[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Tapp	Thomas	H	[redacted]	E-2
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

3d Bn, 5th Mar, 1st MARDIV	USMC	Camp Pendleton, California
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) — COURT-MARTIAL
(GCM, SPCM, or SCM)

Convened by Commanding General
(Title of Convening Authority)

1st Marine Division (REIN)
(Unit/Command of Convening Authority)

Tried at

Camp Pendleton, California — On 19 Oct, 23 Nov, 14 Dec of 2020, 20 Jan, 12 Feb, 15-20 Feb, 8 Mar, 15 Apr of 2021
(Place or Places of Trial) — *(Date or Dates of Trial)*

Companion and other cases [redacted]
(Rank, Name, DOD ID No., (if applicable), or enter "None")

This volume contains [redacted]

CONVENING ORDER

UNITED STATES MARINE CORPS
1ST MARINE DIVISION (REIN)
BOX 555380
CAMP PENDLETON CALIFORNIA 92055-5380

IN REPLY REFER TO:
5000-82
GCMCO #1-20
SEP 2 9 2020

A General Court-Martial is hereby convened. It may proceed at Marine Corps Base Camp Pendleton, California, or Marine Air Ground Task Force Training Center Twentynine Palms, California, unless otherwise directed. The Court-Martial will be constituted as follows:

MEMBERS

Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC; and
Captain [redacted] USMC.

[redacted]

R. B. TURNER, JR.
Major General
U. S. Marine Corps
Commanding General

[redacted]

UNITED STATES MARINE CORPS
1ST MARINE DIVISION (REIN) FMF
BOX 555380
CAMP PENDLETON CALIFORNIA 92055-5380

IN REPLY REFER TO
5000-82
GCMCO #1-20a
JAN 0 5 2021

A General Court-Martial Convening Order #1-20 is hereby modified only for the case of U.S. v. PRIVATE FIRST CLASS THOMAS H. TAPP, USMC:

DELETE

Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC; and
Captain [redacted] USMC.

ADD

Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Sergeant [redacted] USMC
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

This General Court-Martial is hereby constituted as follows:

Major [redacted] USMC;
Major [redacted], USMC;
Major [redacted], USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;

[redacted]

GCMO #1-20a continued

First Lieutenant [redacted], USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Sergeant [redacted] USMC
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted], USMC;
Master Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

[redacted]

R. B. TURNER, JR.
Major General
U. S. Marine Corps
Commanding General

UNITED STATES MARINE CORPS
1ST MARINE DIVISION (REIN) FMF
BOX 555380
CAMP PENDLETON CALIFORNIA 92055-5380

IN REPLY REFER TO:
5000-82
GCMCO #1-20b
JAN 26 2021

A General Court-Martial Convening Order #1-20a is hereby modified only for the case of U.S. v. PRIVATE FIRST CLASS THOMAS H. TAPP, USMC:

DELETE

Major [redacted] USMC;
Major [redacted] USMC;
Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC
First Lieutenant [redacted] USMC;
First Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

ADD

Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;

[redacted]

Gunnery Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

This General Court-Martial is hereby constituted as follows:

Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Gunnery Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; a[redacted]
Staff Sergeant [redacted] USMC.

R. B. TURNER, JR.
Major General
U. S. Marine Corps
Commanding General

UNITED STATES MARINE CORPS
1ST MARINE DIVISION (REIN) FMF
BOX 555380
CAMP PENDLETON CALIFORNIA 92055-5380

IN REPLY REFER TO
5000-82
GCMCO #1-20c
FEB 0 5 2021

A General Court-Martial Convening Order #1-20b is hereby modified only for the case of U.S. v. PRIVATE FIRST CLASS THOMAS H. TAPP, USMC:

DELETE

Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

ADD

None.

This General Court-Martial is hereby constituted as follows:

Major [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
Captain [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
First Lieutenant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Master Sergeant [redacted] USMC;
Gunnery Sergeant [redacted] USMC;
Staff Sergeant [redacted] USMC; and
Staff Sergeant [redacted] USMC.

[redacted]

R. B. TURNER, JR.
Major General
U. S. Marine Corps
Commanding General

[redacted]

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EDIPI	3. RANK/RATE	4. PAY GRADE
TAPP, Thomas H.	[redacted]	PFC	E-2

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
3rd Battalion, 5th Marine Regiment, 1st Marine Division	16 Dec 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		
2,000.10 ~~$1,942.50~~	N/A	2,000.10 ~~$1,942.50~~	Pretrial Confinement	20 Jul 20 - Present

II. CHARGE(S) AND SPECIFICATION(S)

10. **Charge I: Violation of the UCMJ, Article 92**

Specification: In that Private First Class Thomas H. Tapp, United States Marine Corps, while on active duty, did, at or near Marine Corps Base Camp Pendleton, California, on or about 18 July 2020, violate a lawful general order, which was his duty to obey, to wit: paragraph 4.a.(1)(j), Marine Corps Order 1700.22G, dated 16 November 2015, by consuming alcohol while under the age of 21 years old aboard Marine Corps Base Camp Pendleton, California.

Charge II: Violation of the UCMJ, Article 120

Specification: In that Private First Class Thomas H. Tapp, United States Marine Corps, while on active duty, did at or near Marine Corps Base Camp Pendleton, California, on or about 18 July 2020, commit a sexual act upon [redacted] by penetrating [redacted] vulva with his penis, without the consent of [redacted]

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-5	HqSptBn, MCI-W, MCB, CamPen, CA

d. SIGNATURE OF ACCUSER	e. DATE
[redacted]	17 Aug 20

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 17th day of August, 2020, 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.

N. E. MICHEL	HqSptBn, MCI-W, MCB, CamPen, CA
Typed Name of Officer	*Organization of Officer*
Major, U.S. Marine Corps	Judge Advocate
Grade and Service	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*

[redacted]
Signature

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

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

[redacted]
Typed Name of Immediate Commander

3rdBn, 5thMarReg, 1stMarDiv
Organization of Immediate Commander

Second Lieutenant, U.S. Marine Corps
Grade

[redacted]

IV. RECEIPT BY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0943 hours, AUGUST 21 20 20 at CAMP PENDLETON BRIG
Designation of Command or

3rdBn, 5thMarReg, 1stMarDiv
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

Second Lieutenant, U.S. Marine Corps
Grade

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
1st Marine Division	Camp Pendleton, CA	OCT 0 2 2020

Referred for trial to the General court-martial convened by General Court-Martial Convening Order #1-20

Dated 29 September 20 20 ,subject to the following instructions:[2]

By //////////////////////////////// Of
Command or Order

R. B. TURNER, JR.
Typed Name of Officer

COMMANDING GENERAL
Official Capacity of Officer Signing

Major General, ~~U.S.~~ Marine Corps

[redacted]
Signature

Signature

15. On 7 OCT ,20 20 , I (caused to be) ~~served~~ a copy hereof on ~~(each of)~~ the above named accused.

G.M. O'CONNELL

[redacted]
Typed Name of Trial Counsel

CAPTAIN ~~Major,~~ U.S. Marine Corps
Grade or Rank of Trial Counsel/Summary Court-Martial Officer

[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

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	DEFENSE MOTION FOR APPROPRIATE RELIEF PURSUANT TO R.C.M.s 902 and 1104 (Disqualify the Military Judge and Set Aside Findings of Guilty and the Sentence due to the Military Judge's Personal Bias and Prejudice affecting the Legal Sufficiency of all Findings of Guilty and the Sentence)

I. Nature of Motion: Pursuant to R.C.M.s 902, 915, and 1104, the Defense seeks dismissal with prejudice of the findings and sentence in this case, based on violation of Private First Class Tapp's constitutional right to an impartial judge, legal insufficiency, and the Military Judge's failure to disqualify or recuse himself. Alternatively, the Defense requests a mistrial. Further, the Defense seeks disqualification of Lieutenant Colonel J. P. Norman as Military Judge for this hearing and any remaining matters for this case.

II. Issue Presented: When the Military Judge makes *ex parte* statements to Trial Counsel prior to entry of judgment in a thirty-to-forty minute session—indicating bias against the accused, stating the government's requested sentence was too lenient, urging Trial Counsel to be angry and seek the maximum sentence in order to impose a "price" when defendants decide to exercise their constitutional right to jury trial or fully litigate cases—coupled with numerous rulings by the Military Judge against the Defense throughout trial, should the findings be set aside or a mistrial granted due denial of due process by the judge's clear bias and failure to impartially preside over the case?

III. Statement of Facts: Please see Enclosure 1 for a summary of relevant facts.

IV. Analysis of Law: An accused has a constitutional right to an impartial judge. *See United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001) (*citation omitted*). To secure this right,

APPELLATE EXHIBIT CXI
PAGE 2 OF 38

R.C.M. 902(a) mandates that a Military Judge "*shall* disqualify himself or herself in any proceeding in which the Military Judge's impartiality might reasonably be questioned." R.C.M. 902(a) (*emphasis added*). Specific grounds for disqualification exist "[w]here the Military Judge has a personal bias or prejudice concerning a party." R.C.M. 902(b)(1). The discussion of R.C.M. 902(d)(1) provides that grounds for disqualification "may be raised at any time" but "should be raised at the earliest reasonable opportunity." The accused is entitled to a fair judge throughout the proceedings, Military Judges have an affirmative "continuing duty to recuse themselves if any of the bases of disqualification under [R.C.M.] 902 develop."[1] *Quintanilla*, 56 M.J. at 45.

When an issue of disqualification is raised under both R.C.M. 902(a) and (b), the court applies a two-step analysis. "The first step asks whether disqualification is required under the specific circumstances listed in [R.C.M.] 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias." *Id.* R.C.M. 902(a) and case law instructs that an appearance of bias is present whenever there is:

> Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. . . . When a Military Judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the Military Judge's actions. . . . On appeal, the test is objective, judged from the standpoint of a reasonable person observing the proceedings.

Quintanilla, 56 M.J. at 78 (citations and internal quotation marks omitted).[2]

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[1] *See also* R.C.M. 902(d)(1), Discussion: ("[a] Military Judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case," and "should broadly construe grounds for challenge.").

[2] *See also Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460-61 (7th Cir. 1985) (disqualifying the trial judge for "accidental" employment inquiries with parties appearing before him, and stating "[t]he test for an appearance of partiality is . . . whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case."); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) ("We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.") (citations and internal quotation marks omitted).)

Judicial conduct is further governed by R.C.M. 109, which binds the Military Judge to the applicable service regulations contained in JAG Instruction 5803.1E, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, 20 Jan 2015, which incorporates the American Bar Association (ABA) Model Code of Judicial Conduct (MCJC) to the extent it does not conflict with other lawful requirements. See JAGINST 5803.1E, at para.7. Thus, a Military Judge is required to conform to the following standards:

> CANON 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
>
> CANON 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.
>
> CANON 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

ABA MCJC, Canons 1-3.[3]

These Canons are an important in evaluating how a reasonable observer, informed of all the facts, would perceive the judicial conduct. Under the objective "reasonable" observer standard, the Military Judge's extra-judicial, out-of-court, and *ex parte* statements must also be considered as part of the totality of circumstances in evaluating a conclusion of partiality. *See United States v. Bremer*, 72 M.J. 624, 628-29 (N.M.C.C.A. 2013) (setting aside findings for the Military Judge's failure to recuse, based largely on that Military Judge's out-of-court statements, strikingly similar in nature to those at issue here. See Appendix, *United States v. Kish*, 2014 CCA LEXIS 358 (N.M.C.C.A. Unpub. 2014). See also, *Quintanilla*, 56 M.J. at 80-81 (finding that the Military Judge ought to have

[3] *See also Quintanilla*, 56 M.J. at 42 (quoting ABA Standard 6-3.4, Special Functions of the Trial Judge (2d ed. 1980), "The trial judge should be the exemplar of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should suppress personal predilections, and control his or her temper and emotions. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom. When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.").

recused himself, holding that "[t]he Military Judge's incomplete disclosures and *ex parte* conversation appear to have prejudiced appellant."). Importantly, judicial comments concerning penalizing the Defense's exercise of the right to trial prejudices the accused and others, because due process forbids penalizing the assertion of a constitutional right to a jury trial. *See United States v. Jackson*, 390 U.S. 570, 581 (1968).

Although the totality of circumstances in this case are not close; "[i]f the question of whether [28 U.S.C. §] 455(a)[4] requires disqualification is a close one, the balance tips in favor of recusal." *Nichols v. Alley*, 71 F.3d 347, 352, (10th Cir. 1995) (citing *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993)). When multiple circumstances form the basis for recusal, the court must assess these incidents both individually, and in the aggregate to determine judicial bias. *See United States v. Laureano-Pérez*, 797 F.3d 45, 74 (1st Cir. 2015).

Once judicial misconduct makes disqualification necessary, reassignment of a disinterested judge from outside an affected sphere is appropriate to prevent compounding error. *See Nichols*, 71 F.3d at 352 (removing the trial judge assigned to the Oklahoma City bombing case, and noting "the relative ease of replacing Judge Alley with an available judge from a very large pool of judges outside the State of Oklahoma."); *see also United States v. Barry*, 78 M.J. 70, 74 (C.A.A.F. 2018) (noting the Court's order that the *DuBay* hearing "be conducted by an officer from outside the Navy and Marine Corps."); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905-1906 (2016) (discussing the intersection of due process and judicial bias, and noting that "[b]ias is easy to attribute to others and difficult to discern in oneself. . . . This objective risk of bias is reflected in the due process maxim

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[4] The Court of Appeals for the Armed Forces has held R.C.M. 902 to be largely the same as that of 28 U.S.C. § 455, while acknowledging that unique aspects of military legal practice must be appropriately considered in its application. *See United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994) (noting the general judicial disqualification standard under R.C.M. 902 "is the same" as 28 U.S.C. § 455, "upon which [R.C.M. 902] is based"— though the unique purposes and context of courts-martial must be appropriately considered. *Id.*)

that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." (*citation and quotation marks omitted*)).

R.C.M. 1104(a) and Article 60(b) afford the accused a procedure for relief from an unjust judgement. Specifically, R.C.M. 1104(a) provides a post-trial mechanism for correction of issues affecting the legal sufficiency of any findings. It permits the reconsideration of any trial ruling substantially affecting legal sufficiency. The existence of judicial bias or even the appearance of a lack of judicial impartiality taints all findings of that tribunal and calls into question the legal sufficiency of every finding.

Importantly, judicial misconduct, like prosecutorial misconduct or unlawful command influence, places an intolerable strain on the public's perception of the military justice system, compelling dismissal with prejudice. *United States v. Chamblin*, 217 CCA LEXIS 694, *28 (N.M.C.C.A. Unpub. 2017) (dismissing with prejudice when the government failed to show "that the UCI 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."); *cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) ("The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); *United States v. Bowser*, 73 M.J. 889, 903 (A.F.C.C.A. 2014) (upholding the trial judge's dismissal of the charges with prejudice due to prosecutorial misconduct, and noting both the appropriateness of dismissal "when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." And "broad deference" to the judicial "choice of remedies" (*citations omitted*)). Alternatively, a mistrial under R.C.M. 915 is appropriate when "such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

Finally, while R.C.M. 902 does not specify a particular remedy for a judge who fails to recuse or disqualify himself because of partiality, C.A.A.F. has adopted a three-part test from *Liljeberg, supra*, to determine whether a conviction should be reversed:

(1) What is the risk of injustice to the parties in the particular case?

(2) What is the risk that the denial of relief will produce injustice in other cases?

(3) What is the risk of undermining the public's confidence in the judicial process?

Quintanilla, 56 M.J. at 80-81.

V. <u>Application To This Case:</u> The Military Judge's bias against the Defense and accused, as evidenced by his rulings throughout the trial; his *ex parte* comments to Trial Counsel asking if there were worse cases in the Marine Corps, urging more severe punishment of the accused, and infliction of a "price" for going to trial, occurring before entry of judgment in this case, violated PFC Tapp's constitutional right to a trial before an impartial judge. Indeed, such comments went so far as to improperly urge Trial Counsel to engage in actions designed to chill the free exercise of the Sixth Amendment right to jury trial in cases going forward. Such acts are specifically forbidden by the Constitution. Importantly, the *ex parte* comments from the Military Judge, concerning both the trial actions of Defense Counsel and confinement request from the prosecution to the members, prove that he had abandoned his impartiality well before the comments passed his lips. The Military Judge's failure to recuse himself during trial, when his impartiality in fact departed, requires that the Court now dismiss the findings and charges against PFC Tapp with prejudice, or in the alternative, declare a mistrial.

Applying the three-part *Liljeberg* test, dismissal of the findings and charges with prejudice is the appropriate remedy in this case. First, the risk of injustice to the parties in this case is high: while under the influence of improper bias, the Military Judge made numerous crucial rulings against the Defense, including denying the Defense the assistance of a forensic pathologist; denying the Defense the assistance of a forensic psychologist; and denying the Defense an expert in the area

of risk recidivism directly related to specific deterrence; denying challenges of members for cause; denying a voluntary intoxication instruction; and preventing the Defense from introducing innocent alternate medical explanations for injuries relied heavily on by the prosecution. Because these rulings "may have contributed to the findings or the sentence in this case," all of these "actions are called into question by the appearance of bias." *Kish*, 2014 CCA LEXIS at *14.

Second, denial of relief will produce injustice in other cases. The Military Judge abandoned his role as an impartial arbiter when, he chastised the Trial Counsel for not arguing for a more severe sentence (the maximum sentence of 32 years instead of the 11 years the government asked for). Encls 4-5. Additionally, the Military Judge's comments to the Trial Counsel heavily implied that the Trial Counsel should penalize an accused for the exercise of his constitutional right to trial. Encl 4. He told the Trial Counsel that by not asking for the maximum sentence, Defense Counsel and accused Marines had no incentive to avoid contested trials. Furthermore, the Military Judge told Trial Counsel they should be angry when Defense Counsel files motions that the court considers "untimely" or "late" during trial, and that by failing to ask for the maximum sentence, there was no "price" to be paid by the Defense for their litigious actions and earlier decisions. Encl 4. The Military Judge's comments appear to be improperly urging the government to penalize the accused for the actions of his Constitutionally required counsel, rather that the sentencing parameters set out in R.C.M. 1002(f). Encl 4. Such comments demonstrate actual bias by the judge against the accused in this case and hostility toward Marines who exercise their rights to a jury trial generally. Through his comments, the Military Judge displayed anger toward Defense Counsel who file motions for reconsideration based on developments at trial, and who file motions that they believe are necessary to protect their client's rights.

A comparison to *United States v. Kish* is instructive. In *Kish*, the Court of Appeals for the Armed Forces ordered a hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147, (C.M.A. 1967), the Appendix to the *Kish* decision consists of the Court of Appeal's findings of fact which

APPELLATE EXHIBIT CX 1
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ultimately resulted in overturning the verdicts in both *Kish* and *Bremer*. In that case, the appellate court granted relief when the Military Judge told counsel, during professional military education requested by Trial Counsel and not in the context of any particular case (among other things): "Don't hold back. Once convicted, we need to crush these Marines and get them out." 2014 CCA Lexis at *26. The judicial comments in this case rise to an even more egregious level of severity given their case related context and the targeting of a specific accused's constitutional rights. They indicate actual bias against accused Marines generally and PFC Tapp specifically, since they occurred in an *ex parte* session before entry of judgement. Condoning such egregious actions will encourage injustice in numerous other cases before this Military Judge.

Finally, the Military Judge's rulings and *ex parte* comments undermine public confidence in the judicial process. Throughout the trial, while operating under the influence of personal bias or prejudice, the Military Judge consistently ruled against the Defense on key issues. First, he discounted sworn affidavits by multiple Defense expert witnesses that contradicted the government's view of the medical findings in the case. When the Defense requested expert assistance from a civilian forensic pathologist who had previously been recognized as an expert in the Western Judicial Circuit, the judge claimed the expert was inflating his opinions based on personal financial considerations.[5] Second, when the government argued that [redacted] bleeding and pain after sex was evidence of nonconsensual sex, the Military Judge prevented the Defense's expert (a government-appointed sexual assault nurse examiner) from testifying that [redacted] had other medical conditions which could innocently explain these symptoms or be a contributing factor. Despite recognizing that [redacted] could result in post-coital bleeding, the Military Judge prevented the Defense from rebutting the government's argument that the majority of [redacted] bleeding occurred during (and not after) the sex, and was therefore evidence of her lack of mental awareness

[5] The judge did not similarly disparage the government's expert toxicologist, who was also a civilian and also received funding in exchange for his testimony during trial.

or consent. Third, the Military Judge denied a Defense challenge for cause of a member whose wife and mother had been sexual assault victims. Fourth, he denied a voluntary intoxication instruction when the government's theory was that the victim was incapable of consenting due to intoxication. The judge's *ex parte* conversation with Trial Counsel laid bare a personal bias and prejudice toward the accused that existed before trial as evidenced by his question to the Trial Counsel about whether there were worse sexual assault cases and criticism regarding Trial Counsel's confinement request to the members. "Although not all *ex parte* communications between judges and counsel are impermissible, in general most are." *United States v. Martinez*, 69 M.J. 683, 692 (A. Ct. Crim. App. 2010).[6] Dismissal with prejudice is the appropriate cure, based on the Military Judge's conduct, rulings, and comments prior to entry of judgment, since "a reasonable member of the public would conclude that this Military Judge had shed his robe of judicial neutrality in the case of this particular accused." *Kish*, 2014 CCA Lexis at *15. In the alternative, a mistrial is an appropriate remedy because the Military Judge's actions injected unacceptable bias throughout trial, and his comments prior to entry of judgment indicate that his failure to disqualify himself "cast substantial doubt upon the fairness of the proceedings." R.C.M. 915.

