudice to the accused. *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021).

In order for a claim of actual UCI to prevail, "an accused must meet the burden of demonstrating: (a) facts, which if true, constitute unlawful command influence; (b) the court-martial proceedings were unfair to the accused; and (c) the unlawful command influence was the cause of the unfairness." *Boyce*, 76 M.J. at 247 (citing *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)).

c. Apparent Unlawful Command Influence

The second category of UCI is known as Apparent UCI. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020). Apparent UCI deals with the appearance of unlawful command influence. *Id.* Unlike a claim of actual UCI, the appearance of unlawful command influence does

not require actual prejudice to an accused. *Proctor*, 81 M.J. at 256. "Instead, the prejudice is what is done to the 'public's perception to the fairness of the military justice system as a whole.'" *Id.* (citing *Boyce*, 76 M.J. at 248). The question of whether there is apparent UCI is determined "objectively." *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006). This objective test for apparent UCI is similar to tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id.* Specifically, the Court must focus on the "perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the pubic." *Id.* at 416. The central question to ask is whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceedings." *Id.*

In order for a claim of apparent UCI to prevail, an accused must demonstrate facts that support the following elements: "(a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an 'intolerable strain' on the public's perception of the military justice system because 'an object, disinterested observer, fully informed of all facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249 (citing *Lewis*, 63 M.J. at 415). "A significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system is whether the 'appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the unlawful command influence was later cured.'" *Proctor*, 81 M.J. at 255 (citing *Boyce*, 76 M.J. at 248 n.5.)

d. Burden of Proof for Unlawful Command Influence Motions

The analytical framework applicable to cases of UCI is as follows. First, the initial burden is on the defense to raise the issue of UCI. *United States v. Biagese*, 50 M.J. 143, 150 (C.A.A.F. 1999). The burden is "low," but is more than a mere allegation or speculation. *Id.* The quantum of evidence required to meet this burden, and thus raise the issue of UCI, is "some evidence." *Id*. The defense must show facts that, if true, would constitute UCI, and it must show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). This initial burden applies no matter if the defense alleges actual or apparent UCI. *See Boyce*, 76 M.J. at 248-49.

Once some evidence of UCI has been raised, the burden then shifts to the Government. *Id.* at 249. The Government may show either that there was no UCI, or that any UCI will not taint these particular proceedings. *Stoneman*, 57 M.J. at 41; *Biagese*, 50 M.J. at 151.

If the government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based, or by persuading the military judge that the facts do not constitute UCI. *Stoneman*, 57 M.J. at 41 (citing *Biagese*, 50 M.J. at 151).

In the case of an allegation of actual UCI, if the government concedes to or fails to rebut the defense's factual showing, it may still prevail if it shows that the subject UCI will not affect these specific proceedings. *Stoneman*, 57 M.J. at 41; *Biagese*, 50 M.J. at 151. In the case of apparent UCI, the Government may still prevail by showing that the proffered facts do not place an intolerable strain on public perception of the fairness of the proceeding and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding. *Proctor*, 81 M.J. at 256; *Boyce*, 76 M.J. at 249; *see also United States v. Calab Dyer*, Navy-Marine Corps Trial Judiciary, pp. 4-5 (EURAFSWA Judicial Circuit, Oct. 30, 2020) (describing procedures for determining for both actual and apparent UCI).

In cases of both actual and apparent UCI, once the defense meets its initial burden, the Government's required quantum of proof in rebuttal is beyond a reasonable doubt. *See Stoneman*, 57 M.J. at 41 (citing *Biagese*, 50 M.J. at 151); *Boyce*, 76 M.J. at 249.

e. The Remedies Available to the Court When the Accused Proves Unlawful Command Influence

Even if actual or apparent UCI is found to exist, the military judge "has broad discretion in crafting a remedy to remove the taint of unlawful command influence," and such a remedy will not be reversed, "so long as the decision remains within that range." *United States v Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

The remedies available to this Court include but are not limited to: (1) transfer of responsibility for disposition of charges to commanders not subject to the UCI; (2) orders protecting service members from retaliation; (3) changes in venue; (4) liberal grants of challenges for cause; and (5) the use of discovery and pretrial hearings to delineate the scope and impact of UCI. *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003). The Court, in its

effort to determine whether the trial has been affected by UCI should conduct extensive voir dire of any panel members that are alleged to have been influenced by UCI. *United States v. Reed*, 65 M.J. 487, 491 (C.A.A.F. 2008).

The judge *may* consider dismissal of charges when the accused would be prejudiced, or if no useful purpose would be served by continuing the proceedings. *Id.* at 354. C.A.A.F. elaborated on this potential remedy by saying, "However, [C.A.A.F. has noted] that when an error can be rendered harmless, dismissal is not an appropriate remedy." *Id.* Dismissal of charges is a drastic remedy and courts must look to see whether alternative remedies are available. *Douglas*, 68 M.J. at 354. The military judge should take proactive, curative steps to remove the taint of UCI if it exists, and therefore ensure a fair trial. *Id.* This rarely requires the dismissal of charges.

4. <u>Discussion.</u>

a. The Accused fails to show Actual UCI. The Defense offers no evidence that the Convening Authority "has been brought into the deliberation room."

The Accused alleges actual UCI, but does not offer a scintilla of evidence of any "improper manipulation of the criminal justice process." *Boyce*, 76 M.J. at 247. The only evidence the Defense has presented is that the Accused was arrested in front of his peers, that the Accused's Commanding Officer, LtCol [redacted] made derogatory comments, and its senior enlisted Marine, SgtMaj [redacted] chided members of the command for not reporting him. The command investigation reveals that accounts of the event conflict, but even accepting the Accused's version, this falls far short of even the "low burden" required to shift the burden of proof to the Government. *See, e.g., United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2002); *United States v. Spykerman*, 81 M.J. 709 (N.M.C.C.A. 2021) (unpublished).

In *Francis*, the accused's squad leader told approximately 20 of his soldiers that the accused had tested positive on a urinalysis and that they needed to "stay away from him as any association would be bad for them." The accused's platoon commander told the soldiers to make sure that "he didn't get in any other trouble". The Army Court of Appeals found that the trial court erred in finding the defense met its initial burden, based on these facts alone. *United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2002). The appellate court reasoned that the Defense failed to provide some evidence of an attempt to influence or interfere with the court-martial

proceedings and that " no evidence" was presented "that any member of appellant's unit reasonably understood the subject admonitions as an attempt to influence, or interefere with, potential witnesses…." *Francis*, 54 M.J. at 638.

In *Spykerman*, the Navy-Marine Corps Court of Appeals found that an orchestrated mass arrest and verbal denigration of Marines involved in an alien smuggling conspiracy was insufficient to show any evidence of actual UCI. *Spykerman*, 81 M.J. at 730. In both cases, similar to here, leadership acted inappropriately in relation to a pending criminal proceeding, but there was no evidence that anyone in the command had actually affected the judicial process by intimidating servicemembers from assisting the accused's defense. "The test for actual unlawful command influence is, figuratively speaking, 'whether the convening authority has been brought into the deliberation room.'" *United States v. Williams*, 2017 CCA LEXIS 599 (N-M. Ct. Crim. App. Sept. 12, 2017). Not only is there no evidence that LtCol [redacted] endeavored to affect the court-martial process, *even if he did*, the speed alone in which this matter was removed from command made it impossible.

Moreover, unlike in *Spykerman*, the command climate debrief had already been scheduled and was not planned solely for the purpose of a public arrest – quite the opposite. Arresting the Accused at the command climate debrief was a decision driven by the exigencies of the investigation, including, crucially, the seizing of his cellular phone before the Accused learned of the investigation and had the opportunity to destroy its contents. The command had attempted to arrest the Accused the night before, and it was only *after they could not find him* that they decided on arresting him the next day at the debrief. And even then, they planned to arrest him beforehand, but the Accused arrived at his appointed place of duty 20 minutes late. They therefore had to arrest him during the debrief, rather than before it. And while LtCol [redacted] could have handled the arrest in a more appropriate manner, the decision to not delay the arrest further possibly prevented the destruction of the trove of incriminating evidence the phone's search captured.[1]

[1] The Defense's Motion states that courts have "unequivocally condemned conduct by those in positions of authority which results in needless degradation, or public denunciation or humiliation of an accused." D. Br., p. 6. First, as noted, LtCol [redacted] and SgtMaj [redacted] made comments that they should not have at the point of arrest, but the timing of the arrest itself was not entirely "needless." There was a legitimate law enforcement purpose in arresting the Accused as soon as possible, and in particular, before he knew his arrest was imminent and could erase evidence from his phone. Second, the cases cited by the Defense in support of this general proposition address pre-trial confinement, not UCI. *See* D. Br. p. 6, n. 47.

The defense asserts that "any member of the command who would have come forward to speak positively about Corporal Suarez has been influenced to keep silent." D. Br., p. 9. Not only is this assertion bald of supporting facts, the command investigation demonstrably contradicts it. Of the 55 members of the command interviewed, 54 specifically stated that their willingness to testify has not been affected. *See* Encl. 31 - 45. And the only witness who did express intimidation said that he feared retaliation from SgtMaj [redacted] who has been relieved from the command. *See* Encl. 44. Since SgtMaj [redacted] has been relieved, this witness has directly stated that he would speak favorably of the Accused in court, and that he plans to do so. *See* Encl. 45. The Defense must present some evidence that amounts to more than "mere allegation or speculation." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013); *See also United States v. Allen*, 33 M.J. 209, 212 (C.A.A.F. 1991) ("proof of [command influence] in the air, so to speak, will not do." (internal quotation marks omitted) (citation omitted)). Here, the defense fails to offer any evidence of actual UCI, because there is no actual evidence of UCI.

b. The Accused fails to show Apparent UCI. The Defense offers no evidence of an "intolerable strain" on the public's perception of the military justice system.

As argued above, even if the Court accepts the Accused's version of the facts at face value, he makes no showing of unlawful command influence. He further fails to show that 'an objective, disinterested observer, fully informed of all facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249.

As an initial matter, the aftermath of the command climate debrief counsels far more strongly against interfering with judicial proceedings than participating in it. Eight days after the command climate debrief and within hours of the filing of the IG Complaint, the Accused's case was removed from LtCol [redacted] command and taken above him to the 3D Marine Littoral Regiment. Then, after a command investigation, both LtCol [redacted] and SgtMaj [redacted] were relieved. Any member of the Accused's command that would consider interfering with his trial has seen the professional consequences, in real-time. In fact, to the extent that any pressure against testifying for an accused inheres in the military justice system, it would be less present here, given the consequences to the Lt Col [redacted] and SgtMaj [redacted] career, in the aftermath. It's hard to imagine a court-martial where members of a command would be less afraid to participate. Tellingly, numerous members of the command provided statements in the command investigation *against* LtCol [redacted] This does not support a climate of intimidation.

In support of its motion, the Defense cites the press coverage of this affair, including that "Lieutenant Colonel [redacted] and Sergeant Major [redacted] were relieved of command" and how their relief "was widely covered in the media." D. Br., p. 4. But this news coverage only broadcasts to the public the higher command's quick, deliberate, and harsh response to their actions. Far from causing "an intolerable strain upon the public's perception of the military justice system," this news coverage provides a strong example of a commitment to fairness towards an accused servicemember.

In *United States v. Proctor*, the C.A.A.F. rejected a claim of apparent UCI in which the commander's conduct was far more serious than LtCol [redacted] by comparison. The accused was pending a court-martial when his commanding officer conducted a commander's call with the company. *United States v. Proctor*, 81 M.J. 250 (C.A.A.F. 2021). The CO used the call to discuss recent misconduct that occurred in the company, said it was his "goal" to "get NCOs to start acting like NCOs" and "to call the other NCOs out," and opined that "[t]hey should be embarrassed when their NCOs are acting a certain way and giving their corps a bad name." *Id.* at 252. He then told a story about a time he was asked to write a positive character statement for a fellow service member that was pending court-martial, but refused in order to "hold the line." *Id.* at 253, adding that if he were to have written the statement, he would expect his leadership to question his judgement, referencing that it may have "had a negative impact on his career." *Id.* Service members testified that the message made them rethink whether they would support the Accused during his court-martial. *Id.* at 254. C.A.A.F. found that these facts to be insufficient to show "an intolerable strain upon the public's perception of the military justice system." *Id.* at 256. Notably, C.A.A.F. highlighted that the commanding officer had been relocated to a new duty station prior to trial. *Id.* at 257-58. Here, the case was relocated to a new commanding officer, and the offending commanding officer was relieved of his command.

In *United States v. Gattis*, the case the Defense most heavily relies on in its brief, the accused made "some showing" that evidence of UCI existed, but the Government demonstrated that the facts did not constitute apparent UCI. 81 M.J. 748 (N-M. Ct. Crim. Apps. Aug. 25, 2021). Shortly after Gattis was arrested, the Defense counsel began calling the accused's co-workers to interview them about the accused. *Id.* at 752. A Chief Petty Officer in the accused's shop discovered that the accused was arrested and that the accused's defense attorneys were reaching out to his sailors. *Id.* In response, the CPO sent a message to the entire shop stating in

part, "you are not authorized to talk to them," referring to the Defense counsel. Three hours later, at the advice of his SJA, he sent out a corrective message that "no one can be denied from talking to an attorney about a Sailor. That it is illegal to do so. Just want to be clear about that." *Id.* at 752. Several weeks later, the commanding officer sent an email to all hands at the command, educating them on UCI. *Id.* at 753. In considering whether apparent UCI infected Gattis' sentencing, the Court held that even if the issue had not been waived, "due to the multiple corrective measures taken by NIOC Hawaii command leadership to address the initial message sent," "no potential defense witnesses for sentencing were chilled from participating in Appellant's case." *Id.* at 758. Here, the case was entirely removed from the command, a command investigation was launched, and the commanding officer was relieved. *Gattis* demonstrates just how inappropriate dismissal would be here.

c. Even if the Court finds UCI occurred, dismissal is not an appropriate remedy.

The C.A.A.F. has routinely held that "the Government may demonstrate that unlawful command influence will not affect the proceedings in a particular case as a result of ameliorative actions." *United States v. Simpson,* 58 M.J. 368 (C.A.A.F. 2003). In the present case, the Government self-imposed one common judicial remedy by transferring the responsibility for disposition of the Accused's charges to a commander not subject to the influence of LtCol [redacted] Prior to the Accused's arrest, LtCol [redacted] would have been responsible for the disposition of the Accused's charges. As soon as the Government was notified of the Accused's public arrest, that responsibility was transferred to Col [redacted] Commanding Officer of 3d Marine Littoral Regiment. Furthermore, MajGen Bargeron relieved LtCol [redacted] from his position as commanding officer. These steps were taken before LtCol [redacted] had any ability to impact these court-marital proceedings. The Accused had not yet been charged with a crime, no preliminary hearing had been conducted, and no disposition decision had been made.

If the Court decides that the Accused has failed to demonstrate UCI, it need not consider remedies. But even if the Court finds UCI, it can take additional action to further ameliorate any potential impact the conduct at issue may have on this court-martial, including liberal grants of challenges for cause and permitting extensive voir dire of the panel members with respect to the issue of UCI.

Dismissal of charges is a drastic remedy and courts must look to see whether alternative remedies are available before dismissing charges. *Douglas,* 68 M.J. at 354. Dismissal of charges

is only warranted when no useful purpose would be served by continuing the proceedings. *Biagese*, 78 M.J. at 79. The Defense has provided no evidence that UCI exists, let alone that the charges in this case should be dismissed. The measures the Government has already taken assure the Court and the public that UCI will not affect these court-martial proceedings.

d. The Defense witness request should be denied.

The Defense's motion includes a request for the production of sixteen (16) witnesses. The Government agrees to produce 1stSgt [redacted] for the subject 39(a) motions hearing scheduled for 28 June 2022. The Government denies the Defense's remaining fifteen (15) witness requests.

The Defense may submit to trial counsel a written list of witnesses whose production by the Government the Defense requests; however, the contents of that request must include the contact information of each witness and a synopsis of the expected testimony sufficient to show its relevance and necessity. The Defense has failed to provide anything other than the names of the witnesses they request the Government produce. The Government assumes that the Defense requested witnesses will testify about the Accused's arrest on 11 January 2022. If that is the case the testimony of the Defense requested witnesses would be cumulative to the statements these witnesses provided to the IO during LtCol [redacted] command investigation. The Government has provided the statements of each Defense requested witness in Enclosures 31-46.

5. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion. Alternatively, the Government requests that the Court grant the Defense liberal voir dire regarding potential UCI concerning the subject case.

6. **Enclosures.**

The following enclosures are attached to this motion as support:

Enclosures related to the Accused's narcotics distribution network

a. Enclosure 1 – Original Charge Sheet
b. Enclosure 2 – Additional Charge Sheet
c. Enclosure 3 – Second Additional Charge Sheet
d. Enclosure 4 – Drug Test Results
e. Enclosure 5 – CW Statement

f. Enclosure 6 – Search of Accused's Barracks Room

g. Enclosure 7 – Results of Interview of Pvt [redacted]

h. Enclosure 8 – Results of Interview of [redacted]

i. Enclosure 9 – MRE 410 Proffer (U.S. v. [redacted]

j. Enclosure 10 – Results of Interview of SPC [redacted]

k. Enclosure 11 – Results of Interview of Pvt [redacted]

l. Enclosure 12 – Results of Interview of Pvt [redacted]

Enclosures related to the Accused's arrest

a. Enclosure 13 – Special Agent [redacted] Summary of Interview (CI)

b. Enclosure 14 – Sergeant Major [redacted] Summary of Interview (CI)

c. Enclosure 15 – Lieutenant Colonel [redacted] Summary of Interview (CI)

d. Enclosure 16 – Anonymous IG Complaint

Enclosures related to elimination of potential UCI

e. Enclosure 17 – E-Mail of Regimental CO's Decision to Handle Accused's case

f. Enclosure 18 – E-Mail Notification to TC of Regimental CO's decision

g. Enclosure 19 – Appointing Letter Command Investigation

h. Enclosure 20 – Command Investigation

i. Enclosure 21 – Report of Substandard Performance

j. Enclosure 22 – Article 1: Why LtCol [redacted] and SgtMaj [redacted] were fired

k. Enclosure 23 – Article 2: Why did the Marine Corps fire this CO?

Enclosures related to the Accused's criminal proceedings

a. Enclosure 24 – Appointing Order

b. Enclosure 25 – PHO Report Addendum

c. Enclosure 26 – CA Order Reopen Preliminary Hearing

d. Enclosure 27 – Reopen Preliminary Hearing PHO Report

e. Enclosure 28 – Excludable Delay

f. Enclosure 29 – Article 33 Letter

g. Enclosure 30 – Article 34 Letter

Enclosures related to Defense requested witnesses

a. Enclosure 31 – Capt [redacted] Summary of Interview (CI)
b. Enclosure 32 – Lt [redacted] Summary of Interview (CI)
c. Enclosure 33 – GySgt [redacted] Summary of Interview (CI)
d. Enclosure 34 – SSgt [redacted] Summary of Interview (CI)
e. Enclosure 35 – SSgt [redacted] Summary of Interview (CI)
f. Enclosure 36 – Sgt [redacted] Summary of Interview (CI)
g. Enclosure 37 – Sgt [redacted] Summary of Interview (CI)
h. Enclosure 38 – Sgt [redacted] Summary of Interview (CI)
i. Enclosure 39 – Sgt [redacted] Summary of Interview (CI)
j. Enclosure 40 – Sgt [redacted] Summary of Interview (CI)
k. Enclosure 41 – Sgt [redacted] Summary of Interview (CI)
l. Enclosure 42 – Sgt [redacted] Summary of Interview (CI)
m. Enclosure 43 – Cpl [redacted] Summary of Interview (CI)
n. Enclosure 44 – 1stSgt [redacted] Summary of Interview (CI)
o. Enclosure 45 – 1stSgt [redacted] Interview Notes
p. Enclosure 46 – V33 Positive Drug Tests

7. **Additional Authorities.**

The following additional authorities are provided for the court's consideration:

a. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999)
b. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000)
c. *United States v. Cooper*, 2018 CCA LEXIS 114 (N.M.C.C.A. 2018)
d. *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004)
e. *United States v. Januski*, 2014 CCA LEXIS 376 (N.M.C.C.A. 2014)

8. **Argument.**

The Government does request oral argument.

[redacted]

A. B. HILL
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 via email on 10 June 2022.

[redacted]

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

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE RESPONSES TO GOVERNMENT MOTION – Admissibility of Accused's Statements** **10 JUN 22**

The Defense respectfully requests this Court deny the Government's motion for a preliminary ruling on the admissibility of the Accused's statements made via text message, Snapchat, and Signal.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the action." M.R.E. 401. "Irrelevant evidence is not admissible." M.R.E. 402. "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R.E. 403. Unless an exception applies, out of court statements are not admissible for their truth value. M.R.E. 801 & 802. As the moving party, the Government bears the burden of persuasion, and the burden of proof on facts necessary to resolve the motion is by a preponderance of the evidence. R.C.M. 905(c).

Here, the Government has failed to prove by a preponderance of the evidence that the statements at issue were made by Cpl Suarez. Additionally, these conversations include numerous statements by a multitude of third parties ([redacted] Lance Corporal [redacted] and other unnamed Snapchat users) which are inadmissible under M.R.E. 802. Without these inadmissible hearsay statements, the statements allegedly made by Cpl Suarez fail the M.R.E. 403 balancing test because they would be confusing and misleading to the factfinder.

Finally, the extraction from the phone alone found on Cpl Suarez's person at the time of his arrest included more than 450 text messages alone covering a wide breadth of topics, such as a conversation with [redacted] about bringing a PlayStation 5 to a room, discussing a birthday, and borrowing a shirt; and wishing [redacted] "Merry Christmas." Messages such as these are inadmissible under both M.R.E. 401/402 because they are irrelevant and M.R.E. 403 because their admission would cause undue delay and waste the factfinder's time.

Therefore, a preliminary ruling on the admissibility of the Accused's statements made via text message, Snapchat, and Signal is inappropriate.

The Defense requests oral argument on this matter.

Appellate Exhibit XI
Page 1 of 2

[redacted]
N. D. MONCK
LT, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June 2022, a copy of this motion was served on Trial Counsel.

[redacted]
N. D. MONCK
LT, JAGC, USN
Detailed Defense Counsel

Appellate Exhibit XI
Page 2 of 2

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY IN MOTIONS FILING** **(MFAR – Release from PTC)** **22 JULY 2022**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(1), the Defense requests the Court find good cause for noncompliance with the motions filing deadline. The Defense plans to file a motion to compel expert consultants on 23 July 2022 in compliance with the Court's comments in the 802.

2. **Facts**.

a. The Trial Management Order was ordered on 26 April 2022. The trial dates were set from 5-9 September 2022.

b. The second motions filing deadline was set for 12 July 2022.

c. On 11 July 2022, the Defense filed a motion for continuance for the motions filing deadlines based on a lack of rulings on the previous motions.

d. On 13 July 2022, the Defense received an email from a court reporter informing the parties that the Court's rulings would be issued on 14 July 2022.

e. On 13 July 2022, the Defense was informed that Colonel Stephen Keane was detailed as the Military Judge.

f. On 14 July 2022, the Military Judge emailed the counsels that the rulings were provided so the continuance may be moot and requested the Defense to route a continuance request to the government if the Defense still requested a continuance.

g. On 15 July 2022, Lieutenant Colonel [redacted] sent an email to all parties with a notice of rulings that provided short summaries of the Court's rulings.

h. The Defense filed a continuance on 19 July 2022 requesting leave of court to file additional motions once a written ruling explaining the Court's summary was received by the Defense. The Defense did not outline court dates as there were no indications when the Court would issue a

more thorough ruling or provide the essential findings of the motion to the parties.

i. On 21JUL22, while meeting with his detailed defense counsel, Cpl Suarez directed the Defense to file a motion for release from pretrial confinement.

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

4. **Law**.

Good Cause

Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) or this rule. R.C.M. 905(e).

Failure to comply with timeliness requirements is generally considered a waiver unless the military judge finds good cause to consider the untimely motion. The rules "should be liberally construed in favor of permitting an accused the right to be heard fully in his defense." *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

Right to Review

R.C.M. 905(d) determines the usual timeline for when the rulings on motions should be determined. A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Continuance

"The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, an accused shall enjoy the right to have the assistance of counsel for his defense. The United States Supreme Court has held that this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. This right extends to the meaningful opportunity to present a complete defense. Moreover, R.C.M. 701(e), Manual Courts-Martial provides that each party shall have adequate opportunity to prepare its case. When necessary for a party to prepare its case, a military judge should grant a continuance for as long and as often as is just." *United*

States v. Parker, 75 M.J. 603, 612-13 (N.M.C.C.A. 2016) (citing Discussion, R.C.M. 906(b)(1)). "Any time defense counsel raises the reasonable possibility of being unprepared for trial, a military judge must proceed cautiously." *Id*. (citing *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)).

Where there is reasonable cause, a military judge may "grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, U.C.M.J. See R.C.M. 906(b)(1). This is reiterated by the Discussion to R.C.M. 906(b)(1). Accordingly, the burden is on the moving party to prove there is reasonable cause for a continuance. R.C.M. 905(c). "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member." Discussion, R.C.M. 906(b)(1).

The factors used to determine whether a military judge abused his or her discretion by denying a continuance include "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

Denial of a motion for continuance is reviewed for an abuse of discretion. *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) (citing *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999). A military judge's "unreasonable and arbitrary insistence upon expeditiousness in the face of [a] justifiable request for delay' is an abuse of discretion. *Id.* (citing *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1991) (alteration in original)).