VI. <u>Evidence:</u>

A. Enclosure 1: Statement of Facts.
B. Enclosure 2: Email dtd 15 Feb 2021.
C. Enclosure 3: [redacted] Unsworn Statement.
D. Enclosure 4: Memo from Trial Counsel re Post-Trial Comments of the Military Judge.
E. Enclosure 5: Affidavit from Lance Corporal [redacted]
F. Enclosure 6: Audio Record of Trial (not attached to this motion).
G. Military Judge Email of 5 March 21.
H. The Defense also moves for the production of the following witnesses to establish the factual record concerning the *ex parte* discussion between the Military Judge and the prosecution on 20 February 2021: LtCol J.P. Norman, Major N. Michel, Captain G. O'Connell, 1stLt [redacted] LCpl K. [redacted]

[6] The court went on to instruct judges that "[a]s a result, regardless of motive, we caution members of the judiciary and counsel alike to avoid ex parte communications that might create demonstrations of bias (R.C.M. 902(b)) or a perception of bias (R.C.M. 902(a)), regardless of motive." *Martinez*, 69 M.J. at 692.

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VII. Burden of Proof: In accordance with 905(c), the burden of proof and persuasion on any factual issue necessary to decide the motion rests on the Defense. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

VIII. Relief Requested: Based on the actual and apparent bias in favor of the prosecution and prejudice towards Defense Counsel and the accused, Defense requests the following: (1) disqualification of the Military Judge from presiding or ruling on any pending or future matters in this case, including this motion; (2) the appointment for this Article 39(a) session of a Military Judge outside the Western Judicial Circuit, who does not personally know or is not personally familiar with LtCol Norman; (3) dismissal with prejudice of the findings in this case or, in the alternative, a mistrial, to repair public confidence in the military justice system and remedy the grave breach of PFC Tapp's core constitutional rights. Additionally, the Defense moves for a continuance of the Article 39(a) hearing until no earlier than 19 March 2021 to allow the government an opportunity to respond to these matters and detailing of alternate Trial Counsel(s) and Military Judge.

IX. Oral Argument: The Defense requests oral argument.

Dated this 6th day of March 2021.

[redacted]

A. M. ROBERT
Captain, U.S. Marine Corps
Defense Counsel

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I certify that I caused a copy of this document to be served on the Court and opposing counsel this 6th day of March 2021.

Dated this 6th day of March 2021.

[redacted]

A. M. ROBERT
Captain, U.S. Marine Corps
Defense Counsel

APPELLATE EXHIBIT CX I
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. THOMAS TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance Request) 14 OCTOBER 2020

1. Nature of Motion. Pursuant to Rule For Courts-Martial 906(b)(l), the Defense moves the Court for a continuance of the subject case.

2. Summary of Facts and Discussion.

a. Arraignment in this case is currently docketed for October 19th, 2020, at 1000.

b. Both defense counsel are unvailable for this arraignment

c. One defense counsel is detailed to a court-martial in the case of U.S. v. [redacted] which was continued from its previous scheduled start time, due to defense counsel medical issues, to October 19th at 0800.

d. The other defense counsel in this case is representing a client in an administratie separation board which is scheduled to start at 0900.

e. Neither defense counsel were afforded the opportunity to be involved in any scheduling communications.

f. Detailed defense counsel propose the arraignment be held on October 22nd.

g. Defense counsel agree that this delay is attributable to the defense and excludable from the R.C.M. 707 clock.

h. The defense counsel do not request oral argument.

[redacted]
M. J. GRANGE
Captain
U.S. Marine Corps
Defense Counsel

Date: 14 October 2020

APPELLATE EXHIBIT V CSP
PAGE 1 OF 2

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Opposing Party Response

1. Trial Counsel does/does not oppose this continuance request and does/does not request oral argument.

Date: 14 October 2020

G. M. OCONNELL
Captain
U.S. Marine Corps
Trial Counsel

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Court Ruling

The above request is approved/disapproved/approved in part.

Arraignment will commence on _____.

Date:

A. C. GOODE
Lieutenant Colonel
U.S. Marine Corps
Military Judge

APPELLATE EXHIBIT V
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 15 November 2020

I. Nature of Motion

Pursuant to Rule For Courts-Martial 906(b)(l), the Defense requests a continuance of the second motions filing deadline from 3 December 2020 to 10 December 2020 with the due date for the Government response being moved from 10 December to 15 December 2020 and the 39a moved from 14 December to 18 December 2020.

II. Summary of Facts

1. The Defense has 4 expert witnesses for which it will submit motions to compel production.
2. The hearing for these motions is set for 23 November 2020.
3. The next due date for filing motions is on 3 December 2020 which gives Defense 10 days to consult with experts, obtain their advice, and file motions accordingly.
4. 23 November 2020 is the Monday before Thanksgiving (26 November 2020) and communicating with experts during his week will likely prove to be difficult.
5. Defense is still receiving discovery from the Government with the latest discovery received on 9 November 2020. There is still outstanding discovery that the Defense is

APPELLATE EXHIBIT VII (22)
PAGE 1 OF 3

expecting to receive and potentially, once any of the 4 outstanding expert witnesses are granted, more discovery that must be requested.

6. Until the evidence is produced, the Defense cannot have its expert consultants review and analyze it. Once Defense receives the evidence, its experts will need additional time to review, analyze and consult with the Defense. Depending on the experts' opinion, it may open the door to additional discovery requests or other possible motions. .
7. Pursuant to the Trial Management Order, a second round of motions are due to the Court by 3 December 2020. However, in light of the previously mentioned facts, the defense believes it is appropriate to delay submission of motions until a later date.

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)).

A delay is in order in the present case due to outstanding discovery requests and so defense may have the appropriate time to consult with their anticipated experts. Further, a delay is justifiable in light of the circumstances since the defense asks for more time in order to obtain their expert's advice and draft the appropriate motions. These facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Id.*

IV. Relief Requested.

The Defense respectfully requests that the Military Judge modify the previously scheduled trial mile stones to the following new dates:

- Motions Filed – 10 December 2020
- Responses to Motions Filed – 15 December 2020
- Article 39(a)- 18 December 2020

V. Argument: Oral argument is requested.

Dated this 15 day of November 2020

[redacted]

M. J. Grange
Captain, U.S. Marine Corps
Detailed Defense Counsel

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I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of November 2020.

Dated this 15th day of November 2020.

[redacted]

M. J. GRANGE
Captain, U.S. Marine Corps

APPELLATE EXHIBIT VII
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UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. Marine Corps**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance)** **20 NOVEMBER 2020**

1. Nature of the Response. The Government respectfully requests that the Defense motion to continue the filing milestones and date of the next Article 39(a) session be **DENIED**.

2. Facts.

a. The Accused was arraigned and the Trial Management Order was signed by the Military Judge on 19 October 2020.

b. Defense submitted its initial request for Discovery on 7 October 2020.

c. The Government submitted its response to Defense's initial discovery request and a request for reciprocal discovery on 28 October 2020.

d. Defense has submitted no supplemental discovery requests to the Government.

e. Defense has filed no motions to compel discovery.

f. The Government is pending receipt of the results of DNA testing conducted by the U.S. Army Criminal Investigatory Laboratory (USACIL). On 18 July 2020, the Government was notified by USACIL that the report is nearing completion, and that there will likely be some DNA evidence in this case. USACIL would not release any substantive information, as their internal review process was not yet completed.

3. Discussion and Analysis. The Government opposes Defense's motion because the Defense's requested reasons for needing a continuance appear completely speculative at this

time. The Defense's motion is based upon two premises: (1) that Defense will have a difficult time contacting expert witnesses that Defense has not yet been granted and (2) that Defense is awaiting receipt of further "discovery" from the Government that may require additional motions. Regarding the first argument, whether the Defense will be granted all four experts requested is a matter still to be litigated. Assuming Defense is granted some of the experts requested—or reasonable Government substitutes—Defense further assumes that it will be unable to contact said experts. Defense's motion is based off of the proposition that it *may* not be able to file certain motions because Defense *may* have issues contacting expert consultants which Defense *may* be granted to assist in their case. Should this issue actually arise in the coming weeks, then it might be appropriate for the Defense to ask for a continuance of the milestones related to the next Article 39(a) session, or alternatively, an additional Article 39(a) session for the limited purpose of taking up a motion that it was not able to formulate before. However, at this time the issue remains too speculative.

Additionally, the Government does not believe that there are any outstanding discovery issues in the case which would require the requested relief. The Government is awaiting results from DNA testing from USACIL. The Government has informed USACIL that this case is docketed for trial, and has requested that the results and report in this case be expedited to the greatest extent possible. The Government has informed Defense that this report is pending. The Government will provide any report or results to the Defense as soon as the Government receives it. Other than this particular discovery issue, the Government is not aware of any other specific outstanding discovery item which would justify a continuance at this time. Thus, continuing any TMO milestones at this time would be purely based on speculation. Of course, the Government recognizes it continuing discovery obligations, and will continue to abide by them.

For the aforementioned reasons, the Government opposes Defense's motion.

4. **Relief Requested.** That Defense's motion be **DENIED**.

5. **Evidence**. The Government provides the following evidence in support of its motion.

   a. Enclosure (1): Defense Initial Request for Discovery of 7 October 2020
   b. Enclosure (2): Government Response to Defense Initial Request for Discovery and Reciprocal Request for Discovery of 28 October 2020

6. **Burden of Proof.** Defense bears the burden by a preponderance of the evidence.

7. **Oral Argument.** The Government does request oral argument.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this motion was electronically served upon the Court and Defense on 20 November 2020.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	MOTION TO COMPEL ASSISTANCE OF EXPERT CONSULTANT IN SEX OFFENDER RISK AND RECIDIVISM (DR. [redacted]) 15 NOVEMBER 2020

1. Nature of Motion. Pursuant to Rule for Courts-Martial (R.C.M.) 701(e), 703(d), and 906, Defense respectfully requests this Court compel the government funding of $7,500.00 to employ Dr. [redacted] as a confidential expert consultant in clinical and forensic psychology with expertise in comprehensive psychological analysis and related testing, including detailed risk assessment.

2. Statement of Relevant Facts.

a. Private First Class Tapp is charged with violating the following Articles of the Uniform Code of Military Justice: one (1) specification of Article 120 and one (1) specification of Article 92.

b. If convicted, Private First Class Tapp faces the possibility of confinement for thirty (30) years, a dishonorable discharge, and potential lifetime registration as a sex offender.

c. No Defense Counsel possess training or experience in psychology, psychiatry, mental and psychological capacity, psychological evaluations, recidivism risk determinations, statistical analysis, research design or construction and associated sciences.

3. Discussion.

A. Legal Standard.

R.C.M. 1001(c) (1) (B) explicitly gives the Defense the right to present matters in mitigation, which are any matters "introduced to lessen the punishment to be adjudged by the court-martial

[.]" Likewise, R.C.M. 1001(g) creates a right to "argue for an appropriate sentence" based on the principles of specific deterrence and future dangerousness.[1]

In view of these rights, making an effective argument at sentencing is one of a defense attorney's most important responsibilities. The American Bar Association's ethical standards explain that "[d]efense counsel should present to the court [at sentencing] any ground which will assist in reaching a proper disposition favorable to the accused."[2]

R.C.M. 703(d) authorizes employment of experts to assist the Defense at Government expense. [3]

An accused must show the trial court that there exists a reasonable probability that an expert would be of assistance to the Defense and that denial of expert assistance would result in a fundamentally unfair trial. The relevant three part analysis from *United States v. Gonzalez* is discussed below as it relates to the instant case.[4]

B. Application of Law

(1) Why Dr. [redacted] is Needed.

In *Strickland v. Washington*, the Supreme Court held that Defense Counsel have a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.[5] The Court held that the proper standard for attorney performance is that of reasonably effective assistance, noting that "prevailing norms of practice as reflected in American Bar

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[1] *United States v. Williams*, 23 M.J. 776, 781 (1987); see also *United States v. George*, 52 M.J. 259, 261 (2000).
[2] *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-8.1 (1993).
[3] *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F.1999). *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A.1990), *cert. denied*, 498 U.S. 821 (1990). *See also United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F.2005) ("An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity").
[4] 39 M.J. 459, 461 (C.M.A. 1994).
[5] 466 U.S. 668 (1984).

Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable."[6]

The ABA sentencing guidelines (non-capital) include the following principles: independent Defense investigation of sentencing factors; individualized consideration of sentences; presentation of mitigating factors; and consideration of those factors by the evaluating court.

Another source of professional standards for defense lawyers in noncapital cases is the Trial Manual for the Defense of Criminal Cases, published by the ALI-American Bar Association Committee on Continuing Professional Education.[7] The chapters relevant to investigation and sentencing, dating back at least to the 1980s, provide a prescription for competent sentencing representation and reinforce the conclusion that the investigation and presentation of facts favorable to the defendant, including relevant psychological or psychiatric issues, have long been considered critical to meaningful sentencing representation.

Like the ABA guidelines, the Trial Manual emphasizes the importance of a Defense sentencing investigation. The manual adds mental health investigation and it advises Defense Counsel to consider psychiatric evaluation of the client, the results of which might prove useful in mitigation.

In *United States v. Kreutzer*, the court held that in the military, the right to supplement the Defense team with expert assistance and witnesses is based on Article 46, UCMJ, 10 U.S.C. § 846, Military Rule of Evidence (M.R.E.) 706, and R.C.M. 703(d).[8] The *Kreutzer* court relied on *Strickland* and *Wiggins* in overturning a capital sentence based on the denial of a mitigation investigation specialist for the Defense and on Defense Counsel's ineffective assistance of counsel

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[6] *Id* at 688-689.
[7] *For the Defense of Criminal Cases, Trial Manual* 5th ed. (Vol. I, 1988).
[8] 59 M.J. 773, 776 (A. Ct. Crim. App. 2004) aff'd, 61 M.J. 293 (C.A.A.F. 2005).

in conducting an adequate mitigation investigation. While Private First Class Tapp does not face a capital sentence, he does face the potential of confine for thirty (30) years, the possibility of a Dishonorable Discharge, and lifetime sex offender registration.

Dr. [redacted] assistance would allow the Defense to investigate and ultimately present potentially mitigating evidence on behalf to the accused. He is needed to assist counsel to identify and understand the relevant factors that are known from psychological research to be significant in understanding the likelihood of sex offenders to reoffend. Risk factors are not well understood by juries and tend to greatly inflate the likelihood of re-offense.[9] The overwhelmingly counter-intuitive nature of sex offender recidivism science makes having an expert an absolute necessity.

The Court of Appeals for the Armed Forces (C.A.A.F.) has repeatedly held that expert testimony is necessary to explain counter-intuitive factors. C.A.A.F. held that, "expert testimony about the sometimes counterintuitive behaviors of sexual assault or sexual abuse victims is allowed because it assists jurors in disabusing themselves of widely held misconceptions."[10]

C.A.A.F. went on to hold, "[w]e again affirm the appropriateness of allowing expert testimony on rape trauma syndrome where it helps the trier of fact understand common behaviors of sexual assault victims that might otherwise seem counterintuitive." In similar fashion, Members are highly likely to inflate the likelihood of re-offense for those convicted of sex crimes. Only expert consultation (possibly maturing into a testimonial expert) can assist counsel in clearing up Member's preexisting misconceptions.

Of the classic sentencing principals, it is anticipated that Dr. [redacted] may be able to offer expert opinion relating to the individual rehabilitative potential of Private First Class Tapp and the

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[9] *See* Enclosure G.
[10] *United States v. Houser*, 36 M.J. at 398 (C.A.A.F. 1993).

protection of society by an actuarial assessment of his risk to recidivate. Therefore, expert assistance is critically important in order to conduct a fair trial. There is simply too much at stake to deny the Defense an expert in this area.

(2) What the expert assistance would accomplish for the accused.

Dr. [redacted] is a licensed clinical and forensic psychologist in the state of California. He is able to conduct a psychological examination of Private First Class Tapp and produce a comprehensive report. Testing and evaluation of Private First Class Tapp will also allow Dr. [redacted] to assist the Defense in reconciling and understanding any specific psychological or personality characteristics that make him more or less likely to have committed these offenses, or to commit such types of offenses in the future. Other psychological testing will be administered based on the needs identified by Dr. [redacted] and from his review of the records in this case, including the evaluation of Private First Class Tapp.

Moreover, Dr. [redacted] will be able to conduct a risk assessment analysis of Private First Class Tapp in which he utilizes scientifically valid and reliable tests to measure Private First Class Tapp's likelihood of reoffending. As part of his report, Dr. [redacted] will also do a thorough analysis of Private First Class Tapp's familial and social relationships to provide for additional mitigation evidence.

(3) Why Defense Counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

Defense Counsel is unable to become sufficiently conversant with the scientific research and testing related to Psychological and Recidivism Evaluations to provide the accused with effective assistance of counsel in the presentation of his defense without the assistance of Dr [redacted] Even if the Defense team was able to acquire such knowledge, they do not have the training or ability to administer psychological testing. Although Private First Class Tapp is represented by adequate Defense Counsel, the Defense Counsel do not possess the required background and

training to fully understand or develop the issues without the assistance of an expert consultant in the field of psychology and psychological evaluations. Nor does the Defense have any capability to scientifically measure and evaluate the likelihood of recidivism. The Defense simply does not have the expertise to effectively represent Private First Class Tapp without the assistance of an expert consultant with the qualifications of Dr. [redacted] No amount of research or self-education between now and trial will adequately prepare Defense Counsel in understanding the implications of the relevant factors present, which is required to effectively provide assistance of counsel for Private First Class Tapp.

After reviewing Dr. [redacted] curriculum vitae, it is readily apparent that competence in his field can only be achieved after years of study and dedicated research in that area of psychological science. While laymen, like Defense Counsel, may be able to achieve a basic understanding of what this science is, Defense Counsel cannot gain sufficient expertise or competence to independently analyze someone such as Private First Class Tapp, or test the veracity and accuracy of the conclusions that will most certainly be espoused by the Government on sentencing. Furthermore, if the testing results in favorable evidence for the Accused, the Defense cannot present their findings as evidence.

C. Denial of the requested expert assistance will result in a fundamentally unfair trial.

It is a core guarantee of the Sixth Amendment that every criminal accused has the right to counsel when facing incarceration.[11] This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings.[12]

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[11] *Gideon v. Wainwright*, 372 U.S. 335 at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial").
[12] *Gideon*, 372 U.S. at 340-341, 344; *Powell v. Alabama*, 287 U.S. 45 at 67-69 (1932).

An analysis of *Gideon's* progeny informs that constructive denial of counsel may occur when detailed counsel are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. Constructive denial may occur even if the detailed counsel is able to fulfill their basic obligations to their clients.[13] Claims of constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the ineffective assistance standard enumerated in *Strickland v. Washington*, which provides only retrospective relief.[14] Ancillary services, such as experts, are traditional markers of the right to counsel as the Supreme Court recognized in *Ake v. Oklahoma,* and its numerous progeny.[15] In *Ake* the Court required the government to provide the Defense with a psychiatrist at government expense where the defendant intended to present a defense of insanity:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake at 612.