5. **Argument**

The Defense was directed by Cpl Suarez to file this motion after the filing deadline in the TMO. The Defense had previously discussed filing a motion for release from pretrial confinement with Cpl Suarez and discussed the factors and implications regarding release from pretrial confinement. On 21JUL22, Cpl Suarez directed the Defense to file the motion. This was the first time he explicit directed that the motion be filed.

6. **Relief Requested**.

Defense Counsel respectfully requests that the Court find there is good cause to permit the Defense to file a motion to be released from pretrial confinement to ensure Corporal Suarez receives an effective defense.

ROGERS.NICHOLAS.KARL [redacted]
Digitally signed by ROGERS.NICHOLAS.KARL [redacted]
Date: 2022.07.23 10:58:20 +09'00'

N. K. ROGERS
Captain, USMC
Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY (Pretrial Confinement)** **Date: 23 July 2022**

1. Nature of Motion.

The Defense motions this Court to find good cause for noncompliance with a court ordered milestone. This Court should deny the Defense's motion. The Defense has failed to show any evidence of "good cause" for the late filing of a motion for the Accused's release from pretrial confinement.

2. Summary of Facts.

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ.

b. On 11 January 2022, the Accused was placed in pretrial confinement. *See* Encl. 1.

c. On 17 January 2022, an Initial Review Officer reviewed evidence from both parties and determined the Accused would remain in pretrial confinement.

d. On 11 March 2022, Defense Counsel requested a reconsideration of the approval of continued pretrial confinement in the subject case. *See* Encl. 2.

e. On 20 March 2022, the Convening Authority denied the Defense request for a reconsideration of pretrial confinement. *See* Encl. 3.

f. On 24 April 2022, charges were referred for trial. *See* Encl. 1.

g. On a number of occasions between 24 April 2022 and today, the Accused was released from the Naval Brig to meet with his attorneys. The Defense has not filed a motion for reconsideration of the Accused's pretrial confinement.

3. Law

"Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial." Rule for Court Martial (R.C.M.) 905(b). "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver." R.C.M. 905(e)(1). "The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule." *Id.*

"Unless good cause is shown, motions must be filed in accordance with the TMO. Good cause is determined by the military judge." Hawaii Judicial Circuit Rule (HJC) 10.8. "Should counsel desire to file any motion or response after a court-ordered trial milestone, that counsel shall include an affidavit of good cause detailing why counsel missed the court ordered deadline and why the court should now entertain the motion." *Id.* at 10.8a.

Regarding continuance requests, Article 40, UCMJ states: "The military judge…may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." The discussion to R.C.M. 906(b)(1) states that a "military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The case of *United States v. Miller*, (47 M.J. 352, 358 (C.A.A.F. 1997) (citing F. Gilligan and F. Lederrer, Court-Martial Procedure § 18-32.00 at 704 (1992)). Factors the Appellate Courts will consider in assessing whether a military judge abused his discretion by denying a continuance include, "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

4. Discussion.

a. The Defense knew the Accused did not want to remain in pretrial confinement, but did not file a motion for reconsideration of the Accused's pretrial confinement.

This Court should deny the Defense's request that this Court find that there is " good cause" to file a motion to reconsider the Accused's pretrial confinement. The Accused has been

in pretrial confinement for more than six (6) months. During that time, the Accused met with his counsel on a number of occasions. The Defense indicated in March 2022 that the Accused did not want to remain in pretrial confinement and requested a reconsideration of the Accused's pretrial confinement. *See* Encl. 2. The convening authority denied that request. The Defense knew, at that time, that the Accused did not want to remain in pretrial confinement. *See* Encl. 3.

Charges were referred for trial on 24 April 2022. *See* Encl. 1. Pursuant to M.R.E. 305(j) "Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief." It has been nearly three (3) months since charges were referred for trial, yet the Defense has not filed a motion to this Court to reconsider the Accused's pretrial confinement.

b. **The Defense has not fulfilled this Court's request to state with "specificity" why this motion could not be filed prior to 12 July 2022.**

This Court requested the Defense explain, with specificity, why this particular motion, a motion to reconsider the Accused's pretrial confinement, could not be filed in advance of the second motions filing deadline. The Hawaii Judicial Circuit Rules require that a "Good Cause" motion for permission to file a late motion include an explanation of "why the court should now entertain the motion." HJC 10.8a. The Defense has failed to make that showing.

As far as the Government is aware, no significant fact has changed that would require the filing of a motion for the reconsideration of the Accused's pretrial confinement after the second motions filing deadline. The Defense was on notice the Accused did not want to remain in pretrial confinement. They were aware, after the denial of their first request for reconsideration of the Accused's pretrial confinement, that they could file a motion for this Court to reconsider the Accused's pretrial confinement. Furthermore, the Defense is aware that during the Accused's pretrial confinement the Accused was charged with an additional violation of the UCMJ for misconduct that took place in the Naval Brig. There is no valid argument that can be made for the reconsideration of the Accused's pretrial confinement and no circumstance has changed in this case to warrant the late filing of such a motion. The Defense has not made a showing of "good cause" to file a motion for reconsideration of the Accused's pretrial confinement.

c. **The Defense has made no legitimate argument for a continuance.**

Finally, this Court should not grant a continuance. The military judge should only grant a continuance "upon a showing of reasonable cause." R.C.M. 906(b)(1). Discussion. Consider the

factors Appellate Courts use in assessing whether a military judge abused his discretion by denying a continuance, especially "surprise" and "prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

As stated previously, the Defense is not facing any surprise in the present case, especially as it relates to the Accused's wish to be released from pretrial confinement. The Defense has been on notice of their client's request to be released from pretrial confinement since March 2022 and previously filed a reconsideration request to the convening authority. The Defense could have filed a timely motion for reconsideration of the Accused's pretrial confinement prior to 12 July 2022. Therefore, the Defense has not met its burden in proving that there is good cause to file this motion or for this Court to grant a continuance.

5. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion.

6. **Burden of Proof.**

The Defense, as the moving party bears the burden of proof and persuasion. R.C.M. 905(c)(2). The burden of proof is a preponderance of the evidence. *Id.*

7. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1 – Charge Sheets
b. Enclosure 2 – IRO Reconsideration Request
c. Enclosure 3 – IRO Reconsideration Denial

8. **Argument.**

The Government does not request oral argument.

//S//
A. B. HILL
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 via email on 23 July 2022.

//S///
A. B. HILL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY IN MOTIONS FILING** **(MTC - Experts)** **22 JULY 2022**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(1), the Defense requests the Court find good cause for noncompliance with the motions filing deadline. The Defense plans to file a motion to compel expert consultants on 23 July 2022 in compliance with the Court's comments in the 802.

2. **Facts**.

a. The Trial Management Order was ordered on 26 April 2022. The trial dates were set from 5-9 September 2022.

b. The second motions filing deadline was set for 12 July 2022.

c. On 11 July 2022, the Defense filed a motion for continuance for the motions filing deadlines based on a lack of rulings on the previous motions.

d. On 13 July 2022, the Defense received an email from a court reporter informing the parties that the Court's rulings would be issued on 14 July 2022.

e. On 13 July 2022, the Defense was informed that Colonel Stephen Keane was detailed as the Military Judge.

f. On 14 July 2022, the Military Judge emailed the counsels that the rulings were provided so the continuance may be moot and requested the Defense to route a continuance request to the government if the Defense still requested a continuance.

g. On 15 July 2022, Lieutenant Colonel [redacted] sent an email to all parties with a notice of rulings that provided short summaries of the Court's rulings.

h. The Defense filed a continuance on 19 July 2022 requesting leave of court to file additional motions once a written ruling explaining the Court's summary was received by the Defense. The Defense did not outline court dates as there were no indications when the Court would issue a

more thorough ruling or provide the essential findings of the motion to the parties.

i. Separately, Defense counsel are burdened with a heavy case load, collateral duties, undermanned offices, and administrative tasks required for an upcoming overseas PCS. Due to trainings, staff turnover during the summer PCS season, and Courts-Martials, at various times during the month of July, they have had no or minimal enlisted and core counsel support in their office.

j. LT Monck completed a draft of a Motion to Compel (Experts) on 18 July 2022. He sent it to the only non-first tour judge advocate in the Defense Service Office – Pacific, Detachment Pearl Harbor at that time, who was a Navy JAGC reservist temporarily supporting the office's operations.

k. LT Monck reviewed the edits and finalized the Motion to Compel (Experts) on 19 July 2022.

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

4. **Law**.

Good Cause

Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) or this rule. R.C.M. 905(e).

Failure to comply with timeliness requirements is generally considered a waiver unless the military judge finds good cause to consider the untimely motion. The rules "should be liberally construed in favor of permitting an accused the right to be heard fully in his defense." *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

Right to Review

R.C.M. 905(d) determines the usual timeline for when the rulings on motions should be determined. A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Continuance

"The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, an accused shall enjoy the right to have the assistance of counsel for his defense. The United States Supreme Court has held that this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. This right extends to the meaningful opportunity to present a complete defense. Moreover, R.C.M. 701(e), Manual Courts-Martial provides that each party shall have adequate opportunity to prepare its case. When necessary for a party to prepare its case, a military judge should grant a continuance for as long and as often as is just." *United States v. Parker*, 75 M.J. 603, 612-13 (N.M.C.C.A. 2016) (citing Discussion, R.C.M. 906(b)(1)). "Any time defense counsel raises the reasonable possibility of being unprepared for trial, a military judge must proceed cautiously." *Id*. (citing *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)).

Where there is reasonable cause, a military judge may "grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, U.C.M.J. See R.C.M. 906(b)(1). This is reiterated by the Discussion to R.C.M. 906(b)(1). Accordingly, the burden is on the moving party to prove there is reasonable cause for a continuance. R.C.M. 905(c). "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member." Discussion, R.C.M. 906(b)(1).

The factors used to determine whether a military judge abused his or her discretion by denying a continuance include "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

Denial of a motion for continuance is reviewed for an abuse of discretion. *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) (citing *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999). A military judge's "unreasonable and arbitrary insistence upon expeditiousness in the face of [a] justifiable request for delay' is an abuse of discretion. *Id.* (citing *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1991) (alteration in original)).

5. **Argument**

The practice of law in a condensed environment is an arduous task. The Trial Management Order of this court does request that counsel "strive to file all ripe motions at the first motions date." However, the order does not require the filing of all motions at the first motions date due to the uncertain and ever-changing responsibilities and burden that Defense counsel face. Due to the difficult workload and changing office environment, the Defense was unable to file a Motion to Compel (Experts) at a previous date. The Defense had planned to file motions in a group for efficiency and comprehension of all parties. The Defense did not file the

Motion to Compel (Experts) on 12JUL22 due to a good faith belief that a continuance had been or would be granted in this case. Based on the responses to the Defense's initial motion for a continuance, that was received after the motions filing deadline had passed, the Defense believed it had until 19JUL22 to submit motions. To clarify after discussion with the Government, the Defense filed a continuance requesting leave of court on 19JUL22 and discussed the need for this motion with the Government.

At no time did the Defense intend not to comply with the order of the Court in filing motions. The Defense counsel was confused by the email traffic following the filing of the 12JUL22 continuance, but maintained a good faith basis for the filing of motions and the representation of Corporal Suarez.

6. **Relief Requested**.

Defense Counsel respectfully requests that the Court find there is good cause to permit the Defense to file a motion to compel expert consultants to ensure Corporal Suarez receives an effective defense.

ROGERS.NICHOLAS.KARL[redacted] Digitally signed by ROGERS.NICHOLAS.KARL[redacted] Date: 2022.07.23 10:48:17 +09'00'

N. K. ROGERS
Captain, USMC
Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY (Compel Expert Consultants)** **Date: 23 July 2022**

1. Nature of Motion.

The Defense motions this Court to find good cause for noncompliance with a court ordered milestone. This Court should deny the Defense's motion. The Defense has failed to show any evidence of "good cause" for the late filing of a motion to compel expert consultation. The trial management order specifically states counsel should strive to litigate all ripe motions at the first motions hearing, including "appointment of expert consultants." The Defense has failed to file this motion prior to the first or second motions filing deadline and should not be granted relief to do so now.

2. Summary of Facts.

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ.

b. On 26 April 2022, the Government and the Defense agreed to a trial management order. The trial management order states in footnote V, "Counsel should strive to litigate all ripe motions at the first motions date, including those required for … appointment of expert consultants…." *See* Encl. 1.

c. On 5 May 2022, Colonel Mann, military judge, ordered all parties comply with this trial management order. *See* Encl. 1.

d. Pursuant to the TMO expert consultant requests were due on 13 May 2022.

e. On 13 May 2022, the Defense filed a request for expert consultation. *See* Encl. 2.

f. On 23 May 2022, the Defense filed an additional untimely request for expert consultation. *See* Encl. 3.

g. The Government did not object to the Defense's untimely request for expert consultation and provided all requests to the convening authority for review.

h. On 27 May 2022, the Government informed the Defense that the Convening Authority had not yet returned the Defense expert requests; however, they should assume they were all denied. *See* Encl. 4.

i. On 3 June 2022, the Convening Authority returned signed endorsements for each of the Defense's expert requests. The Convening Authority denied the Defense's requests. *See* Enc. 5.

j. The Defense has failed to file a motion to compel the Government provide the Defense expert consultation.

3. Law

"Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial." Rule for Court Martial (R.C.M.) 905(b). "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver." R.C.M. 905(e)(1). "The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule." *Id.*

"Unless good cause is shown, motions must be filed in accordance with the TMO. Good cause is determined by the military judge." Hawaii Judicial Circuit Rule (HJC) 10.8. "Should counsel desire to file any motion or response after a court-ordered trial milestone, that counsel shall include an affidavit of good cause detailing why counsel missed the court ordered deadline and why the court should now entertain the motion." *Id.* at 10.8a.

The trial management order, agreed to by all parties, specifically states, "Counsel should strive to litigate all ripe motions at the first motions date, including those required for M.R.E. 412, allegations of error in the Article 32, preferral and referral process, *appointment of expert consultants*, witnesses, production, and discovery." *See* Encl. 1, Footnote V.

Regarding continuance requests, Article 40, UCMJ states: "The military judge…may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." The discussion to R.C.M. 906(b)(1) states that a "military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The case of *United States v. Miller*, (47 M.J. 352, 358 (C.A.A.F. 1997) (citing F. Gilligan and F. Lederrer, Court-Martial Procedure § 18-32.00 at 704 (1992)). Factors the Appellate Courts will consider in assessing whether a military judge abused his discretion by denying a continuance include, "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller,* 47 M.J. 352, 358 (C.A.A.F. 1997).

4. <u>Discussion.</u>

a. **The Defense has not fulfilled this Court's request to state with "specificity" why this motion could not be filed prior to 12 July 2022.**

This Court should deny the Defense's request that this Court find that there is "good cause" to file a motion to compel expert assistance. This Court requested the Defense explain, with specificity, why this particular motion, a motion to compel expert assistance, could not be filed in advance of the second motions filing deadline. The Hawaii Judicial Circuit Rules require that a "Good Cause" motion for permission to file a late motion include an explanation of "why the court should now entertain the motion." HJC 10.8a. The Defense has failed to make that showing.

The Defense has been aware since 27 May 2022 that their requests for experts would be denied. The convening authority officially denied the Defense requests for expert consultants on 3 June 2022. If the Defense believed that they needed an expert consultant, they were ordered by the Court ordered TMO to file a motion compelling expert assistance prior to the first motions hearing. The Defense did not file any motions related to expert consultants or witnesses.

The Defense has presented no evidence or argument to support why there is "good cause" to file this motion after both the first and second motion filing deadlines. As far as the Government is aware, no significant fact has changed that would require the filing of this motion

late. The Defense only provides one sentence in their motion to support the late filing of this motion: "Due to the difficult workload and changing office environment, the Defense was unable to file a Motion to Compel (Experts) at a previous date." *Def. Br. pg. 3.* The Defense has been aware since May 2022 that motions to compel expert assistance was necessary in this case. They could have sought assistance from peers or leadership. A difficult workload alone, is not evidence enough for this Court to find that there is "good cause" to allow the Defense to file a motion to compel expert assistance.

In *United States v. Salas*, 2018 CCA LEXIS 555 (N.M.C.C.A. 2018), the military judge signed a TMO requiring parties submit expert assistance requests no later than 23 November 2016. *Id.* *10. "All motions were to be filed not later than 5 December 2016." *Id.* "Despite the dates set in the TMO," the Defense submitted a request for expert assistance on 28 November 2016. *Id.* That request was denied. *Id.* On 9 January 2017, the Defense filed a motion to compel production of an expert assistant. *Id.* On 18 January 2017, the military judge informed counsel that he would not consider the motion to compel expert assistance absent good cause for the late filing. *Id. *11.* The military judge determined that counsel had not shown good cause for the late filing and declined to hear the untimely motion. *Id.*

The Navy-Marine Corps Court of Criminal Appeals reviewed the military judge's denial of expert assistance. *Id.* *18. The Court held that the military judge was not in error for denying the Defense request and determined that the motion lacked merit. *Id.* at 19.

In the present case, the Defense has not made a showing of "good cause" to file a motion for expert assistance. The Defense has already submitted one untimely expert request and chose not to file a motion to compel expert assistance in advance of the first or second motion filing deadlines. Similar to the court in *Salas*, this Court should deny the Defense request to hear this motion as untimely.

b. **The Defense has made no legitimate argument for a continuance.**

Finally, this Court should not grant a continuance. The military judge should only grant a continuance "upon a showing of reasonable cause." R.C.M. 906(b)(1). Discussion. Consider the factors Appellate Courts use in assessing whether a military judge abused his discretion by denying a continuance, especially "surprise" and "timeliness of the request." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

As stated previously, the Defense is not facing any surprise in the present case. The Defense has been aware that their expert requests were denied well in advance of the second motions filing deadline. This request is extremely untimely. The Defense has had several months to request expert assistance and file motions to compel that assistance. Furthermore, at this late stage of trial, the granting of expert assistance could cause significant delay. The Government would have to find expert assistance for the Defense, get that expert properly funded, likely litigate the adequacy of Government provided expert assistance, and the Defense would need to consult with that expert in advance of trial. It is due to the lengthy process involved in finding and funding experts that military judge's often require issues related to experts be resolved early in court proceedings. Ultimately, the Defense has not met its burden in proving that there is good cause to file this motion or for this Court to grant a continuance.

5. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion.

6. **Burden of Proof.**

The Defense, as the moving party bears the burden of proof and persuasion. R.C.M. 905(c)(2). The burden of proof is a preponderance of the evidence. *Id.*

7. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1 – Trial Management Order
b. Enclosure 2 – Defense Expert Requests
c. Enclosure 3 – Defense Supplemental Expert Request
d. Enclosure 4 – Response to Defense Expert Requests
e. Enclosure 5 – Denial of Defense Expert Requests

8. **Argument.**

The Government does not request oral argument.

//S//
A. B. HILL
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 via email on 23 July 2022.

//S///
A. B. HILL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY IN MOTIONS FILING** **(Motion to Suppress)** **22 JULY 2022**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(1), the Defense requests the Court find good cause for noncompliance with the motions filing deadline. The Defense plans to file a motion to supress on 23 July 2022 in compliance with the Court's comments in the 802.

2. **Facts**.

a. The Defense first identified an issue with a verbal Command Authorized Search and Seizure related to this case on 13 July 2022.

b. On 14 July 2022, the Defense emailed Trial Counsel requesting additional information related to the CASS. Trial Counsel replied later that day to confirm that the relevant CASS was verbal.

c. Since the discovery of the issue related to the CASS, the Defense has worked diligently to research the issue and prepare a motion to suppress.

d. Cpl Suarez has been in pre-trial confinement at the Navy Consolidated Brig Miramar Detachment Pearl Harbor since his apprehension on 11 January 2022.

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

4. **Law**.

Good Cause

Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a

party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) or this rule. R.C.M. 905(e).

Failure to comply with timeliness requirements is generally considered a waiver unless the military judge finds good cause to consider the untimely motion. The rules "should be liberally construed in favor of permitting an accused the right to be heard fully in his defense." *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

Right to Review

R.C.M. 905(d) determines the usual timeline for when the rulings on motions should be determined. A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Continuance

"The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, an accused shall enjoy the right to have the assistance of counsel for his defense. The United States Supreme Court has held that this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. This right extends to the meaningful opportunity to present a complete defense. Moreover, R.C.M. 701(e), Manual Courts-Martial provides that each party shall have adequate opportunity to prepare its case. When necessary for a party to prepare its case, a military judge should grant a continuance for as long and as often as is just." *United States v. Parker*, 75 M.J. 603, 612-13 (N.M.C.C.A. 2016) (citing Discussion, R.C.M. 906(b)(1)). "Any time defense counsel raises the reasonable possibility of being unprepared for trial, a military judge must proceed cautiously." *Id.* (citing *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)).

Where there is reasonable cause, a military judge may "grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, U.C.M.J. See R.C.M. 906(b)(1). This is reiterated by the Discussion to R.C.M. 906(b)(1). Accordingly, the burden is on the moving party to prove there is reasonable cause for a continuance. R.C.M. 905(c). "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member." Discussion, R.C.M. 906(b)(1).

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

denying a continuance include "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

Denial of a motion for continuance is reviewed for an abuse of discretion. *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) (citing *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999). A military judge's "unreasonable and arbitrary insistence upon expeditiousness in the face of [a] justifiable request for delay' is an abuse of discretion. *Id.* (citing *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1991) (alteration in original)).

5. **Argument**

The Defense first discovered there may be grounds to object to the search authorization of Cpl Suarez's person, vehicle, barracks, and workspace when reviewing the evidence on 13JUL22. The Defense believed that it had not been provided with a copy of the written Command Authorization for Search and Seizure authorizing the search and elected to email Trial Counsel requesting a copy of the CASS. It was not until Trial Counsel responded confirming that the CASS had, in fact, been verbal, and was never reduced to writing, that the Defense began drafting this motion. Furthermore, this is a novel motion – both Cpl Suarez's Navy and Marine Corps Detailed Defense Counsel have contacted their respective chains of command regarding the validity of a verbal CASS which had not been reduced to writing. Instructors at Naval Justice School and at the Navy's DCAP were also been contact. Based on LT Monck's legal research, on or about 19JUL22 that the verbal CASS was not legally objectionable, however, there may be other grounds to challenge the CASS. For this reason, the Defense seeks to submit the attached Motion to Suppress and to receive a ruling on the merits.

6. **Relief Requested**.

Defense Counsel respectfully requests that the Court find there is good cause to permit the Defense to file motions to ensure Corporal Suarez receives an effective defense.

ROGERS.NICHOLAS.KARL[redacted]
Digitally signed by ROGERS.NICHOLAS.KARL[redacted]
Date: 2022.07.23 11:00:49 +09'00'

N. K. ROGERS
Captain, USMC
Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF – GOOD CAUSE FOR DELAY (MTS)** **Date: 23 July 2022**

1. Nature of Motion.

The Defense motions this Court to find good cause for noncompliance with a court ordered milestone. This Court should deny the Defense's motion. The Defense has failed to show any evidence of "good cause" for the late filing of a motion to suppress evidence they have been in possession of prior to the Article 32, UCMJ, Preliminary Hearing for the subject case.

2. Summary of Facts.

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ.

b. On 11 January 2022, the Accused was placed in pretrial confinement. *See* Encl. 1.

c. That same day, pursuant to a verbal CASS, NCIS searched the Accused's barracks room and located controlled substances, drug paraphernalia, a cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. *See* Encl. 3.

d. On 4 March 2022, the Government discovered to the Defense the Report of Investigation (ROI) that included documents that specifically addressed that verbal CASSs were issued for the search of the Accused's vehicle and barracks room. *See* Encl.6.

e. On 7 March 2022, an Article 32, UCMJ, preliminary hearing was conducted for the subject case. The Government presented documentary evidence in the form of twenty-five (25) preliminary hearing exhibits, including documents that directly cited to the verbal CASSs issued in this case. Preliminary hearing exhibits 13 states, "Based on the

information provided, LtCol [redacted] verbally authorized NCIS to search S/Suarez' person, barracks room and vehicle…" *See* Encl. 3. Preliminary hearing exhibit 14 states, "LtCol [redacted] provided a verbal CASS for NCIS to conduct a search of S/Suarez' person, barracks room (barracks [redacted] room [redacted]), and his vehicle (a grey BMW Z4 convertible bearing HI license plate [redacted]". *See* Encl. 4. The exhibits also referenced the CASS for the search of the Accused's cell phone. *See* Encl. 5.

f. The Government provided the Defense the above-mentioned preliminary hearing exhibits prior to the preliminary hearing. *See* Encl. 6.
g. On 2 May 2022, the Accused's arraignment took place at Marine Corps Base Hawaii.
h. On 5 May 2022, Colonel Mann, Military Judge, ordered certain trial milestones outlined in a Trial Management Order (TMO). *See* Encl. 7.
i. On 11 July 2022, the Defense filed a continuance request asking this court for an additional week to file motions.
j. The second motions filing deadline was 12 July 2022. *See* Encl. 1.
k. On 14 July 2022, this Court asked the Defense to route the request to the government with a block to see if they were opposing the continuance and a block for the Court to either grant or deny the request.
l. That same day the Defense emailed Trial Counsel requesting more information related to the CASSs issued in the subject case. The Trial Counsel responded with bate stamp specific references to all of the information regarding the CASSs issued in the case.
m. The Defense did not respond to the Court's request regarding the continuance until 19 July 2022, the original day in which the Defense requested an extension to file motions.
n. The Government opposed the Defense continuance request.

3. <u>Law</u>

"Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial." Rule for Court Martial (R.C.M.) 905(b). "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver." R.C.M. 905(e)(1). "The military judge for good cause shown may

permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule." *Id.*

"Unless good cause is shown, motions must be filed in accordance with the TMO. Good cause is determined by the military judge." Hawaii Judicial Circuit Rule (HJC) 10.8. "Should counsel desire to file any motion or response after a court-ordered trial milestone, that counsel shall include an affidavit of good cause detailing why counsel missed the court ordered deadline and why the court should now entertain the motion." *Id.* at 10.8a.

"[A] motion to suppress evidence must be raised before trial or by the deadline set by the trial judge unless good cause is shown." *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007). "M.R.E. 311(d)(2)(A) requires that motions to suppress evidence 'be made by the defense prior to submission of a plea.'" *Id.* (citing M.R.E. 311(d)(2)(A)). "The general rule is that a failure to make the motion prior to the plea 'constitutes a waiver of the motion or objection.'" *Id.* "Fed. R. Crim.P. 12(e) is analogous to M.R.E. 311(d)(2). It states, inter alia, that a motion to suppress evidence must be raised before trial or by the deadline set by the trial judge unless good cause is shown." *Id.* (citing Fed. R. Crim.P. 12(b)(3)(C)). "Federal courts have determined that no good cause exists when the defense knew or could have known about the evidence in question before the deadlines imposed under Fed. R. Crim.P. 12." *Id.*

Courts have routinely denied requests by Defense to file late motions or make untimely objections to suppress evidence. *United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993); *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993); *Jameson*, 65 M.J. 160. The same reasoning applies to military courts. *Jameson*, 65 M.J. 160; *United States v. McCollum*, 58 M.J. 323, 341 (C.A.A.F. 2003).

Regarding continuance requests, Article 40, UCMJ states: "The military judge…may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." The discussion to R.C.M. 906(b)(1) states that a "military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The case of *United States v. Miller*, (47 M.J. 352, 358 (C.A.A.F. 1997) (citing F. Gilligan and F. Lederrer, Court-Martial Procedure § 18-32.00 at 704 (1992)). Factors the Appellate Courts will consider in assessing whether a military judge abused his discretion by denying a continuance include, "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to

opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

4. <u>Discussion.</u>

a. The Government provided the Defense all information related to the CASSs issued in this case well before the first motions filing deadline.

This Court should deny the Defense's request that this Court find there is good cause to file a motion to suppress evidence past the court ordered milestone. The Government provided the Defense all information related to the CASSs issued in this case well in advance of the court ordered milestone for motions filing. In fact, the Government provided the Defense the ROIs related to the search of the Accused's barracks room, vehicle, and phone before the preliminary hearing. The Government discovered these documents to the Defense not once, but twice. First, as part of the regular course of discovery and second, in the form of a preliminary hearing exhibit binder. *See* Encl. 3; Encl. 4; Encl. 5; Encl. 6.

The Defense thoroughly examined the evidence provided during the preliminary hearing. In the Defense's written Article 32 comments they stated, "Here, the Government's case rests solely on ambiguous phone messages, so-called "ledgers" which are open to various interpretations, and self-serving statements by individuals involved in drug trafficking." *See* Encl. 8. It is clear that the Defense was aware of the importance of the evidence seized from the Accused's barracks room and the Accused's cell phone. The Defense had read the documents containing the specific language "verbal CASS" and commented on them. Now, four (4) months later, the Defense seeks relief from this Court to address issues related to this evidence past both motions filing deadlines.

The burden is on the Defense to prove why they were unable to file a motion to suppress evidence prior to the first or second motions filing deadlines. They have not provided any evidence, argument, or rationale to support this request. No "good cause" has been shown.

b. **The Defense has not fulfilled this Court's request to state with "specificity" why this motion could not be filed prior to 12 July 2022.**

This Court has requested the Defense explain, with specificity, why this particular motion, a motion to suppress evidence, could not be filed in advance of the second motions filing

deadline. The Hawaii Judicial Circuit Rules require that a "Good Cause" motion for permission to file a late motion include an explanation of "why the court should now entertain the motion." HJC 10.8a. The Defense has failed to make that showing.

The Defense was on notice of the evidence they now seek to suppress. On 14 July 2022, the Defense asked the Trial Counsel to explain to them what type of CASS was utilized to search the Accused's barracks room and vehicle. Trial Counsel did just that, by referencing specific bate stamp numbers for evidence discovered to the Defense months prior. Trial Counsel's cordial assistance to Defense Counsel is not "good cause" to file a motion to suppress evidence.

The situation we find ourselves in is similar to that of the court in *Jameson*. 65 M.J. 160 (C.A.A.F. 2007). The military judge denied the Defense an opportunity to file a motion to exclude evidence after the court ordered milestone for motions filing. *Id.* at 163. The court's rationale was that the evidence at issue was "not a surprise" and "the prosecution did nothing to contribute to the defense decision not to file a timely motion to suppress." *Id.* On review, the Court of Appeals for the Armed Forces held that the military judge did not abuse his discretion in determining that there was no good cause to permit the defense's untimely evidentiary challenge. *Id.*

In the present case, the Defense was provided the evidence at issue prior to the Accused's preliminary hearing and provided that evidence a second time before to the Accused's arraignment. There was no surprise. And the Government counsel "did nothing to contribute to the Defense's decision not to file a timely motion to suppress." *Id.* Trial Counsel answered the Defense's questions related to the CASS and directed them to the previously discovered evidence. The Defense has not made a showing of "good cause."

c. **The Defense has made no legitimate argument for a continuance.**

Finally, this Court should not grant a continuance. The military judge should only grant a continuance "upon a showing of reasonable cause." R.C.M. 906(b)(1). Discussion. Consider the factors Appellate Courts use in assessing whether a military judge abused his discretion by denying a continuance, especially "surprise," "nature of the evidence," and "prior notice." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

The Defense is not facing any surprise in the present case, especially as it relates to the evidence at issue. The evidence at issue is essentially the entirety of the physical evidence collected from the initial apprehension of the Accused in January 2022, which should have been a focus of

evaluating this case. It is clear that it was a focus of the Defense Counsel's evaluation of this case. The Defense commented on the importance of this evidence in written Article 32 comments. And the Defense had known of this evidence well in advance of motions filing deadlines. Ultimately, the Defense has not met its burden in proving that there is good cause to file a motion to suppress or for this Court to grant a continuance.

5. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion.

6. **Burden of Proof.**

The Defense, as the moving party bears the burden of proof and persuasion. R.C.M. 905(c)(2). The burden of proof is a preponderance of the evidence. *Id.*

7. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1 – Charge Sheets
b. Enclosure 2 – Article 32, PHO Report Addendum
c. Enclosure 3 – Verbal CASS Barracks Room
d. Enclosure 4 – Verbal CASS Vehicle
e. Enclosure 5 – CASS Cell Phone
f. Enclosure 6 – Discovery Notice
g. Enclosure 7 – Trial Management Order
h. Enclosure 8 – Defense Article 32 Comments

8. **Argument.**

The Government does not request oral argument.

//S//
A. B. HILL
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 via email on 23 July 2022.

//S///
A. B. HILL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION** **FOR APPROPRIATE RELIEF** **(Release from Pre-Trial Confinement)** **23 July 22**

MOTION

Pursuant to Rules for Courts-Martial 305 and 906(8), as well as Amendment V to the U.S. Constitution, the Defense moves this Court to order the immediate release of Cpl Suarez from pretrial confinement. The 7-day reviewing officer's decision to maintain Cpl Suarez in pretrial confinement was an abuse of discretion, and continued pretrial confinement is not justified under R.C.M. 305. Additionally, the Government has failed to comply with the provisions of R.C.M. 305 in the case of Cpl Suarez's pretrial confinement, and there are insufficient grounds for continued pretrial confinement under the rule.

BURDEN

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

FACTS

1. Cpl Suarez was apprehended by Special Agent [redacted] on 11 JAN 22. His person was searched at the time of his apprehension and evidence was collected by NCIS. (Encl. A.)

2. A Command Authorized Search and Seizure (CASS) apparently authorized the search of Cpl Suarez's person, vehicle, workspace, and barracks room. (Encl. A.)

3. On 11 JAN 22, LtCol [redacted] Commanding Officer, 3D Battalion, 3D Marines, ordered Cpl Joseph Suarez into pretrial confinement at Naval Consolidated Brig Miramar Detachment Pearl Harbor. (Encl. B.)

4. Blocks 9—11 of Cpl Suarez's DD 2707 ordering him to into pretrial confinement are incomplete. Notably, there is no evidence that he received a medical examination confirming he was fit for confinement, nor is there documentation of who received Cpl Suarez at the Brig. (Encl. B.)

5. On 11 JAN 22, the vehicle driven by Cpl Suarez was searched apparently pursuant to a CASS and evidence was collected by NCIS. (Encl. C.)

6. On 11 JAN 22, the barracks room shared by Cpl Suarez and LCpl [redacted] was searched apparent pursuant to a CASS and evidence was collected by NCIS. (Encl. D.)

7. Maj [redacted] conducted a 7-day review of Cpl Suarez's pretrial confinement on 17JAN22. (Encl. E.)

8. During the IRO Hearing, NCIS Special Agent [redacted] testified that if Cpl Suarez was released he could interfere with an ongoing investigation at Schofield Barracks. (Encl. E.)

9. During the IRO Hearing, the command presented evidence that less severe forms of restrain were inadequate due to the large number of personnel involved with the drug ring Cpl Suarez is accused of running, limits on the ability to restrict Cpl Suarez's communication, and Cpl Suarez's ability to interfere with witnesses if her were to be released from confinement. (Encl. E.)

10. The Government presented no evidence that Cpl Suarez would not appear at trial. (Encl. E.)

11. Maj [redacted] ordered that Cpl Suarez's pretrial confinement be continued. (Encl. E.)

12. Maj [redacted] found that "it is reasonably foreseeable that if released, the detainee will appear at trial . . . ." (Encl. E.)

13. In the "summary of evidence" section of his Initial Review Officer's Findings and Order, Maj [redacted] wrote, "the threat to ongoing investigations and good order and discipline translates to the Cpl being continued in confinement." (Encl. E.)

14. On 11 MAR 22, the Defense sought a reconsideration of the IRO's determination. (Encl. F.)

15. The Defense noted that NCIS had two months to secure any evidence it was concerned that Cpl Suarez might tamper with and that "many, if not all, of the approximately 35 service members accused of using drugs provided by Cpl Suarez" should have been administratively separated and moved off island. (Encl. F.)

16. The Defense further requested that Cpl Suarez's IRO reconsideration be before a different hearing officer "because Maj [redacted] misapplied R.C.M. 305(h)(2)(B). As demonstrated by the Initial Review Officer's Findings and Orders (Art. 32 Hearing Gov. Ex. 6), Maj [redacted] inappropriately considered the impact on good order and discipline when he decided to continue Cpl Suarez's confinement. Impact on good order and discipline is not a valid grounds for continuing confinement and should not have been considered by Maj [redacted]" (Encl. F.)

17. On 20 MAR 22, the Government informed the Defense that Col [redacted] "does not support" an IRO reconsideration for Cpl Suarez. No explanation for Col [redacted] position was provided. (Encl. G.)

18. While in pretrial confinement, Cpl Suarez has "earned 0 negative observation reports and 0 Disciplinary Reports. Notes by immediate supervisors in the housing unit reflect 55 positive entries for volunteering to do various tasks around the brig with 3 negative entries. . . . Cooperation toward all staff members at the brig is consistently in a military and professional manner." (Encl. H.)

LAW

A. Pretrial confinement is only appropriate if it can be established by probable cause that (1) the accused committed an offense triable by court-martial; (2) confinement is necessary because it is foreseeable that the accused will fail to appear at trial or will engage in serious criminal misconduct; and (3) less severe forms of restraint are inadequate.

The presumption of innocence "is a fundamental component of due process" and "[p]retrial release has long been recognized as a vital concomitant of that presumption." *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976). "If a person may be arbitrarily confined before his trial, then in truth the punishment precedes conviction and the presumption of innocence avails the defendant little." *Id*. As a matter of due process, a "neutral and detached magistrate" must decide if a person could be detained and if he should be detained. *Id*.

"Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses." R.C.M. 304(a)(4). It is "not punishment and shall not be used as such." R.C.M. 304(f). Moreover, "[a] person should not be confined as a mere matter of convenience or expedience." R.C.M. 305(i)(B), Discussion, Manual for Courts-Martial (2019 ed.). In fact, "[p]retrial confinement inevitably makes defense of a case more difficult," so "unless there is a need for it, pretrial confinement should be avoided." *Berta v. United States*, 9 M.J. 390, 393 (C.M.A. 1980) (mem.).

1. Initial confinement.

Any commissioned officer may order an enlisted person into pretrial confinement, unless that authority has been withheld by a superior competent authority. R.C.M. 305(c); *see also* R.C.M. 304(b). Pending trial, an officer may be confined only by his or her commanding officer. *Id*. Regardless of rank, "[n]o person may be ordered into pretrial confinement except for probable cause." R.C.M. 305(d). Probable cause exists if there is a "reasonable belief that (1) [a]n offense triable by court-martial has been committed; and (2) [t]he person confined committed it; and (3) [c]onfinement is required by the circumstances." R.C.M. 305(d).

A confinee "shall be promptly informed" of the nature of the offenses for which he is held, the right to remain silent and that any statement may be used against him, and the right to retain civilian counsel as well as to request the assignment of military counsel. R.C.M. 305(e)(1)-(3). The person confined must also be informed of the "procedures by which pretrial confinement will

be reviewed. R.C.M. 305(e)(4). If requested, military counsel shall be provided before the initial review of confinement, or within 72 hours of the request, whichever occurs first. R.C.M. 305(f).

2. Forty-Eight-Hour Review.

Within forty-eight hours of initial confinement, "a neutral and detached officer" must review the adequacy of probable cause to continue pre-trial confinement. R.C.M. 305(i)(1). Only a military judge, a military magistrate untainted by and unconnected with the referral process, or "any other person authorized by the Code to confine who is not directly or particularly involved in the command's law enforcement function" may conduct this probable cause review. *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982). Neither the staff judge advocate or the court-martial convening authority are qualified to act as a neutral and detached magistrate; however, the accused's commander is not *per se* disqualified so long as he or she can otherwise meet the requirements of the rule. *United States v. Rexroat*, 38 M.J. 292, 297-298 (C.A.A.F. 1993).

3. Seventy-Two-Hour Determination.

No more than seventy-two hours after being notified that someone has been ordered into pretrial confinement, the person's commander "shall decide whether pretrial confinement will continue." R.C.M. 305(h)(1)(B).[1] T he commander "shall direct the confinee's release" unless he or she "believes upon probable cause" that (1) the confinee committed an offense triable by court-martial; (2) confinement is necessary because it is "foreseeable" that the confinee will fail to appear at trial or will engage in "serious criminal misconduct"; and, (3) "less severe forms of restraint are inadequate." R.C.M. 305(h)(2)(B); *see United States v. Heard*, 3 M.J. 14, 20-21 (C.M.A. 1977) ("Whether pretrial confinement is required by the circumstances involves two separate determinations: (1) whether there is an adequate basis for ordering the confinement; and (2) whether there is a need for the confinement as opposed to some lesser form of restraint.").

Serious criminal misconduct "includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community, or to the effectiveness, morale, discipline, readiness, or safety of the command." R.C.M. 305(i)(B).

If continued confinement is approved, "the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement [under R.C.M. 305] have been met." R.C.M. 305(h)(C). This memorandum shall then be forwarded to the seven-day reviewing officer. *Id*.

4. Seven-Day Review Hearing.

Within seven days of confinement being imposed[2], "a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the

[1]This decision can satisfy the forty-eight hour determination requirement so long as the commander is "neutral and detached" as described above, and the decision is made within forty-eight hours of confinement. R.C.M. 305(h)(2)(A).
[2] For "good cause," the seven-day reviewing officer may extend the time limit for completion of the review up to ten days after imposition of restraint. R.C.M. 305(i)(2)(B).

probable cause determination and necessity for continued pretrial confinement." R.C.M. 305(i)(2).[3] The seven-day reviewing officer's "conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum." R.C.M. 305(i)(2)(D). The requirements for confinement under R.C.M. 305(h)(2)(B) "must be proved by a preponderance of the evidence." R.C.M. 305(i)(2)(A)(ii).

In the Marine Corps, all "general court-martial convening authorities have authority to designate one or more officers in the grade of O-4 or higher to act as initial review officers." JAGINST 5800.7F_CH-3 § 0127(d) (March 30, 2020). The officers designated "should be selected for their maturity and experience, and have command experience if practicable." *Id*. On installations with a military confinement facility, the GCMCA exercising jurisdiction over the confinement facility will assign the seven-day reviewing officer to specific hearings. *Id*.

The confinee and his counsel "shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable." R.C.M. 305(i)(2)(A)(i). The proceeding "shall include a review of the memorandum submitted by the confinee's commander," and "additional written matters may be considered, including any submitted by the confinee." *Id*. Except for privileges and Rules 302 and 305, the Military Rules of evidence do not apply. R.C.M. 305(i)(2)(A)(iii).

If the Government fails to carry its burdens, the seven-day reviewing officer must order the confinee's release. Otherwise, the seven-day reviewing officer may ratify continued confinement. However, upon request, and after notice to both parties, the seven-day reviewing officer shall "reconsider the decision to confine the confinee based upon any significant information not previously considered." R.C.M. 305(i)(2)(E).

B. <u>After referral, the military judge has the authority to review the propriety of pretrial confinement upon a motion for appropriate relief.</u>

After referral, and upon a motion for appropriate relief, "the military judge shall order release from pretrial confinement only if:

> (A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph (h)(2)(b) of [R.C.M. 305];
>
> (B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under subparagraph (h)(2)(B) of [R.C.M. 305]; or,
>
> (C) The provisions of paragraph (i)(1) or (2) of [R.C.M. 305] have not been compiled with and information presented to the military judge does not establish sufficient grounds for continued confinement under subparagraph (h)(2)(B) of [the] rule."

R.C.M. 305(j)(1)(A)-(C). Stated another way, if the military judge finds that the seven-day reviewing officer abused his discretion, or that the procedural requirements of R.C.M. 305 were

[3] The initial date of confinement counts as one day, as does the date of the review. R.C.M. 305(i)(2).

not followed, or if the Court is presented with evidence not previously presented to the seven-day reviewing officer, the military judge shall make a new determination about the propriety of continued confinement.

The judge shall release the accused unless the preponderance of the evidence supports that (1) the accused committed an offense triable by court-martial, (2) confinement is necessary because it is *foreseeable* that the accused will not appear at trial or will engage in serious criminal misconduct; *and* less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B); R.CM. 905(c).

ARGUMENT

A. The seven-day reviewing officer abused his discretion by applying the wrong legal standard for continued confinement.

Maj [redacted] misapplied R.C.M. 305(h)(2)(B). As demonstrated by Enclosure E, and statements he made at the IRO hearing, Maj [redacted] inappropriately considered the impact on good order and discipline when he decided to continue Cpl Suarez's confinement. Impact on good order and discipline is not a valid grounds for continuing confinement and should not have been considered by Maj [redacted]

B. Cpl Suarez should be immediately released, because a *de novo* review does not support his continued pretrial confinement.

1. The preponderance of the evidence does not support that it is foreseeable that Cpl Suarez will commit serious misconduct or that he is a flight risk.

During the 7-Day Review hearing, the Government argued that, if released, Cpl Suarez could engage in other misconduct. Maj [redacted] agreed with the Government and continued Cpl Suarez's confinement. This was the incorrect standard. R.C.M. 305 requires evidence that a detainee will engage in further serious criminal misconduct if released from confinement. The Government has provided no such evidence in this case.

Furthermore, the Government claimed it was concerned that, if released, Cpl Suarez could tamper with evidence and interfere with an ongoing investigation. Law enforcement has now had more than six months to secure potential crime scenes and collect evidence. Cpl Suarez's barracks room, car, and person were searched the day he was arrested and all potential evidence was seized at that time. In fact, his barracks room has been fully cleaned out, the contents inventoried and secured, and it has been reassigned to new Marines. At this point, there is no risk that Cpl Suarez could interfere with the ongoing investigation.

Additionally, Cpl Suarez has been in confinement for more than six months. His communication, other than with counsel and chaplains, has presumably been monitored by the Naval Consolidated Brig Miramar Detachment Pearl Harbor. During that time, no evidence of threats or interference with witnesses has been provided to Defense Counsel.

Finally, Cpl Suarez has been a model confinee. Aside from the mandatory quarantine period, Cpl Suarez has been in the Brig's general population and interacted with other co-accused in his case. At no time has he been violent, made threats, or in any way interfered with these individuals' testimony.

2. The preponderance of the evidence does not support that lesser forms of restriction are inadequate to prevent serious misconduct or ensure Cpl Suarez's appearance at trial.

The arguments advanced by the Government during the 7-Day Review hearing as to why lesser forms of restriction were inadequate to prevent serious misconduct are no longer applicable. During the hearing, the Government stated the 3D Marines' Restricted Barracks contained approximately 35 Marines who were implicated in the drug ring that Cpl Suarez allegedly ran. The Government claimed that this number of Marines in restriction already presented a significant burden to the command and that they would be unable to effectively segregate Cpl Suarez from the other restrictees. Six months have since passed, and many, if not all, of these Marines should have been administratively separated by now. Even if some remain in the 3D Marines' Restricted Barracks, investigators have had ample time to interview them.

Furthermore, at the 7-Day Review hearing, the Government failed to articulate that it had even considered any alternative forms of restriction other than the 3D Marines Restricted Barracks. No evidence has been presented as to the possibility of placing Cpl Suarez in a different unit's Restricted Barracks, restricting him to base or the island of Hawaii, or any other type of restriction. No evidence was presented that Cpl Suarez would not appear at trial and the 7-day reviewing officer found that it was reasonably foreseeable that Cpl Suarez would appear at trial.

RELIEF REQUESTED

The Defense requests that the Court order Cpl Suarez's immediate release from pre-trial confinement.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

Enclosure A: Results of Apprehension of S/Suarez
Enclosure B: Cpl Suarez Initial Confinement Order of 11JAN22
Enclosure C: Result of CASS for S/Suarez's Vehicle/11JAN22
Enclosure D: Result of CASS for S/Suarez's Barracks Room/11JAN22
Enclosure E: 7-Day Review Memorandum ICO Cpl Suarez of 17JAN22
Enclosure F: IRO Reconsideration Request ICO Cpl Suarez
Enclosure G: FW: IRO Reconsideration Request ICO Cpl Suarez
Enclosure H: Prisoner Progress Summary; Case of Suarez, Joseph D. USMC

The Defense intends to call Maj [redacted] as witness in support of this motion, and hereby requests the Government produce Maj [redacted] in accordance with R.C.M. 703 at the Article 39(a) session held to receive evidence and hear argument on the motion. Maj [redacted] is stationed Marine Corps Base Hawaii on the island of Oahu, Hawaii. Maj [redacted] served as the 7-day reviewing officer in Cpl Suarez's case, and his testimony is relevant and necessary to establish (1) the standard he used to authorize continued confinement; and (2) the evidence he considered and did not consider during the 7-day review hearing.

The Defense intends to call Col [redacted] as witness in support of this motion, and hereby requests the Government produce Col [redacted] in accordance with R.C.M. 703 at the Article 39(a) session held to receive evidence and hear argument on the motion. Col [redacted] is stationed Marine Corps Base Hawaii on the island of Oahu, Hawaii. Col [redacted] denied the Defense request for a reconsideration of the 7-day reviewing officer's order to continue Cpl Suarez's confinement, and his testimony is relevant and necessary to establish (1) the standard he used to deny this request; and (2) the evidence he considered and did not consider when denying this request.

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

[redacted]
N. D. MONCK
LT, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Release from Pre-Trial Confinement)** **Date: 29 July 2022**

1. **Nature of Motion.**

Pursuant to Rule for Courts-Martial 305(j)(1) the Government requests this Court to deny the request for the release of the Accused from pretrial confinement.

2. **Summary of Facts.**

a. The Accused is charged with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. *Encl. 3.*

b. The Accused was ordered into pretrial confinement on 11 January 2022. *Encl. 1.*

c. On 17 January 2022, the Accused had a hearing for the 7-day review of pretrial confinement. *Encl. 2.*

d. During the hearing, Naval Criminal Investigative Service (NCIS) Special Agent [redacted] testified that the Accused's release from pretrial confinement would potentially interfere with an ongoing investigation being conducted by NCIS and the Drug Enforcement Administration (DEA). *Encl. 2.*

e. The Initial Reviewing Officer (IRO) heard evidence of positive urinalysis results, written and verbal statements from Special Agent [redacted] the Accused's attempt at prostitution, and evidence from the Accused's phone. *Encl. 2.*

f. After considering all of the evidence, the IRO ordered the Accused to remain in pretrial confinement because lesser forms of restraint were inadequate and there was a threat to ongoing investigations and good order and discipline. *Encl. 2.*

g. On 11 March 2022, Defense Counsel requested a reconsideration of the approval of continued pretrial confinement in the subject case. *Encl. 1.*

h. On 20 March 2022, the Convening Authority denied the Defense request for a reconsideration of pretrial confinement. *Encl. 3.*

3. **Discussion.**

a. **The 7-day reviewing officer did not abuse his discretion in deciding to keep the accused in pretrial confinement.**

In evaluating the legality of pretrial confinement, a military judge must limit his review to the information available to the magistrate at the time the decision to continue confinement was made. *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996). The military judge reviews the magistrate's decision under an abuse of discretion standard. *Id*.