Since the Supreme Court's decision in *Ake,* courts have applied an *Ake* analysis and required the granting experts on a wide variety of issues, and expanded its reach beyond the limited sphere of capital litigation.[16] Moreover, in *United States v. Lee,* C.A.A.F. recognized the established

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[13] *See United States v. Cronic*, 466 U.S. 648, 659-60 (1984).
[14] 466 U. S. 668 (1984).
[15] 470 U.S. 68, 77, (U.S. 1985).
[16] E.g., Pediatrician, *United States v. Warner*, 62 M.J. 114 (2005); Pathologist, *Terry v. Rees,* 985 F.2d 283 (6th Cir. 1993); DNA Expert, *Leonard v. Michigan*, 256 F.Supp.2d 723 (W.D.Mich. 2003); Chemist, *United States v. Chase*, 499 F.3d 1061 (9th Cir. 2007); Mitigation Specialist, *United States v. Kreutzer*, 61 M.J. 293 (2005); Hypnotist, *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988)

principal that an accused's entitlement to expert assistance is not limited to actual expert testimony at trial.[17] Entitlement to that expertise is available before trial to aid in the preparation of his defense.

While *Gideon,* rather than *Strickland*, is the lens through which this court must review this request, nevertheless *Strickland* and its progeny can inform an assessment of what are the traditional markers of representation. The inevitable conclusion from review of such cases is that counsel must consult with appropriate experts when counsel alone cannot effectively understand and/or articulate issues of significance to the jury's decision making. In analyzing the issue, Courts have looked to whether Defense Counsel consulted experts qualified in a relevant field to assist counsel in preparing a defense.[18]

In this case, should it reach sentencing, research shows that lay members will inflate the likelihood of re-offense and risk to society based on the nature of the offenses alone.[19] Actuarial evidence and scientific studies demonstrate that this belief is simply false in the majority of those who have committed this type of offense. Research demonstrates that this is contrary to prevalent belief in the general populace and is counter intuitive to potential members. This widespread, but mistaken, belief weighs heavily in a sentencing decision by non-professionals when an individual has been convicted of a sexual crime.

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[17] 64 M.J. 213 (C.A.A.F. 2006).

[18] See, *e.g., Duncan v. Ornoski,* 528 F.3d 1222, 1235 (9th Cir. 2008) (counsel's "failure to consult a *serologist* when there existed potentially exonerating blood evidence . . . [is] unreasonable under prevailing professional norms") (emphasis added); *Dugas v. Coplan,* 428 F.3d 317, 331 (1st Cir. 2005) ("Nor can we find that [counsel's] failure to consult an expert or educate himself on the techniques of defending an arson case is excusable . . .") *Miller v. Anderson,* 255 F.3d 455, 459 (7th Cir. 2001), *vacated on other grounds,* 268 F.3d 485 (7th Cir. 2001) ("[T]here was also no excuse for the lawyer's failure to consult experts on hair, DNA, trademarks, and footprints . . . . In these circumstances, it was irresponsible of the lawyer not to consult experts.")

[19] *See* Enclosure G.

Instead, standardized, reliable and valid psychometric tests can measure the risks associated with an individual's personality and give the members specific, individualized, scientifically valid and reliable information about future risk to make a sentencing judgement on facts, not an appeal to the prejudices of members.

D. CONCLUSION

In the instant case, denial of the requested expert prevents the accused from mounting a case in extenuation and mitigation at the necessary and important sentencing phase of this Court-Martial.

Dr. [redacted] consultation with Defense Counsel concerning the presence of factors related to recidivism, rehabilitation, mitigation, and other sentencing factors, will assist Defense Counsel to effectively present a sentencing case in support of Private First Class Tapp. The absence or presence of these factors may inform Defense Counsel's case strategy moving forward.

The Sixth Amendment and Due Process Clause guarantees every accused the right to a fair trial. *Gideon v. Wainwright* guarantees every accused the right to counsel to insure that the adversarial process of the trial is fair. In *Ake v. Oklahoma* the Court found that the provision of necessary experts is a component of the Sixth Amendment right to counsel. No adversarial system is, or can be, fair when the Defense does not have access to resources to test the Government's case or present appropriate evidence in mitigation. The charges and specifications against Private First Class Tapp carry an extremely heavy penalty, not just a significant period of incarceration and dismissal from the Marine Corps, but lifetime registration as a sex offender.

The constitutional Due Process right to present a defense and the Sixth Amendment right to effective assistance of counsel require appointment of the requested expert to assist the Defense in thoroughly preparing a sentencing case.

4. Evidence Offered.

Encl (A): Defense Request for Expert Consultant
Encl (B): Government Denial of Defense Request for Expert Consultant
Encl (C): Curriculum Vitae of Dr. [redacted]
Encl (D): Fee Schedule of Dr. [redacted]
Encl (E): *Public Perception about Sex Offenders and Community Protection Policies* – Analyses of Social Issues and Public Policy, Vol 7, No. 1, 2007, pp 1-25

5. Burden of Proof: As the moving party, the Defense bears the burden of proof on any factual issue the court deems necessary to decide this motion. R.C.M. 905(c)(2)(A).

6. Relief Requested. The Defense respectfully moves the Court to order the Convening Authority to appoint Dr. [redacted] as a defense consultant, and to approve expenditures of at least $7,500.00 to facilitate completion of his review of necessary discovery and investigation and to consult with counsel.

7. Argument. The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 15th day of November 2020.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

APPELLATE EXHIBIT IX
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UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. Marine Corps**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT ASSISTANCE (Sex Offender Risk and Recidivism- Dr. [redacted])** **20 NOVEMBER 2020**

1. Nature of the Response. The Government hereby opposes the Defense motion to compel a forensic psychologist as an expert consultant in the field of sex offender risk and recidivism. Because the Defense has not shown why said expert is necessary, their motion should be **DENIED**.

2. Facts.

a. The Accused is charged with a violation of Article 120, for the sexual assault of victim [redacted]

b. On 30 October 2020, the Defense requested funding from the Convening Authority for an expert consultant in recidivism, Dr. [redacted] (Encl. 1).

c. On 6 November 2020, the Convening Authority denied the Defense request. (Encl. 2).

3. Discussion and Analysis.

Uniform Code of Military Justice (UCMJ) Article 46 provides that trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. This generally includes the right to expert assistance. "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2001) (internal citations omitted). "Necessity" is more "than a mere possibility of assistance from a requested expert" *Id;* see also *United States*

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v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010) ("[t]he defense's stated desire to 'explor[e] all possibilities, however, does not satisfy the requisite showing of necessity."). The accused must show a reasonable probability exists both 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." *Bresnahan,* 62 M.J. at 143. To show that an expert would assist the Defense, the Defense must show "(1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused, and (3) why the defense counsel are unable to gather and present the evidence that the expert assistance would be used to develop." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (internal citation omitted).

C.A.A.F. has drawn a sharp distinction between necessity and helpfulness and concluded that an accused's trial is not fundamentally unfair simply because the Government did not pay for an expert to screen or evaluate evidence. See, e.g., *Freeman,* 65 M.J. at 459 (affirming the military judge's denial of a motion to compel expert assistance where, "[a]lthough it is by no means clear that the expert would add anything that could not be expected of experienced defense counsel, we also accept arguendo that Appellant's counsel could benefit from the consultant's assistance."); *Bresnahan*, 62 M.J. at 143 (affirming the military judge's denial of a motion to compel expert assistance while accepting, arguendo, that the expert in question "possessed knowledge and expertise in the area of police coercion beyond that of the defense counsel and that the defense counsel could benefit from his assistance."). Just because a case may deal with difficult or complex issues does not mean that defense is automatically entitled to an expert. See *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Additionally, Defense Counsel are expected to educate themselves regarding relevant issues when defending a case in order to obtain competence. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).

of rape." *Id.* at 400. The case does not discuss offender recidivism, and Defense fails to cite any case law directly on point to recidivism expert testimony.

Second, Defense Counsel are more than capable of collecting and presenting evidence in presentencing regarding the Accused's rehabilitative potential or to argue that he poses no danger to society. It is a basic, reoccurring function of any defense counsel's practice to present evidence relevant under applicable sentencing factors. The two detailed defense counsel in this case are more than capable of doing so, through a variety of methods articulated in R.C.M. 1001(d). These include introducing extenuation and mitigation evidence via witnesses, affidavits, documentary evidence, and an unsworn statement of the accused. Given the range of evidence normally admissible in presentencing, Defense can simply articulate no reason why an expert is necessary for this purpose, or why defense counsel is incapable of presenting an effective presentencing case. Defense cites *United States v. Kreutzer*, 59 M.J. 773 (A.C.C.A. 2004) (affirmed by *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005)). That case is distinguishable. In *Kreutzer*, a capital case involving a convictions for premeditated murder and attempted premeditated murder, defense's arguments for an expert were centered on the mental health and state of mind of the defendant, and they pointed to "a wealth of relevant information available" within the case for which they needed assistance. 59 M.J. at 777. In this case, Defense offers no specific facts or information about why the Accused in this case needs the assistance of an expert, nor are there any specific facts about the mental health of the accused or the crimes he is charged with which suggest such assistance is necessary. To the contrary, the fact pattern in the instant case involves a single incident of alcohol facilitated sexual assault. While every case is different, the facts in this case are not so significantly distinct or complex

that Defense would be unable to present an effective presentencing case, should it be necessary. Denial of Dr. [redacted] will not result in a fundamentally unfair trial.

4. **Evidence.** In support of its motion, the Government offers the following:

a. Enclosure (1): Defense Request of 30 October 2020
b. Enclosure (2): Convening Authority Response of 6 November 2020

5. **Relief Requested.** The Government respectfully requests that this Court **DENY** the Defense motion to compel.

6. **Burden of Proof.** The Defense bears the burden by a preponderance of the evidence.

7. **Oral Argument.** The Government requests oral argument.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on 20 November 2020.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT X
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	MOTION TO COMPEL ASSISTANCE OF EXPERT CONSULTANT FORENSIC BIOLOGY AND DNA (MR. [redacted] 15 NOVEMBER 2020

1. Nature of Motion. Pursuant to Rule for Courts-Martial (R.C.M.) 701(e), 703(d), and 906, Defense respectfully requests this Court compel funding in the amount of $4,000.00 to employ Mr. [redacted] as a confidential defense expert consultant in forensic biology and DNA with the potential to ripen into an expert witness.

2. Statement of Relevant Facts.

On 18 July 2020 Private First Class Tapp, along with another Marine, met Ms. [redacted] near the pier in Oceanside. Ms. [redacted] is sixteen (16) years old at the time. After conversing with the two Marines, the group decides to leave and go back to Marine Corps Base Camp Pendleton. They walk to liquor store and purchase liquor before taking an Uber back to base. They arrive at the barracks around 1900. The three proceed to consume alcohol for the next hour. Ms. [redacted] alleges she "blacked out" around 2000 just after kissing Private First Class Tapp in the bathroom. According to NCIS interviews, the two Marines and Ms. [redacted] proceeded to engage in a threesome. Neither Marine is able to climax and the sexual act ends. Due to his level of intoxication, Private First Class Tapp then passes out on his bed. Ms. [redacted] falls asleep on the floor. Ms. [redacted] mother cannot reach her, so she "pings" her phone location and alerts authorities on Camp Pendleton. PMO searches for Ms. [redacted] and finds her in Private First Class Tapp's barracks room. PMO makes entry and finds Ms. [redacted] on the floor, partly clothed, with blood on the carpet, and throw-up on the floor in close

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proximity. They find Private First Class Tapp asleep on the bed in just a pair of basketball shorts. Both parties are clearly intoxicated and the smell of alcohol is readily apparent.

PMO performs medical treatment on Private First Class Tapp and [redacted] is then transferred to a hospital because of her level of intoxication and possible injuries. A SART Exam is performed on Ms. [redacted] Several tests were performed to include vaginal injury testing, anal injury testing, STI testing, and photographs were taken. Several of Ms. [redacted] items of clothing were seized for testing. Private First Class Tapp also undergoes a SAFE Exam. Several tests were performed on him and clothing items were seized. Several items in the barracks room to include pieces of furniture, sections of carpet, and other samples were seized and sent for testing.

3. Discussion.

A. Legal Standard.

An accused is entitled to government-funded expert assistance if the services are necessary to an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). In order to make a showing of necessity, the defense has the burden to establish 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 defense must show more than a mere possibility of assistance to explore all possibilities; they must instead show a reasonable probability of assistance. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

This court must apply a three-part test to determine whether expert assistance is necessary. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), cert. denied, 513 U.S.965 (1994). The defense must show: (1) why expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

B. Application of Law

(1) Why Dr. [redacted] is Needed.

In this case, the Government alleges Private First Class Tapp committed a sexual act upon Ms. [redacted] by penetrating her vulva with his penis without her consent. Ms. [redacted] is alleged to have suffered several injuries to her vaginal area and anus along with possible rug burns, bruises, and scrapes/scratches. A SAFE/SART exam was conducted on Ms. [redacted] Several tests were performed and samples were taken during the SAFE/SART exam. Additionally, several items of Ms. [redacted] clothing and belongs were seized and sent for testing. Private First Class Tapp also under a SAFE Exam. Several tests were performed and samples were taken during his SAFE/SART exam. Several items of Private First Class Tapp's clothing and belongings were seized and sent for testing. Portions of the barracks were seized for testing along with numerous forensic samples. Because it is alleged Private First Class Tapp sexually assaulted Ms. [redacted] without her consent, the testing of the clothing for DNA, the biological testing of the blood and vomit within the barracks room, and any lack of testing are incredibly important evidence. It is critical to have an understanding of the types of testing performed, the results, and the impact of those testing results or lack thereof. This evidence, and the interpretation of that evidence, will be critical in the corroborating or disproving the Government's allegations.

Mr. [redacted] a forensic biologist and DNA expert, is the only requested expert that can speak with authority on whether the evidence, its testing, and the results are consistent with the allegations. Mr. [redacted] can speak to whether the blood found of the floor is menstrual or simple bleeding. Mr. [redacted] can speak to whether the vomit found on scene is Ms. [redacted] or Private First Class Tapp's. Mr. [redacted] can

speak to the type of DNA testing conducted or lack thereof. Further, Mr. [redacted] can speak to the importance and interpretation of the results of that testing. For example, whether the presence of DNA and its relative amount on certain items of clothing is consistent with consensual interactions. Or, in the alternative whether the lack of DNA can help prove or disprove the Government's allegations. As a consultant, Mr. [redacted] will review all of the evidence in this case, including any and all testing forensic biological or DNA testing that was performed. Mr. [redacted] will educate the Defense on the important aspects of the testing or lack thereof, how to interpret the results or lack thereof, and how to utilize this information to prepare for trial and defend against the Government's allegations.

(2) What the expert assistance would accomplish for the accused.

Mr. [redacted] will review all of the materials in the case, to include the Ms. [redacted] interview, witness statements, SAFE/SART Exams, photographs, all testing conducted, and the results of that testing. He will also review the testimony of any government witness, to include any expert witnesses such as biological or DNA experts. He will be able to make an interpretation of the testing and its results. Mr. [redacted]n will be able to assist the Defense in understanding the results, or lack thereof, and prepare an effective defense to the Government's allegations and evidence.

(3) Why Defense Counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

Forensic biology and DNA expertise takes extensive schooling and years of advanced area specific training. Neither defense counsel nor anyone on counsel's staff have the years of training and experience required to review the evidence and provide expert consultation regarding interpretation of the testing, its results, and how that effects the case.

C. Denial of the requested expert assistance will result in a fundamentally unfair trial.

It is a core guarantee of the Sixth Amendment that every criminal accused has the right to counsel when facing incarceration. *Gideon v. Wainwright*, 372 U.S. 335 at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon*, 372 U.S. at 340-341, 344; *Powell v. Alabama*, 287 U.S. 45 at 67-69 (1932).

An analysis of *Gideon's* progeny informs that constructive denial of counsel may occur when: (1) on a systemic basis, detailed defense counsel face severe structural limitations, such as a lack of resources, high workloads, and understaffing or (2) detailed counsel are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. Constructive denial may occur even if the detailed counsel is able to fulfill their basic obligations to their clients. *See United States v. Cronic*, 466 U.S. 648, 659-60 (1984). Claims of constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the ineffective assistance standard enumerated in *Strickland v. Washington*, 466 U. S. 668 (1984), which provides only retrospective relief. Ancillary services, such as experts, are traditional markers of the right to counsel as the Supreme Court recognized in *Ake v. Oklahoma,* 470 U.S. 68, 77, (U.S. 1985) and its numerous progeny. In *Ake* the Court required the government to provide the Defense with a psychiatrist at government expense where the defendant intended to present a defense of insanity:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake at 612.

Since the Supreme Court's decision in *Ake,* courts have applied an *Ake* analysis and required the granting experts on a wide variety of issues, and expanded its reach beyond the limited sphere of capital litigation.[1] Moreover, in *United States v. Lee, 64 M.J. 213 (C.A.A.F. 2006),* C.A.A.F. recognized the established principal that an accused's entitlement to expert assistance is not limited to actual expert testimony at trial. Entitlement to that expertise is available before trial to aid in the preparation of his defense.

While *Gideon,* rather than *Strickland,* is the lens through which this court must review this request, nevertheless *Strickland* and its progeny can inform an assessment of what are the traditional markers of representation. The inevitable conclusion from review of such cases is that counsel must consult with appropriate experts when counsel alone cannot effectively understand and/or articulate issues of significance to the jury's decision making. In analyzing the issue, Courts have looked to whether Defense Counsel consulted experts qualified in a relevant field to assist counsel in preparing a defense.[2]

Here, denial of the Mr. [redacted] consultancy would effectively deny the Defense the ability to challenge the biological testing and results, or lack thereof. Without an expert who can speak to the testing procedures and its results the Defense will be forces to simply accept the testing and its results as fact while not fully understanding or appreciating the nature and impact

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[1] E.g., Pediatrician, *United States v. Warner*, 62 M.J. 114 (2005); Pathologist, *Terry v. Rees,* 985 F.2d 283 (6th Cir. 1993); DNA Expert, *Leonard v. Michigan*, 256 F.Supp.2d 723 (W.D.Mich. 2003); Chemist, *United States v. Chase*, 499 F.3d 1061 (9th Cir. 2007); Mitigation Specialist, *United States v. Kreutzer*, 61 M.J. 293 (2005); Hypnotist, *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988)

[2] See, *e.g., Duncan v. Ornoski,* 528 F.3d 1222, 1235 (9th Cir. 2008) (counsel's "failure to consult a *serologist* when there existed potentially exonerating blood evidence . . . [is] unreasonable under prevailing professional norms") (emphasis added); *Dugas v. Coplan,* 428 F.3d 317, 331 (1st Cir. 2005) ("Nor can we find that [counsel's] failure to consult an expert or educate himself on the techniques of defending an arson case is excusable . . .") *Miller v. Anderson,* 255 F.3d 455, 459 (7th Cir. 2001), *vacated on other grounds,* 268 F.3d 485 (7th Cir. 2001) ("[T]here was also no excuse for the lawyer's failure to consult experts on hair, DNA, trademarks, and footprints . . . . In these circumstances, it was irresponsible of the lawyer not to consult experts.")

of the testing or results. Moreover, the Defense is left woefully unprepared to challenge the Government's assertion that Ms. [redacted] was sexually assault without consent and whether the results of the testing performed corroborate those assertions.

D. CONCLUSION

In the instant case, denial of the requested expert prevents the accused from effectively challenging the credibility of the testimony of the complaining witness, the SAFE Nurses, and the testing evidence presented by the Government. In this case, Ms. [redacted] credibility must be challenged because her ability to accurately perceive and recall events is likely to have been impacted by her mental health disorders, her use of prescription and illegal drugs, her alcohol consumption, and her lack of memory regarding important aspects of the events. Additionally, the SAFE tests, biological sample tests, and clothing/item tests must be verified to ensure these tests were conducted properly, the results are accurate, and the interpretation of those results are consistent with the allegations. This issue is central to the Defense's case. Without Mr. [redacted] consultancy, the Defense cannot develop an effective and scientifically accurate challenge to the Government's assertions.

The Sixth Amendment and Due Process Clause guarantees every accused the right to a fair trial. *Gideon v. Wainwright* guarantees every accused the right to counsel to insure that the adversarial process of the trial is fair. In *Ake v. Oklahoma* the Court found that the provision of necessary experts is a component of the Sixth Amendment right to counsel. No adversarial system is, or can be, fair when the defense does not have access to resources to test the government's case.

The constitutional Due Process right to present a defense and the Sixth Amendment right to effective assistance of counsel require appointment of the requested expert to assist the Defense.

4. Evidence Offered. The Defense offers the following documentary evidence in support of this motion:

Encl (A): Defense Request for Expert Consultant;
Encl (B): Government Denial of Request for Expert Consultant
Encl (C): Curriculum Vitae of Mr. [redacted]
Encl (D): Fee Schedule of Mr. [redacted]
Encl (E): SART Exam of Ms. [redacted] (BS 000169-000193)
Encl (F): SAFE Exam of PFC Tapp (BS 000146-000161)
Encl (G): NCIS Evidence Custody Records (BS 000684-000694)

5. Burden of Proof: As the moving party, the Defense bears the burden of proof on any factual issue the court deems necessary to decide this motion. R.C.M. 905(c)(2)(A).

6. Relief Requested. The Defense respectfully requests this Court compel funding in the amount of $4,0000.00 to employ Mr. [redacted] as a confidential defense expert consultant in forensic biology and DNA with the potential to ripen into an expert witness.

7. Argument. The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 15th day of November 2020.

[redacted]

B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

APPELLATE EXHIBIT XI
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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT FOR TRIAL (DNA Expert- Mr. [redacted]** **20 November 2020**

1. **Nature of Motion.** Defense has filed a motion to compel a DNA expert consultant and the Government does not oppose said motion.

2. **Burden of Proof and Standard of Review.** As the moving party, defense bears the burden in this motion by a preponderance of the evidence.

3. **Summary of Facts**

1. Defense Counsel requested an expert consultant in DNA on 30 October 2020.
2. That expert request was denied on 6 November 2020.
3. That expert was denied due to the fact that at that time there was no DNA evidence.
4. On 18 November 2020 trial counsel contacted the United States Army Criminal Investigative Laboratory (USACIL) regarding this case and was informed that there would likely be DNA evidence forthcoming.
5. On 19 November Trial Counsel requested that Defense counsel resubmit their requests.

4. **Relief Requested.** The Government does not oppose the Defense motion.

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

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:24:28 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 20 November 2020.

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:25:18 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. Marine Corps	DEFENSE MOTION TO COMPEL PRODUCTION OF EXPERT CONSULTANT FOR TRIAL (Dr. [redacted]) 15 November 2020

Issue Presented

The Fifth Amendment to the United States Constitution recognizes an accused's right to present a defense through his own witnesses. The Sixth Amendment provides that a constructive denial of counsel occurs when detailed counsel is significantly compromised in their ability to provide meaningful adversarial testing of the prosecution's case. The Government has charged PFC Tapp with a violation of article 120, committing a sexual act without the consent of the alleged victim, [redacted] During the time of the alleged incident, [redacted] was prescribed Prozac, an antidepressant, and was drinking significant amounts of alcohol. As a result, it is necessary for an adequate defense of PFC Tapp that an expert consultant in forensic psychiatry is granted to assist defense counsel in explaining [redacted] processes of cognitive appraisal and her ability to actually, or manifest, consent while under the influence of drugs and alcohol. Without a forensic psychiatrist, PFC Tapp's rights to challenge the Government's case, present his own witnesses, and establish an adequate defense—all fundamental elements of due process—would be severely diminished. Should the Government be allowed to violate PFC Tapp's due process rights by denying defense counsel the expert assistance of a forensic psychiatrist?

1. **Summary of Relevant Facts**

a) PFC Tapp is charged with one specification of article 120.

b) The alleged victim, [redacted] has a history of using antidepressants and was prescribed antidepressants, Prozac, for daily use during the time of the alleged incident. (See Encl. 1,)

c) [redacted] describes to NCIS that she was drinking hard liquor with PFC Tapp on the day of the alleged incident (See Encl. 2)

d) [redacted] tells NCIS that the last thing she remembers from the night of the incident was kissing PFC Tapp and does not remember anything else until she woke up in the hospital the next day. (See Encl. 2).

e) The Defense requested funding for a "confidential expert consultant with the potential to ripen into a defense expert witness; specifically, an expert in forensic psychiatry" on 30 October 2020. Defense identified Dr. [redacted] as that forensic psychiatrist. (See Encl. 3.)

f) The Government denied Defense's funding request on 6 November 2020; (See Encl. 6).

g) Specifically, Defense is requesting that the Court order the convening authority to provide 15 hours of Dr. [redacted] expert consultation at the cost of $350 per hour, with the possibility to ripen into an expert witness at trial, at the cost of $4500 per day at trial for a total of $23,250.

2. **Discussion of the Law**

A. Defendants Are Entitled to Expert Assistance When the Expert is Necessary for an Adequate Defense.

Service members are entitled to expert assistance when necessary for an adequate defense.[1] Rule for Courts-Martial (RCM) 703(d) affords the defense equal access to witnesses

[1] *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986) (citing *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986)).

and evidence, including employment of experts to assist the defense at government expense when their testimony would be "relevant and necessary."[2] Article 46 mandates that the defense "shall have equal opportunity to obtain witnesses" to prevent the government from stacking its deck with witnesses while the defense cannot advance its case. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."[3] The Supreme Court recognized this right in *Washington v. Texas*:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[4]

In order to make a showing of necessity, the defense has the burden to establish 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.[5] The defense must show more than a mere possibility of assistance to explore all possibilities; they must instead show a reasonable probability of assistance.[6]

The Supreme Court has also discussed what is referred to as the constructive denial of counsel. In some circumstance, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct

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[2] *Id.*
[3] *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2006) (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)).
[4] *Washington v. Texas*, 388 U.S. 14, 19 (1967).
[5] *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006).
[6] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

of the trial."[7] Constructive denial of counsel occurs when: (1) detailed defense counsel faces severe structural limitations such as a lack of resources, high workloads, and understaffing or (2) detailed counsel are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as a meaningful adversarial testing of the prosecution's case.[8]

B. Dr. [redacted] Testimony is Necessary to PFC Tapp's defense.

Dr [redacted] expert consultation is necessary to assist the Defense in 1) analyzing [redacted] cognitive ability, 2) preparing any mistake of fact theory, and most importantly, 3) assisting Defense with the cross-examination of the alleged victim.

The Government case hinges on the theory that, due to her intoxicated state, [redacted] did not consent to the sexual acts of PFC Tapp. The Defense expects her to testify that she does not remember anything after kissing PFC Tapp and that she had drank a significant amount of liquor that night. Other witnesses will likely testify that they found [redacted] in an unconscious state in PFC Tapp's room. The Government will likely introduce evidence from PFC [redacted] NCIS interrogation in which he states that [redacted] seemed really drunk during the time that PFC Tapp was having sex with her. In light of this evidence, Dr. [redacted] consultation will assist the Defense in analyzing [redacted] cognitive abilities; to include an assessment of her likely level of awareness and ability to manifest consent especially given her mental health history and her history of drug use. This consultation is essential to PFC Tapp's defense, and if Dr. [redacted]r were to ripen into an expert witness would assist the trier of fact in evaluating the cognitive ability of [redacted]

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[7] *United States v. Cronic*, 466 U.S. 648, 659-60 (1984).

[8] *Gideon v. Wainwright*, 372 U.S. 335, 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial") (emphasis added); *see also Powell v. Alabama*, 287 U.S. 45, 67-69 (1932).

Similarly, Dr. [redacted] expert consultation is necessary for the Defense to develop any mistake of fact theory. If a mistake of fact case is presented by defense, the members are instructed as follows:

> "The accused is not guilty of the offense of sexual assault if: he mistakenly believed that [redacted] did consent to the sexual acts of the accused and if such belief on his part was reasonable. To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that [redacted] did consent to the sexual acts of the accused" (See Judicial Benchbook 5-11-2).

Dr. [redacted] psychiatric expertise is essential for the defense, and potentially the trier of fact, to look at the situation through the eyes of any reasonable person. Given the facts of this case, Dr. [redacted] can form an opinion over the cognitive functions of [redacted] and her ability to manifest consent in the context of the situation and given the medications that [redacted] was prescribed. This will help the defense and potentially the trier of fact evaluate any mistake of fact theories.

The medical history of [redacted] reveals that she has been prescribed Prozac for despression for daily use at the time of the incident (See Encl. 2). This evidence is relevant to [redacted] cognitive ability, credibility as a witness, emotional state, and even her propensity for social activity. Dr. [redacted] consultation is necessary in order to prepare for cross-examination of [redacted], and to potentially clarify to the trier of fact the effects of these drugs on a Complaining Witness's cognitive ability, credibility as a witness, emotional state, and her propensity for social activity especially when mixed with alcohol. Only a highly qualified clinical and forensic psychiatrist can properly evaluate the effects of psychiatric medications on the alleged victim. An understanding of these medications, their effects on a person and the effects of mixing them with alcohol is essential to an effective cross examination of the alleged victim. Denial would result

in PFC Tapp being denied an effective cross-examination.[9] Thus, Dr. [redacted] testimony is essential to an adequate defense.

Lastly, Defense counsel is incapable of meaningfully testing the government's case without Dr. [redacted] consultation and potential testimony. Cross-examination alone is not an effective substitute to Dr. [redacted] testimony because of Defense Counsel's lack of expertise in forensic psychiatry. Defense counsel are not permitted to testify regarding their knowledge of the facts of this case. Nor does defense counsel have the expertise or training possessed by Dr. [redacted], which allows him to present his opinions and findings in a digestible manner to the members.

3. **Relief Requested:** The defense respectfully requests that the Court order the convening authority provide 15 hours of Dr. [redacted] expert consultation at the cost of $350 per hour, with the possibility to ripen into an expert witness at trial, at the cost of $4500 per day at trial. Total funding requested is $23,250.

4. **Burden of Proof and Standard of Proof:** As the moving party, the defense bears the burden of proof on any factual issue the court deems necessary to decide this motion. R.C.M. 905(c)(2)(A).

5. **Enclosures:** The defense encloses the following in support of its motion:

(1) Victim Medical Exam and Report (BS 562-567);

(2) Results of NCIS interview of [redacted] dtd 20 July 2030 (BS 90-92)

(3) Defense Request for Expert Consultant dtd 30 October 2020;

(4) Affidavit of Dr. [redacted]

(5) Dr. [redacted] Curriculum Vitae;

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[9] Denying an accused the right of effective cross-examination "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 318 (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

(6) Government denial of Defense expert consultant request dtd 6 November 2020.

6. **Argument**: The defense requests oral argument.

Dated this 15th day of November 2020.

[redacted]

M. J. GRANGE
Captain, U.S. Marine Corps
Defense Counsel

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I certify that I caused a copy of this document to be served on the Court and opposing counsel this 15th day of November 2020.

Dated this 15th day of November 2020.

[redacted]

M. J. GRANGE
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT FOR TRIAL (Forensic Psychiatry-Dr. [redacted])** **20 November 2020**

1. **Nature of Motion.** Pursuant to Rule for Court-Martial (R.C.M.) 703, the government respectfully requests this court deny the Defense Motion to Compel Expert Assistance because it is not necessary based upon Defense's motion and controlling case law.

2. **Burden of Proof and Standard of Review.** As the moving party, defense bears the burden in this motion by a preponderance of the evidence.

3. **Summary of Facts**

   1. Defense requested Dr. [redacted] a forensic psychiatrist on 30 October 2020. (Encl 3 to Defense Motion).
   2. Defense's request was denied on 6 November 2020. (Encl 6 to Defense Motion).
   3. Defense requested a forensic toxicologist on 30 October 2020. (Enclosure 1).
   4. Defense's request for a forensic toxicologist was granted on 6 November 2020. (Enclosure 2).

4. **Statement of Law.** An accused is only entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). This "requires more than the 'mere possibility of assistance from a requested expert.'" *Id.* The standard for compelling an expert consultant is two-pronged, showing (1) the expert would be of assistance to the defense and (2) denial of the expert would result in a fundamentally unfair trial. *Id.* To satisfy the first prong, the defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop. *Id.*

5. Argument.

a. Dr. [redacted] Expertise is not Needed.

Here, the Defense fails to show why an expert consultant is needed to "1) analyz[e] [redacted] cognitive ability, 2) prepar[e] any mistake of fact theory, and most importantly, 3) assist[ ] Defense with the cross-examination of the alleged victim," and for this reason their motion should be denied. (Def. Mot. 4).

First, Defense asserts that Dr. [redacted] is needed to "analyz[e] [redacted] cognitive abilities; to include an assessment of her likely level of awareness and ability to manifest consent especially given her mental health history and her history of drug use." (Def. Mot. 4). First and most importantly, there has been no motion filed regarding Military Rule of Evidence (MRE) 513 or to introduce testimony related to the victim's "mental health history." Further, there is no evidence that her "mental health history" is relevant in any way to this case other than Defense's assertion that it in some way plays a role in her level of "awareness and ability to manifest consent." Defense's motion first discusses her inability to consent due to her intoxicated state, but then diverts into "mental health history" and "history of drug use." (Def. Mot. 4). Ultimately, the Government is unclear as to what Defense's need for this expert is based upon their motion. Defense has already been granted a toxicologist who will be able to testify to [redacted] level of intoxication and her ability or inability to consent based upon that level that level of intoxication and thus this expert is not needed for this purpose.

Next, Defense asserts that Dr. [redacted] is needed to "develop any mistake of fact theory." Once again, the Government is unclear as to what Defense is attempting to argue as their rationale for this expert. For example, Defense argues that "Dr. [redacted] psychiatric expertise is essential for the defense, and possibly the trier of fact to look at the situation through the eyes of any reasonable person." (Def. Mot 5). It appears that Defense is attempting to argue that they need Dr. [redacted] as an expert on "reasonable people." This is not the area of an expert. If, however, Defense is attempting to argue about "blackouts" and [redacted] ability to make judgements and decisions but not record memories based on her level of intoxication, a subject area that is typically explored in alcohol-facilitated sexual assault cases - this is exactly the subject area that the already approved expert in toxicology will be able to testify to. As the Defense has been granted an expert in this area, they have not demonstrated that Dr. [redacted] is necessary.

Similarly, Defense states that [redacted] has been prescribed Prozac for depression." (Def. Mot. 5). Once again, as stated earlier, Defense has not filed any motions related to [redacted] mental health history or her use of medication for any mental health issues. However, even if this evidence was to come in, Defense erroneously asserts that "only a highly qualified clinical and forensic psychiatrist can properly evaluate the effects of psychiatric medications on the alleged victim." (Def. Mot. 5). This is clearly within the realm of a forensic toxicologist, which has already been granted. Further, Defense has not even indicated whether or not they have spoken to their toxicologist to determine if he could testify to this, as this expert has already been granted the Government cannot call to ask him in response to Defense's motion.

The Defense has already been granted an expert witness that can presumably testify to all of the areas brought up in their motion and even if they had not, their motion in no way meets their burden in demonstrating how Dr. [redacted] is in any way necessary. Thus, their motion fails on this prong of the analysis and should be denied.

b. Defense Counsel is able to Gather and Present the Evidence that the Expert Assistance would be able to Develop.

The Defense has likewise failed to demonstrate that they are unable to gather and present the evidence that the expert assistance would be able to develop. First, the Defense has the ability to consult with the MCB Camp Pendleton Senior Defense Counsel, the Regional Defense Counsel, and most importantly [redacted] the Defense Services Organization Highly Qualified Expert. Ms. [redacted] is an expert in the area of criminal defense involving sex offenses and more specifically sex offenses involving alcohol. Defense counsel's ability to consult with all of these more senior, experienced counsel, including an expert in criminal defense involving sex offenses, demonstrates their ability to gather and present this evidence.

5. **Relief Requested**. As the Defense has failed to meet their burden, the Government respectfully requests this court deny the defense motion to Compel Dr. [redacted]

6. **Evidence.** The following evidence is offered in the form of enclosures in support of this motion:

1. Defense Request for a Forensic Toxicologist of 30 Oct 20.
2. Approval of funding for Forensic Toxicologist of 6 Nov 20.

7. **Oral Argument.** The Government respectfully requests oral argument.

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:31:50 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 20 November 2020.

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:33:50 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	MOTION TO COMPEL ASSISTANCE OF EXPERT CONSULTANT FORENSIC PATHOLOGIST (DR. [redacted] 15 NOVEMBER 2020

1. Nature of Motion. Pursuant to Rule for Courts-Martial (R.C.M.) 701(e), 703(d), and 906, Defense respectfully requests this Court compel funding in the amount of $5,000.00 to employ Dr. [redacted] as a confidential defense expert consultant in forensic pathology with the potential to ripen into an expert witness.

2. Statement of Relevant Facts.

On 18 July 2020 Private First Class Tapp, along with another Marine, met Ms. [redacted] near the pier in Oceanside. Ms. [redacted] is sixteen (16) years old at the time. After conversing with the two Marines, the group decides to leave and go back to Marine Corps Base Camp Pendleton. They walk to liquor store and purchase liquor before taking an Uber back to base. They arrive at the barracks around 1900. The three proceed to consume alcohol for the next hour. Ms. [redacted] alleges she "blacked out" around 2000 just after kissing Private First Class Tapp in the bathroom. According to NCIS interviews, the two Marines and Ms. [redacted] proceeded to engage in a threesome. Neither Marine is able to climax and the sexual act ends. Due to his level of intoxication, Private First Class Tapp then passes out on his bed. Ms. [redacted] falls asleep on the floor. Ms. [redacted] mother cannot reach her, so she "pings" her phone location and alerts authorities on Camp Pendleton. PMO searches for Ms. [redacted] and finds her in Private First Class Tapp's barracks room. PMO makes entry and finds Ms [redacted] on the floor, partly clothed, with blood on the carpet, and throw-up on the floor in close

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proximity. They find Private First Class Tapp asleep on the bed in just a pair of basketball shorts. Both parties are clearly intoxicated and the smell of alcohol is readily apparent.

PMO performs medical treatment on Private First Class Tapp and Ms. [redacted] is then transferred to a hospital because of her level of intoxication and possible injuries. A SART Exam is performed on Ms. [redacted] Several tests were performed to include vaginal injury testing, anal injury testing, STI testing, and photographs were taken. Several of Ms. [redacted] items of clothing were seized for testing. Private First Class Tapp also undergoes a SAFE Exam. Several tests were performed on him and clothing items were seized. Several items in the barracks room to include pieces of furniture, sections of carpet, and other samples were seized and sent for testing.

3. Discussion.

A. Legal Standard.

An accused is entitled to government-funded expert assistance if the services are necessary to an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). In order to make a showing of necessity, the defense has the burden to establish 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 defense must show more than a mere possibility of assistance to explore all possibilities; they must instead show a reasonable probability of assistance. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

This court must apply a three-part test to determine whether expert assistance is necessary. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), cert. denied, 513 U.S.965 (1994). The defense must show: (1) why expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

B. Application of Law

(1) Why Dr. [redacted] is Needed.

In this case, the Government alleges Private First Class Tapp committed a sexual act upon Ms. [redacted] by penetrating her vulva with his penis without her consent. Ms. [redacted] is alleged to have suffered several injuries to her vaginal area and anus along with possible rug burns, bruises, and scrapes/scratches. A SAFE/SART exam was conducted on Ms. [redacted] Several tests were performed during the SAFE/SART exam and injuries were allegedly discovered. Because it is alleged Private First Class Tapp sexually assaulted Ms. [redacted] without her consent, the evidence of injuries, specifically injuries to the vaginal and anal areas, are incredibly important evidence. The Government has notified the Defense that they plan to call two (2) SAFE nurses to speak to this evidence. This evidence, and the interpretation of that evidence, will be critical in the corroborating or disproving the Government's allegations.

Dr. [redacted] a forensic pathologist, licensed Gynecologist, and wound interpretation expert, is the only requested expert that can speak with authority on whether the assault described is likely to cause the alleged injuries purported by the Government and Ms. [redacted] Dr. [redacted] can further testify as to whether Ms. [redacted] alleged injuries are the likely result of force, lack of consent, or whether they are consistent with the allegations. Or, in the alternative whether the lack of injuries suggests otherwise. As a consultant, Dr. [redacted] will analyze the evidence and educate the defense on alternative sources of injuries and the type of force required to cause these injuries.

Dr. [redacted] is solely focused upon forensic pathology, gynecology, and the interpretation of the alleged injuries. The testimony that an individual suffered injuries

as a result of non-consensual sex requires a highly technical and educated expert to test the veracity of that testimony. The Defense requested Dr. [redacted] because he has the training and education to speak on and test the veracity of all the alleged injuries in this case. As a forensic pathologist and wound interpretation expert he can speak to all the alleged injuries outside of the "private areas." As a licensed Gynecologist with years of experience he can speak to all aspects of the SAFE/SART Exams that were performed in this case. The SAFE/SART Exam and its results will be a instrumental piece of the Government's case. So much so that they are calling two (2) SAFE Nurses to testify to it. We must have an expert that specializes in pathology, gynecology, and wound interpretation to help us understand how these seemingly damning alleged injuries may not be as they first appear. Without Dr. [redacted] the Defense will not be able to prepare a case in defense these alleged injuries.

(2) What the expert assistance would accomplish for the accused.

Dr. [redacted] will review all of the materials in the case, to include the Ms. [redacted] interview, witness statements, SAFE/SART Exams, and digital photographs of the injuries. He will also review the testimony of any government witness, to include any expert witnesses such as SAFE Nurses. He will be able to make a wound interpretation analysis from the material, determining whether the evidence presented by the government demonstrates injuries consistent with force or a lack of consent.