In *Gaither*, the court concluded that the magistrate did not abuse his discretion when he found that the accused was a risk to commit serious criminal misconduct, refused to conform to disciplinary standards, and was a risk to flee. *Id.* The likelihood that an accused will continue to engage in serious criminal misconduct which undermines the readiness, moral, or safety of the command may equally give cause to continue pretrial confinement. *See* RULE FOR COURTS-MARTIAL 305(h)(2)(B)(iii)(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.).

In reviewing the magistrate's decision, the military judge is restricted to considering the evidence available to the magistrate at the time of his decision. *Gaither*, 45 M.J. at 351 (C.A.A.F. 1996); *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003); *United States v. Gatlin*, No. NMCCA 201400291, 2015 CCA LEXIS 23 (N.M.C.C.A. 2015); *United States v. Plummer*, No. NMCCA 200601319, 2007 CCA LEXIS 229 (N-M Ct. Crim. App. June 29, 2007).

Here, the Defense references the documentary record presented before the Initial Reviewing Officer (IRO), which indicates that the IRO relied in part on testimony from NCIS Special Agent [redacted] Agent [redacted] indicated at the time that the Accused's release from pretrial confinement would interfere with an ongoing investigation being conducted by NCIS with the DEA on the island of Oahu, Hawaii. The IRO heard evidence of the far reach of the Accused's drug conspiracy, to include dealing drugs to both service members and civilians on Oahu. Additionally, the command presented evidence that less severe forms of punishment were

inadequate due to the large number of personnel involved in the Accused's conspiracy to distribute drugs. This evidence prompted the IRO to order that the Accused would remain in pretrial confinement.

The Defense now asks this Court to release the Accused from pretrial confinement on the basis that the IRO abused his discretion in considering the threat to good order and discipline posed by the Accused being released. However, this assertion is legally incorrect. R.C.M. 305 (h)(2)(B)(i)-(iv) states that confinement is necessary if the accused will engage in serious criminal misconduct and less severe forms of restraint are inadequate. Further, R.C.M. 305 states that serious criminal misconduct includes "intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, moral, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305 (h)(2)(B)(iv).

The Defense's argument relies on the fact that the words "good order" are not included in the definition of serious criminal misconduct next to the word "discipline." The Defense does not support this claim with any legal justification other than their own interpretation of the rule. Further, even if this basis is accepted, it is clear from the IRO's findings that the IRO relied on a lengthy combination of evidence and factors in his decision, not just the threat to good order and discipline as the Defense attempts to portray.

Finally, the Defense's contention that a *de novo* review is required in this case is not supported by the evidence. CAAF has established that for a *de novo* standard to apply, the Accused must show that conditions have changed or that new information has been developed which shows that confinement is no longer necessary. *Gaither*, 45 M.J. at 351 (C.A.A.F. 1996).

Here, the Defense's claim that there is no longer a risk that the Accused will interfere with the ongoing investigation is unsupported by any evidence. In fact, it is clear from all of the evidence available that it is reasonably foreseeable that the Accused will engage in serious criminal misconduct upon release and that less severe forms of restraint are inadequate. First, the Accused has many co-conspirators, including service members and civilians, still currently present on the island of Oahu. It is reasonably foreseeable that upon release from confinement, the Accused would attempt to contact one of his many co-conspirators in an attempt to either flee the island, tamper with their testimony, or even to further his criminal conspiracy. This is supported by the fact that while the Accused has been in the brig, he was further charged with

solicitation when he requested that another inmate remain in Hawaii after being released from confinement to assist the Accused with distributing cocaine. *See* Encl. 4. Additionally, the day after the Accused was confined he again tested positive on urinalysis for cocaine. *See* Encl. 5.

Finally, the Defense has failed to demonstrate that lesser forms of restriction are adequate. The Accused was originally confined due in part to the command's inability to segregate the Accused from his co-conspirators or the more than 35 Marines implicated in his drug ring. The Defense contends that alternative forms of restriction exist, but they fail to provide any evidence to support their claim. Even if the Accused were placed into a restricted barracks as the Defense proposes, there would be no way to prevent him from communicating with other co-conspirators, former civilian suppliers and customers, or any party implicated in his drug ring. Therefore, lesser forms of restriction are not possible in this case because it is reasonably foreseeable that the Accused would still pose a risk to safety, discipline, or other obstruction of justice. Because the Defense has failed to offer any significant evidence that the conditions have changed, the court should not apply a *de novo* review standard in this case, and instead should rely on an abuse of discretion standard. In doing so, the Court should deny the Defense's motion because the IRO did not abuse his discretion when ordering the Accused to continued confinement.

4. **Evidence.**

The Government submits the following:

1. Defense MFAR Release from Pretrial Confinement
2. IRO Findings dtd 17Jan22
3. Charge Sheets
4. Interview with Pvt [redacted] dtd 08Apr22
5. Interview with Dr. [redacted] dtd 28Apr22

5. **Burden of Proof.**

Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party." RULE FOR COURTS-MARTIAL 905(c)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.). As the moving party, the defense bears the burden of persuasion of demonstrating that the magistrate abused his discretion in continuing the pretrial confinement of the Accused.

6. **Relief Requested.**

The Government respectfully requests that the court DENY the Defense's motion to release the Accused from pretrial confinement.

7. **Argument.**

The Government does request oral argument.

//S//
C. A. FRANCO
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 via email on 29 July 2022.

//S///
C. A. FRANCO
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**MOTION TO COMPEL PRODUCTION EXPERT CONSULTANT** **23 JUL 22**

MOTION

Pursuant to R.C.M. 703(d), the Due Process Clause, Right to Counsel, and Right to Compulsory Process under the Constitution, and Article 46, Uniform Code Military Justice (UCMJ), 10 U.S.C. § 846 (2019), the Defense moves this Court to compel the Convening Authority to provide the funding and resources necessary to ensure adequate expert assistance for Cpl Suarez, USMC. The Defense specifically requests this Court to order the Convening Authority to appoint an investigator, a toxicologist, and a forensic psychologist to provide expert consultation to the Defense.

SUMMARY

Corporal Joseph Suarez, USMC has been charged with multiple counts of use, possession, distribution, and introduction of drugs around Hawaii. The defense must be able to research, investigate, and interpret drug based evidence. Defense counsel has conducted self-help through research in this area of expertise. However, without the assistance of a private investigator and toxicologist with expertise in drug cases, the defense will be unable to fully evaluate the circumstances of Corporal Suarez's case or present an effective defense that explains these circumstances, meaning the defense cannot effectively assist Corporal Suarez without the assistance of an expert in investigating drug based offenses. Additionally, a forensic psychologist is necessary to review evidence of drug addition, the psychological basis for drug distribution, evaluate Cpl Suarez's likelihood for recidivism, and consider other factors in mitigation.

BURDEN

As the moving party, the Defense bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this motion. R.C.M. 905(c).

FACTS

1. Corporal Joseph D. Suarez, the accused, is charged with five specifications of Article 112a, two specifications of Article 80, and one specification of Article 81. (Charge Sheet).

2. Cpl Suarez's alleged criminal activity spanned more than half a year across multiple locations on the island of Oahu, including locations onboard Marine Corps Base Hawaii and Schofield Barracks. (Charge Sheet)

3. NCIS collected a substantial amount of physical evidence from Cpl Suarez's person, vehicle, and Barracks Room, including drugs and drug paraphernalia, ledger style documents, a Sig Sauer M17 airsoft gun, CO2 cartridge, airsoft magazine, two cell phones, books, papers, and wrappers. (Encl. A.)

4. Cpl Suarez provided an urinalysis sample on 22NOV21 which tested positive for cocaine and MDMA. (Encl. B.)

5. Tripler Army Medical Center's Forensic Toxicology Drug Testing Laboratory produced an 88 page Laboratory Documentation Packet with the chain of custody, celebration, and technical date related to Cpl Suarez's drug pop. (Encl. C.)

6. The Defense requested the Convening Authority provide funding and resources for an investigator, forensic toxicologist, and forensic psychologist. (Encl. D; Encl. E; Encl. F.)

7. The Government denied the Defense request for an investigator, forensic toxicologist, and forensic psychologist. (Encl. G; Encl. H; Encl. I.)

LAW

Per Article 46, UCMJ, and *United States v. Bresnahan*, an accused is entitled to expert assistance if the denial of such assistance would result in "a fundamentally unfair trial." 62 M.J. 137, 143 (C.A.A.F. 2005). In order to be entitled to expert assistance, an accused simply must show the assistance of an expert consultant is necessary. R.C.M. 703. "Necessary" means reasonably necessary. *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976). There are three aspects to showing necessity. First, it must be clear why the expert assistance is needed. Second, the Defense must explain what the expert assistance would accomplish for the accused. Third, the Defense must demonstrate why Defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

In a recent Army case in Hawaii, the defense request for an expert forensic toxicologist was approved. *See United States v. Smith*, 2015 CCA Lexis 301 (A.C.C.A. 2015). There, an 18-year Army medical provider was charged with wrongful cocaine use based solely on the results of a random urinalysis processed by Tripler Army Medical Center's Drug Testing Laboratory. The Army appellate court ultimately reversed the finding of guilt based, in part, on the defense's failure to effectively utilize the defense expert to lay foundation to admit certain exculpatory laboratory evidence. Implicit in this holding is that a defense expert was necessary to prepare the accused's defense and that the expert's testimony was crucial at trial. Though not binding in the subject case, the Army Court of Criminal Appeals' analysis on the importance of a defense forensic toxicologist expert would likely be relied upon by the Naval-Marine Corps Court of Criminal Appeals if this request is denied.

ARGUMENT

An investigator, forensic toxicologist, and forensic psychologist are relevant and necessary to preparation of Cpl Suarez's defense for the following reasons:

a. Defense Investigator

An investigator's expert assistance is relevant and necessary to preparation of Cpl Suarez's defense for the following reasons:

i. An investigator is necessary. An expert in the area of drug investigation is absolutely essential for the defense understanding of the evidence against Cpl Suarez. An investigator is also crucial to investigate and corroborate any intent by the parties involved regarding the alleged offenses. Without an expert in investigation, the defense will be not be able to effectively answer these questions, answers that would influence the factfinder's determinations at trial. Fundamental due process and notions of fairness necessitate this expertise and assistance for the defense so that the defense can establish and prepare its case and adequately respond to the Government's case as presented through their witnesses' perceptions.

ii. An investigator will provide valuable assistance. In addition to the above, an investigator will help the defense to understand and interpret the complexities of drug enforcement investigations including those in this case. An investigator will conduct a review of the discovery in order to properly apply his or her expertise specifically to this case. Finally, he or she will be able to provide detailed opinions and analysis based on this review of the evidence, information that will assist the defense in developing its case—including the cross-examination of key witnesses at the trial—and that will be a precursor to any potential expert testimony at trial.

iii. The Defense is unable to gather and present this evidence. Unaided, the defense will be unable to effectively gather, interpret, and present evidence. No member of the defense has the requisite investigatory licenses, training about drug enforcement, and experience in investigating drug based offense. We have commenced our own initial research which has shown that we must have an expert in order to interpret and fully understand, present, or challenge the Government's evidence in this case. Further, defense counsel cannot act as a witness or present evidence of this science at trial. Therefore, an expert acting as a consultant and a potential trial witness is both relevant and necessary to the defense's case.

b. Forensic Toxicologist

A forensic toxicologist's expert assistance is relevant and necessary to preparation of Cpl Suarez's defense for the following reasons:

i. A Forensic Toxicologist is necessary. The Defense needs the requested expert assistance to evaluate Cpl Suarez's urinalysis test results and drug lab litigation packet, and

present evidence to rebut the Government's assertion that his positive drug result was due to intentional cocaine use. Defense counsel cannot effectively and sufficiently represent Cpl Suarez and ensure he receives a fair trial without the assistance of the requested expert. Without a forensic toxicologist, the Defense is unable to interpret the evidence the Government has provided to convict Cpl Suarez of wrongful cocaine use, nor can the Defense independently verify the Government's claim that the laboratory results show that Cpl Suarez's urine was positive for cocaine or cocaine metabolites. Denial of this request will result in a proceeding that is one-sided, devoid of appropriate and crucial context, and fundamentally unfair.

ii. An Forensic Toxicologist will provide valuable assistance. A forensic toxicologist would review the evidence in this case, such as the initial drug lab result, the drug lab litigation packet, and the results of retesting of Cpl Suarez's urine (if any). Based on their experiencing and training, they will be able to identify any procedural errors by the laboratory and form opinions as to the improprieties in lab testing protocols and potential contamination of urine samples at the laboratory. They will also help the Defense understand and interpret the drug lab litigation packet. They will assist the Defense with prepping Cpl Suarez's case and he will be able to provide detailed opinions and analysis based on this review of the evidence, information that will assist the Defense in developing its case—including the cross-examination of key witnesses at the trial—and that will be a precursor to any potential expert testimony at trial. This insight is crucial to Defense strategy and they are expected to make recommendations about new lines of investigative inquiry in Cpl Suarez's case.

iii. The Defense is unable to gather and present this evidence. Forensic toxicology is a complex, technical field that requires continuous review of published studies and reports in order to maintain currency. Defense counsel has no training and only limited experience in interpreting drug lab results. It is both impractical and unreasonable for Defense counsel to obtain the proper competency by consulting primary and secondary materials alone. Defense counsel would be unable to apply any principles gleaned through their own efforts to the specifics of this case. Further, Defense counsel lacks the training or experience to form any conclusions about the potential interactions which could have produced his positive drug lab result. Nor can Defense counsel testify as to any opinions regarding the testing of Cpl Suarez's urinalysis sample or the laboratory results.

c. <u>Forensic Psychologist</u>

An forensic psychologist's expert assistance is relevant and necessary to preparation of Cpl Suarez's defense for the following reasons:

i. A Forensic Psychologist is necessary. A forensic psychologist will review the case file and documentary evidence to evaluate the impact that recent and past events had on Cpl Suarez. A forensic psychologist will then assist by helping the Defense identify, develop, and present evidence about Cpl Suarez's susceptibility to addictive drugs and drug trafficking behavior. They will conduct an examine of Cpl Suarez and evaluate his potential for rehabilitation, likelihood of recidivism, and any mitigating factors present in Cpl Suarez's background. A forensic psychologist will also consult with the Defense on the results of

their review and create a report, then assist the Defense with preparation for trial, relevant motions, and the sentencing case.

ii. A Forensic Psychologist will provide valuable assistance. Cpl Suarez is accused of multiple counts of use, possession, distribution, and introduction of addictive drugs. A forensic psychologist will be able to conduct a clinical assessment of Cpl Suarez and evaluate whether his background, upbringing, and/or personality makes him more susceptible to addiction or reckless behavior. A forensic psychologist will also be able to advise Defense Counsel on the psychological basis for drug distribution and the impact group/power dynamics have on those who engage in drug trafficking. A Forensic Psychologist will also be able to evaluate the societal and actual pressures Cpl Suarez was under when he allegedly trafficked drugs and whether, based on his personality and background, Cpl Suarez was unusually susceptible to these pressures.

iii. The Defense is unable to gather and present this evidence. The Defense does not have the expertise to properly educate itself of the fact finders about forensic psychology, which is a recognized specialty area. No member of the Defense has the academic background or practical experience to perform the necessary analysis of Cpl Suarez. No member of the Defense has any training in the field of psychology nor could any member of the Defense, in a reasonable period of time, attain the necessary level of professional certification to render such an opinion. A thorough understanding in the area of forensic psychology requires a level of knowledge that the Defense cannot gain in a few years, much less weeks, of study.

RELIEF REQUESTED

The Defense requests that the Court compel the Convening Authority to appoint and fund an investigator, a forensic toxicologist, and a forensic psychologist to assist the Defense. If one cannot be obtained within DoD channels, the Defense requests that the Court order the Convening Authority to approve $20,000 for pre-trial expert assistance (40 hours at $500 per hour) for the investigator, $10,500 for pre-trial expert assistance (30 hours at $350 per hour) for the forensic toxicologist, and $3,500 for pre-trial expert assistance (10 hours at $350 per hour) for the forensic psychologist. This estimate is subject to change based on discovery and is for FY22 funding. This estimate includes sufficient time for an investigator to visit the crime scenes, collect evidence, review all relevant discovery materials, and time to consult with Defense counsel; for a forensic toxicologist to review all relevant discovery materials and time to consult with Defense counsel regarding the results of all testing and the potential impact on Cpl Suarez's case; and for forensic psychologist to review the evidence, interview Cpl Suarez, and form conclusions about his psychology.

The Defense also requests that these experts be assigned as a consulting member of Cpl Suarez's defense team, such that all communication between Cpl Suarez, Defense counsel, and the expert are privileged and confidential pursuant to Military Rule of Evidence 502(a) and other applicable federal laws and regulations. The Defense further requests that the Government refrain from any substantive contact with the expert. It is understood that this limitation may be removed if the Defense ultimately desires to have the individual testify as an expert witness at trial.

EVIDENCE & ORAL ARGUMENT

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

A. Executive Summary for NCIS Investigation [redacted]
B. Summary Urinalysis Results ICO Cpl Suarez
C. TAMC Litigation Report ICO Cpl Suarez
D. Defense Expert Request ICO Cpl Suarez
E. Defense Investigator Expert Request ICO Cpl Suarez
F. Defense Forensic Toxicologist Expert Request ICO Cpl Suarez
G. Government Denial of Expert Witness (Criminal Forensic)
H. Government Denial of Expert Consultant (Forensic Toxicologist)
I. Government Denial of Expert Witness (Forensic Psychologist)

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

[redacted]
M. D. MONCK
LT, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANTS** **Date: 29 July 2022**

1. Nature of Motion.

This is the Government's response to the defense motion to compel the production of multiple expert consultants. This Court should deny the defense requests for expert consultants in the fields of forensic psychology and drug investigation. The Defense has not demonstrated the necessity of these experts. The Government agrees to produce a Department of Defense (DoD) employed expert toxicologist.

2. **Summary of Facts.**

a. The Accused is charged with violating Articles 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. *Encl. 1.*

b. On 13 May 2022, the Defense filed a request for expert consultation. *Encl. 3.*

c. On 23 May 2022, the Defense filed an additional untimely request for expert consultation. *Encl. 3.*

d. On 3 June 2022, the Convening Authority denied the Defense's request for expert consultants. *Encl. 4.*

3. **Statement of the Law.**

"The legal standards pertaining to a request for an expert witness… [are] a far cry from a request for an investigative assistant, despite their common source." *United States v. Axe*, 80 M.J. 578, 582 (N.M.C.C.A. 2020) (quoting *United States v. True*, 28 M.J. 1057, 1061

(N.M.C.C.A. 1989). The Government is not required to employ the expert consultant of an accused's choosing, nor one with precisely the equivalent professional qualifications as any defense-requested expert. *Id.* An accused is entitled to pre-trial expert assistance upon a showing of both necessity, and that denial of expert assistance would result in a fundamentally unfair trial. *Id.* The "mere possibility of assistance from a requested expert" is not sufficient to prevail on the request for expert assistance. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). Instead, "[t]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *Id*. (quoting *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008)).

To satisfy the first prong of this test, the defense must show, "(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Id*. (quoting *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)). "Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case," including consulting "a number of primary and secondary materials." *Id*. (quoting *United States v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994)). Once necessity is established, the Government is required to provide an accused with an expert who can provide "competent assistance" to counsel in exploring the issues requiring expertise. *United States v. Garries*, 21 M.J. 288, at 290-291 (C.M.A. 1986). Further, the NMCCA has held that an accused has the right to expert assistance when they have demonstrated necessity, but they are not automatically entitled to any expert of their choosing. *United States v. Robinson*, 24 M.J. 649 (N.M.C.A.A. 1987); *United States v. Velez*, No. NMCCA 200600399, 2007 CCA LEXIS 165, (N.M.C.A.A. 2007).

4. **Discussion.**

a. The Defense has failed to show why a Private Investigator is necessary or why the denial of this motion would cause an unfair trial.

The Defense has failed to show why an investigator is necessary. The Defense purports that an investigator is necessary to understand the evidence against the Accused and to investigate and corroborate any intent by the parties involved in this case. *See Encl. 2.* This assertion is not supported by any evidence from the Defense. The Government has provided the

Defense with an extensive witness list in this case. If the Defense wishes to investigate and corroborate the intent of the relevant parties, they can do so by simply interviewing those individuals. The Defense does not need an investigator to conduct interviews on their behalf in order to gain the knowledge they seek.

The Defense is not "unaided" in their pursuit of relevant and necessary evidence. *Encl. 2.* That is, the Defense is clearly aware of the Government resources at its disposal. As the Court in *United States v. True* states, "Unlike the civilian defendant, the military accused has the resources of the Government at his disposal." *True*, 28 M.J. at 1061. The Defense can make use of the Government's resources by making discovery requests, submitting deposition requests or requesting background checks. *Id*. The Government has complied with its ongoing disclosure obligations and has not deprived the Defense of any relevant or necessary evidence that they may use in preparation for trial. The Defense has not requested a single fact witness or any contact information for any individual tied to this case.

The Defense also has access to law enforcement databases through NCIS. The Defense has not stated what specific or useful databases they want access to, or any specific need that this request will address. The investigator requested by Defense is not filling a knowledge gap or breaking down a highly technical process; the investigator requested would be doing run-of-the-mill attorney work by speaking with witnesses. The Defense has adequate resources to question witnesses and if it does not, Defense can make use of the Government's resources. The Government is unaware of what the private investigator will accomplish. Accordingly, the Defense's request for an investigator should be denied.

b. The Defense has not demonstrated why an expert psychologist is necessary or why denial of this motion would result in an unfair trial.

The Defense has not shown why a forensic psychologist is necessary for preparation of their defense. The Defense's request is premised on speculation. Specifically, the Defense is requesting a forensic psychologist to "evaluate whether his background, upbringing, and/or personality makes him more susceptible to addiction or reckless behavior." The Defense wants an expert to "review the case file and documentary evidence" to determine whether there is

anything worth pursuing. The Defense speculates that a forensic psychologist may identify a possible defense or any mitigating factors in the Accused's background. *Encl. 2.* The Defense does not offer any evidence to support these claims. The request shows neither a reasonable probability that a forensic psychologist would help the Accused nor that the denial of his assistance would result in a fundamentally unfair trial. In fact, the Defense does not even address whether denial of this expert consultant would result in an unfair trial, as is required by the law. *Freeman*, 65 M.J. at 458 (C.A.A.F. 2008)).

This request is much like the request in *United States v. Lloyd* in that the Defense here essentially based this request on the desire to have an expert explore all possibilities. 69 M.J. 95, 99-100 (C.A.A.F. 2010). In *Lloyd*, The defense argued that a blood spatter expert was necessary to "explor[e] all possibilities as to how the blood came to be on the shirt that SrA Lloyd was wearing at the time of the altercation." *Id.* The court in that case determined that hiring an expert to explore all possibilities does not satisfy the requisite showing of necessity. *Id.* The Defense has not demonstrated with any specificity how an expert consultant is necessary or how denial would result in an unfair trial.

Furthermore, the Defense has not satisfied the third prong outlined in *Gonzalez*, which requires the Defense to show why they are unable to educate themselves. The Defense has not articulated a convincing reason why they are unable to educate themselves on the topic of forensic psychology. "[T]he requirement that the government provide for expert consultation stems from the Due Process demand that an accused be given the 'basic tools' necessary to present a defense." *United States v. Axe*, 80 M.J. 578 at 582 (N.M.C.C.A. 2020) (citing *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999); and *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). This requirement contemplates that defense counsel must educate themselves, including consulting primary and secondary research materials. *Short,* 50 M.J. at 373 (C.A.A.F. 1999). The Defense notes that they are unable to properly educate themselves about forensic psychology because it is a specialty area. Additionally, the Defense proffers that they cannot gain the requisite knowledge in time for trial. However, the Defense does not provide any evidence that they have taken any steps to research the topic. Because the Defense has failed to demonstrate necessity or efforts to educate themselves, the court should deny the request for an expert consultant in the field of forensic psychology.

c. The Government agrees to provide a DoD funded expert in the area of forensic toxicology.

The Government has consulted a forensic toxicologist in this case to analyze the urinalysis test results and the laboratory litigation packet. The Government will be employing an expert in its trial preparation. According to Article 46, UCMJ, trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). CAAF has held that the playing field is even more uneven when the government benefits from scientific evidence and expert testimony, while the defense is denied a necessary expert to prepare for and respond to the government's expert. *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006). Accordingly, the Government agrees to produce a DoD funded expert in the area of forensic toxicology to assist the defense in preparation for trial.

d. The Defense has only requested pre-trial expert consultants and has not previously submitted a request for expert witnesses with the convening authority.

It is important to note that the Defense's entire request is for pre-trial expert consultants and not a motion requesting expert witnesses. Pursuant to R.C.M. 703(d)(1), if the Court rules that any expert consultants are necessary, the Defense should submit a request to the convening authority requesting expert witnesses at trial. If the convening authority denies that request, the Defense should raise the issue in a proper motion with this Court.

e. Adequate substitute.

In the event the Court finds any expert is necessary, the Government requests an opportunity to produce an adequate substitute as opposed to the Defense's named expert. *United States v. Robinson*, 43 M.J. 501 (A.F.C.C.A. 1995); *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990).

5. **Relief Requested.**

The Government respectfully requests that this Court deny the Defense's motion seeking an expert consultant investigator and an expert consultant in the area of forensic psychology.

6. **Burden of Proof.**

The Defense bears the burden to demonstrate the necessity of expert assistance. *See United States v. Hendrix*, 76 M.J. 283 (C.A.A.F. 2017).

7. **Enclosures.**

1. Charge Sheets
2. Defense Motion to Compel Expert Consultants
3. Defense Expert Requests
4. Convening Authority's response to expert request

8. **Argument.**

The Government does request oral argument.

[redacted]

C. A. FRANCO
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 via email on 29 July 2022.

[redacted]

C. A. FRANCO
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL, USMC**	**DEFENSE MOTION TO SUPPRESS** **(Invalid CASS)** **23 July 22**

MOTION

Pursuant to Amendments IV, V, and VI of the U.S. Constitution, Article 31, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831 (2018), R.C.M. 905(b)(3), and Mil. R. Evid. 304, 305, and 311(a), the Defense moves to suppress all evidence collected from Corporal Suarez's person, vehicle, barracks room, and workspace and any evidence or reports derived from the unlawful search and seizure of that evidence.

BURDEN

Upon motion by the Defense to suppress a search, the prosecution has the burden to establish that the evidence was not obtained through unlawful search or seizure or that an exception applies. Mil. R. Evid. 311(d)(5).

SUMMARY

On 10JAN22, LtCol [redacted] provided a verbal CASS to search Cpl Suarez's "person, barracks, workspace, and vehicle." NCIS apprehended Cpl Suarez on 11JAN22 and executed a search on Cpl Suarez's person, the barracks room he shared with LCpl [redacted] and the vehicle he arrived in. Evidence was collected from Cpl Suarez's person, the barracks room, and the vehicle, and subject to laboratory testing.

FACTS

1. On 10JAN22, NCIS Special Agent [redacted] notified LtCol [redacted] LtCol [redacted], and Capt [redacted] that Cpl Suarez had popped positive for cocaine. He briefed LtCol [redacted], LtCol [redacted], and Capt [redacted] on the "probable cause of the investigation" LtCol [redacted] and Capt [redacted] concurred that there was probable cause to apprehend and search Cpl Suarez. (Encl. A.)

2. LtCol [redacted] then verbally provided authorization to search Cpl Suarez's "person, barracks, workspace, and vehicle." (Encl. A.)

3. On 11JAN22, Special Agent [redacted] apprehended Cpl Suarez and conducted a search of Cpl Suarez's barracks, vehicle, workspace, and person. (Encl. A & B.)

4. Cpl Suarez was arrested in front of his unit during a command climate survey debrief in "Classroom 7" onboard Marine Corps Base Hawaii. (Encl. C.)

5. Upon entering the classroom, SgtMaj [redacted] called out for Corporal Suarez to identify himself and LtCol [redacted] point out Cpl Suarez to the NCIS agents who were present. (Encl. C.)

6. As Cpl Suarez was arrested and taken out of the classroom, LtCol [redacted] said, "That's the guy selling cocaine in my barracks." LtCol [redacted] then said he would "crush anyone that was even suspected of selling drugs in [the] barracks." (Encl. D.)

7. LtCol [redacted] called Cpl Suarez a "drug kingpin." (Encl. C.)

8. Various items of evidence were seized from Cpl Suarez's person, including a set of vehicle keys and a black Apple I-Phone. (Encl. B.)

9. Cpl Suarez stated that the keys were for the vehicle he drove that day and that it had been lent to him by a friend. (Encl. B.)

10. Cpl Suarez later stated that he had recently purchased the vehicle. (Encl. E.)

11. Hawaii motor vehicle records do not show Cpl Suarez to be the owner of the vehicle. (Encl. F.)

12. On 11JAN22, Special Agent [redacted] and NCIS Participating Agent [redacted] searched the BMW Z4, Hawaii license plate [redacted], which Cpl Suarez had driven onto base. (Encl. E.)

13. At the time of the search, the vehicle was parked on the second level of Parking Garage [redacted] Street, Marine Corps Base Hawaii. (Encl. E.)

14. Various items of evidence were seized and surfaces were swabbed for residue. (Encl. E.)

15. On 11JAN22, NCIS Special Agent [redacted] USMC Criminal Investigative Division Agent [redacted] and USMC Criminal Investigative Division Agent [redacted] conducted a search of room [redacted] of Barracks [redacted] located at the west end of [redacted] on Marine Corps Base Hawaii. (Encl. G.)

16. At the time of the search, Barracks [redacted] room [redacted] was shared by Cpl Suarez and LCpl [redacted] LCpl [redacted] was present at the time of the search and identified a bed, wall locker, and dresser which belonged to Cpl Suarez. (Encl. G.)

17. Various items of evidence were seized from the barracks room. (Encl. G.)

18. On 12JAN22, Special Agent [redacted] requested a CASS to search the contents of Cpl Suarez's phone. (Encl. H.)

19. A written Command Authorization for Search and Seizure was issued by LtCol [redacted] on 12JAN22 for the digital contents of the black Apple I-phone and the black Samsung phone belonging to Cpl Suarez. (Encl. I.)

20. A digital forensic extraction was completed on Cpl Suarez's phone which identified various messages, photos, and videos. (Encl. J.)

21. The BMW Z4 which Cpl Suarez drove on 11JAN22 was later observed parked in the carport of a residence at Schofield Barracks. (Encl. K.)

22. On 14JUL22, Trial Counsel confirmed via email that the search of Cpl Suarez's barracks room and vehicle was done based on LtCol [redacted] verbal CASS and that the CASS had not been reduced to writing. (Encl. L.)

LAW

a. The Fourth Amendment protection against unreasonable searches requires that law enforcement have probable cause before obtaining any search authorization.

The Fourth Amendment protects "[t]he right of the people to be secure in their ... houses, papers, and effects[ ] against unreasonable searches and seizures" and generally prohibits the warrantless entry and search of a person's dwelling or property. U.S. Const. amend. IV; *see also Payton v. New York*, 445 U.S. 573, 587 (1980). "This text protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Id*. That expectation of privacy is reasonable where a person has (a) an actual subjective expectation of privacy; and, (b) society recognizes that expectation as objectively reasonable. *Katz v. United States*, 389 U.S. 347, 351 (1967). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id*.

There is a strong presumption that the government must first obtain a warrant supported by probable cause prior to conducting a search of a person's property. "'Over and again [the Supreme] Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (internal citations omitted); *see also* Mil. R. Evid. 315 (authorizing searches of certain property in the military context pursuant to a search authorization based on probable cause). Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. *Illinois v. Gates*, 462 U.S.

213, 232 (1982); *see also* Mil. R. Evid. 315. Probable cause to seize property or evidence exists where there is a reasonable belief that the property is in fact evidence of a crime. Mil. R. Evid. 316(c)(1). If there is an insufficient basis for that probable cause determination, the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.

A probable cause analysis is fact-specific and requires that "a sufficient nexus [] be shown to exist between the alleged crime and the specific item to be seized." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). "The question of nexus focuses on whether there was a 'fair probability' that contraband or evidence of a crime will be found in a particular place.'" *Id*. "A 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. *Id*. "[A] law enforcement officer's generalized profile about how people normally act in certain circumstances does not, standing alone, provide a substantial basis to find probable cause to search and seize an item in a particular case; there must be some additional showing that the accused fit that profile or that the accused engaged in such conduct." *Id*. "[W]hile courts have relied on such profiles to inform search determinations, ... a [law enforcement officer's] profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search" or seize." *Id*.

b. In the military, a commanding officer may verbally authorize a search based on probable cause, however, they must be neutral and detached when doing so.

In the military, a search may be authorized by an impartial military commander. Milt. R. Ev. 315(d); *United States v. Armendariz*, 80 M.J. 130 (C.A.A.F. 2019). A fundamental principle of the Fourth amendment is that a magistrate failing to manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application and who instead act as an adjunct law enforcement officer cannot provide a valid authorization for an otherwise unconstitutional search. *United States v. Perkins*, 78 M.J. 381 (C.A.A.F. 2018). The evaluation of impartiality includes consideration of whether a commander's actions call into question the commander's ability to review impartially the facts and circumstances of the case. *United States v. Huntzinger*, 69 M.J. 1 (C.A.A.F. 2009). To the extent that appellate case law has indicated that a commander acting as a law enforcement official with a police attitude may be disqualified from authorizing a search, the disqualification applies when the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another. *Id*. The critical inquiry in determining if a commander was biased or participated in an investigation to such an extent, or in such a manner, that he compromised his ability to act impartially in issuing a search authorization is whether the commander conducted an independent assessment of the facts before issuing the search authority and remained impartial throughout the investigation process. *Id*.

c. Additionally, a military commander may only authorize a search in areas subject to his or her control.

"A search authorization under this rule is valid only if issued by . . . (1) A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched or found . . . or (2) a military judge or magistrate . . . ." Milt. R. Ev. 315(d).

d. The search authorization must describe the place to be search with adequate particularity.

Warrants must "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment requires that a search warrant describe the items to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings; the proper metric of specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation. *See U.S. v. Richards*, 76 M.J. 365 (C.A.A.F. 2017).

ARGUMENT

a. There was not probable cause to authorize a search of Cpl Suarez's person, vehicle, workplace, or barracks room.

Based on Special Agent [redacted] notes, the only evidence relied upon by LtCol [redacted] when he verbally authorized the search of Cpl Suarez's person, vehicle, workplace, and barracks room was a positive urinalysis result for cocaine. This evidence alone was inadequate to provide the "sufficient nexus . . . between the alleged crime and the specific item to be seized" required by C.A.A.F. in *Nieto*.

For this reason, the search authorization of Cpl Suarez's person, barracks, workspace, and vehicle was invalid because there was not probable cause for the search.

b. LtCol [redacted] was not neutral and detached when he authorized the search.

LtCol [redacted] comments during Cpl Suarez's arrest make clear that he had already concluded that Cpl Suarez was guilty and deserved to be punished. By subjecting Cpl Suarez to an extremely public and humiliating arrest during a unit event and labelling Cpl Suarez a "kingpin" and "the guy selling cocaine in my barracks," LtCol [redacted] interjected himself into the investigation and acted as a member of law enforcement. These comments were made less than 24 hours after LtCol [redacted] authorized the search and in the intervening time, he was not presented with any new information related to Cpl Suarez or the investigation. The prejudice he displayed during the apprehension of Cpl Suarez would have influenced him just as strongly when he authorized the search.

For this reason, the search authorization of Cpl Suarez's person, barracks, workspace, and vehicle was invalid because LtCol [redacted] was not neutral and detached when he gave it.

c. LtCol [redacted] lacked the authority to search Cpl Suarez's vehicle.

Though LtCol [redacted] had the authority to search areas under his control, such as Cpl Suarez's person, workspace, and barracks room, he lacked the authority to authorize a search of Cpl Suarez's vehicle which was parked in a shared base multistory parking garage near the medical clinic, fitness center, and MCX Annex. The appropriate officer who would have been able to authorize the search would have been the Marine Corps Base Hawaii Commanding Officer.

For this reason, the search authorization of Cpl Suarez's vehicle was invalid because LtCol [redacted] lacked control over the location it was parked.

d. LtCol [redacted] search authorization lacked particularity.

The exhibits indicate that LtCol [redacted] verbally authorized a search of Cpl Suarez's "person, barracks, workspace, and vehicle." This description lacks the requisite level of particularity necessary for this to have been a valid search authorization. Though NCIS apparently interpreted "barracks" to only mean Cpl Suarez's barrack's room, they also could have reasonably concluded that LtCol [redacted] had authorized a search of the entire building. Furthermore, Cpl Suarez shared a room with LCpl [redacted] LtCol [redacted] search authorization does not make clear whether he intended to authorize a search of the entire room, or only areas under Cpl Suarez's unilateral control. This ambiguity is relevant here where evidence was collected under the sink in the bathroom shared by Cpl Suarez and LCpl [redacted] The same issue occurs based on LtCol [redacted] authorization to search Cpl Saurez's "workspace." Though there is no evidence that indicates that NCIS actually carried out this search, LtCol [redacted] authorization could cover only the areas under Cpl Suarez's direct control or the entire building. As a junior enlisted marine, law enforcement could have taken LtCol [redacted] approval to search Cpl Suarez's workspace as *carte blanche* to search vast areas of Marine Corps Base Hawaii's athletic fields, ranges, storage lots, repair shops, etc.

Finally, and most significantly, it is unclear what vehicle LtCol [redacted] authorized NCIS to search: a vehicle owned by Cpl Suarez or a vehicle driven by Cpl Suarez. The record is mixed on whether the BMW Z4 driven by Cpl Suarez belonged to him or had been lent to him. The fact that the vehicle was later observed by law enforcement at another location strongly indicates that Cpl Suarez did not own the vehicle and did not have exclusive control over it. NCIS relied on LtCol [redacted] nonspecific authorization to search Cpl Suarez's "vehicle" when they searched a vehicle Cpl Suarez was seen driving, but the ownership was ambiguous. Furthermore, the record is also unclear if Cpl Suarez owned other vehicles, and if so, how many and where they might have been located. The opaqueness of LtCol [redacted] authorization could have resulted in NCIS searching any vehicle they thought might belong or have been driven by Cpl Suarez.

For these reasons, the search authorization of Cpl Suarez's barracks, workspace, and vehicle was invalid based on a lack of particularity.

RELIEF REQUESTED

The Defense moves to suppress all evidence collected from Corporal Suarez's person, vehicle, barracks room, and workspace and any evidence or reports derived from the unlawful search and seizure of that evidence.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

Enclosure A: NCIS Case Activity Record ICO Suarez, Joseph Daniel
Enclosure B: Results of Apprehension of S/ Suarez
Enclosure C: Inspector General Complaint Investigation ICO LtCol [redacted]
Enclosure D: Inspector General Complaint – Case [redacted] dtd 19 Jan 22
Enclosure E: Results of CASS For S/Suarez' Vehicle
Enclosure F: Hawaii Motor Vehicle Search Results
Enclosure G: Results of CASS For S/Suarez' Barracks Room
Enclosure H: Affidavit in Support of Application for Search Warrant
Enclosure I: Command Authorization for Search and Seizure dtd 12JAN22
Enclosure J: Results of Review of Cellular Extraction of S/Suarez's Cellular Phone
Enclosure K: Results of Contact with SPC [redacted]
Enclosure L: Trial Counsel Response to Defense Motion for Continuance dtd 14JUL22

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

[redacted]
M. D. MONCK
LT, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **JOSEPH D. SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS (CASS)** **Date: 29 July 2022**

1. Nature of Motion.

The Defense motions this Court to suppress all evidence seized from the Accused's person, vehicle, barracks room, and workplace and all evidence or reports derived from those searches. This Court should deny the Defense's motion because the evidence seized was properly obtained pursuant to a lawful command authorization supported by probable cause.

2. Summary of Facts.

Narcotics Distribution Network

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ.
b. The Accused began using cocaine on or about 1 August 2021. *See* Encl. 1.
c. Shortly thereafter the Accused began purchasing cocaine for both personal use and distribution. The Accused targeted his sales at service members on Marine Corps Base Hawaii and other military installations on the island of Oahu, Hawaii. *See* Encl. 1.
d. As the Accused's drug distribution network grew he hired several Marines as narcotics dealers, "runners" to assist in the purchase of drugs so sales could not be traced back to him, and as "muscle" to protect the Accused as he purchased drugs from a number of prominent civilian drug dealers. The Accused held parties in the barrack rooms with Marines and "barracks bunnies," likely prostitutes, to entice Marines to purchase and use cocaine. The Accused set up lines of cocaine throughout the parties for Marines to use or

purchase. The Accused marketed his drugs by providing Marines free lines of cocaine until they were "hooked." *See* Encl. 1, 9, 10, and 11.

e. The Accused's drug sales resulted in a large group of Marines from 3D Marine Littoral Regiment testing positive for cocaine. A majority, if not all of the Marines that tested positive for cocaine purchased the cocaine from the Accused or his middlemen distributors. *See* Encl. 1.

f. The Accused paid several PMO Marines to provide him information about MCBH security measures, base gate schedules, anti-terrorism measures, and other law enforcement sensitive information to assist with bringing drugs onto base without detection. And he employed Staff Non-Commissioned Officers to warn him of random urinalysis inspections. *See* Encl. 12.

g. If any of the Accused's employed PMO Marines attempted to exit the conspiracy he or his hired "muscle" would threaten the Marines. *See* Encl. 12.

h. The Accused was so confident of his control over base security and his distribution operations that on at least one occasion the Accused pulled over on the side of the road just outside of MCBH, called base security to brief them that he was bringing drugs on base, and then proceeded to snort a line of cocaine and drive onto base with drugs in his vehicle. *See* Encl. 12.

Command Authorization for Search and Seizure

i. On 22 December 2021, a NCIS Cooperating Witness (CW) informed law enforcement that the Accused used and sold narcotics. The Accused employed several Marines as middlemen distributors to distribute drugs on Marine Corps Base Hawaii and various locations on the island of Oahu, Hawaii. The CW informed NCIS that the Accused stored bulk cocaine, MDMA, and LSD in his barracks room, and had recently began selling sexual services as a prostitute on the mobile phone application "Snapchat." *See* Encl. 1.

j. The CW informed NCIS that the Accused recently purchased a BMW Z4 convertible with the Hawaii license plate number "[redacted]" but had not yet registered the car in his name. *See* Encl. 1.

k. On 6 January 2022, an NCIS Agent assumed control of the CW's Snapchat account in order to facilitate contact with the Accused. The Accused posted an advertisement for his

sexual services on Snapchat. The Agent responded to the add asking to purchase sexual services from the Accused and requested that the Accused bring an "8-ball" (3.5 grams) of cocaine with him when they met up for the sexual services. *See* Encl. 1.; Encl. 2.

l. At this time, NCIS observed Cpl Suarez leaving Marine Corps Base Hawaii driving a grey BMW Z4 convertible with the Hawaii license plate number "[redacted]" *See* Encl. 1.

m. From December 2021 to January 2021, Special Agent [redacted] kept LtCol [redacted] informed on the status of the Accused's investigation. SA [redacted] informed LtCol [redacted] that a CW had provided a significant amount of information about the Accused's misconduct and that NCIS's subsequent surveillance provided additional information about the Accused's narcotics distribution network and prostitution services. *See* Encl. 3.

n. On 10 January 2022, SA [redacted] was notified that the Accused tested positive for cocaine during a urinalysis test conducted on 6 January 2022. *See* Encl. 4.

o. At approximately 1300 on 10 January 2022, SA [redacted] met with LtCol [redacted] to request a command authorization for search and seizure of the Accused's person, barracks room (barracks [redacted] room [redacted]), and his vehicle (a grey BMW Z4 convertible with the Hawaii license plate number [redacted]), in order to seize the Accused's cell phone, "burner" cell phones, drug paraphernalia, and drugs. SA [redacted] informed LtCol [redacted] of the facts and circumstances of the investigation, explained that a CW had provided information specifically tying the Accused's misconduct to his cell phone, barracks room, and vehicle, and that subsequent surveillance provided intelligence that the Accused was using his cell phone, vehicle, and barracks room to distribute narcotics and illegally sell sexual services. *See* Encl. 4; Encl. 5.

p. During this meeting, LtCol [redacted] asked a number of questions to ensure that the evidence NCIS had obtained was sufficient for the authorization of a CASS and more specifically a CASS to search the Accused's person, barracks room, and vehicle. *See* Encl. 5.

q. LtCol [redacted] provided a verbal CASS for NCIS to conduct a search of the Accused's person, barracks room (barracks [redacted] room [redacted], and his vehicle (a grey BMW Z4 convertible with the Hawaii license plate [redacted] in order to seize the Accused's cell phone, "burner" cell phone, drug paraphernalia, and drugs.

r. On 10 January 2022, NCIS arrested the Accused. NCIS searched the Accused's person pursuant to the verbal CASS and the Accused's cell phone and car keys were seized as evidence. *See* Encl. 4.

s. That same day, pursuant to the verbal CASS, NCIS searched the Accused's barracks room and located controlled substances, drug paraphernalia, a cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. *See* Encl. 5.

t. Pursuant to LtCol [redacted] verbal CASS, NCIS also searched the Accused's BMW Z4 convertible and seized drug paraphernalia. *See* Encl. 7.

u. On 12 January 2022, LtCol [redacted] signed a physical CASS for the search of the Accused's cell phone to locate text messages, application messages, call logs, photographs, location data, social media posts, and any digital information on the device related to the purchase, use, possession, distribution, and sales of narcotics and/or prostitution. *See* Encl. 4.

v. The search of the Accused's cell phone revealed hundreds of text messages directly related to the sale of drugs and sexual services. *See* Encl. 8.

3. <u>Discussion.</u>

a. The subject evidence was lawfully obtained pursuant to a Command Authorization supported by probable cause.

SA [redacted] provided LtCol [redacted] information about his investigation including intelligence collected from surveillance of the Accused, information provided by an eye witness to the Accused's misconduct, evidence collected from the Accused's Snapchat, and the Accused's positive urinalysis to support his request for Command Authorization to search the Accused's person, barracks room, and vehicle. LtCol [redacted] believes that he was provided more than enough information to determine that there was probable cause to search the Accused's person, barracks room, and vehicle and that the Accused's cell phone, "burner" phone, drug paraphernalia, and drugs would be located in these places. The information provided to LtCol [redacted] was accurate and led to the seizure of the Accused's cell phone, a "burner phone," drug paraphernalia, and drugs. This search was lawful and supported by probable cause.

The Fourth Amendment guarantees servicemembers' right to "be secure in their persons, houses, papers, and effects." *United States v. Hernandez*, 2021 CAAF LEXIS 752 at *12

(C.A.A.F. 2021) (citing U.S. Const. amend. IV). It protects against unreasonable searches and seizures and requires warrants to be issued only if based upon probable cause. *Id*. The President has incorporated the protections of the Fourth Amendment directly into the Military Rules of Evidence in M.R.E. 311 through M.R.E. 317. Id. (citations omitted).

In the military, the equivalent to a search warrant is called a search authorization, and may be issued by an appropriate neutral and detached commander, military judge, or military magistrate. *See generally United States v. Irvin*, 80 M.J. 722 (N-M. Ct. Crim. App 2020). "Consistent with the Fourth Amendment, M.R.E. 315(f)(1) mandates that all search authorizations must be based on probable cause. Probable cause exists if there is a 'reasonable belief that the property or evidence [to be searched] is . . . evidence of a crime.' M.R.E. 316(c)(1). Probable cause for issuing a search authorization exists when there is enough information for the authorizing official to have 'a reasonable belief that the person . . . or evidence sought is located in the place or on the person to be searched.' M.R.E. 315(f)(2)." *Hernandez* at *13 (editorial marks in original). In deciding whether there is a substantial basis for probable cause, the magistrate looks to the totality of the circumstances. *Id*. (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

"It is a fundamental fact that probable cause is not a high bar." *United States v. Garcia, 80 M.J. 379,* (C.A.A.F. 2020) (citations and editorial marks omitted). "It merely requires that a person of reasonable caution could believe that the search may reveal some evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Hernandez* at *13-14. (citations and internal quotations omitted). When deciding whether probable cause exists "[t]he authorizing official is free to draw 'reasonable inferences' from the material supplied by those applying for the authority to search." *Id*. (citations omitted). But, as a threshold matter, for there to be probable cause, "a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized." *Id*. (quoting *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017)).

"Great deference" is owed to a commander making a probable cause determination due to the strong preference for searches conducted pursuant to a warrant. *See Hernandez* at *11-12 (citations omitted).

In the present case, SA [redacted] developed sufficient knowledge, from multiple sources, including surveillance as part of his own investigation, that the Accused was involved in the

distribution of narcotics and other controlled substances and prostitution services. Specifically, SA [redacted] spoke to an eyewitness and a NCIS CW that had firsthand knowledge of the interworking of the Accused narcotics distribution network. *See* Encl. 1. On 22 December 2022, the CW informed SA [redacted] that the Accused received payment from drug sales through his cell phone and sold his prostitution services through the mobile application Snapchat. *Id.* The CW informed NCIS that the Accused used his grey BMW Z4 convertible to transport drugs and that the Accused stored controlled substances in his barracks room. *Id.*

Furthermore, NCIS conducted surveillance of the Accused and witnessed him driving his grey BMW Z4 convertible shortly after agreeing to sell prostitution services and transport drugs to a potential customer. *See* Encl. 4. SA [redacted] was provided an advertisement for the Accused's prostitution services posted by the Accused using his cell phone. *See* Encl. 2. Additionally, an NCIS agent, with the assistance of the CW, interacted with the Accused via Snapchat in an attempt to purchased narcotics and prostitution services. *See* Encl. 1; Encl. 4.

On 10 January 2022, SA [redacted] met with LtCol [redacted] and informed him of all of the evidence obtained in the investigation and how it specifically related to the Accused's drug distribution network and prostitution services. SA [redacted] requested a Command Authorization to search the Accused's person, barracks, and vehicle in order to obtain the Accused's cell phone, "burner" cell phones, drug paraphernalia, and drugs. *See* Encl. 3. LtCol [redacted] did not act as a rubber stamp, simply approving SA [redacted] request. *See* Encl. 3; Encl. 5. Instead, LtCol [redacted] asked questions about the evidence, considered the relation the evidence had to the places to be searched and the items to be seized, and then determined that there was probable cause to search the Accused's person, barracks, and vehicle for the items sought by NCIS. *See* Encl. 5. To this day both LtCol [redacted] and SA [redacted] believe that there was probable cause to search the Accused's person, barracks, and vehicle. *See* Encl. 3.; Encl. 5.