(3) Why Defense Counsel is unable to gather and present the evidence that the expert assistance would be able to develop.

Forensic pathology, Gynecology, and wound interpretation is a specialized area that requires a Medical Degree and years of advanced area specific training. Neither defense counsel nor anyone on counsel's staff have the years of training and experience required to

review the evidence and provide expert consultation regarding interpretation the injuries and the force required to cause said injuries.

C. Denial of the requested expert assistance will result in a fundamentally unfair trial.

It is a core guarantee of the Sixth Amendment that every criminal accused has the right to counsel when facing incarceration. *Gideon v. Wainwright*, 372 U.S. 335 at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon*, 372 U.S. at 340-341, 344; *Powell v. Alabama*, 287 U.S. 45 at 67-69 (1932).

An analysis of *Gideon's* progeny informs that constructive denial of counsel may occur when: (1) on a systemic basis, detailed defense counsel face severe structural limitations, such as a lack of resources, high workloads, and understaffing or (2) detailed counsel are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. Constructive denial may occur even if the detailed counsel is able to fulfill their basic obligations to their clients. *See United States v. Cronic*, 466 U.S. 648, 659-60 (1984). Claims of constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the ineffective assistance standard enumerated in *Strickland v. Washington*, 466 U. S. 668 (1984), which provides only retrospective relief. Ancillary services, such as experts, are traditional markers of the right to counsel as the Supreme Court recognized in *Ake v. Oklahoma,* 470 U.S. 68, 77, (U.S. 1985) and its numerous progeny. In *Ake* the Court required the government to provide the Defense with a psychiatrist at government expense where the defendant intended to present a defense of insanity:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a

> criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake at 612.

Since the Supreme Court's decision in *Ake,* courts have applied an *Ake* analysis and required the granting experts on a wide variety of issues, and expanded its reach beyond the limited sphere of capital litigation.[1] Moreover, in *United States v. Lee, 64 M.J. 213 (C.A.A.F. 2006),* C.A.A.F. recognized the established principal that an accused's entitlement to expert assistance is not limited to actual expert testimony at trial. Entitlement to that expertise is available before trial to aid in the preparation of his defense.

While *Gideon,* rather than *Strickland,* is the lens through which this court must review this request, nevertheless *Strickland* and its progeny can inform an assessment of what are the traditional markers of representation. The inevitable conclusion from review of such cases is that counsel must consult with appropriate experts when counsel alone cannot effectively understand and/or articulate issues of significance to the jury's decision making. In analyzing the issue, Courts have looked to whether Defense Counsel consulted experts qualified in a relevant field to assist counsel in preparing a defense.[2]

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[1] E.g., Pediatrician, *United States v. Warner*, 62 M.J. 114 (2005); Pathologist, *Terry v. Rees,* 985 F.2d 283 (6th Cir. 1993); DNA Expert, *Leonard v. Michigan*, 256 F.Supp.2d 723 (W.D.Mich. 2003); Chemist, *United States v. Chase*, 499 F.3d 1061 (9th Cir. 2007); Mitigation Specialist, *United States v. Kreutzer*, 61 M.J. 293 (2005); Hypnotist, *Little v. Armontrout,* 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988)

[2] See, *e.g., Duncan v. Ornoski,* 528 F.3d 1222, 1235 (9th Cir. 2008) (counsel's "failure to consult a *serologist* when there existed potentially exonerating blood evidence . . . [is] unreasonable under prevailing professional norms") (emphasis added); *Dugas v. Coplan,* 428 F.3d 317, 331 (1st Cir. 2005) ("Nor can we find that [counsel's] failure to consult an expert or educate himself on the techniques of defending an arson case is excusable . . .") *Miller v. Anderson,* 255 F.3d 455, 459 (7th Cir. 2001), *vacated on other grounds,* 268 F.3d 485 (7th Cir. 2001) ("[T]here was also no excuse for the lawyer's failure to consult experts on hair, DNA, trademarks, and footprints . . . . In these circumstances, it was irresponsible of the lawyer not to consult experts.")

Here, denial of the Dr. [redacted] consultancy would effectively deny the Defense the ability to challenge the medical evidence of injury that will be espoused by the complaining witness and the two (2) SAFE Nurses. Without a medical doctor to test Ms. [redacted] account of the alleged assault and the corresponding alleged injuries along with the SAFE Nurses' interpretation of those injuries, the Defense in left in a position to simply accept her version of events and the SAFE Nurses' conclusions as true. Moreover, the Defense is left woefully unprepared to challenge the Government's assertion that Ms. [redacted] alleged injuries are a result force or a lack of consent.

D. CONCLUSION

In the instant case, denial of the requested expert prevents the accused from effectively challenging the credibility of the testimony of the complaining witness, the SAFE Nurses, and the medical evidence presented by the Government. In this case, Ms. [redacted] credibility must be challenged because her ability to accurately perceive and recall events is likely to have been impacted by her mental health disorders, her use of prescription and illegal drugs, her alcohol consumption, and her lack of memory regarding important aspects of the events. Additionally, the veracity of the SAFE Nurses' testimony and the SAFE Test must be tested to ensure these tests were conducted properly, the results are accurate, and the interpretation of those results are consistent with the allegations. This issue is central to the Defense's case. Without Dr. [redacted] consultancy, the Defense cannot develop an effective and scientifically accurate challenge.

The Sixth Amendment and Due Process Clause guarantees every accused the right to a fair trial. *Gideon v. Wainwright* guarantees every accused the right to counsel to insure that the adversarial process of the trial is fair. In *Ake v. Oklahoma* the Court found that the provision of necessary experts is a component of the Sixth Amendment right to counsel. No adversarial

system is, or can be, fair when the defense does not have access to resources to test the government's case.

The constitutional Due Process right to present a defense and the Sixth Amendment right to effective assistance of counsel require appointment of the requested expert to assist the Defense.

4. Evidence Offered. The Defense offers the following documentary evidence in support of this motion:

Encl (A): Defense Request for Expert Consultant;
Encl (B): Government Denial of Request for Expert Consultant;
Encl (C): Curriculum Vitae of Dr. [redacted]
Encl (D): Fee Schedule of Dr. [redacted]
Encl (E): NCIS ROI of Ms. [redacted] interview (BS 000090-000092);
Encl (F): SART Exam of Ms. [redacted] (BS 000169-000193);
Encl (G): SAFE Exam of PFC Tapp (BS 000146-000161).
Encl (H): Gov Initial Discovery Response Dtd 20201028

5. Burden of Proof: As the moving party, the Defense bears the burden of proof on any factual issue the court deems necessary to decide this motion. R.C.M. 905(c)(2)(A).

6. Relief Requested. The Defense respectfully requests this Court compel funding in the amount of $5,000.00 to employ Dr. [redacted] as a confidential defense expert consultant in forensic psychology with the potential to ripen into an expert witness.

7. Argument. The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 15th day of November 2020.

[redacted]

B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

APPELLATE EXHIBIT XV
PAGE 9 OF 94

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

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. Marine Corps**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT ASSISTANCE (Forensic Pathologist- Dr. [redacted])** **20 NOVEMBER 2020**

1. Nature of the Response. The Government hereby opposes the Defense motion to compel a forensic pathologist. Because the Defense has not shown why a forensic pathologist is necessary, their motion should be **DENIED**. Additionally, the Government agrees to provide defense an adequate Government substitute in the field of sexual assault forensic examination.

2. Facts.

a. The Accused is charged with a violation of Article 120, for the sexual assault of Victim [redacted] on 18 July 2020.

b. On 19 July 2020, a sexual assault forensic examination was performed on [redacted] by Ms. [redacted]

c. The Government informed Defense Counsel that the Government intended to call Ms. [redacted] on 28 October 2020.

d. On 30 October 2020, the Defense requested funding from the Convening Authority for an expert consultant in forensic pathology. (Encl. 1).

e. On 6 November 2020, the Convening Authority denied the Defense request. (Encl. 2).

f. The Government has not retained the expert assistance of a forensic pathologist in this case.

g. Defense has not requested the assistance of an expert in sexual assault forensic examinations.

h. Trial Counsel are currently in the process of communicating with DoD sexual assault forensic nurse examiner (SAMFE) nurses and doctors in order to find an available expert for the Defense team.

3. Discussion and Analysis.

Uniform Code of Military Justice (UCMJ) Article 46 provides that trial counsel and defense counsel shall have equal opportunity to obtain witnesses and other evidence. This generally includes the right to expert assistance. "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2001) (internal citations omitted). "Necessity" is more "than a mere possibility of assistance from a requested expert" *Id;* see also *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) ("[t]he defense's stated desire to 'explor[e] all possibilities, however, does not satisfy the requisite showing of necessity."). The accused must show a reasonable probability exists both 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." *Bresnahan,* 62 M.J. at 143. To show that an expert would assist the Defense, the Defense must show "(1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused, and (3) why the defense counsel are unable to gather and present the evidence that the expert assistance would be used to develop." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (internal citation omitted).

When Defense requests a particular expert, the Government may alternatively agree to provide an adequate Government substitute. C.A.A.F. has held that Article 46 expresses a

congressional intent to prevent allowing the Government to "obtain an expert vastly superior to defense's." *United States v. Warner*, 62 M.J. 114, 120 (C.A.A.F. 2005). However, defense counsel are not entitled to the named expert of their choice. *United States v. Ndanyi*, 45 M.J. 315, 321 (C.A.A.F. 1996). The Government may provide a reasonable substitute. *Id.*

The Defense has failed to meet the first prong of the *Freeman* test, specifically to show why Dr. [redacted]—a forensic pathologist—is needed in this case. The Government does intend to call a an expert in the field of sexual assault forensic examinations, Ms. [redacted] to testify about the examination performed on [redacted] following her sexual assault.[1] Additionally, the Government agrees to provide Defense with an adequate Government substitute to Dr. [redacted]—specifically to provide Defense with its own SAMFE. The Government is currently in the process of communicating with DoD sexual SAMFE nurses and doctors in order to find an available expert for the Defense team.

With an adequate government substitute provided, Defense cannot show why the assistance of Dr. [redacted] is needed. Defense states that Dr. [redacted] is necessary to evaluate the injuries sustained by [redacted] as a result of the sexual assault, and as documented in [redacted] subsequent examination. Def. Mot. 3. A SAMFE is more than capable of performing this evaluation, as well as assisting Defense in analyzing the examinations performed on [redacted] and the Accused, and preparing any necessary defense or cross-examinations. Concurrently, while the Defense clearly recognizes that the Government is calling a SAMFE as a witness, Defense's motion makes no attempt to distinguish between the assistance of a SAMFE and a forensic pathologist, or to explain why a SAMFE is incapable of providing the assistance Defense claims to require in its

[1] Defense notes that on its witness list, the Government lists two sexual assault forensic examiners, Ms. [redacted] whom performed the examination on [redacted] and Ms. [redacted] whom performed the sexual assault forensic examination on the Accused. However, Ms. [redacted] will not be testifying regarding [redacted] examination, Ms. [redacted] will only be testifying about the examination she performed on the Accused.

motion. The assistance of a forensic pathologist is not necessary, and denial of that assistance will not cause a fundamentally unfair trial.

4. **Relief Requested.** The Government respectfully requests that the Court **DENY** the Defense motion to compel.

5. **Evidence.** In support of its motion, the Government offers the following:

a. Enclosure (1): Defense Request of 30 October 2020
b. Enclosure (2): Convening Authority Response of 6 November 2020

6. **Burden of Proof.** The Defense bears the burden by a preponderance of the evidence.

7. **Oral Argument.** The Government requests oral argument.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on 20 November 2020.

[redacted]
N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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

UNITED STATES	)	
	)	
v.	)	**GOVERNMENT MOTION FOR APPROPRIATE RELIEF**
	)	
THOMAS H. TAPP	)	
Private First Class	)	**(Trial Counsel Telephonic Participation)**
U.S. Marine Corps	)	
	)	**20 November 2020**

1. Nature of Motion. The Government moves the Court to allow one trial counsel to participate telephonically during the 23 November 2020 Article 39a session of court due to his being ordered into quarantine as a result of potential novel coronavirus 2019 (COVID-19) exposure.

2. Summary of Facts.

a. Major [redacted] and Captain [redacted] are detailed as trial counsel in the case at bar.

b. Captain [redacted] was ordered into a Restriction of Movement ("ROM") status, which is effectively a home-based quarantine on the afternoon of 18 November 2020 by the Officer-in-Charge, Legal Services Support Section – West, due to potential exposure to COVID-19 from a fellow trial counsel who is experiencing COVID-19-related symptoms.

c. The fellow trial counsel received a COVID-19 test on 18 November and the test returned a positive result on 19 November 2020.

d. Captain [redacted] is in a ROM status for two weeks from 18 November.

e. Captain [redacted] was the author of the response to the Defense motion to compel an expert in forensic psychiatry.

f. Lead counsel for the defense, Capt Grange, was consulted about Capt [redacted] appearing telephonically and he indicated that he did not object.

g. The Government does not intend to call any witnesses in support of its response, and based on Defense's filings, Defense does not plan to call any witnesses either.

3. Discussion.

a. State of the Law

(1) Rule for Courts-Martial (R.C.M.) 805 provides that "[a]s long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session."

(2) There is no rule in the Navy-Marine Corps Trial Judiciary's Uniform Rules of Practice (dated 5 August 2020) or in the Western Judicial Circuit's (WJC) Rules of Court (dated 17 February 2020) that prohibit counsel from appearing telephonically to argue motions during an Article 39a session of court.

(3) WJC's Rule 32.1 provides that video teleconferencing "may be used to conduct Article 30a sessions for pre-referral subpoenas, orders, or warrants, or Article 39(a) sessions for arraignments, motions practice and any other sessions permitted by the military judge."

(4) Navy-Marine Corps Trial Judiciary's Uniform Rules of Practice, provide in Rule 36.7 that "[t]he military judge has discretion to allow victims' legal counsel to be heard in court via telephone or VTC."

(5) WJC Rule 15.1 states that "[t]he military judge is responsible for maintaining the dignity and decorum of the proceedings, for courtroom security generally and for controlling spectators and ensuring their conduct is appropriate."

b. Analysis

The COVID-19 pandemic and the Marine Corps' necessary responses to the pandemic have created challenging and relatively unique situations for the practice of law. While there is

no rule granting the authority to conduct telephonic participation by trial counsel or defense counsel during Article 39a sessions of court, there is likewise no rule prohibiting such participation. Put simply, the Rules are silent and thus the decision to allow telephonic participation is squarely within the military judge's discretion under WJC Rule 15.1. Given the seriousness of both COVID-19 and the allegations against the Accused, allowing one counsel for the government to appear telephonically provides for a just and fair proceeding for both sides and is unopposed by the defense.

4. Burden of Proof and Standard of Review.

a. Pursuant to Rule for Court Martial (R.C.M.) 905(c) (Manual for Courts-Martial (M.C.M.), 2019 ed.), the burden of proof is with the moving party by a preponderance of the evidence.

b. A military judge's ruling regarding the conduct of the court-martial and appearance of parties is reviewed under an abuse of discretion standard of review.

5. Evidence. The Government does not have any documentary evidence or witnesses in support of this motion.

6. Relief Requested. The Government respectfully requests this Court grant Captain [redacted] permission to argue in response to the Defense motion to compel an expert in forensic psychiatry telephonically.

7. Oral Argument. The Government respectfully requests oral argument on this motion.

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:17:58 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 20 November 2020.

OCONNELL.GAGE.MICHAEL.[redacted] Digitally signed by OCONNELL.GAGE.MICHAEL.[redacted] Date: 2020.11.20 12:17:19 -08'00'

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	MOTION IN LIMINE (EXCLUSION OF EVIDENCE IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 401 AND 403) (Evidence of Blood and Vomit) 3 DECEMBER 2020

1. Nature of Motion. Pursuant to Military Rules of Evidence (Mil.R.Evid) 401 and 403, the Defense moves the Court to issue a preliminary ruling on the preclusion of evidence. Mil.R.Evid 403 and current case law permit the preclusion of relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Photographic and testimonial evidence of blood and vomit found in PFC Tapp's room should be excluded under M.R.E 401 and M.R.E 403.

2. Statement of Relevant Facts.

a. The night of 18 July 2020 Officer [redacted] conducted a check of building #620426. Officer [redacted] knocked on the door of room #242 and Private First Class [redacted] answered the door. Upon entering room #242, the room of Private First Class Tapp and Private First Class [redacted] Officer [redacted] found [redacted] lying on the floor unconscious, partially clothed, with a wet red stain on the back of her skirt. He also observed another red stain on the carpet, vomit throughout the room, and a puddle of yellow liquid near a wall locker. Private First Class Tapp was found on his bed, unconscious and unresponsive. (Encl A)

b. Paramedics arrived on the scene and walked throughout the room before law enforcement was able to photograph and properly document the scene. They "placed a chair in the yellow substance and stepped in the blood many times." (Encl. B)

c. Once Private First Class Tapp and [redacted] were removed from the scene, NCIS arrived and documented the Private First Class Tapp's room. NCIS took photographs of the room, paying particular attention to the red stains they claim is blood and vomit. (Encl J).

d. On 18 July 2020, [redacted] underwent an exam by Dr. [redacted] He documented no external trauma and bleeding consistent with menstrual bleeding. (Encl. D).

e. On 19 July 2020, [redacted] underwent a forensic exam at Palomar Health Forensic Heal Services. The forensic nurse took at least 58 photographs of [redacted] lacerations, swelling, and bruising. The forensic exam specifically notes [redacted] was menstruating at the time of the exam. (Encl E).

f. Private First Class Tapp underwent a forensic exam at Naval Hospital Camp Pendleton on 19 July 2020. Private First Class Tapp's body and, specifically, his penis were examined. There were no findings of blood on his penis or pubic hair. There were no findings of vomit. (Encl F).

g. When interviewed by NCIS, [redacted] stated she was menstruating on the night of 18 July 2020. [redacted] admits to being digitally penetrated by Private First Class [redacted] admits to consuming an estimated 5 to 8 shots of Svedka Vodka that evening. [redacted] does not remember throwing up. The last thing [redacted] remembers is consensually kissing and touching Private First Class Tapp in the bathroom. (Ecnl G).

h. Private First Class Tapp admits to having consensual vaginal sex with [redacted] Private First Class Tapp admits to seeing Private First Class [redacted] digitally penetrate [redacted] Private First Class Tapp admits to seeing Private First Class [redacted] have vaginal sex with [redacted] Private First Class Tapp did not see [redacted] vomit. (Encl H).

i. Ms. [redacted] spoke with NCIS on 29 July and informed them [redacted] had tested positive for Chlamydia. (Encl E).

j. Private First Class Tapp tested negative for [redacted] (Encl I).

k. Private First Class [redacted] admits to entering room [redacted] on the evening of 18 July 2020 and finding [redacted] on the floor and Private First Class Tapp on the bed. Private First Class [redacted] stated that when he attempted to wake up [redacted] she began to vomit. (Encl C).

3. Discussion.

A. Legal Standard.

M.R.E. 401 establishes that evidence is relevant if: 1) "it has any tendency to make a fact more or less probable than it would be without the evidence" and 2) "the fact is of consequence in determining the action." M.R.E. 403 requires that: "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." Here, the court must apply the M.R.E. 403 balancing test, which will show that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Thus, it should be excluded.

Probative value of evidence is higher when the evidence directly goes "to prove or disprove a fact in issue." *United States v. Reynolds*, 29 M.J. 105, 110 (C.M.A. 1989). Unfair prejudice, on the other hand, "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

"It is well-settled that photographs are not admissible for the illegitimate purpose of inflaming or shocking the court-martial." *United States v. White*, 23 M.J. 84, 88 (C.M.A. 1986). Which is why CAAF has repeated in two separate murder cases that "it cannot be seriously argued that [the autopsy and surgical] photographs were admitted only to inflame or shock this court-martial." *United States v. Akbar*, 74 M.J. 364, 407 (C.A.A.F. 2015)(*United States v. Gray*, 51 M.J.

1, 35 (C.A.A.F 1999). "[P]hotographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or exact nature of wounds." *United States v. Gray*, 37 M.J. 730, 739 (A.C.M.R. 1992). "It is not a matter of whether the photographs were inflammatory but whether they *served a legitimate purpose*." *United States v. Witt*, 72 M.J. 727, 745 (A.F. Ct. Crim. App. 2013)(quoting *U.S. v. Gray*, 37 M.J. at 739)(emphasis added).

B. Application of Law

(1) Evidence of the Blood Stains found in Private First Class Tapp's Room are Not Relevant under M.R.E. 401.