The thorough investigation conducted by NCIS and SA [redacted] along with the significant amount of information provided to LtCol [redacted] far exceeds the low bar of probable cause. Compare this case to that of *United States v. Irvin*, 80 M.J. 722 (N-M. Ct. Crim. App 2020). In *Irvin*, witnesses informed NCIS that they believed the Accused was involved in an extramarital relationship and that he used Facebook to communicate with prior girlfriends. *Id.* at 727. NCIS requested a Command Authorization for Search and Seizure (CASS) of the Accused's cell phone and Apple Watch for evidence of images, emails, and internet search history that were

evidence of false statements, murder, and assault. *Id.* The CASS was granted and the search executed. *Id.* The Defense moved the court to suppress all information obtained from the Accused's cell phone for lack of probable cause. *Id.* at 727. On review, the appellate court held that the military judge did not abuse his discretion by failing to suppress the cell phone evidence seized. *Id.* at 729. The Court held that the commander had probable cause to issue the CASS based on the information he obtained from previous interviews and that despite the broad wording of the CASS, it was "affirmatively limited" to searching and seizing specific types of data for evidence of specific crimes." *Id.*

In the present case, LtCol [redacted] possessed enough information to have a reasonable belief that the evidence sought was located in the places and on the persons to be searched and that the evidence indicated criminal activity. "Probable cause for issuing a search authorization exists when there is enough information for the authorizing official to have 'a reasonable belief that the person . . . or evidence sought is located in the place or on the person to be searched.' M.R.E. 315(f)(2)." Hernandez at *13 (editorial marks in original). In *Irvin* there were background interviews that led NCIS to believe the Accused used his cell phone to communicate to potential witnesses and that there *may* be evidence of criminal activity on the Accused's phone. In the present case there was an interview conducted of an eyewitness to criminal activity that took place in the Accused's barracks room and using the Accused's vehicle and cell phone, SA [redacted] himself conducted surveillance that confirmed the Accused's criminal activity, and NCIS communicated with the Accused about his criminal conduct telephonically.

The Defense incorrectly states that the only evidence LtCol [redacted] relied on to grant his command authorization was the Accused's positive urinalysis. There is no evidence to support that proffer by Defense Counsel, nor do they cite to any support for that assertion. On 29 July 2022, SA [redacted] informed Trial Counsel that LtCol [redacted] was briefed on nearly the same information provided in the affidavit in support of the search and seizure of the Accused cell phone. *See* Encl. 3; Encl. 4. This affidavit includes a summation of over a month of investigatory work that directly connects the Accused's misconduct to the Accused's cellphone, barracks room, and vehicle. *See* Encl. 4. The evidence LtCol [redacted] and SA [redacted] relied on to grant and execute the subject command authorization far exceed the evidence relied on for most command authorizations, and certainly meets the low threshold of probable cause.

b. LtCol [redacted] was a neutral and detached magistrate that provided a lawful Command Authorization to search the Accused's person, vehicle, and barracks.

The command authorization to search the Accused's person, vehicle, and barracks room was issued by a neutral and detached commander with the properly authority and impartiality to issue the subject command authorizations. The Defense has presented no evidence that supports their assertion that LtCol [redacted] interjected himself into the subject investigation.

For a command authorization to be valid, "the probable cause determination must be made by an official who is 'neutral and detached.'" *United States v. Hobbs*, 62 M.J. 556, 559 (A.F.C.C.A. 2005) (citing *United States v . Rivera*, 10 M.J. 55, 58 (C.M.A. 1980)). M.R.E. 315(d) states in pertinent part, "A search authorization under this rule is valid only if issued by an impartial individual.…" "The term 'neutral and detached' has been treated as synonymous with 'impartial.'" *Id.* (citing *United States v . Staggs*, 23 C.M.A. 111, 48 C.M.R. 672, 674-75 (C.M.A. 1974)). "A commander or magistrate who takes an active and personal part in the gathering of evidence, or otherwise acts 'as a law enforcement official,' is not neutral and detached and cannot authorize a valid search." *Id.* (citing *United States v . Freeman*, 42 M.J. 239, 243 (C.A.A.F. 1995)). "An otherwise impartial authorizing official does not lose impartiality merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities…." M.R.E. 315(d).

"A military commander must perform a variety of duties which include "the concomitant authority to enforce the law, authorize prosecutions for offenses allegedly committed, maintain discipline, investigate crime, authorize searches and seizures, as well as train and fashion those under his command into a cohesive fighting unit. *United States v. Ezell*, 6 M.J. 307, 318 (C.M.A. 1979)." However, military courts have consistently recognized that, "the military commander is capable of neutrality when he is not actively involved in the investigative or prosecutorial functions which are otherwise clearly within the perimeters of command authority." *Id.* A commander may be neutral and detached even though he has personal knowledge of an investigation, directs the acquisition of additional information before issuing a command authorization, or makes public comments about crime in his or her command. *See generally Ezell*, 6 M.J. 329.

LtCol [redacted] knew about the ongoing investigation into the Accused's misconduct and was briefed on the status of the investigation on a regular basis. *See* Encl. 4. This is a part of LtCol [redacted] role as a military commanding officer. *Ezell*, 6 M.J. at 318. It was LtCol [redacted] job to stay informed about the interworking of his command and law enforcements' involvement with his Marines. *Id.* He did not become involved in the investigation, direct law enforcement activities, personally gather evidence, or otherwise acts "as a law enforcement official." *Freeman*, 42 M.J. at 243. On 10 January 2022, LtCol [redacted] was presented the facts and evidence gathered by law enforcement and made an impartial determination that probable cause existed to execute a Command Authorization to search the Accused's person, barracks room, and vehicle and seize certain evidence. *Id.* There is nothing improper about a Commanding Officer properly executing his role as a military commander.

Instead, the Defense cites to a single comment made by LtCol [redacted] *after* he granted the subject command authorization as evidence of LtCol [redacted] impartiality. LtCol [redacted] comment is not related to his involvement in the investigation or the prosecution of the Accused. LtCol [redacted] comment is unrelated to his impartiality at the time of the verbal CASS. In fact, military commanders may make public comments about crime or voice their concerns with actions that impact good order and discipline. *See generally Ezell*, 6 M.J. 329. The ultimate responsibility of LtCol [redacted] as the commanding officer of an infantry battalion was to "train and fashion those under his command into a cohesive fighting unit." *Ezell*, 6 M.J. at 318 (C.M.A. 1979). This includes at times, discussing misconduct with subordinate Marines.

There is no evidence that LtCol [redacted] was anything other than neutral and detached in his decision-making. This Court has previously ruled that the fairness of the Accused's criminal proceedings have not been and will not be impacted by LtCol [redacted] comments. And LtCol [redacted] was completely uninvolved in the investigation that led to the collection of evidence used to support the subject command authorization. LtCol [redacted] reviewed the evidence presented to him by NCIS, questioned the relationship between that evidence and the places and items NCIS sought to search and seize, and made a decision as a neutral and detached magistrate in compliance with the law.

c. LtCol [redacted] had the proper authority to issue a Command Authorization for the search of the Accused's vehicle.

LtCol [redacted] had the proper authority to issue a command authorization for the search of the Accused's vehicle parked in a parking garage, shared, in part, by the Marines under his command.

M.R.E. 315(d)(1) requires that a commander issuing a command authorization have "control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war." On a military installation, multiple commanders may share authority over a single property or location. *United States v. Mix, 35 M.J. 283, 288 (C.A.A.F. 1992).* This concept specifically applies to shared parking garages located on military installations, wherein service members from multiple battalions may share the same parking garage. *Id.* The commanders of each battalion have authority to execute command authorizations to search property located in the parking garage shared by Marines in their battalions. *Id.*

In *Mix*, "three battalion commanders as well as the brigade commander had control over the place where the [accused's] automobile was located." *Id.* "This was a joint parking lot which surrounded the dining facility used by the three battalions." *Id.* The accused's commanding officer issued a command authorization for the search of the accused's automobile located in the shared parking garage. The Court of Appeals for the Armed Forces held that the commanding officer could authorize a search of appellant's car located in the garage. *Id.* "Alternatively, the good-faith exception applies because the battalion commander acted as a rational, reasonable commander having probable cause to believe that he could authorize a search of appellant's car." *Id.*

Similarly, in the present case, the Accused's car was located in a parking garage shared by Marines from a number of battalions, including LtCol [redacted] battalion. LtCol [redacted] had authority to execute the search of a vehicle in a parking garage used by his Marines. The Defense argues that the Marine Corps Base Hawaii Commanding Officer had the *sole* authority to authorize a search of the Accused's vehicle. While the MCBH Commanding Officer could authorize a search of vehicles in this garage, he did not have the *sole* authority to do so. In accordance with *Mix*, LtCol [redacted] could also authorize a search of the Accused's vehicle. *Id.* In the alternative, if this Court were to determine that LtCol [redacted] did not have proper

authority to issue the command authorization for the search of the Accused's vehicle, the good-faith exception would apply. LtCol [redacted] acted as a "rational, reasonable commander having probable cause to believe that he could authorize a search" of the Accused's vehicle. *Id.*

d. The Command Authorization was not overbroad and stated with particularity where to search and what to seize.

The subject command authorization was not overbroad. It stated, with particularity, exactly where NCIS could search and what could be seized. The Defense's argument that LtCol [redacted] verbal authorization could have authorized NCIS to search the entire barracks building or any vehicle is without merit. SA [redacted] drafted an investigative action report for each search that outlined the specific search authorization granted. Those investigative action reports state that LtCol [redacted] only authorized the search of the Accused's person, the Accused's barracks room (barracks [redacted] room [redacted]), and his vehicle (a grey BMW Z4 convertible with the Hawaii license plate number "[redacted]"). *See* Encl. 3; Encl 4; Encl. 5; Encl. 6.; and Encl. 7. This is outlined clearly in the ROIs discovered to Defense. *See* Encl. 5; Encl. 6.

"The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017) (quoting *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999)). "Despite the importance of preserving this particularity requirement, considerable support can be found in federal law for the notion of achieving a balance by not overly restricting the ability to search electronic devices." *Id*.

Whether police or Government agents are acting within the scope of the warrant depends in large part on the reasonableness of their actions. *United States v. Tienter*, 2014 CCA LEXIS 700, at *9 (N-M Ct. Crim. App. 2014). "As the Supreme Court has explained, '[b]y limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.'" United States v. Lee, 82 M.J. 591 (N-M Ct. Crim. App. 2022) (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

It is unclear how the Defense has determined LtCol [redacted] generally granted authority to search *a* vehicle and *a* barracks room, rather than the Accused's barracks room and the

Accused's vehicle. The Defense's own enclosures state, "LtCol [redacted] provided a verbal CASS for NCIS to conduct a search of S/Suarez' person, barracks room (barracks [redacted] room [redacted]), and his vehicle (a grey BMW Z4 convertible bearing HI license plate [redacted]." *Def. Encl. pg. 54.* SA [redacted] stated that he only had authority to search the Accused's person, barracks room, and vehicle for the Accused's cell phone, "burner" phones, drug paraphernalia, and drugs. *See* Encl. 3. And LtCol [redacted] more than six (6) months after issuing the subject Command Authorization still remembers that he granted specific authorization to search the subject locations for at least the Accused's cell phone and burner phones used for drug dealing. *See* Encl. 5.

We do not need to rely just on the individuals' memories. SA [redacted] published investigative action reports that summarize the specific places he was authorized to search and things he was authorized to seize. *See* Encl. 7. SA [redacted] states in his "legal authority" memorandum that "LtCol [redacted] verbally authorized NCIS to… seize items related to the possession, use and distribution of illegal or otherwise controlled substances, pursuant to a command authorization for search and seizure." *See* Encl. 7. The Command Authorization provided by LtCol [redacted] was not a "general exploratory rummaging" of the Accused's property. It was specific and tailored to locate evidence of the Accused's misconduct.

This Court must also consider the reasonableness of the actions taken by NCIS during the subject searches. "Whether police or Government agents are acting within the scope of the warrant depends in large part on the reasonableness of their actions." *United States v. Tienter*, 2014 CCA LEXIS 700, at *9 (N-M Ct. Crim. App. 2014). NCIS limited their scope to the Accused's vehicle, barracks room, and person and only seized evidence directly related to narcotics distribution and prostitution. The search conducted in this case was reasonable and did not amount to a general exploratory search.

The Defense makes an argument that the vehicle searched may not have belonged to the Accused. The CW informed NCIS that the Accused purchased the subject vehicle. *See* Encl. 1. NCIS witnessed the Accused drive in the subject vehicle. *See* Encl. 3. For all intents and purposes the Accused was in possession of the vehicle that was searched. And even if the Accused did not own the vehicle, the good faith exception would apply. Based on the evidence available to NCIS and LtCol [redacted] it was reasonable to believe the Accused owned and was in possession of the vehicle searched.

e. NCIS reasonably relied on the Command Authorization in good faith.

Under M.R.E. 311(a), evidence seized pursuant to a search warrant issued without probable cause must be excluded unless an exception applies. *Hernandez* at *19-20 (citing *United States v. Perkins*, 78 M.J. 381, 386 (C.A.A.F. 2019)). Under the "good faith" exception to the exclusionary rule, evidence obtained pursuant to a search warrant that was ultimately found to be invalid should not be suppressed if it was gathered by law enforcement officials acting in reasonable reliance on a warrant issued by a neutral and detached magistrate. *Id*. (citing *United States v. Leon*, 468 U.S. 897, 918 (1984)).

If this Court were to determine that any of the Command Authorizations at issue in this case were invalid, the good faith exception would apply. The evidence obtained from the search of the Accused's person, vehicle, and barracks room were gathered by law enforcement officials acting in reasonable reliance on a Command Authorization issued by a person they believed to be a neutral and detached magistrate with control over the areas and persons searched.

The Supreme Court has advised that the "good faith" exception is unavailable when any of the following four circumstances are present: (1) the authorizing official was given incorrect information that was either known to be "false or would have [been] known [to be] false except for . . . reckless disregard of the truth"; (2) the magistrate acted as a "rubber stamp" and thus, abandoned his judicial role; (3) the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the warrant was facially deficient. *Id.* (citing *Leon*, 468 U.S. at 914, 923-24 (alternations in original) (citations omitted). The Court of Appeals for the Armed Forces has therefore construed M.R.E. 311(c)(3) in a manner consistent with the Supreme Court's decision in *Leon*. *Id.* (citing *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001)). M.R.E. 311(c)(3)(B) "addresses the first and third exceptions noted in *Leon, i.e.*, the affidavit must not be intentionally or recklessly false, and it must be more than a 'bare bones' recital of conclusions." *Id.* M.R.E. 311(c)(3)(C) "addresses the second and fourth exceptions in *Leon, i.e.*, objective good faith cannot exist when the police know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective." *Id.*

With respect to subsection (B) of the exception dealing with the issue of probable cause, C.A.A.F. has held this condition is satisfied "if *the law enforcement official had an objectively reasonable belief* that the magistrate or commander had a substantial basis for determining the

existence of probable cause." *United States v. Irvin*, 80 M.J. 722, 728-29 (N-M. Ct. Crim. App 2020) (quoting *United States v. Perkins*, 78 M.J. 381, 387 (C.A.A.F. 2019)(emphasis in original)). Conversely, the condition is not satisfied "if the materials presented to the commander or magistrate issuing the search and seizure authorization are 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (citations omitted).

Both SA [redacted] and LtCol [redacted] make clear in their interviews that accurate information was presented, that was supported by evidence, it was reliable, seriously considered by LtCol [redacted] and that, ultimately, there was probable cause for the Command Authorization. Furthermore, there was no facial deficiency with the Command Authorizations issued. Both the Commanding Officer and law enforcement personnel believed that the Command Authorizations were legally sufficient and supported by probable cause. The searches conducted were reasonable and led to the exact evidence sought, in the places NCIS believed it would be. SA [redacted] will testify that he had a good faith belief that the Command Authorizations were proper and issued by a neutral and detached commander. Therefore, the Defense's motion should be denied.

f. The deterrent effect of suppression would not outweigh the cost of suppression to the justice system.

Suppression of evidence gathered pursuant to a warrant is a "last resort, not our first impulse." *Hernandez*, 2021 CAAF LEXIS 752 at *25 (citing *Herring v. United States*, 555 U.S. 135, 140, (2009)). Before suppressing evidence based on an unlawful search, this Court must determine that the deterrent effect of suppression would outweigh the costs to justice. See M.R.E. 311(a)(3).

In *Irvin*, while upholding the lawfulness of a search, the Navy-Marine Corps Court of Criminal Appeals noted that, even assuming an unlawful search and no good faith exception, the benefits of deterrence would not outweigh the costs to justice in that case. 80 M.J. 722 at 731. The Court noted that the affidavit was detailed and explained the Agent's investigative efforts, interviews, and analysis. *Id*. It further noted that while the search authorization was broadly worded, it was tailored to the specific crimes uncovered by the investigation. *Id*. The Court explained that "the benefits of such deterrence outweigh the costs to the justice system, which

both envisions and encourages law enforcement to pursue evidence in such a detailed, methodical fashion." *Id*.

If this Court were to determine that the good-faith exception does not apply, this Court must consider the whether the deterrent effect of the suppression outweighs the cost of suppression on the justice system. The deterrent effect of the suppression of the evidence gathered from the subject searches would not outweigh the cost of suppression on the justice system. It is clear that SA [redacted] and NCIS have attempted to follow proper protocol, the Military Rules of Evidence, and abide by the law in the execution of their law enforcement duties. Every search conducted in this case was conducted pursuant to either a verbal or a written CASS. There is no evidence that NCIS has attempted to evade legal requirements or unlawfully obtain evidence. A suppression of evidence in this case would provide no deterrent effect to law enforcement while debilitating the Government's ability to prosecute what amounts to one of the most serious military narcotics distribution operations in recent years. For the reasons stated above, this Court should deny the Defense motion.

4. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion.

5. **Burden of Proof.**

When the defense makes an appropriate motion or objection under M.R.E. 311(d), the Government 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; that the evidence would have been obtained even if the unlawful search or seizure had not been made; that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence. M.R.E. 311(d)(5).

6. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1 – CW Statement

b. Enclosure 2 – Accused's Prostitution Advertisement

c. Enclosure 3 – Results of Interview SA [redacted]

d. Enclosure 4 - Affidavit in Support of Search (Cell Phone)

e. Enclosure 5 - Results of Interview LtCol [redacted]

f. Enclosure 6 - Verbal CASS Barracks Room

g. Enclosure 7 - Verbal CASS Vehicle

h. Enclosure 8 - Review of Accused's Cell Phone

i. Enclosure 9 - MRE 410 Proffer Pvt [redacted]

j. Enclosure 10 - Results of Interview of SPC [redacted]

k. Enclosure 11 - Results of Interview of Pvt [redacted]

l. Enclosure 12 - Results of Interview of Pvt [redacted]

m. Enclosure 13 - Results of Interview of [redacted]

The Government also intends to offer the testimony of SA [redacted] and LtCol [redacted]

7. **Argument.**

The Government does request oral argument.

//S//
A. B. HILL
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 via email on 29 July 2022.

//S///
A. B. HILL
Captain, U.S. Marine Corps
Trial Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

THERE ARE NO NOTICES

COURT RULINGS & ORDERS

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

UNITED STATES **v.** **JOSEPH D.SUAREZ** **CORPORAL** **U.S. MARINE CORPS**	)	**JOINT CONTINUANCE REQUEST** **19 Aug 22**

1. **Nature of Motion:**

Pursuant to Rule for Courts-Martial 906(b)(1), the Government and the Defense Counsel jointly move the Court for a continuance of the trial date in the subject case.

2. **Statement of Facts.**

a. On 5 May 2022, Colonel Mann, Military Judge, ordered that the subject trial would commence on 5 September 2022. *See* Encl. 1.

b. On 26 July 2022, Private First Class [redacted] a named co-conspirator in the subject case, submitted a plea agreement to the convening authority. Pursuant to the plea agreement, PFC [redacted] has agreed to testify at Cpl Suarez's trial. *See* Encl. 2.

c. On 1 August 2022, both the Trial and Defense Counsel informed the Military Judge, during an Article 39(a) motions hearing, that the parties were working towards the completion of a memorandum of plea agreement.

d. On 9 August 2022, the Convening Authority approved PFC [redacted] plea agreement. *Id.* PFC [redacted] trial is scheduled for 6 October 2022. On 15 August 2022, the Convening Authority signed a grant of testimonial immunity ordering PFC [redacted] to testify at the Accused trial. *See* Encl. 5.

e. On 9 August 2022, the Accused submitted a plea agreement to the convening authority. *See* Encl. 3.

f. On 12 August 2022, the Convening Authority approved the subject plea agreement. *Id.*

g. On 16 August 2022, Trial Counsel informed the Military Judge that the Accused and the Convening Authority reached an agreement and requested the Accused's trial be scheduled for 18 October 2022.

h. On 18 August 2022, the Military Judge directed the Trial and Defense Counsel submit a joint continuance request if both parties requested the trial be continued to 18 October 2022.

i. On 19 August 2022, Corporal [redacted] a named co-conspirator in the subject case, submitted a plea agreement to the convening authority. Pursuant to the plea agreement, Cpl [redacted] has agreed to testify at Cpl Suarez's trial, if given a grant of testimonial immunity. *See* Encl. 4.

j. The Convening Authority will decide whether to accept Cpl [redacted] proposed plea agreement the week of 22-26 August 2022.

3. **Discussion.**

Article 40, UCMJ states: "The military judge… may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." The discussion of R.C.M. 906(b)(1) states that a "military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Government request this continuance, with the support of the Defense Counsel, to avoid violating *Kastigar v. United States*, 406 U.S. 441 (1972). Each of the *Miller* factors weigh in favor of granting this joint continuance request. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

a. Prosecutorial authorities may not use testimony compelled by a grant of testimonial immunity. If co-conspirators testify in advance of their trials, the Court would be required to hold a *Kastigar* hearing before each co-conspirators trial and remove detailed Trial Counsel from their cases.

In *Kastigar v. United States*, the Supreme Court held that prosecutorial authorities may not use testimony compelled by a grant of immunity. *Kastigar v. United States,* 406 U.S. 441 (1972). The Court of Appeals for the Armed Forces has broadly "construed 'use' to include non-evidentiary use such as the decision to prosecute," the Government's use of testimony of a witness influenced by immunized testimony, and the Government's use of immunized statements to prepare witnesses for trial. *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003). "If a person

provides information under a grant of immunity, the Government in a subsequent criminal prosecution must affirmatively demonstrate 'that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'" *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004) (quoting *Kastigar*, 406 U.S. at 460). "Under *Kastigar*, the Government has a 'heavy burden' to show non-use of immunized testimony." *Id.* at 67.

Kastigar violations can occur even if an accused testifies subject to a grant of testimonial immunity pursuant to a plea agreement. *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010); *United States v. Laubach*, 2019 CCA LEXIS 245 (A.F. Ct. Crim. App. June 7, 2019) (unpublished). *Bradley*, presents the number of *Kastigar* issues that can occur if a co-conspirator testifies pursuant to a plea agreement before his trial. *Bradley*, 68 M.J. 279.

In *Bradley*, the accused and the convening authority "signed a pretrial agreement containing a provision that, if given a grant of testimonial immunity, the appellant would cooperate with investigators and testify on behalf of the Government in the courts-martial of the other co-actors." *United States v. Bradley*, 2008 CCA LEXIS 398, *6 (N-M. Ct. Crim. App. Nov. 25, 2008) (unpublished). The convening authority granted the accused testimonial immunity. *Id.* After the accused testified at his co-actors trial, he withdrew from his pretrial agreement and moved the court to dismiss the charges and specifications, arguing that the Government had made derivative use of his immunized statements and testimony. *Id.* The Military Judge denied the motion, "but forbade the Government from mentioning immunized information that he determined was not known to the Government before the [accused] was granted immunity...." *Id.* at *12; *Bradley*, 68 M.J. at 281.

After the military judge denied the accused's motion to dismiss, the accused signed a second unconditional plea agreement. *Bradley*, 68 M.J. at 281. At trial the accused moved to dismiss the charges under *"Kastigar v. United States*, contending that the trial counsel made improper use of [the accused's] immunized testimony to prepare witnesses for trial" and in the alternative, "moved to disqualify the trial counsel on the grounds that the trial counsel's intimate involvement with [the accused's] immunized statements made it impossible for the trial counsel to not use [the accused's] immunized statements against him at trial." *Bradley*, 68 M.J. at 283. The Court denied the motion. *Id.*

Despite the Accused's unconditional plea agreement, the Accused appealed the military judge's decision to allow the trial counsel to remain on the case. *Id.* at 283. The Navy-Marine

Corps Court of Criminal Appeals held that it was "inconceivable that the trial counsel in this case, no matter how intent on not using the [accused's] immunized statements against him, could identify direct or derivative information attributable to the [accused's immunized statements, and then not use that information." *Bradley*, 2008 CCA LEXIS 398 at *24. The Court held that "the military judge had "abused his discretion when he did not disqualify the prosecutors from further participation in the case and that their continued participation resulted in a *Kastigar* violation." *Id.; Bradley*, 68 M.J. at 281. The Judge Advocate General of the Navy certified questions for review concerning trial counsel's disqualification. The Court of Appeals for the Armed Forces discussed the *Kastigar* violation in dicta but ultimately did not decide the *Kastigar* issue, instead holding that the accused waived the Trial Counsel disqualification issue. *Bradley*, 68 M.J. at 283.

The present case raises the same concerns in *Bradley*. 69 M.J. 279. The Government intends to present evidence in the form of testimony from two co-conspirators, subject to grants of testimonial immunity prior to their trials, during the Accused's presentencing proceeding. PFC [redacted] and the convening authority have signed a plea agreement that contains a provision that, if given a grant of testimonial immunity, PFC [redacted] will testify on behalf of the Government in the Accused's trial. Cpl [redacted] has signed a similar plea agreement and the convening authority will review the agreement the week of 22-26 August 2022. Cpl [redacted] has agreed to testify in the Accused's trial if given a grant of testimonial immunity. When these co-conspirators testify at the Accused's trial, their immunized statements will create *Kastigar* violations. If either co-conspirator withdraws from their plea agreements, they will move the Court to dismiss pursuant to *Kastigar* or request the Court remove Trial Counsel shortly before trial. The Government has attempted to reschedule the co-conspirators' trials before the Accused's trial to avoid *Kastigar* violations; however, the co-conspirators' Defense Counsel are unavailable prior to October 2022.

If this Court were to deny this joint continuance request, the Government will be forced to remedy the situation. The Government will have to either alter its trial strategy and forego presenting testimony from these co-conspirators at the Accused's trial or preemptively remove Trial Counsel from the co-conspirator's cases to avoid *Kastigar* violations. If these co-conspirators testify prior to their trials, the Court would have to hold *Kastigar* hearings prior to each co-conspirators' trial to determine whether there is any direct or derivative use of the co-conspirators' immunized statements. *United States v. Olivero*, 39 M.J. 246 (C.A.A.F. 1994).

Kastigar violations can be avoided by continuing the Accused's trial to 18 October 2022, after the co-conspirators' trials.

b. The *Miller* Factors weigh in favor of the parties' joint continuance request.

In *United States v. Miller*, the Court of Appeals for the Armed Forces listed factors the Appellate Courts will consider in assessing whether a military judge abused his discretion by denying a continuance. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). Those factors include: "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonably diligence by moving party, possible impact on verdict, and prior notice." *Id.* None of these factors favor the denial of the parties' joint continuance request.

Surprise. The appropriate consideration regarding the factor of "surprise" is whether the request constitutes a surprise to the opposing party. The Trial and Defense Counsel notified the Court that they were working on completing a plea agreement on 1 August 2022. The parties, in discussion with the convening authority, agreed to request a continuance of the trial dates on 12 August 2022 and notified the Court of the joint request on 16 August 2022, three weeks prior to trial. Neither party was surprised by the continuance request. Both parties notified the Military Judge in a timely manner of their request for a continuance.

Nature of Evidence. A denial of this continuance request would negatively affect the Government's ability to present a pre-sentencing case. Specifically, the Government intends to have two co-conspirators testify at the Accused's trial. These co-conspirators would be testifying pursuant to grants of testimonial immunity prior to their trials. These co-conspirators are eyewitnesses to the Accused's misconduct. The immunized statements made by these co-conspirators create *Kastigar* violations. Absent this continuance, the Government would be forced to either alter its trial strategy or risk the outcome of future proceedings.

Timeliness. The Trial and Defense Counsel notified the Court of its request for a continuance two-business days after the Convening Authority signed the subject plea agreement. The Convening Authority signed the subject plea agreement on 12 August 2022 (Friday) and the parties notified the Court of its request to continue trial dates on 16 August 2022 (Tuesday).

Substitute Testimony or evidence. The Government requests this continuance in order to present testimony from two eyewitnesses during its pre-sentencing case. There is no substitute evidence equivalent to the in-person testimony of eyewitness to the Accused's misconduct.

Availability of witnesses. While, both Cpl [redacted] and PFC [redacted] are available on 5 September 2022, their testimony will create *Kastigar* violations for future proceedings. The Government would have to forego placing these witnesses on the stand or undergo *Kastigar* hearings prior to each of the co-conspirators' trials.

Length of Continuance. Both parties are requesting a 41-day continuance. This is a relatively short continuance request. The Convening Authority is aware of and approves of the Government's continuance request. The command favors handling the co-conspirators' trials prior to the Accused's trial.

Prejudice to the Opposing Party. This factor is inapplicable to the present case because this request is a joint motion signed by both the Trial and Defense counsel.

Prior Continuance. This Court has not granted any continuances in the subject case. The Government placed the Accused in pretrial confinement on 11 January 2022. The Government preferred charges on 3 February 2022. The Convening Authority referred the subject case to a General Court-Martial on 24 April 2022. The Court arraigned the Accused on 2 May 2022. Trial was scheduled to commence approximately five-months after arraignment. If this continuance request is granted the case will still be resolved in approximately six-months.

Good Faith of Moving Party. Neither party opposes this request nor is there any evidence the parties made this request in bad faith. The parties have agreed to make this request to support expeditious and economically efficient judicial proceedings for the Accused and a number of co-conspirators with minimal cost or inconvenience to the convening authority.

Use of Reasonable Diligence. The Government has attempted to coordinate with both Cpl [redacted] and PFC [redacted] Defense Counsel to reschedule their trial dates before 5 September 2022, to avoid making this continuance request. Unfortunately, the co-conspirators' Defense Counsel are unavailable prior to 5 September 2022.

Possible Impact on the Verdict. This factor is inapplicable to the present case because the Accused and Convening Authority have signed a plea agreement. However, the Military Judge's determination of the Accused's sentence may be impacted by the Government ability, or inability to present eyewitness testimony during its presentencing case.

Prior Notice. The parties were aware of the trial dates, but were unaware that nearly every co-conspirator would sign a plea agreement shortly before trial. The Government informed the Court of the *Kastigar* violations shortly after becoming aware of the issue.

Ultimately, the parties are requesting a relatively short continuance to allow the Government to present a complete presentencing case while avoiding *Kastigar* violations that will affect future proceedings. The parties brought this continuance request to the Court in a timely manner and made this request in good faith. All of the *Miller* factors weigh in favor of the Court granting this continuance request.

4. **Relief Requested.**

The parties request that this Court grant a continuance of the trial date from 5 September 2022 until 18 October 2022.

5. **Argument.**

The parties do not request oral argument.

6. **Enclosures.**

The following enclosures are attached to this motion as support:

a. Enclosure 1. Trial Management Order
b. Enclosure 2. Memorandum of Plea Agreement (PFC [redacted]
c. Enclosure 3. Memorandum of Plea Agreement (Cpl [redacted]
d. Enclosure 4. Memorandum of Plea Agreement (Cpl [redacted]
e. Enclosure 5. Grant of Testimonial Immunity and Order to Testify (PFC [redacted]

//s//

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

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Opposing Party Response

Defense Counsel does not oppose this continuance request

ROGERS.NICHOL AS.KARL [redacted] Digitally signed by ROGERS.NICHOLAS.KARL [redacted] Date: 2022.08.20 19:28:39 +09'00'

N. K. ROGERS
Captain, U.S. Marine Corps
Defense Counsel

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Court Ruling

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

Trial will be held on 18 Oct 2022

22 Aug 2022
DATE

[redacted]
S. F. KEANE
Military Judge
Colonel, U.S. Marine Corps

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

U N I T E D S T A T E S	**)**	**RULING ON DEFENSE**
	)	**MOTION TO COMPELL**
v.	**)**	**EXPERT WITNESSES**
	)	
JOSEPH D. SUAREZ	**)**	
CORPORAL	**)**	
U.S. MARINE CORPS	**)**	
	)	**25AUGUST 2022**

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1. Nature of the Motion and Procedural Posture

On 23 July 2022, the Defense moved pursuant to M.R.E. 703, and filed a motion to for the Government to compel production of three expert consultants: (1) investigator, (2) forensic toxicologist, and (3) forensic psychologist . The Government responded on July 29, 2022 and an Article 39(a) hearing was held on 1 August 2022. This is the Court's written ruling.

2. Findings of Fact

In reaching the findings of fact and conclusions of law herein, the Court has considered all legal and competent evidence presented by the parties, the parties' asserted facts, all reasonable inferences to be drawn from the evidence, allied papers, documents, and enclosures, the record of trial, and has resolved any issues of credibility. In doing so, the Court makes the following findings of fact by a preponderance of the evidence:

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of

Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. See

b. Cpl Suarez on about 1 August 2021 was an Active Duty Marine stationed at Marine Corps Base Hawaii.

c. The Accused started to use cocaine on or about 1 August 2021.

d. Shortly after the 1 August 2021 date the accused began purchasing cocaine for both personal use and distribution.

e. The Accused targeted his sales at service members on Marine Corps Base Hawaii and other military installations on the island of Oahu, Hawaii.

f. As the Accused's drug distribution network grew, he hired several Marines as narcotics dealers, "runners" to assist in the purchase of drugs so sales could not be traced back to him.

g. The Accused also hired Marines to protect the Accused as he purchased drugs from civilian drug dealers.

h. The Accused held parties in the barrack rooms with Marines and likely prostitutes, to entice Marines to purchase and use cocaine.

i. The Accused set up lines of cocaine throughout the parties for Marines to use or purchase.

j. The accused marketed his drugs by providing Marines free lines of cocaine.

k. A urinalysis was conducted that resulted in a large number of Marines from 3D Marine Littoral Regiment testing positive for cocaine. A majority of the of the Marines from this unit that tested positive purchased or received their drugs from Cpl Suarez or someone working for Cpl Suarez.

l. On or about 22 December 2021 NCIS (Naval Criminal Investigative Service) was made aware of Cpl Suarez distributing cocaine. A Cooperating Witness (CW) notified NCIS that Cpl Suarez was using and selling narcotics. The CW informed NCIS that the Accused stored bulk cocaine, MDMA, And LSD in his barracks room. The CW also stated that the Accused was selling sexual services via "Snapchat".

m. NCIS and the CW begin to collect evidence of on the drug distribution ring and the co-

n. conspirators.

o. Tripler Army Medical Center's Forensic Toxicology Drug Testing Laboratory produced an 88 page Laboratory Documentation Packet with the chain of custody, celebration, and technical date related to Cpl Suarez's urinalysis.

p. The Accused's barracks room was searched and NCIS agents located controlled substances, drug paraphernalia, an additional cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. NCIS assumed control of the CW's snapchat account in order to make contact with the Accused.

q. That the Accused informed the NCIS Cooperating Witness he could get the "best (snowflake emoji) on the island".

r. An NCIS agent made contact with Accused over "snapchat" and set up a meeting with the Accused where the NCIS agent agreed to pay Cpl Suarez for sexual services.

s. The Accused agreed to bring cocaine to this meeting.

t. That the Accused provided a photograph of himself to an individual prior to a meet-up, where the Accused intended to sell sexual services.

u. Multiple Marines were interviewed and provided NCIS with the extent of the Accused drug use and distribution within 3d Battalion 3d Marines.

v. That the Accused's barracks room was searched and contained a digital scale, ledgers, gold foil, and other drug paraphernalia.

w. That the Accused's barracks room contained a Sig Sauer M17 airsoft handgun.

x. Interviews were conducted of various Marines that detailed how the Accused obtained the assistance of various PMO Marines.

y. That the Accused received PMO schedules and procedures on how PMO operates.

z. Defense requested the Convening Authority provide funding for a defense investigator, forensic toxicologist, and forsensic psychologist.

aa. The Government denied the defense request for an investigator, forensic toxicologist, and forensic psychologist.

4. <u>Statement of Law</u>

RCM 703(d) specifically provides for employment of defense requested expert consultants under certain circumstances: "A request for an expert . . . consultant denied by the convening authority may be renewed after referral of the charges before the military judge who shall determine, in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense." RCM 703(d)(2)(A)(ii).

An accused has a right to the assistance of an expert upon a showing of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). In order to determine necessity, courts apply a two pronged test: "[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006). The

first prong of that test is demonstrated by satisfying three conditions:

> "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop."

United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (citations omitted). The defense's desire to "explor[e] all possibilities" does not satisfy the required showing of necessity. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations omitted). The defense is required to show more than a mere possibility of assistance. See *United States v. Short*, 50 M.J. 370, 372 (C.A.A.F. 1999). Even though a case may involve difficult issues, this does not mean the defense is automatically entitled to expert assistance. See *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Further, defense counsel are expected to educate themselves to attain competence in defending the issues in a particular case. See *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). However, the military judge cannot deny a defense request for an expert assistant by telling the defense to use the government's own expert to prepare for trial. See *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006).

With regard to the second prong, a trial is considered fundamentally unfair where the government's actions are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973). In *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005), the C.A.A.F. held "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." Where the government provides itself with a top expert, it must provide a reasonably comparable expert to the defense. In *United States v. Lee*, 64 M.J. 213, commenting on *Warner* and Article 46, the C.A.A.F. held the playing field is even more uneven when the government benefits from

scientific evidence and expert testimony, and the defense is denied a necessary expert to prepare for and respond to the government's expert.

One factor courts use to determine if a trial would be fundamentally unfair is whether the content of the expert's knowledge is central to the government's case. Where scientific analysis is the "linchpin" of the government's case, the C.A.A.F. held that the denial of an expert by the military judge constitutes an abuse of discretion. *United States v. McAllister,* 55 M.J. 270, 276 (C.A.A.F. 2001). On the other hand, where the content of the expert's expertise does not constitute the "linchpin" of the government's case, military courts have readily distinguished *McAllister*. See, e.g., *Lloyd*, 69 M.J. at 100 ("Absent a more precise explanation of the theory they hoped to pursue through the assistance of a blood spatter expert, we cannot find that the military judge abused her discretion when she denied the defense motion for expert assistance.").

5. <u>Analysis</u>

a. **Has defense established by a preponderance of the evidence that assistance of an investigator is necessary to defense for an adequate defense.**

The defense has not met its burden to show a reasonable probability that (1) an expert in this field would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. *Freeman*, 65 M.J. at 458. Under the first prong of *Freeman*, and applying the *Gonzalez* test for necessity, the defense has just not shown why a investigator expert is needed or what exactly this expert would accomplish. The investigation in this case is relatively straightforward and easy to understand. The Accused was a Corporal stationed aboard Marine Corps Base Hawaii at the time of the incident. Cpl Suarez started using cocaine on 1 August 2021 and soon thereafter started to bring cocaine aboard MCB Hawaii to use and distribute to other Marines. During the investigation multiple Marines in 3d

Battalion 3d Marines and in PMO were interviewed. This interviewes provided NCIS with information with regard to the extent of Cpl Suarez's operation. These interviews were very straight forward do not require and expert in narcotics distribution to understand. The search of the barracks room and Cpl Suarez's person were completed on 11 January 2022.
There is nothing about this investigation that is overly complicated or of a nature that would require an explanation by an expert.

The defense argues that the investigator is necessary to the defense to be able to understand the evidence and to corroborate any intent by the parties. The defense states the expert assistance of an investigator is necessary to prepare its case and adequately respond to the government witnesses' perceptions. This Court fails to see how an expert is needed to accomplish this. The evidence against the Accused in this case appears to be straight forward and defense has not pointed any aspect of the case they are unable to understand. The witnesses have made statements, the defense has the ability to re-interview them if they wish. There is nothing that seems to be complicated about this investigation. The defense has provided no evidence to show that this drug distribution investigation is so complex as to necessitate the need for an expert investigator.

This Court finds the denial of the requested expert will not result in a fundamentally unfair trial. First, there is nothing overly complicated about the investigation in this case. It consisted of multiple interviews of various witnesses that had knowledge of the accused misconduct and a search of Cpl Suarez's property. As the government points out in its written filing, an investigator is not filling a knowledge gap or breaking down a highly technical process. Next, the Court finds that anything an expert investigator would accomplish for the accused can be done with the resources already available to the defense. This investigation is not some piece

of complex scientific evidence that the government is exploiting while not allowing the defense to respond. As stated above, the investigation is straightforward and easy to understand on its face. There is no need for expert analysis. Finally, the defense has failed to adequately state why they would unable to gather and present the evidence that the expert assistant would be able to develop. For these reasons the defense motion to compel an expert investigator is **DENIED**.

b. **Forensic Toxocologist.**

The Government has consulted a forensic toxicologist in this case to analyze the urinalysis test results and the laboratory litigation packet. The Government will be employing an expert in its trial preparation. According to Article 46, UCMJ, trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). The government has agreed to provide the defense with the requested forensic toxicologist. Therefore, defense motion to compel an expert in forensic toxicology is **GRANTED**.

c. **Has defense established by a preponderance of the evidence that assistance of forensic psychologist is necessary for an adequate defense.**

The defense has not met its burden to show a reasonable probability that (1) an expert in this field would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. *Freeman*, 65 M.J. at 458. Under the first prong of *Freeman*, and applying the *Gonzalez* test for necessity, the defense has just not shown why a Forensic psychologist expert is needed or what exactly this expert would accomplish. Defense argues that a forensic psychologist will be able to conduct a clinical assessment of Cpl Suarez

and evaluate whether his background, upbringing, and/or personality makes him more susceptible to addiction or reckless behavior. This use of the forensic psychologist goes more to the reason why the accused may have committed the alleged acts. The Court does not find that this evidence relevant to the trial. Thus, there is nothing for a forensic psychologist consultant to assist with. Presenting evidence that the Accused is susceptible to addiction or reckless behavior has little if anything to do with whether the alleged misconduct was or was not committed by the Accused.

This is not a case that revolves around the science of psychological results, thus the defense has not shown why such an expert is needed or what exactly this expert would accomplish. This is a case primarily about what percipient witnesses observed throughout roughly a six month period, searches of the Accused property and finally about some of the accused's admissions. The Accused's susceptibility to addiction and reckless behavior are not central to the government's case in any way. The defense can certainly point out that the alleged controlled substances are usually highly addictive and that some people are susceptible to destructive behavior, however they do not need an expert to say it.

Finally, denial of the requested expert will not result in a fundamentally unfair trial. What the defense is asking the forensic psychologist to analyze is not the "linchpin" of the government's case. The defense is not placed at any unfair disadvantage by this denial. The Court finds this case to be analogous to *Lloyd*, where CAAF held, "Absent a more precise explanation of the theory they hoped to pursue through the assistance of a[n] . . . expert, we cannot find that the military judge abused her discretion when she denied the defense motion for expert assistance." Lloyd, 69 M.J. at 100. Here, the evidence does not support anything that the

defense precisely needs assistance on with respect to whether the Accused wrongfully introduced and distributed a controlled substance or whether the accused attempted to commit acts of prostitution. Denial of this forensic psychologist expert will not result in a fundamentally unfair trial because the defense did not meet its burden to show that there is a reasonable probability of defendant's psychologic state playing a central or important role in this case. For these reasons the defense motion to compel an expert forensic psychologist is **DENIED**.

6. Ruling

Accordingly, the Defense's motion is **GRANTED** in part and **DENIED** in part.

So **ORDERED** this 25th day of August, 2022.

[redacted]

S. F. KEANE
Col, USMC
Military Judge

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

U N I T E D S T A T E S	**)**	**RULING ON DEFENSE**
	)	**MOTION TO RELEASE**
v.	**)**	**FROM PRE-TRIAL CONFINEMENT**
	)	
JOSEPH D. SUAREZ	**)**	
CORPORAL	**)**	
U.S. MARINE CORPS	**)**	
	)	**21 AUGUST 2022**

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1. Nature of the Motion and Procedural Posture

The Defense moved to have the Accused released from pre-trial confinement. The Government opposed the motion and a UCMJ Article 39(a) hearing was held on 1 August 2022. This is the Court's written ruling.

2. Findings of Fact

In reaching the findings of fact and conclusions of law herein, the Court has considered all legal and competent evidence presented by the parties, the parties' asserted facts, all reasonable inferences to be drawn from the evidence, allied papers, documents, and enclosures, the record of trial, and has resolved any issues of credibility. In doing so, the Court makes the following findings of fact by a preponderance of the evidence:

a. The Government charged the Accused with violating Article 112a (Wrongful use, introduction, and distribution of controlled substances), Article 80 (Attempt of Prostitution), Article 81 (Conspiracy), and Article 82 (Solicitation) of the UCMJ. See
b. The Accused was ordered into pretrial confinement on 11 January 2022.
c. Cpl Suarez on about 1 August 2021 was an Active Duty Marine stationed at Marine Corps Base Hawaii.
d. The Accused started to use cocaine on or about 1 August 2021.
e. Shortly after the 1 August 2021 date the accused began purchasing cocaine for both personal use and distribution.
f. The Accused targeted his sales at service members on Marine Corps Base Hawaii and other military installations on the island of Oahu, Hawaii.

g. As the Accused's drug distribution network grew, he hired several Marines as narcotics dealers, "runners" to assist in the purchase of drugs so sales could not be traced back to him.
h. The Accused also hired Marines to protect the Accused as he purchased drugs from civilian drug dealers.
i. The Accused held parties in the barrack rooms with Marines and likely prostitutes, to entice Marines to purchase and use cocaine.
j. The Accused set up lines of cocaine throughout the parties for Marines to use or purchase.
k. The accused marketed his drugs by providing Marines free cocaine.
l. A urinalysis was conducted that resulted in a large number of Marines from 3D Marine Littoral Regiment testing positive for cocaine. A majority of the of the Marines from this unit that tested positive purchased or received their drugs from Cpl Suarez or someone working for Cpl Suarez.
m. On or about 22 December 2021 NCIS (Naval Criminal Investigative Service) was made aware of Cpl Suarez distributing cocaine. A Cooperating Witness (CW) notified NCIS that Cpl Suarez was using and selling narcotics. The CW informed NCIS that the Accused stored bulk cocaine, MDMA, And LSD in his barracks room. The CW also stated that the Accused was selling sexual services via "Snapchat".
n. NCIS and the CW begin to collect evidence of on the drug distribution ring and the co-
o. conspirators.
p. On 6 January 2022, the Accused tested positive for cocaine during a random command
q. urinalysis.
r. Pursuant to a CASS, the Accused's barracks room was searched and NCIS agents located controlled substances, drug paraphernalia, an additional cell phone, and notebooks containing leger-style writing consistent with narcotics trafficking. NCIS assumed control of the CW's snapchat account in order to make contact with the Accused.
s. That the Accused informed the NCIS Cooperating Witness he could get the "best (snowflake emoji) on the island".
t. That the Accused provided a photograph of himself to an individual prior to a meet-up, where the Accused intended to sell sexual services.
u. That the Accused's barracks room contained a digital scale, ledgers, gold foil, and other drug paraphernalia.
v. That the Accused's barracks room contained a Sig Sauer M17 airsoft handgun.
w. That the Accused received PMO schedules and did not disclose the leak of Marine Corps Base Hawaii security and anti-terrorism measures to authorities.
x. That the Accused made threats to [redacted] regarding snitching, saying "Alright man, you have a lot of dirt on me and I do on you too. We did it all together."
y. On 17 January 2022, the Accused had a hearing for the 7-day review of pretrial confinement.

z. During the hearing, Naval Criminal Investigative Service (NCIS) Special Agent [redacted] testified that the Accused's release from pretrial confinement would potentially interfere with an ongoing investigation being conducted by NCIS and the Drug Enforcement Administration

aa. The Initial Reviewing Officer (IRO) Maj [redacted] heard evidence of positive urinalysis results, written and verbal statements from Special Agent [redacted] the Accused's attempt at prostitution, and evidence from the Accused's phone.

bb. During the IRO Hearing, the command presented evidence that less severe forms of restraint were inadequate due to the large number of personnel involved with the drug ring Cpl Suarez is accused of running, limits on the ability to restrict Cpl Suarez's communication, and Cpl Suarez's ability to interfere with witnesses if her were to be released from confinement.

cc. In the "summary of evidence" section of his Initial Review Officer's Findings and Order, Maj [redacted] wrote, "the threat to ongoing investigations and good order and discipline translates to the Cpl being continued in confinement."

dd. The Government presented no evidence that Cpl Suarez would not appear at trial.

ee. After considering all of the evidence, the IRO ordered the Accused to remain in pretrial confinement because lesser forms of restraint were inadequate and there was a threat to ongoing investigations and good order and discipline.

ff. On 11 March 2022, Defense Counsel requested a reconsideration of the approval of continued pretrial confinement in the subject case.

gg. On 20 March 2022, the Convening Authority denied the request for reconsideration of pretrial confinement.

4. Statement of Law

Service members pending criminal charges may be ordered into pretrial confinement as the circumstances may require. Article 10, UCMJ. Such confinement may not be imposed unless reasonable grounds exist to believe that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary either because the accused is a flight risk or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B). "Serious criminal misconduct" includes "offenses which pose a serious threat to . . . the effectiveness, morale, discipline, readiness, or safety of the command." Id. On motion from the defense, the military judge must order an accused released from pre-trial confinement only if: (A) the 7-day review officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continued pretrial confinement; (B) information not presented to the 7-day review officer establishes that the prisoner should be released; or (C) the requirements of R.C.M. 305(i)(1) and R.C.M. 305(i)(2) were not complied with, and information presented to the military judge does not establish grounds for continued confinement. R.C.M. 305(j).