The primary issue at trial is whether or not [redacted] was able to consent and whether or not she did consent. Private First Class Tapp is not charged with violating Article 120 with the use of force. As such, force is not an element the government must prove. The blood stain does not make it more or less likely that [redacted] consented to sexual intercourse. The government will likely argue the stains are relevant to indicate her level of intoxication. The government will likely further argue the stains are relevant to disprove any mistake of fact defense. The government will also likely argue the blood and stains are relevant as a result of her injuries. However, there is a lack of evidence that [redacted] was bleeding during the sexual intercourse. No blood was found on the body or penis of Private First Class Tapp. Additionally, there is evidence the sexual intercourse took place on the bed, not on the floor where [redacted] was found and whether the blood stains are located. No blood was found on the bed where the alleged sexual act occurred.

This lack of evidence regarding whether [redacted] was bleeding during the sexual act clearly indicates that she was not bleeding prior to or during the sexual act. As such, it is improper to assume it plays any role indicating her level of intoxication, her ability to or

willingness to consent, her injuries, or Private First Class Tapp's ability to have a reasonable mistake of fact as to consent.

[redacted] also believes her menstrual cycle started on the night 18 July 2020. The emergency room examination confirms that [redacted] was menstruating. The forensic examination confirms that [redacted] was menstruating. There is also lack of evidence on when [redacted] actually started menstruating. Private First Class [redacted] did not report the appearance of blood on his fingers after he digitally penetrated her in the Uber or while on the bed in the room. Additionally, the lack of blood on Private First Class Tapp is indicative that she was not menstruating during the sexual act. As such, this again disproves any government argument that the bleeding is indicative of a lack of consent, [redacted] intoxication level, is a result of her injuries, or Private First Class Tapp's ability to have a reasonable mistake of fact as to consent.

[redacted]. Bleeding post sexual intercourse is a common side effect of [redacted]. Again, the lack of blood on Private First Class Tapp and the bed indicates the bleeding was post sexual intercourse. This is consistent with the [redacted] where it is common for females to bleed post sexual intercourse. As such, this fact again disproves any government argument that the bleeding is indicative of a lack of consent, [redacted] intoxication level, is a result of her injuries, or Private First Class Tapp's ability to have a reasonable mistake of fact as to consent.

The lack of evidence regarding when [redacted] started bleeding, the lack of evidence that [redacted] was bleeding prior to or during the sexual act, and the evidence that the bleeding is clearly a result of her menstrual cycle and/or consistent with [redacted] make this evidence irrelevant to this case. [redacted] made no mention of a correlation between

her menstrual cycle and her willingness to consent. The blood is not indicative of injuries because it is easily explained as a result of her menstrual cycle [redacted]. Most importantly, the appearance of blood does not make any fact of consequence more or less likely. Lastly, the lack of blood evidence prior to or during the sexual act makes the blood evidence irrelevant in disproving a possible mistake of fact defense. Therefore, the blood stains are irrelevant and should be excluded.

(2) Any Probative Value of the Blood is Substantially Outweighed by the Danger of Unfair Prejudice under M.R.E. 403.

The primary question is whether [redacted] consented to the sexual act with Private First Class Tapp. In light of the lack of relevance argument above, the evidence of the blood will also be unfairly prejudicial to Private First Class Tapp and should be excluded under M.R.E. 403. As evidenced in the argument above, the blood lacks probative value. There is a lack of evidence that [redacted] bled prior to or during the sex act. Additionally, the blood is not indicative of her injuries as there is little evidence the blood is actually a result of injuries. More importantly, unlike *United States v. Gray* and *United States v. Akbar*, the photos of the blood do not depict the alleged wounds at all. There were numerous photos taken during the forensic exam that better depict and detail the injuries. The evidence of the blood does not help the members answer the questions of whether [redacted] consented to the sexual act or not.

Conversely, the evidence of the blood is unfairly prejudicial to Private First Class Tapp. First, it confuses the issue and distracts the members. There are multiple explanations for the blood which play no part in determining whether the sex was consensual or not. The introduction of the blood will distract the members from the real issue, whether [redacted] consented or not, and will instead create a sub trial on the source and reason behind the blood. This distraction of the members unfairly prejudices Private First Class Tapp and

causes the members to focus on "injuries" instead of whether there was consent or not. Second, the blood will inflame the passions and shock the members. This kind of evidence can provoke emotional responses that will sway the member's ability to see the entire picture. The issue is consent, not how or why [redacted] bled. However, pictures and testimony of blood, especially as in this case, will steer the focus of the trial to explaining the issue of blood when that is not probative of the primary issue of fact.

Most importantly, unlike the cases of *United States v. Gray* and *United States v. Akbar*, the government does not need the blood evidence to prove any material fact in this case. The blood does not make consent more or less likely. With the questions about whether the blood is even a result of [redacted] injuries and its lack of probative value in proving consent or not, the danger to unfair prejudice is much too great. Introducing this evidence to members is unfairly prejudicial and outweighs any probative value it may have. Testimony and pictures of the blood will likely lead the members to conclude that the sexual interaction could not have been consensual because of the scene. Additionally, testimony and photographs of the blood creates a risk that the members will ignore the more probative and less provocative sources of evidence the defense may seek to admit in proving consent or a mistake of fact as to consent. This kind of evidence creates a unacceptable risk that it will "lure the factfinder into declaring guilt on a ground different from proof specific for the offense charged." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009). Such a risk should not play a part in trial of this magnitude. As such, the evidence of the blood should be excluded to as the probative value is significantly outweighed by the danger of unfair prejudice to Private First Class Tapp.

(3) The Evidence of the Blood is Cumulative.

The government will be able to present evidence of [redacted] alleged in through the Sexual Assault Forensic Examination, [redacted] testimony, and the testimony of medical professionals. These forms of evidence are more reliable and far less prejudicial than evidence of blood found in PFC Tapp's room. Additionally, it is more reliable than photographs taken by NCIS because those photographs were taken after [redacted] was moved and after paramedics had stepped in and spread the blood throughout the room. This contamination of the scene creates a severe issue of reliability of the evidence. The actions of the paramedics altered the composition of the stains, possibly spread them, and created new stains throughout the room. Most importantly, the blood at the scene is likely not a result of the injuries suffered by [redacted] Testimony and documentary evidence through medical professionals is a more reliable and probative presentation of her injuries. For these reasons the evidence of the blood in Private First Class Tapp's room is unnecessarily cumulative when the government has more reliable and accurate evidence through the SAFE Exam and medical professional testimony. Consequently, the evidence of blood in Private First Class Tapp's room should be excluded as unnecessarily cumulative.

(4) Evidence of Vomit found in Private First Class Tapp's Room is Not Relevant under M.R.E. 401.

The primary issue at this trial is whether or not [redacted] was able to consent and whether or not she did consent. At a cursory glance it would appear that the vomit would be a relevant piece of evidence. However, upon a closer review of the evidence, the vomit is not probative in determining whether [redacted] was able to consent or whether she did consent at the time of the sexual act. The vomit fails to make any fact of consequence more or less likely. As such,

the vomit is not probative in establishing whether [redacted] was able to consent or did consent at the time of the sexual act and is therefore irrelevant.

It is without question that vomit was found at the scene. However, it is also without question that the vomiting occurred post the sexual act. Private First Class [redacted] clearly indicates that [redacted] vomited when he entered the room and attempted to wake her up. At that time the sexual act had already occurred and Private First Class Tapp was passed out on his bed. This evidence raises serious questions. First, how long after the sexual act occurred did [redacted] vomit? Second, did [redacted] drink more alcohol post the sexual act? Third, how does the vomit post sexual act help the trier of fact determine [redacted] intoxication level prior to and during the sexual act?

First, there is a lack of evidence establishing a clear timeline for when the sexual act began, ended, and how long after [redacted] vomited. However, one thing is clear. There is no evidence of vomit on the body or penis of Private First Class Tapp. There is no evidence of vomit on the bed either. This lack of evidence clearly indicates [redacted] did not vomit prior to or during the sexual act. This makes it evident that the vomit cannot be relevant in determining her level of intoxication and ability to consent prior to and at the time of the sexual act. Additionally, the unknown amount of time between the sexual act occurring and the vomit disproves the argument that the vomit can be used as a basis to determine [redacted] intoxication level at the time of the sexual act and whether [redacted] was able to consent or not. Furthermore, because there is no evidence that Private First Class Tapp had any knowledge of [redacted] vomiting, the vomit is not relevant in any government argument against a reasonable mistake of fact defense by Private First Class Tapp.

Second, there is no evidence one way or the other about whether [redacted] drank more alcohol or not post the sexual act. The memory in all parties involved is blank for that time period. We simply do not know what occurred in that room after the sexual act and before third parties entered the room. There is a possibility [redacted] consumed more alcohol post the sexual act. With that possibility, the vomit becomes even less relevant and it is further attenuated from [redacted] ability to consent prior to or during the sexual act. If there was further drinking after the sexual act and before the vomit, the vomit would be even more irrelevant in determining possibility of Private First Class Tapp's ability to have a reasonable mistake of fact defense.

Third, the vomit does not assist the trier of fact in determining [redacted] intoxication level and her ability to consent prior to or during the sexual act. The vomit, post sexual act, it indicative of [redacted] intoxication level after the sexual act in question had occurred. This is different from other cases whether an alleged victim vomits prior to the sexual act, which can clearly assist the trier of fact determining the level of intoxication prior to and during the sexual act. That is not the case here. The vomit is only probative of the fact that [redacted] was so intoxicated after the sexual act had already that she vomited and possibly could not consent at that time. It does not probative in indicating that she was so intoxicated that she could not consent prior to or during the sexual act. We already have evidence of [redacted] height and weight, the amount of alcohol she drank prior to the sexual act, and the amount of time she spent drinking prior to the sexual act. That is plenty enough information for a toxicologist and the trier of fact to determine her level of intoxication and ability to consent prior to and during the sexual act. Vomit post the sexual act does not make those facts any more or less probable. As such, the vomit is not relevant and should be excluded.

(5) Any Probative Value of the Blood is Substantially Outweighed by the Danger of Unfair Prejudice under M.R.E. 403.

The primary question is whether [redacted] consented to the sexual act with Private First Class Tapp. In light of the lack of relevance argument above, the evidence of the vomit will also be unfairly prejudicial to Private First Class Tapp and should be excluded under M.R.E. 403. As evidenced in the argument above, the vomit lacks probative value. There is a lack of evidence that [redacted] vomited prior to or during the sexual act. Additionally, the vomit is not indicative of her intoxication prior to or during the sexual act. More importantly, unlike *United States v. Gray* and *United States v. Akbar*, the photos of the vomit do not depict any alleged wounds and do not provide an insight of whether [redacted] consented or not to the sexual act. The evidence of the vomit does not help the members answer the questions of whether [redacted] consented to the sexual act or not.

Conversely, the evidence of the vomit is unfairly prejudicial to Private First Class Tapp. First, it confuses the issue and distracts the members. There are multiple explanations for the vomit which play no part in determining whether the sex was consensual or not. The introduction of the vomit will distract the members from the real issue, whether [redacted] consented or not, and will instead create a sub trail on the intoxication required to vomit, the timing of the vomit, the actions in the time between the end of the sex and her vomiting, and the reason why she vomited. This distraction of the members unfairly prejudices Private First Class Tapp and causes the members to focus on "how drunk she must have been to vomit" instead of whether there was consent or not at the time of the sexual act. This distraction will cause the members to focus on her intoxication post the sexual encounter which is not a relevant factor in whether she was too intoxicated to consent at the time of the sexual act.

Second, the vomit will inflame the passions and shock the members. This kind of evidence can provoke emotional responses that will sway the member's ability to see the entire picture. The issue is consent, not why, when, or how much did [redacted] vomit. However, pictures and testimony of vomit, especially as in this case, will steer the focus of the trial to explaining the issue of vomit when that is not probative of the primary issue of fact.

Most importantly, unlike the cases of *United States v. Gray* and *United States v. Akbar*, the government does not need the vomit evidence to prove any material fact in this case. The vomit does not make consent more or less likely. Introducing this evidence to members is unfairly prejudicial and outweighs any probative value it may have. The government has various other ways of proving her level of intoxication and whether she was able to consent. Testimony and documentary evidence of the amount of alcohol she drank, the type of alcohol, the amount of time she spent drinking, and her height and weight are much more probative pieces of evidence with significantly less risk of unfair prejudice.

Testimony and pictures of the vomit will likely lead the members to conclude that the sexual interaction could not have been consensual because of the scene and her level of intoxication post the sexual act. Additionally, testimony and photographs of the vomit creates a risk that the members will ignore the more probative and less provocative sources of evidence the Defense or government may seek to admit in proving or disproving consent or a mistake of fact as to consent. This kind of evidence creates a unacceptable risk that it will "lure the factfinder into declaring guilt on a ground different from proof specific for the offense charged." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009). The risk is too great. As such, the evidence of the vomit should be excluded to as the probative value is significantly outweighed by the danger of unfair prejudice to Private First Class Tapp.

(6) Evidence of Vomit is Cumulative.

The government will be able to present evidence of [redacted] alleged intoxication level through medical reports, [redacted] testimony, witness testimony, and the testimony of medical professionals. These forms of evidence are more reliable and far less prejudicial than evidence of vomit found in PFC Tapp's room. Additionally, it is more reliable than photographs taken by NCIS because those photographs do not serve in explaining [redacted] intoxication at the time of the sexual act. Furthermore, the paramedics were walking throughout the scene. It is confirmed the paramedics contaminated the blood on the scene and, as such, it is reasonable to assume they contaminated the vomit as well. This contamination of the scene creates an issue of reliability of the evidence. The actions of the paramedics altered the composition of the stains, possibly spread them, and created new stains throughout the room. Most importantly, the vomit at the scene is not an indicator [redacted] intoxication at the time of the sexual. More reliable evidence by [redacted] Testimony, witness testimony, and documentary evidence through medical professionals is a more reliable and probative presentation of her intoxication at the time of the sexual act. For these reasons the evidence of the vomit in Private First Class Tapp's room is unnecessarily cumulative when the government has more reliable and accurate evidence through the medical documentation, [redacted] testimony, and medical professional testimony. Consequently, the evidence of vomit in Private First Class Tapp's room should be excluded as unnecessarily cumulative.

D. CONCLUSION

In light of the evidence, law, and arguments presented, the Defense respectfully requests this court preclude the introduction of evidence related to the blood and vomit found in Private First Class Tapp's barracks room to the members because it is not relevant, unfairly prejudicial, and

cumulative. The government can present more reliable and less unfairly prejudicial evidence of consent, injuries, and intoxication through other means.

4. **Evidence Offered.** The Defense offers the following documentary evidence in support of this motion:

Encl (A): Contact with Officer [redacted] (BS 00061);
Encl (B): Statement of Corporal [redacted] (BS 000211-000212);
Encl (C): PFC [redacted] (BS 000802-000803);
Encl (D): CHOC Mission Hospital Addendum (BS 000568-000569);
Encl (E): SART Exam of [redacted] (BS 000169-000193)
Encl (F): SAFE Exam of PFC Tapp (BS 000146-000161)
Encl (G): NCIS Interview of [redacted] (BS 00090-00092)
Encl (H): NCIS Interview of PFC Tapp (BS 00082-00086)
Encl (I): PFC Tapp Negative [redacted] (BS 000799)
Encl (J): NCIS Photographs of the Scene (PFC Tapp's Barracks Room)

5. **Burden of Proof:** The burden of proof is on the government to prove by a preponderance of the evidence that the evidence of blood and vomit in Private First Class Tapp's room is relevant and any probative value is not outweighed by the danger of unfair prejudice.

6. **Relief Requested.** The Defense respectfully requests this Court preclude the introduction of evidence related to the blood and vomit found in Private First Class Tapp's barracks room to the members and instruct the trial counsel to admonish their witness's not to testify on these topics.

7. **Argument.** The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 3rd day of December 2020.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	)	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE (Blood and Vomit) 10 December 2020

1. Nature of Motion.

Pursuant to Military Rule of Evidence (M.R.E.) 401 and 403, the Government respectfully requests this court **DENY** the Defense Motion in *Limine* to Exclude Evidence of Blood and Vomit, because said evidence is highly probative and not outweighed by the danger of unfair prejudice.

2. Burden of Proof and Standard of Review.

As the proponent of the evidence, the Government bears the burden in this motion by a preponderance of the evidence.

3. Summary of Facts

a. The Accused is charged with a violation of Article 120 for the sexual assault of [redacted] for the penetration of [redacted] vagina with the Accused's penis, without [redacted] consent on the evening of 18 July 2020.

b. According to [redacted]. she arrived at the barracks around 1900 and went to PFC [redacted] room. (Encl. G to Def Mot).

c. [redacted] stated that they were in PFC [redacted] room for approximately 40 minutes, where [redacted] PFC [redacted] and the Accused began drinking. (*Id.*).

d. PFC Tapp, PFC [redacted], and [redacted] then went to PFC Tapp's room. (*Id.*).

e. [redacted] stated that in PFC Tapp's room they listened to music and consumed alcohol for approximately an hour and a half. (*Id.*).

f. [redacted] last memory is being in the bathroom with PFC Tapp and then waking up in the hospital. (*Id.*).

g. PFC [redacted] went to PFC Tapp's room and looked in the window at "around 2030." (Enclosure 1).

h. PFC [redacted] stated that he "saw tap [sic] with no clothes on as well as the girl with no clothes on. They were in the middle of the room laying on the floor. (*Id.*).

i. [redacted] mom called PMO at 2221 when [redacted] did not come home. (Enclosure 2).

j. PFC [redacted] opened the door at 2304 for PMO. (*Id.*)

k. PMO found [redacted] unresponsive but breathing. She could not respond to PMO initially but only make grunts.

l. The jean skirt she had on had a trail of blood on the back of it. (*Id.*)

m. There was a puddle of blood approximately 12 inches long on the floor and a wet red stain on the back of her skirt. (*Id.*).

n. [redacted] was transported via ambulance to Mission Hospital. (*Id.*).

o. [redacted] underwent a sexual assault forensic examination (SAFE) on 19 July 20. (Encl E to Def Mot).

p. During the SAFE, the examiner noted lacerations to [redacted] vagina. (*Id.*).

q. During her SAFE, the examiner noted that the lacerations were bleeding. (*Id.*).

r. [redacted] determined that she was not in fact menstruating on 18 July 20, due to an app that she uses to track her menstruation. (Enclosure 3).

s. [redacted] had her period two weeks after the sexual assault. (*Id.*).

4. <u>Statement of Law</u>

Evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." M.R.E 401. "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 (emphasis added). "Under the M.R.E. 403 balancing test, a *presumption of admissibility exists* since the burden is on the opponent to show why the evidence is

inadmissible." *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004) (emphasis added). M.R.E. 403 is a rule of inclusion." *Id.*

5. Argument.

a. The Blood Stains Found in PFC Tapp's Room are Relevant under M.R.E. 401.

The blood found at the crime scene is clearly highly relevant under M.R.E. 401. Defense argues and the Government agrees that "[f]orce is not an element the government was must prove." (Def. Mot 4). However, just because force is not an element of the crime PFC Tapp is charged with does not mean that the blood found at the scene is not relevant.

First, this evidence is *clearly* and *highly* relevant to [redacted] level of intoxication, and thus to her ability to consent. It shows that she was so intoxicated that she laid on the carpet long enough for a pool of blood to form underneath her. To be clear, this is not a few drops of blood. This is described as a ***12 inch*** blood stain on the carpet. (Enclosure 1). The size of the stain can be seen in the photos, additionally the carpet was saturated with enough blood that when people stepped in it they left footprints of blood in the room. (Encl J to Def Mot). Whether it was from menstruation, the injuries noted in her SAFE exam, or some other unidentified reason, it is still relevant for this purpose. A competent person does not lay on the carpet while bleeding long enough for a pool of blood to form underneath them. This evidence is even more probative when you consider that she was found with a "wet red stain" on the back of her skirt when she was found by the responding police officers in a different location from where the large blood stain on the carpet was located. (Encl B to Def. Mot.). This suggests that she either laid long enough for the blood to soak through her skirt and into the carpet and then moved, *or* she was moved by someone else, *or* she – or someone else – put her skirt on and she continued to bleed enough to stain her skirt and did nothing about it. Any of these possible scenarios makes the blood found at the scene probative of her level of intoxication, and thus her ability to consent.