5. Analysis

a. **Did the seven-day reviewing officer abuse his discretion by applying the wrong legal standard for continued confinement.**

The defense argues that the IRO's decision was an abuse of discretion and that there is not sufficient information presented to the military judge justifying continued pretrial confinement in lieu of some lesser form of restraint. The court disagrees. First, based on the information presented to the IRO, *see United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996), the court concludes that the IRO did not abuse his discretion. *United States v. Fisher*, 37 M.J. 812, (N.M.C.M.R. 1993) states:

> The exercise of discretion implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by reason and conscience to a just result. The test for an abuse of discretion is the failure to exercise discretion or its exercise on grounds that are untenable. It does not imply a bad motive or willful disregard of an accused's rights, but can be the failure to apply the principles of law applicable to the situation at hand.

Id at 816-17. The required exercise of common sense, factual analysis, and independent judgment is designed ultimately to guard against the "mere ratification of the bare bones conclusions of others." *Id.* at 818. In order to find an abuse of such discretion, the court must find "more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011).

In this case, the IRO received sufficient evidence pertaining to the allegations and also received argument from both Defense Counsel and Government representatives regarding said evidence. The IRO did not abuse his discretion in determining reasonable grounds exist to believe that an offense triable by court-martial was committed, and that the accused committed it. Importantly, the allegations in this case involve the multiple violations of wrongful distribution of controlled substance and conspiracy to commit wrongful distribution. The Accused's actions effected not only himself but a large number of Marines within 3d Battalion 3d Marines, to include not only those he sold controlled substances to but also those he conspired with. This information was presented to the IRO at the hearing. Due to the potential for long term confinement and the nature of the alleged offenses, the IRO did not abuse his discretion in determining reasonable grounds exist to believe that restraint is necessary to prevent further serious misconduct.

Based on all the evidence presented on the motion, the court concludes that there is sufficient information to justify continued pretrial confinement. It is settled that an accused cannot be placed into pretrial confinement simply for convenience," *United States v. Heard*, 3 M.J. 14, 19 (C.M.A. 1977), "*the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined." United States v. Rosato*, 29 M.J. 1052, 1054 (A.F.C.M.R. 1990), *rev'd on other grounds*, 32 M.J. 93 (C.M.A. 1991). In

this case, the accused is charged with a serious offense which allegedly took place over multiple months and involved multiple Marines and negatively affected a command aboard Marine Corps Base Hawaii. The interests in protecting the military community are prominent in this case. The court finds probable cause that offenses triable by court-martial were committed by Cpl Suarez. The court considered the evidence presented, the nature of the charges, and potential for long term confinement of Cpl Suarez. Based on those considerations the court further finds *de novo*, that there is sufficient evidence under RCM 305(h)(2)(B) to find it is foreseeable that Cpl Suarez will engage in serious misconduct and/or not appear at trial if not confined. The court finds that that lesser forms of restraint are inadequate.

6. Ruling

Accordingly, the Defense's motion is **DENIED**.

So **ORDERED** this 21st day of August, 2022.

[redacted]

S. F. KEANE
Col, USMC
Military Judge

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

U N I T E D S T A T E S	**)**	**RULING**
	)	**(SEARCH AND SEIZURE OF**
v.	**)**	**CORPORAL SUAREZ'S PERSON,**
	)	**VEHICLE, BARRACKS ROOM,**
JOSEPH D. SUAREZ	**)**	**WORKPLACE AND EVIDENCE FROM**
CORPORAL	**)**	**THOSE SEARCHES)**
U.S. MARINE CORPS	**)**	
	)	**19 AUGUST 2022**

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1. Nature of the Motion and Procedural Posture

On 29 July 2022, the Defense moved for a preliminary ruling suppressing all evidence obtained from an illegal seizure, and subsequent search, of Cpl Suarez's person, vehicle, barracks room, and workplace and all evidence or reports derived from those searches. The Court **DENIED** the motion on 1 AUG 2022. This written ruling now supplements the Court's ruling.

2. Issue Presented

a. Was the search and seizure of Cpl Suarez's property lawful?
b. Was the Command Authorization to search and seize Cpl Suarez's property lawfully given?
c. If the Command Authorization to search and seize Cpl Suarez's property was not lawfully given, does the "Good faith Exception" apply?

3. Findings of Fact[1]

a. Cpl Suarez on about 1 August 2021 was an Active Duty Marine stationed at Marine Corps Base Hawaii.
b. The Accused started to use cocaine on or about 1 August 2021.
c. Shortly after the 1 August 2021 date the accused began purchasing cocaine for both personal use and distribution.
d. The Accused targeted his sales at service members on Marine Corps Base Hawaii and other military installations on the island of Oahu, Hawaii.

[1] The Court finds the following facts by a preponderance of the evidence based upon the evidence submitted by the parties and adduced at the hearing.

e. As the Accused's drug distribution network grew, he hired several Marines as narcotics dealers, "runners" to assist in the purchase of drugs so sales could not be traced back to him.
f. The Accused also hired Marines to protect the Accused as he purchased drugs from civilian drug dealers.
g. The Accused held parties in the barrack rooms with Marines and likely prostitutes, to entice Marines to purchase and use cocaine.
h. The Accused set up lines cocaine throughout the parties for Marines to use or purchase.
i. A urinalysis was conducted that resulted in a large number of Marines from 3D Marine Littoral Regiment testing positive for cocaine. .A majority of the of the Marines from this unit that tested positive purchased or received their drugs from Cpl Suarez or someone working for Cpl Suarez.
j. On or about 22 December 2021 NCIS (Naval Criminal Investigative Service) was made aware of Cpl Suarez distributing cocaine. A Cooperating Witness (CW) notified NCIS that Cpl Suarez was using and selling narcotics. The CW informed NCIS that the Accused stored bulk cocaine, MDMA, And LSD in his barracks room. The CW also stated that the Accused was selling sexual services via "Snapchat".
k. The CW informed NCIS that the Accused had recently purchased a BMW Z4 convertible with the Hawaii license plate "[redacted]" but had not yet registered the car in his name.
l. NCIS assumed control of the CW's snapchat account in order to make contact with the Accused. An NCIS Agent responded to one of the Accused's advertisements for sexual services. The Agent responded by asking to purchase sexual services from the Accused and requested that he bring and "8-ball" (3.5 grams) of cocaine with him.
m. LtCol [redacted] was the Commanding Officer of 3d Bn 3d Marines at the time of the search. He was updated routinely by SA [redacted] with NCIS about Cpl Suarez's misconduct and NCIS's surveillance of Accused narcotics distribution.
n. On 10 January 2022, NCIS was informed that Cpl Suarez tested positive for cocaine on a unit urinalysis conducted on 6 January 2022.
o. On 10 January 2022, SA [redacted] met with LtCol [redacted] to request a Command Authorization Search and Seizure (CASS) for Cpl Suarez's person, barracks room (Barracks [redacted], room [redacted], and his vehicle (a grey BMW Z4 convertible with Hawaii license plate number [redacted]') in order seize Accused's cell phone, "burner" cell phones, drug paraphernalia, and drugs.
p. LtCol [redacted] was informed by SA [redacted] that through surveillance and the CW they had information tying the Accused's narcotics distribution misconduct to his cell phone, barracks room and vehicle. It showed that he was using all of these to distribute narcotics and illegally sell sexual services.
q. LtCol [redacted] did not have any control over the parking garage and did not believe he had any ownership as a commander over Building [redacted] parking garage where Cpl Suarez's vehicle was parked.

r. LtCol [redacted] Marines may sometimes park in the building, but it is utilized by others on the base to include patrons of Panda Express, the MCX and possibly the base clinic.
s. LtCol [redacted] was not aware of where the vehicle was located at the time of the issuance of the CASS.
t. LtCol [redacted] issued a verbal CASS to NCIS agents to search the Accused person, barracks room, cell phone and car.
u. Pursuant to the CASS Accused's person was searched and a cellphone and car keys were seized.
v. Pursuant to the CASS Accused's barracks room was searched and controlled substances, drug paraphernalia, a cell phone, and a notebook was seized.
w. Pursuant to the CASS Accused's vehicle was located on the second level of parking garage [redacted] and was searched on 11 January 2022.
x. Agents seized drug paraphernalia to include: one green plastic straw, one yellow plastic straw, one pink plastic straw, one gum wrapped in foil wrapper, one black in color plastic pen bottom, one black in color plastic pen top. Several swabs moistened with sterile water and used to swab driver side door and floor, passenger side floor and floor mat and a swab of center console and gearshift.

4. <u>Summary of Relevant Law</u>

The Defense seeks to suppress all items collected from the search of Cpl Suarez's person, barracks room, phone and vehicle on 11 January 2022. They seek suppression based on the Fourth Amendment to the United States Constitution and the Military Rules of Evidence (MRE) that enforce it, namely MREs 311, 315, and 316. The Fourth Amendment is a foundational principle of evidence law:

> "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."

Congress extended the Fourth Amendment's protections to military servicemembers through the Universal Code of Military Justice and the MREs promulgated by the President. 10 U.S.C. § 836 (2022).

MRE 315 provides, in relevant part:

(a) Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, or under the exigent circumstances described in this rule, is

admissible at trial when relevant and not otherwise inadmissible under these rules or he the Constitution of the United States as applied to members of the Armed Forces.

(b) Definitions. As used in these rules: (1) "Search authorization" means express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

Federal law prohibits the introduction into evidence of material seized in violation of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). This is known as the "exclusionary rule." MRE 311(a) codifies the exclusionary rule: "Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused." An unlawful search or seizure is one that does not comport with the requirements of MREs 312-317. The general rule from MREs 315 and 316 is that searches and seizures are only lawful when conducted pursuant to a warrant issued upon probable cause or when duly authorized by an appropriate authority upon probable cause. The Defense's motion implicates two justifications for the Government's seizure of Cpl Suarez's person, barracks, cellphone, and vehicle: (1) command authorization under MRE 315(d)(1); and (2) good faith reliance on command authorization under MRE 311(c)(3).

A commander "who has control over the place where the property or person to be searched is situated or found" may issue a search authorization based on probable cause communicated to him by investigators. MRE 315(d)(1) and 315(f).

The good faith exception in MRE 311(c)(3) is an exception to the exclusionary rule. It has three elements:

1. the seizure resulted from an authorization issued by an individual competent to issue the authorization under MRE 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 good faith exception exists because the exclusionary rule has no deterrent effect where police mistakes are the result of mere negligence, rather than deliberate misconduct. *See Herring v. United States*, 555 U.S. 135 (2009). Importantly, the good faith exception applies to both probable cause determinations and authorizations where the commander did not have control over the area searched. *See United States v. Mix*, 35 M.J. 283 (C.M.A. 1992); *United States v Chapple*, 36 M.J. 410 (C.M.A. 1993). Where an investigation meets all three elements of the good faith exception, the exclusionary rule will not apply.

5. Analysis

a. LtCol LtCol [redacted] did not have control over building [redacted] the garage Cpl Suarez's vehicle was in, and as such could not authorize the search and seizure of the Accused's vehicle. The "Good Faith Exception" does not apply to the search of the vehicle.

The Government contends that LtCol [redacted] had the proper authority to issue a Command Authorization for the search of the Accused's vehicle, based on the fact it was in a facility that his Marines routinely parked in. The government argues that LtCol [redacted] had a shared authority over this parking garage and could thus order a search of his Marines vehicle. At the 39(a) hearing LtCol [redacted] stated he did not have control over this building nor did he believe as a commander of 3d Battalion 3d Marines that he had ownership over it.

M.R.E. 315(d)(1) requires that a commander issuing a command authorization have "control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war." The government argues that, on a military installation, multiple commanders may share authority over a single property or location. *United States v. Mix, 35 M.J. 283, 288 (C.A.A.F. 1992).* This concept specifically applies to shared parking garages located on military installations, wherein service members from multiple battalions may share the same parking garage. *Id.* The commanders of each battalion have authority to execute command authorizations to search property located in the parking garage shared by Marines in their battalions. *Id.*

The case at hand is distinguishable from *United States v. Mix,* in that LtCol [redacted] specifically stated he did not have any control over the parking garage building [redacted] nor did he believe he had any control over the parking garage. LtCol [redacted] clearly had no control over the parking garage where the vehicle was located and had no authority to authorize a search of the vehicle. Therefore, search of the vehicle was not authorized, and the items found in the vehicle shall be excluded, unless there is a valid exception.

The government argues that good faith exception in MRE 311(c)(3) to the exclusionary rule applies to this search. As noted previously MRE 311(c)(3) has three elements that must be met. The government's good faith exception argument fails with the first of the three elements. MRE 311(c)(3)(A), states that the authorization must have been issued by someone competent to authorize the search under MRE 315(d). The government argues that the case at hand is akin to facts in *Mix*. Unlike the battalion commander in *United States v. Mix*, where it was found that the commander's shared controlled of the parking lot. *Id.*, LtCol [redacted] did not have any control of building [redacted] where Cpl Suarez's vehicle was parked. Although LtCol [redacted] Marines may sometimes park in the building, it was also utilized by others on the base to include patrons of Panda Express, the MCX and possibly the base clinic. LtCol [redacted] in the 39(a) stated he did not believe he had ownership of the building in which the vehicle was located.

LtCol [redacted] had no authority over the building and thus was not a competent authority to issue an authorization to search under MRE 315(d).

The court also finds that the good faith exception is lacking in this case, in that SA [redacted] should have known based on his training and experience that LtCol [redacted] was not the proper command authority to request a CASS from, as it pertained to the vehicle. LtCol [redacted] was not made aware by SA [redacted] of where the vehicle was located when it was to be searched. Had LtCol [redacted] been fully informed of the location and told that the vehicle was located in building [redacted] it could have easily been determined that the LtCol [redacted] lacked the ability to authorize a search in that location. For these reasons and those noted above, the search of the vehicle is invalid and the items seized from the vehicle are excluded.

Defense motion to suppress items seized from Cpl Suarez's vehicle is **GRANTED**.

b. The search of Cpl Suarez's person, barracks and phone was lawful, and all items seized as a result of those searches was lawfully obtained.

LtCol [redacted] was the commander of 3rd Battalion 3rd Marines, the unit the Cpl Suarez belonged to, at the time to of the search. Cpl Suarez's person, and belongings on his person along with his barracks room are all areas that LtCol [redacted] can appropriately authorize a search of. In December of 2021 NCIS, was made aware that Cpl Suarez is distributing cocaine and selling sexual services on board Marine Corps Base Hawaii. NCIS conducted surveillance of Cpl Suarez and LtCol [redacted] was informed by SA [redacted] that from the surveillance and the CW they had information tying the Accused's narcotics distribution misconduct to his cell phone, barracks room and vehicle. It showed that he was using all of these to distribute narcotics and illegally sell sexual services. LtCol [redacted] had authority to issue a CASS for the person of Cpl Suarez, his belongings found on his person and Cpl Suarez's barracks room, pursuant to MRE 315(d). There was probable cause to authorize the search pursuant to MRE 315(f).

There was no evidence produced to show that LtCol [redacted] was not acting as an impartial commander when the CASS was issued. For a command authorization to be valid, "the probable cause determination must be made by an official who is 'neutral and detached.'" *United States v. Hobbs*, 62 M.J. 556, 559 (A.F.C.C.A. 2005) (citing *United States v . Rivera*, 10 M.J. 55, 58 (C.M.A. 1980)). M.R.E. 315(d) states in pertinent part, "A search authorization under this rule is valid only if issued by an impartial individual...." "The term 'neutral and detached' has been treated as synonymous with 'impartial.'" Id. (citing *United States v . Staggs*, 23 C.M.A. 111, 48 C.M.R. 672, 674-75(C.M.A. 1974)). "A commander or magistrate who takes an active and personal part in the gathering of evidence, or otherwise acts 'as a law enforcement official,' is not neutral and detached and cannot authorize a valid search." Id. (citing *United States v . Freeman*, 42 M.J. 239, 243 (C.A.A.F. 1995)).

Defense motion to suppress the items seized from Cpl Suarez's person, and Cpl Suarez's barracks room is **DENIED.**

6. Conclusion

NCIS agents lawfully searched Cpl Suarez's belongings located on his person, and Cpl Suarez's barracks room. All items seized were lawfully obtained. Those items are admissible evidence.

LtCol [redacted] did not have the authority issue a CASS to search the vehicle that was located in an area of the base he did not have control over and the Good Faith Exception does not apply.

7. Order

Accordingly, the Defense's motion is **DENIED** in part and **GRANTED** in part.

So **ORDERED** this 19th day of July, 2022.

[redacted]
S. F. KEANE
Col, USMC
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

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

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
Marine Corps Base Hawaii	General	Judge Alone - MJA16	Oct 18, 2022

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	5 years	None	None	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ●	Yes ○ No ●	Yes ○ No ●	Yes ○ No ●	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
280	0	280 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

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

A dishonorable discharge will be adjudged; the maximum confinement that may be adjudged is 5 years, the minimum confinement that may be adjudged is 2 years; forfeitures may be adjudged; no fine shall be adjudged; reduction to the grade of E-1 will be adjudged; no other lawful punishments may be adjudged.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		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
Goode, Andrea C.	Marine Corps	O-5	Oct 18, 2022	[redacted]

37. NOTES

ORIGINAL

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: Guilty Plea: Guilty Findings: Guilty	112a	Specification 1:	**Guilty**	Guilty			112AC1
		Offense description	Use of Schedule I / II / III controlled drugs				
		Specification 2:	**Guilty**	Guilty			112AH1
		Offense description	Introduction of Schedule I / II / III controlled drugs with intent to distribute				
		Specification 3:	**Guilty**	Guilty			112AD1
		Offense description	Distributing Schedule I / II / III controlled drugs				
		Specification 4:	**Guilty by E&S**	Guilty by E&S			112AD1
		Offense description	Distributing Schedule I / II / III controlled drugs				
		Exceptions and Substitutions	Guilty, except for the words "3,4 Methylenedioxymethamphetamine" and "Psilocybin mushrooms;" of the excepted words, not guilty; of the specification as excepted, guilty.**				
		Specification 5:	**Guilty by E&S**	Guilty by E&S			112AD1
		Offense description	Distributing Schedule I / II / III controlled drugs				
		Exceptions and Substitutions	Guilty, except for the words "Hydrocodone;" of the excepted words, not guilty; of the specification as excepted, guilty.				
Charge II: Not Guilty Plea: Not Guilty Findings: Not Guilty	80	Specification:	**Not Guilty**	Not Guilty			134B6
		Offense description	Attempts - other than murder and voluntary manslaughter				
Add Charge: Guilty Plea: Guilty Findings: Guilty	81	Specification:	**Guilty**	Guilty			112AD1
		Offense description	Conspiracy				
2d Add Ch: Not Guilty Plea: Not Guilty Findings: Not Guilty	82	Specification:	**Not Guilty**	Not Guilty			082-A-
		Offense description	Soliciting commission of an offense				

**For Specification 5 of Charge I, following providency questioning, the military judge entered a plea of NOT GUILTY to the words "on divers occasions". The finding is: GUILTY, except for the words "on divers occasions" and "hydrocodone"; of the excepted words, NOT GUILTY, of the specification as excepted, GUILTY.

ORIGINAL

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I: Guilty Plea: Guilty Findings: Guilty	Specification 1:	24 months	All others charges and specifications	None	None
	Specification 2:	24 months	All others charges and specifications	None	None
	Specification 3:	60 months	All others charges and specifications	None	None
	Specification 4:	24 months	All others charges and specifications	None	None
	Specification 5:	24 months	All others charges and specifications	None	None
Charge II: Not Guilty Plea: Not Guilty Findings: Not Guilty	Specification:	N/A	N/A	N/A	N/A
Add Charge: Guilty Plea: Guilty Findings: Guilty	Specification:	60 months	All others charges and specifications	None	None
2d Add Ch: Not Guilty Plea: Not Guilty Findings: Not Guilty	Specification:	N/A	N/A	N/A	N/A

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
SUAREZ, JOSEPH D.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
3D BN, 3D MLR, [redacted]	25 MAR 19	4 YRS

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
[redacted]	General	Judge Alone - MJA16	18-Oct-2022

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	(•) Yes	( ) No
12. Has the accused made a request for deferment of confinement?	( ) Yes	(•) No
13. Has the accused made a request for deferment of adjudged forfeitures?	( ) Yes	(•) No
14. Has the accused made a request for deferment of automatic forfeitures?	( ) Yes	(•) No
15. Has the accused made a request for waiver of automatic forfeitures?	( ) Yes	(•) No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	( ) Yes	(•) No
17. Has the accused submitted matters for convening authority's review?	(•) Yes	( ) No
18. Has the victim(s) submitted matters for convening authority's review?	( ) Yes	(•) No
19. Has the accused submitted any rebuttal matters?	( ) Yes	(•) No
20. Has the military judge made a suspension or clemency recommendation?	( ) Yes	(•) No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	( ) Yes	(•) No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	( ) Yes	(•) No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

On 28 October 2022, the accused, through counsel, requested that the convening authority suspend the adjudged reduction in pay grade.

24. Convening Authority Name/Title	25. SJA Name
Major General Jay M. Bargeron Commanding General, [redacted]	Lieutenant Colonel [redacted]

26. SJA signature	27. Date
[redacted]	Nov 14, 2022

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

I take no action on this case.

I have reviewed all matters submitted by the accused, the statement of trial results, and the plea agreement and have been advised by the staff judge advocate. After considering the accused's convicted offenses, the sentence adjudged, the effect that taking action on the accused's request would have on good order and discipline, and the accused's character, I deny the accused's request.

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:

30. Convening Authority's signature	31. Date
BARGERON.JAY.M.[redacted] Digitally signed by BARGERON.JAY.M.[redacted] Date: 2022.11.23 08:09:58 +09'00'	Nov 23, 2022

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

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable. (Continued)

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
SUAREZ, JOSEPH D.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
3D BN, 3D MLR, [redacted]	25 MAR 19	4 YRS

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
[redacted]	General	Judge Alone - MJA16	18-Oct-2022

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)]

The following are the Accused's pleas and the Court's findings to all offenses the convening authority referred to trial:

Charge I: Violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912.
Plea: Guilty
Finding: Guilty

Specification 1: Wrongful Use on or about 1 August 2021 and on or about 11 January 2022.
Plea: Guilty
Finding: Guilty

Specification 2: Wrongful Introduction on or about 1 August 2021 and on or about 11 January 2022.
Plea: Guilty
Finding: Guilty

Specification 3: Wrongful Distribution on or about 1 August 2021 and on or about 11 January 2022.
Plea: Guilty
Finding: Guilty

Specification 4: Wrongful Distribution on or about 1 August 2021 and on or about 11 January 2022.
Plea: Guilty except for the words "3,4 Methylenedioxymethamphetamine" and "Psilocybin mushrooms"; of the excepted words Not Guilty, of the specification as excepted, Guilty.*
Finding: Guilty except for the words "3,4 Methylenedioxymethamphetamine" and "Psilocybin mushrooms", of the excepted words, Not Guilty, of the specification as excepted, Guilty.*

Specification 5: Wrongful Distribution on or about 1 August 2021 and on or about 11 January 2022.
Plea: Guilty except for the words "on divers occasions" and "hydrocodone"; of the excepted words, Not Guilty, of the specification as excepted, Guilty.* (After the providence inquiry, the Military Judge entered a plea of Not Guilty to the words "on divers occasions" on behalf of the Accused.)
Finding: Guilty except for the words "on divers occasions" and "hydrocodone"; of the excepted words, Not Guilty, of the specification as excepted, Guilty.*

[See Supplemental Page]

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 18 October 2022, a military judge sentenced the Accused to the following:

Reduction to pay grade E-1.

For Specification 1 of Charge I: 24 months.

For Specification 2 of Charge I: 24 months.

For Specification 3 of Charge I: 60 months.

For Specification 4 of Charge I: 24 months.

For Specification 5 of Charge I: 24 months.

For the Specification of Additional Charge I: 60 months.

The terms of confinement will run concurrently for a total of 60 months.

A Dishonorable Discharge.

The accused has served 280 days of pretrial confinement and shall be credited with 280 days of confinement already served, to be deducted from the adjudged sentence to confinement.

The Convening Authority took no action on the sentence.

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 28 October 2022, the accused, through counsel, requested that the convening authority suspend the adjudged reduction in pay grade. The Convening Authority denied this request.

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

N/A

15. Judge's signature:	16. Date judgment entered:
[redacted]	2 FEB 23

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 II: Violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880.
Plea: Not Guilty
Finding: Withdrawn and dismissed without prejudice to ripen into prejudice upon pronouncement of appellate review.

Specification: Attempt of Prostitution on or about 6 January 2022.
Plea: Not Guilty
Finding: Withdrawn and dismissed without prejudice to ripen into prejudice upon pronouncement of appellate review.

Additional Charge I: Violation of Article 81, Uniform Code of Military Justice, 10 U.S.C. § 881.
Plea: Guilty
Finding: Guilty

Specification: Conspiracy on or about 1 October 2021 and on or about 11 January 2022.
Plea: Guilty
Finding: Guilty

Additional Charge II: Violation of Article 82, Uniform Code of Military Justice, 10 U.S.C. § 882.
Plea: Not Guilty
Finding: Withdrawn and dismissed without prejudice to ripen into prejudice upon pronouncement of appellate review.

Specification: Solicitation on or about 11 January 2022 and on or about 7 February 2022.
Plea: Not Guilty
Finding: Withdrawn and dismissed without prejudice to ripen into prejudice upon pronouncement of appellate review.

*The language to which the accused was found Not Guilty was withdrawn and dismissed without prejudice to ripen into prejudice upon pronouncement of appellate review.

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)