Second, there were lacerations to [redacted] vagina found during the SAFE exam. The fact that penetration caused lacerations is relevant to [redacted] ability to consent to sex, as a person who is heavily intoxicated would likely not feel the pain from these types of injuries being caused, particularly if she is unconscious. Defense

included the SAFE report as an enclosure to their motion, but failed to mention that the report states that the lacerations found on [redacted] vagina were still bleeding when she was examined *several hours after the sexual assault*. (Encl E to Def Mot at 9). As the blood, at the very least – based upon the SAFE Exam - was in part due to the lacerations on [redacted] vagina it is highly relevant to her level of intoxication, as well as her ability or inability to consent. Defense has placed a lot of weight on the fact that [redacted] was menstruating at the time of the assault, because immediately following the trauma she stated that she was. However, sometime later [redacted] was able to determine that she was not in fact menstruating on 18 July 2020. Defense states that "the forensic examination confirms that [redacted] was menstruating," however does not offer a citation to where in the exam this is "confirmed." (Def Mot 5).

Finally, it borders on absurd to suggest that in a sex assault case, evidence of the Victim's blood – enough to form a puddle and leave footprints when stepped in – is not relevant when the SAFE Exam explicitly states that the injuries to [redacted] vagina were bleeding. Defense can, through cross examination and argument, challenge the cause of the blood and its probative value. However, this evidence is inarguably relevant and on this ground the Defense motion must be denied.

b. The Victim's Blood Found in PFC Tapp's Room is Highly Probative and is in Not Outweighed by the Danger of Unfair Prejudice.

[redacted] blood located at the scene is highly probative of her level of intoxication, as well as, her ability to consent based upon the injuries notated in her SAFE Report. Defense can, through cross examination and argument, challenge the cause of the blood and its probative value. This is evidence of stains on a carpet that were at the very least caused in part by injuries to [redacted] genitals, not photos of severed body parts or corpses. Ultimately, Rule 403 is a rule of inclusion that assumes a presumption of admissibility and as this evidence is highly probative of a number of material issues in this case, and as Defense has clearly failed to demonstrate that this evidence's probative value is outweighed by any prejudice, their motion must be denied.

c. The Evidence of Blood is not Cumulative.

Defense argues that the evidence of blood is cumulative with [redacted] testimony, the Sexual Assault Forensic Examination, and the testimony of medical professionals to show her "alleged injuries." (Def. Mot. 8). It

is unclear how Defense would propose that the Government present evidence of the SAFE Exam and medical professionals without discussing blood evidence, being that the SAFE exam explicitly states that her injuries *were bleeding.* Next, Defense does not describe how this evidence is cumulative in any way. Nor do they argue how the evidence of the blood is cumulative with any other evidence to show her level of intoxication. This argument thus fails. Defense then shifts to the "reliability" of the blood evidence, which goes to the weight of the evidence and not its admissibility. (Def. Mot. 8). Defense will have the opportunity to cross examine all the witnesses who were in the room about any "alter[ing] [of] the composition of the stains" or "creat[ion] [of] new stains throughout the room." (Def. Mot. 8). This evidence is not cumulative simply because Defense proclaims it to be, and thus their motion fails on this argument and should be denied.

d. **The Evidence of Vomit found in PFC Tapp's Room Is Relevant.**

Once again, to suggest that vomit from [redacted] is not relevant in this court martial is preposterous. Simply put, the vomit has a tendency to make it more probable that [redacted] was intoxicated, which is - even Defense must concede - a fact of consequence in this court martial. Thus, this evidence is, by definition, relevant. Defense gives great examples of points for closing argument, attacking the potential weight of this evidence, however, none of their arguments actually demonstrate that the vomit is not relevant.

e. **The Probative Value of the Vomit is not Outweighed by the Danger of Unfair Prejudice.**

As Defense states, "the primary question is whether [redacted] consented to the sexual act with [PFC] Tapp," and – as is common in alcohol facilitated sexual assaults - [redacted] level of intoxication is highly relevant to answering this question. (Def Mot 11). To argue, that in a case of sexual assault where intoxication is a key component, the victim vomiting at the most an hour or two after the assault has no probative value is nonsensical. As is the case with the evidence of blood found at the scene, Rule 403 is a rule of inclusion that assumes a presumption of admissibility and as this evidence is highly probative of one of the most material issues in this case. Defense has clearly failed to demonstrate that this evidence's probative value is outweighed by any prejudice, and thus their motion must be denied.

f. **Evidence of the Vomit is not Cumulative**

Defense's argument on this point is simply that the Government has multiple pieces of evidence that demonstrate [redacted] level of intoxication on the night in question. The fact that the Government has multiple pieces of evidence that go to proving an essential element of this crime does not make any of that evidence cumulative. Thus, Defense does not describe how this evidence is cumulative in any way and their argument fails. Defense then shifts to the "reliability" of the vomit evidence, which goes to the weight of the evidence and not its admissibility. (Def. Mot. 13). Defense will have the opportunity to cross examine all the witnesses who were in the room about how the stains may or may not have changed (Def. Mot. 13). This evidence is not cumulative simply because Defense proclaims it to be and thus their motion fails on this argument and should be denied

5. **Relief Requested**.

As the evidence of blood and vomit in the room where the sex assault occurred is clearly highly relevant and probative to material issues in this case, in addition to the presumption of admissibility inherent in M.R.E. 403, Defense's motion should be denied.

6. **Evidence.**

The following evidence is offered in the form of enclosures in support of this motion:

1. Statement of PFC [redacted]
2. PMO Incident Report
3. Notes of Interview with [redacted] dated 19 Nov 20

7. **Oral Argument.**

The Government respectfully requests oral argument.

[redacted]
G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 10 December 2020.

[redacted]

G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	MOTION IN LIMINE (EXCLUSION OF EVIDENCE IN ACCORDANCE WITH MILITARY RULE OF EVIDENCE 401 & 403) 03 December 2020

I. ISSUES PRESENTED

Pursuant to Military Rules of Evidence (Mil.R.Evid) 401 and 403, the defense moves the Court to issue a preliminary ruling on the preclusion of evidence. Mil.R.Evid 403 and current case law permit the preclusion of relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. [redacted] age is not relevant under M.R.E. 401 and is unfairly prejudicial under M.R.E 403.

II. Summary of Relevant Facts

a. The afternoon of 18 July 2020, [redacted] and her daughter, [redacted] were at the beach in Oceanside Ca. PFC [redacted] approached them and started flirting with [redacted]. Ms. [redacted] left while her daughter remained at the beach and [redacted] then agreed to go back to the barracks with PFC Tapp and PFC [redacted] (Encl. 1).

b. Later that night, Officer [redacted] conducted a check of building [redacted]. There he found [redacted] lying on the floor of room [redacted] unconscious, partially clothed, with a wet red stain on the back of her skirt. He observed another red stain on the carpet, vomit throughout the room, and a puddle of yellow liquid near a wall locker. PFC Tapp was found on his bed, unconscious and unresponsive. (Encl. 2)

c [redacted] was brought to [redacted] where Nurse [redacted] told NCIS that [redacted] had a blood alcohol content of .24. (Encl. 3)

d. [redacted] was [redacted] (Encl. 4).

e. When NCIS asks [redacted] how much she drank her answer is "more than usual." (Encl. 5).

III. Discussion of The Law

M.R.E. 401 establishes that evidence is relevant if: 1) "it has any tendency to make a fact more or less probable than it would be without the evidence" and 2) "the fact is of consequence in determining the action." M.R.E. 403 requires that: "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." Here, the court must apply the M.R.E. 403 balancing test, which will show that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Thus, it should be excluded. Probative value of evidence is higher when the evidence directly goes "to prove or disprove a fact in issue." *United States v. Reynolds*, 29 M.J. 105, 110 (C.M.A. 1989). Unfair prejudice, on the other hand, "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

IV. Analysis

a. <u>Evidence of [redacted] Age Does Not Make a Fact of Consequence More or Less Probable Than it Would be Without the Evidence</u>

PFC Tapp is not charged with violating Article 120b. He is charged with having vaginal sex with [redacted] without her consent. [redacted] age is not an element the government must prove. The primary issue at trial will be whether or not [redacted] was able to consent and whether or not she did

in fact consent. [redacted] age does not make either of these facts more or less likely. [redacted] is not less likely to consent to sex with PFC Tapp, who is [redacted] because of her age. The government may argue [redacted] age is relevant to her level of intoxication or alcohol tolerance. But when NCIS ask [redacted] how much she drank her answer is "more than usual."[1] Even though she is sixteen, [redacted], has drank alcohol before and is familiar with alcohol and its effects on her.[2] Age is not a significant factor when it comes to tolerance and [redacted] level of intoxication or ability to consent is not made more or less probable by her age.[3]

b. **The Probative Value of This Evidence is Substantially Outweighed by the Danger of Unfair Prejudice.**

Even if the Court finds [redacted] age relevant, its probative value is low. Any probative value [redacted] age has is speculative and indirect because it assumes that a [redacted] would not have some experience with alcohol and would somehow be less likely to consent when intoxicated than someone older. The government's theory is that [redacted] either did not consent or was so intoxicated that she could not consent. This could be true of a person of any age. It can also be proven using evidence that is less prejudicial, like the amount of alcohol she drank or the state she was in when law enforcement arrived.

Any probative value [redacted] age has is substantially outweighed by the danger of unfair prejudice because it is likely "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Collier*, 67 M.J. at 354. Here, proof specific to the offenses charged does not require the members know the age of [redacted]. The legal age of consent in California where [redacted] lives is [redacted] California Penal Code § 261.5. There is a substantial likelihood that knowledge of [redacted] age will inflame the passions of the members. Whether or

[1] Encl 1
[2] Encl 1
[3] Encl 6

not the Military Judge instructs the members that the age of consent under the UCMJ is [redacted]. It is likely the member will already be working from a framework that assumes it is illegal or just wrong for PFC Tapp to have sex with a girl under the age of [redacted] based on their understanding of California law and societal norms. There is a substantial danger that the members will declare PFC Tapp guilty because of [redacted] age regardless of evidence of consent or mistake of fact as to consent. This danger substantially outweighs the probative value of [redacted] age.

V. Relief Requested

The Defense respectfully request the court preclude any mention of or allusions to [redacted] age or any reference to [redacted] as a minor.

Burden of Proof and Standard of Proof: The burden is on the government to prove by a preponderance of the evidence that [redacted] age is relevant and any probative value is not outweighed by the danger of unfair prejudice.

Evidence:

a. Documentary Evidence

(1) NCIS Results of interview with [redacted] BS 90-92.

(2) Provost Martial Officer Incident Report. BS 61.

(3) NCIS Investigative Action Report. BS 63

(4) [redacted] Medical Documentation dated 18 July 2020 with date of birth. BS 404.

(5) Email from Dr. [redacted]

b. Expected Witnesses

(1) Dr. [redacted]

Argument: Oral argument is requested.

Dated this 3rd day of December 2020

[redacted]
M. J. Grange
Captain, U.S. Marine Corps
Detailed Defense Counsel

CERTIFICATE OF SERVICE

A true copy of this motion was uploaded to the Judicial SharePoint on 3rd day of December 2020 and is accessible to all parties.

[redacted]
M. J. Grange
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE (AGE) 10 December 2020

1. **Nature of Motion.**

Pursuant to Military Rule of Evidence (M.R.E.) 401 and 403, the Government respectfully requests this court deny the Defense Motion in *Limine* to Exclude Evidence of [redacted] Age because, said evidence is relevant and highly probative and not outweighed by any danger of unfair prejudice.

2. **Burden of Proof and Standard of Review.**

As the proponent of the evidence, the Government bears the burden in this motion by a preponderance of the evidence.

3. **Summary of Facts**

a. The Accused is charged, *inter alia*, with a violation of Article 120 for the sexual assault of [redacted] for the penetration of [redacted] vagina with the Accused's penis, without [redacted] consent on the evening of 18 July 2020.

b. On 18 July 20, [redacted] mother, [redacted], called the Camp Pendleton Provost Marshal's Office (PMO) because [redacted] did not come home. (Enclosure 2 to Defense motion).

c. Ms. [redacted] knew [redacted] was aboard Camp Pendleton, California by tracking [redacted] cell phone. (*Id.*).

d. Throughout the night of 18 July 20, [redacted] attempted to call [redacted] however [redacted] did not answer her phone. (Enclosure 1).

e. PMO found [redacted] unconscious, unresponsive, and partially clothed with a wet red stain on the back of her skirt. (Enclosure 2 to Defense Motion).

4. **Statement of Law**

Evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." M.R.E 401. "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 (emphasis added). "Under the M.R.E. 403 balancing test, a *presumption of admissibility exists* since the burden is on the opponent to show why the evidence is inadmissible." *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004) (emphasis added). M.R.E. 403 is a rule of inclusion." *Id.*

5. Argument.

a. The Victim's Age is Relevant under M.R.E. 401.

[redacted] age is highly relevant to the violations of the U.C.M.J. that PFC Tapp is charged with committing. First, [redacted] level of intoxication is highly relevant to her ability to consent, an element of Article 120 which PFC Tapp is charged with violating. The fact that [redacted] goes to her familiarity with, and tolerance to alcohol. Defense argues that because she stated that she drank "more than usual," to NCIS this, in and of itself, demonstrates her familiarity with alcohol and its effects. (Def. Mot 3). The fact that [redacted] has possibly drank alcohol before does not make her age irrelevant to her experience and familiarity with alcohol. Defense will be able to challenge the weight of her age through cross examination, but their argument falls well short of what is necessary to demonstrate that this evidence is not relevant under MRE 401.

Further, her age shows her level of intoxication not only through her experience and familiarity with alcohol but also due to the fact that she did not go home or answer her mother's phone calls. The fact that a [redacted] did not come home on time or even answer her mother's calls is highly relevant as to her level of intoxication, as it is more serious than if she were older. This may not necessarily be the case if [redacted] was not a minor, but that is the case here. It is also relevant to her mother's actions and ultimately why [redacted] was found by PMO in the barracks room.

[redacted] age is highly relevant to show her level of intoxication through both her inexperience with alcohol due to her young age, as well as, the seriousness of her follow on actions – failing to go home and not answering

her mother's phone calls - due to her level of intoxication. It is also relevant to explain how she was found by PMO and her mother's course of action. Thus, as [redacted] age is pertinent to her level of intoxication which goes directly to her ability to consent – an element of one of the crimes PFC Tapp is charged with – it is relevant under MRE 401 and is therefore admissible under this rule.

b. The Victim's Age is Highly Probative and is in Not Outweighed by the Danger of Unfair Prejudice.

A.N's age is highly relevant to her level of intoxication, as well as, her mother's response and PMO's involvement. There is nothing speculative about the probative value of [redacted] age on her level of intoxication. The fact that other evidence also goes to prove this does not make [redacted] age inadmissible. Nowhere in M.R.E. 403 does it state that the presence of additional relevant evidence impacts the balancing test conducted by the military judge.

The clearly probative value of [redacted] age is not substantially outweighed by the danger of unfair prejudice. The Government is willing to allow for a curative instruction that states the age of consent under the UCMJ and that the member's cannot consider [redacted] age for any improper purpose. Defense speculates that it is "likely the members will already be working from a framework that assumes it is illegal or just wrong for PFC Tapp to have sex with a girl under the age of [redacted] based on their understanding of California law and societal norms." (Def. Mot 4). Defense is in effect saying that members would likely ignore the military judge's instruction. To the contrary, the law presumes that members follow a military judge's instructions. Ignoring the fact that all members will be asked extensively whether or not they will be able to follow the military judge's instructions, this argument is not supported by any evidence and is not a consideration for the M.R.E. 403 balancing test. Further, Defense disregards the fact that it would be highly unlikely that all of the members are from California, and that other states have different ages of consent. Ultimately, the Defense's argument is nothing but speculation and as such they have not demonstrated that the probative value demonstrated by the Government is outweighed by any unfair prejudice.

5. **Relief Requested**.

As the Victim's age is clearly, highly relevant and probative to material issues in this case, in addition to the presumption of admissibility inherent in M.R.E. 403, Defense's motion should be denied.

6. **Evidence.** The following evidence is offered in the form of enclosures in support of this motion:

1. Screenshot of missed calls taken from [redacted] phone.

7. **Oral Argument.** The Government respectfully requests oral argument.

[redacted]
G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 10 December 2020.

[redacted]
G. M. O'CONNELL
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. MARINE CORPS**	**GOVERNMENT MOTION IN LIMINE** **(Admissibility of Accused's NCIS Interview)** **3 December 2020**

1. **Nature of Motion.** This is a motion by the Government regarding the Accused's statements to NCIS on 19 July 2020, pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13), and the applicable Military Rules of Evidence (M.R.E.). Specifically, the Government respectfully moves the Court to rule that the NCIS interview of the Accused is admissible pursuant to M.R.E. 304, 305, and 801, and is otherwise admissible at trial.

2. **Summary of Facts.**

a. The Accused is charged with a violation of Article 120, for the sexual assault of [redacted] by penetrating [redacted] vulva with the Accused's penis without her consent on 18 July 2020. The sexual assault occurred within the Accused's barracks room in Building [redacted] Third Battalion, 5th Marine Regiment (3/5) bachelor enlisted quarters barracks, Marine Corps Base Camp Pendleton.

b. On 18 July 2020, shortly after the sexual assault, [redacted] was found unconscious on the floor of the Accused's barracks room by Camp Pendleton Provost Marshal's Office (PMO) police officers. Enclosure (5).

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c. The following day, the Accused was brought to the Naval Criminal Investigative Service (NCIS) office aboard Camp Pendleton.

d. The Accused is interviewed by Special Agent [redacted] and Special Agent [redacted], NCIS.

e. Prior to commencing the interview, the Accused is advised of his rights by Special Agent [redacted] Enclosure (1), 00:8:58-00:10:32.[1]

f. The Accused asks Special Agent [redacted] a question about his right to speak to counsel. Special Agent [redacted] reiterates that the Accused has a right to remain silent or speak to a lawyer. Enclosure (1), 00:10:47-00:11:28.

g. Additionally, Special Agent [redacted] states, "if you don't want to talk to us you don't have to, I don't want you to feel pressured." Enclosure (1) 00:11:31-00:11:35.

h. The Accused subsequently agrees to talk to NCIS, waives his rights, and completes the Rights Acknowledgement and Waiver form. The form is signed at approximately 1944. Enclosure (1), 00:11:35-00:13:25. Enclosure (2).

i. The Accused is then interviewed by Special Agents [redacted] and [redacted] The Accused initially denies any sexual contact with [redacted] The Accused eventually admits to engaging in sexual activity with the Victim, but claims it was consensual.

j. During the interview, the Accused draws a sketch depicting how the Accused, the Victim, and another Marine, Private First Class [redacted] were positioned during the sexual assault. Enclosure (1), 01:08:40-01:20:12.

k. The interview concludes at approximately 2237 on 19 July 2020. Enclosure (1), 03:06:23.

[1] All time references is to the disc play-time for Enclosure (1) as they appear in Windows Media Player.

l. The Accused was [redacted] at the time of the misconduct and his interview with NCIS. Enclosure (6).

m. The Accused successfully completed Marine recruit Training, Basic Infantry Training, and Infantry Mortarman Training. Enclosure (6).

n. The Accused's GT/GCT score is [redacted] Enclosure (6).

o. The Accused completed the 12th grade, and has a high school diploma. Enclosure (6).

3. Discussion.

a. Applicable Law

Pursuant to Military Rules of Evidence (M.R.E.) 304(f)(6) and 304(f)(7), the Government must show "by a preponderance of the evidence that a statement by the Accused was made voluntarily." Prior to an interrogation, an accused must be advised on his or her rights under Article 31b, UCMJ. M.R.E. 305. Specifically: Under M.R.E. 305(c)(1), a person subject to the UCMJ may not interrogate "a person suspected of an offense without first: (A) informing the Accused or suspect of the nature of the accusation;(B) advising the Accused or suspect that the Accused or suspect has the right to remain silent; and (C) advising the Accused or suspect that any statement made may be used as evidence against the Accused or suspect in a trial by court-martial." A statement made in violation of M.R.E. 305 is normally not admissible. M.R.E. 305(e) states in relevant part:

> After receiving applicable warnings under this rule, a person may waive the rights described therein and in [M.R.E.] 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the right involved, affirmatively decline the right to counsel, and affirmatively consent to making such a statement.

The analysis for whether a statement is voluntary is "whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process. *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). This analysis is based upon review of the totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (U.S.). This includes factors like age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep. *Id.* See also *Fare v. Michael C.*, 442 U.S. 707, 725 (U.S. 1979).

In determining that a statement is voluntary, it can be relevant if the accused attempted to couch admissions in an exculpatory explanation. *United States v. Henderson*, 52 M.J. 14 at 18 (C.A.A.F. 1999). See also *United States v. Washington*, 46 M.J. 477 (C.A.A.F. 1997). The inquiry is two-fold: was the waiver voluntary and was it knowing and intelligent. *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F., 2012). "An accused's confession will not be suppressed for involuntariness absent 'coercive police activity.'" Id at 445. Likewise, an Accused's waiver can be knowing and intelligent, and therefore admissible, even if the suspect does not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 574 (1987).

According to M.R.E. 304(c)(1), a confession of the Accused "may be considered as evidence against the Accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." According to M.R.E. 304(c)(2), not every

"element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety." The purpose of this rule is to "prevent errors in convictions based upon untrue confessions alone or suspect convictions based upon words which might reflect the strain and confusion caused by the pressure of a police investigation." *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987).

The Court of Appeals for the Armed Forces (C.A.A.F.) ruled that the corroboration requirement for admission of a confession "does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted." *United States v. Adams*, 74 M.J. 137, 140 (C.A.A.F. 2015) (quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997)). The "quantum of independent evidence necessary to corroborate a confession is 'very low' as it 'must raise only an inference of truth as to the essential facts admitted.'" *United States v. Green*, 2014 CCA LEXIS 536 (N.M.C.C.A. 2014, review denied by C.A.A.F. 2014 CAAF LEXIS 1056) (quoting *United States v. Seay*, 60 M.J. 73, 79-80 (C.A.A.F. 2004)).

M.R.E. 801(d)(2)(A) excludes the Accused's statements from hearsay limitations. Under the rule, an opposing party's statements are not hearsay if "the statement is offered against an opposing party and was made by the party in an individual or representative capacity."

b. Analysis.

The Accused's statements to NCIS on 19 July 2020 are admissible, including both the verbal statements of the Accused, as well as Enclosure (3). In the instant case, the Accused was advised of his rights, and waived those rights voluntarily and knowingly to speak to NCIS. The facts suggest that the Accused was aware he was talking to law enforcement and that he was

aware of the rights he had. The accused asked questions specifically about his rights. Special Agent [redacted] responded by re-reading portions of Enclosure (2) to the Accused and emphasized that the Accused did not have to speak to NCIS if he did not wish to. The Accused then affirmatively responded that he was willing to speak to NCIS. He also initialed and signed Enclosure (2). Additionally, the Accused statements themselves suggest that the accused knew the crimes of which he was suspected, and that they involved [redacted] It is significant that the Accused denies any sexual interaction with [redacted] for a significant portion of interview. As in *Henderson*, the fact that the Accused attempted to make exculpatory statements is relevant, and speaks to the statements being voluntary. 52 M.J. at 18.

The Accused's statements also meet the corroboration requirements of M.R.E. 304(c). At trial, the Government will offer the testimony of [redacted] regarding her interactions with the Accused earlier in the day prior to the sexual assault. [redacted] memory of events from the day and night in question are largely consistent with the Accused's account, prior to the sexual assault. Additionally, at trial the Government will offer the testimony of PMO officers whom responded to the scene on the night of 18 July 2020 and found [redacted] unconscious. This includes the testimony of Sergeant [redacted] whose statement is included as Enclosure (5). The testimony of [redacted] being found unconscious in the Accused's room is additional circumstantial evidence that tends to corroborate the admissions of the accused, sufficient to meet the requirements of M.R.E. 304(c).

Additionally, the statements of the accused to NCIS are not hearsay, as the Government will offer said statements under M.R.E. 801(d)(2)(A) at admissions of a party-opponent. Thus, these statements are admissible as to the truth of the matter asserted. The statements were made by the Accused, in his individual capacity, to NCIS. In contrast, the Government recognizes that

the statements of Special Agents [redacted] are hearsay. In seeking to admit the recording of the Accused's statements, the Government does not seek to offer the statements of Special Agents [redacted] as to the truth of the matter asserted, but only seeks to admit them for the limited purpose of context and effect on the listener, specifically the Accused. More plainly, the statements of the Accused won't make sense unless the fact-finder can also hear the statement of the NCIS agents, as the Accused's statements are part of an ongoing discussion.

4. Relief Requested. The Government respectfully requests that the Court rule that the Accused's statements made to NCIS on 19 July 2020 are admissible pursuant to M.R.E. 304, 305, and 801, and are otherwise admissible at trial.[2]

5. Burden of Proof and Evidence.

The government has the burden of proof as the moving party under R.C.M. 905(c)(2)(A). Further, the Government is the proponent of the evidence. It is within the military judge's discretion to rule on evidentiary questions prior to trial. R.C.M. 906(b)(13). The Government intends to offer the following evidence in support of this motion:

a. Enclosure (1): Video recording of Accused Interview on 19 July 2020;

b. Enclosure (2): Military Suspect's Acknowledgement and Waiver of Rights;

c. Enclosure (3): Sketch by the Accused on 19 July 2020;

d. Enclosure (4): Results of Interview of [redacted]

e. Enclosure (5): Statement of PMO Sergeant [redacted] and

f. Enclosure (6): 3270 Excerpts for Accused.

[2] As of the time of filing, the Government does not move to actually preadmit Enclosure (1) as a prosecution exhibit. Prior to trial, the Government intends to edit a version of Enclosure (1) to remove those portions of the video recording where the Accused is alone and no interview is occurring, for the sake of judicial economy. Additionally, the Government is currently transcribing the interview in order to satisfy WJCR 31.4 when the interview is offered as a prosecution exhibit at trial.

The Government also intends to call the following witnesses:

a. Special Agent [redacted] NCIS; and

b. Special Agent [redacted] NCIS.

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

[redacted]

N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

I caused a copy of this document to be served on the Court and opposing counsel electronically on 3 December 2020.

[redacted]

N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT XXIX
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NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	DEFENSE REPSONSE TO GOVERNMENT MOTION IN LIMINE (PFC Tapp's NCIS Interrogation) 10 DECEMBER 2020

1. Nature of Motion. The Defense respectfully requests the Court to **DENY** the Government's motion for admissibility of the NCIS interrogation of Private First Class Tapp. The Defense respectfully requests the Court **SUPPRESS** the NCIS interrogation of Private First Class Tapp or, in the alternative, **SUPPRESS** the relevant portions that violate M.R.E. 401, 403, 707 and 802.

2. Statement of Relevant Facts

a. Private First Class Tapp is charged with violating the following Articles of the Uniform Code of Military Justice: one (1) specification of both Article 120 and Article 92.

b. In the late evening of 18 July 2020, Private First Class Tapp, Private First Class [redacted], and [redacted] engaged in a consensual threesome in Private First Class Tapp's barracks room in Building [redacted] aboard Marine Corps Base Camp Pendleton. (encl A)

c. In the late evening of 18 July 2020, PMO found Private First Class Tapp and [redacted] in Private First Class Tapp's barracks room. Special Agent [redacted] and Special Agent [redacted] NCIS, were not present when Private First Class Tapp and [redacted] were found. (encl A, C)

d. [redacted] was taken to the hospital and had a SAFE Exam performed. Special Agent [redacted] and Special Agent [redacted] were not present for that exam. ~~(encl A, D)~~

e. In the late evening of 19 July 2020, Private First Class Tapp is interviewed in a small, windowless interrogation room at NCIS by Special Agent [redacted] and [redacted] (encl A)

f. Private First Class Tapp was [redacted] at the time of the interview. (encl E)

g. Private First Class Tapp had only been in the Marine Corps for 7 months and only been with his current unit for 15 days at the time of the incident. (encl E)

h. Special Agents [redacted] used coercive police interrogation tactics throughout the interview. (encl A)

i. Special Agent [redacted] mischaracterize and exaggerate the evidence throughout the interview. (encl A)

j. Special Agent [redacted] utilize statements made by Private First Class [redacted] as accusations and the basis of questions on multiple occasions throughout the interview. (encl A)

k. Special Agent [redacted] asked Private First Class Tapp if he would be willing to take a polygraph. Private First Class Tapp answered in the affirmative. (encl A)

l. The interview lasted just over 3 hours in time and ended at 2305. (encl A).

3. Discussion.

A. Legal Standard.

Pursuant to Military Rules of Evidence (M.R.E.) 304(f)(6) and 304(f)(7), the Government must show "by a preponderance of the evidence that a statement by the Accused was made voluntarily." Prior to an interrogation, an accused must be advised on his or her rights under Article 31b, UCMJ. M.R.E. 305. Specifically: Under M.R.E. 305(c)(1), a person subject to the UCMJ may not interrogate "a person suspected of an offense without first: (A) informing the Accused or suspect of the nature of the accusation; (B) advising the Accused or suspect that the Accused or suspect has the right to remain silent; and (C) advising the Accused or suspect that any statement made may be used as evidence against the Accused or suspect in a trial by court-martial." A statement made in violation of M.R.E. 305 is normally not admissible. M.R.E. 305(e) states in relevant part:

> After receiving applicable warnings under this rule, a person may waive the rights described therein and in [M.R.E.] 301 and make a statement. The waiver must be made freely,

knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the right involved, affirmatively decline the right to counsel, and affirmatively consent to making such a statement.

The analysis for whether a statement is voluntary is "whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process. *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). This analysis is based upon the totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (U.S.). This includes factors like age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep. *Id. See* also *Fare v. Michael C.*, 442 U.S. 707, 725 (U.S. 1979). For example, in *United States v. Chatfield*, based on the totality of the circumstances, appellant's statements were voluntary, where the appellant was an experienced Naval officer, where he was neither ordered by military officers to go to the police station or to give a statement once there, where the officer did not use any overreaching tactics and was not accusatory, and where the interview with the officer was short and undertaken with the expectation that appellant would be free to have dinner with other military officers after it was over. 67 M.J. 432 (C.A.A.F 2008).

In determining whether a statement is voluntary, the inquiry is two-fold: was the waiver voluntary and was it knowing and intelligent. *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F., 2012). "An accused's confession will not be suppressed for involuntariness absent 'coercive police activity.'" *Id* at 445.

According to M.R.E. 304(c)(1), a confession ~~of the Accused~~ "may be considered as evidence against the Accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." According to M.R.E. 304(c)(2), not every "every

fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety." The purpose of this rule is to "prevent errors in convictions based upon untrue confessions alone or suspect convictions based upon words which might reflect the strain and confusion caused by the pressure of a police investigation." *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987). However, the "quantum of independent evidence necessary to corroborate a confession is 'very low' as it 'must raise only an inference of truth as to the essential facts admitted.'" *United States v. Green*, 2014 CCA LEXIS 536 (N.M.C.C.A. 2014, review denied by C.A.A.F 2014 CAAF LEXIS 1056) (quoting *United States v. Seay*, 60 M.J. 73, 79-80 (C.A.A.F 2004)).

M.R.E. 401 establishes that evidence is relevant if: 1) "it has any tendency to make a fact more or less probable than it would be without the evidence" and 2) "the fact is of consequence in determining the action." M.R.E. 403 requires that: "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." Here, the court must apply the M.R.E. 403 balancing test, which will show that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Thus, it should be excluded.

Probative value of evidence is higher when the evidence directly goes "to prove or disprove a fact in issue." *United States v. Reynolds*, 29 M.J. 105, 110 (C.M.A. 1989). Unfair prejudice, on the other hand, "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

M.R.E. 707 unequivocally states, "the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination is not admissible."

M.R.E. 801 defines "hearsay" as an out of court statement made by a declarant offered to prove the truth of the matter assert. M.R.E 802 states that hearsay is not admissible unless it falls under one of the hearsay exceptions lined out in M.R.E. 803. However, M.R.E. 801(d)(2)(A) excludes the Accused's statements from hearsay limitations. Under the rule, an opposing party's statements are not hearsay if "the statement is offered against an opposing party and was made by the party in an individual or representative capacity."

B. Application of Law

(1) PFC Tapp's interview should be suppressed because it was not voluntary.

The present case is distinguishable from *Chatfield* in many ways and, therefore, the Private First Class Tapp's interview should be suppressed. Unlike the experienced Naval Officer in *Chatfield*, Private First Class Tapp was a young Private First Class at the time of the interview. He had only been in the Marine Corps for 7 months and "in the fleet" for 15 days. His education is limited to a high school level education. Private First Class Tapp did not voluntarily go to NCIS. The interrogation took place from 1930 to 2230 and you can clearly see Private First Class Tapp is exhausted by his constant falling asleep every time the agents leave the room. Furthermore, the interrogation of Private First Class Tapp included coercive and accusatory tactics.

Special Agent [redacted] berated him with questions, so much so that many times one agent would ask another question before Private First Class Tapp could even respond to the original question. More importantly, the questions were accusatory and leading. Special Agent [redacted] repeatedly called Private First Class Tapp a liar. Special Agent [redacted] and [redacted] told Private First Class Tapp that they "knew" he had sex with [redacted] six times before he "admits" to it. When Private First Class Tapp answers their questions with one word or short

answers, they continue to berate him with statements accusing him lying or that Private First Class Tapp's lack of memory is not possible or true. Special Agent [redacted] went so far as to accuse Private First Class Tapp of lacking integrity, aligning him to the "bad Marines" that he sees. Special Agent [redacted] goes on to pressure Private First Class Tapp that good Marines come in and tell the truth and bad Marines, who don't understand integrity, come in an lie. This unlawful coercion and plays into the

Most importantly, Special Agent [redacted] and [redacted] make the statements for Private First Class Tapp. When Private First Class Tapp continues to reiterate that he does not remember or that the event happened in a certain way, Special Agent [redacted] and [redacted] tell him what he "did." They continue to berate him with their version of events to the point of Private First Class Tapp succumbing to their will on multiple occasions where he responds with simple one word answers such as "ok," "yes," "sure," and "I guess." Special Agent [redacted] and [redacted] over and over again, accused Private First Class Tapp of lying, not telling the whole story, and evading the questions. Then they would follow up with questions that were leading, forcing Private First Class Tapp to answer yes, or no and face a barrage of untruthful accusations from the Special Agents.

These types of interrogation tactics greatly diminished the integrity of the interview and Private First Class Tapp makes statements against his will. As such, the statements of Private First Class Tapp are involuntary and must be suppressed.

(2) Statements and questions by the Special Agents and the responses stemming from them should be suppressed as they violate M.R.E. 401, 403, 707, and 802.

Any statements or questions by the Special Agents regarding a polygraph must be suppressed, under M.R.E. 707. Additionally, any responses by Private First Class Tapp regarding polygraph examinations must be suppressed under M.R.E. 707.

Throughout the interview the NCIS Agents make multiple accusations and statements regarding legal or factual conclusions. The Special Agents [redacted] and [redacted] have no legal

authority to make these statements. First, they are hearsay under M.R.E. 802. Second, they are a gross mischaracterizations of the evidence designed to enflame the passions of the listener. Third, Special Agents [redacted] and [redacted] lack the requisite knowledge or expertise to offer opinions or explanations for these issues. Lastly, these statements fail under M.R.E. 401 and 403.

Special Agents [redacted] and [redacted] made numerous statements about [redacted] the state she was found in, and her alleged injuries. For example, the Agents said, "Why all the blood… yeah that's not normal, even if she was on her period, that's not blood that would be normal for someone who is on their period," and "this woman comes over, you all both have sex with her, she has bruises all over her body, she's bleeding everything, not just a little bit, a lot. She looks like she got stabbed in the vagina and that she's bleeding out everywhere," and "her vagina is all scrapped up," and "you weren't on the ground throwing up in a pool of your own blood were you? No you weren't, she was," and "she wasn't sober." These statements possess little to no probative value. First, these Agents have zero authority to discuss the state of [redacted] alleged injuries. They are not medical professionals, they are not toxicologists, they were not their when the alleged incident occurred, they were not the ones who found her, and they were not present during her SAFE Exam. These statements served no investigatory purpose and were not questions.

Their statements lack any probative value as they are merely the thoughts and opinions of an interrogator who lacks the qualifications, experience, and understanding to opine on these topics. These statements were not questions designed to illicit a response. They were argumentative, inflammatory, and of a design to steer the discussion regardless of any response. Therefore, they lack relevance. Furthermore, they are overly prejudicial in that they will enflame the passions of the jury and mislead ~~them to believing~~ a fact or legal conclusion has already been proven. These are the types of statements that no judicial warning or instruction can overcome. These types of statements and the various others outlined in enclosure A create an unfair prejudice

against Private First Class Tapp and should therefore be suppressed and response should be suppressed as well.

Aside from the inflammatory and uneducated opinions about facts and legal conclusions expressed by Special Agents [redacted] and [redacted] they also professed double hearsay throughout the interview when they reiterated what Private First Class [redacted] stated to them. The statements of Private First Class [redacted] are hearsay and inadmissible under M.R.E. 802. Furthermore, Special Agents [redacted] and [redacted] reiterating those statements to Private First Class Tapp throughout the interview create hearsay within hearsay.

Those statements again fail under 401 and 403. A majority of these statements are not questions, but statements about facts and legal conclusions. Facts and legal conclusions the Government must prove through competent and reliable evidence. These statements are not used as a questions or designed to illicit a response as such. They were argumentative, inflammatory, and used to steer the discussion instead of illicit a response to a question. The statements by the Agents regarding Private First Class [redacted] admissions are therefore not relevant. Furthermore, they fail under 403 balancing as the danger of unfair prejudice outweighs any probative value they may hold. These statements lack reliability, from an accused in a companion case, and were used to intimidate and coerce Private First Class Tapp into making confessions. The statements are inflammatory and conclusory. They are the type of statements that cleansing warnings and jury instructions cannot mitigate because they will enflame the passion of the jury and lure the fact finder in determining guilt different from the evidence presented by the government. As such, the Agent's statements regarding Private First Class [redacted] statements must be suppressed as they are hearsay ~~and fail under~~ M.R.E. 401 and 403.

D. CONCLUSION

In conclusion, the statements by Private First Class Tapp to Special Agents [redacted] and [redacted] should be suppressed because they were made involuntarily as a result of his young age, low

rank, limited time in service and experience, and due to coercive police tactics. Special Agents [redacted] and [redacted] over an extended period of time berated Private First Class Tapp with questions in an argumentative and hostile manner, their questions were leading, and they continued to accuse him of being a liar after the same questioned were answered over and over again. Additionally, the commentary regarding a polygraph examination must be suppressed under M.R.E. 707. Lastly, the inflammatory statements of Special Agents [redacted] and [redacted] must be suppressed as they are hearsay, irrelevant, and fail under M.R.E. 403.

4. **Evidence Offered.**

Documentary Evidence:

Encl (A): NCIS Interrogation of PFC Tapp
Encl (B): Statement of PMO Sergeant [redacted]
Encl (C): Statement of PMO Corporal [redacted]
Encl (D): SAFE Exam of [redacted]
Encl (E): 3270 Excerpts for PFC Tapp

Expected Witnesses:
(1) Dr. [redacted]

5. **Burden of Proof:** The government has the burden of proof as the moving party under R.C.M. 905(c)(2)(A) and the proponent of this evidence.

6. **Relief Requested.** The Defense respectfully requests the Court to **DENY** the Government's motion for admissibility of the NCIS interrogation of Private First Class Tapp. The Defense respectfully requests the Court **SUPPRESS** the NCIS interrogation of Private First Class Tapp or, in the alternative, **SUPPRESS** the relevant portions that violate M.R.E. 401, 403, 707 and 802.

7. **Argument.** The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 10th day of December 2020.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. Thomas H. Tapp Private First Class U.S. Marine Corps	MOTION FOR APPROPRIATE RELIEF (PROHIBIT PREJUDICIAL LABELS) 3 DECEMBER 2020

1. Nature of Motion. The Defense moves this Court to prohibit the use of prejudicial labels before the members at any time, including but not limited to, member selection, opening statements, trial, closing arguments, witness testimony, on evidence labels, in jury instructions, and in any special interrogatories. Specifically, the Defense request this Court prohibit the use of:

1. References to [redacted] as a "victim" or "the victim" or "alleged victim."

2. References to [redacted] legal counsel as a "victim's legal counsel" or "VLC."

3. References to any advocate or representative appointed by the Family Advocacy Program as a "victim's advocate" or "VA."

The Defense respectfully requests the Court refrain from, and order that all parties and witnesses be precluded from utilizing such prejudicial labels as referenced above, or any other conclusory labels for [redacted], and instead order such parties to refer to [redacted] by her name, as "the complaining witness," "the complainant," or "the accuser."

2. Statement of Relevant Facts.

a. Private First Class Tapp is charged with a violation of Article 120, sexual assault without consent.

b. [redacted] is the alleged victim in this case.

c. [redacted] allegedly suffered injuries. However, whether those injuries are the result of sexual assault or consensual sexual activities have not been determined yet.

3. Discussion.

A. Legal Standard.

There is little case law on the issue of whether "victim" is the appropriate or constitutionally correct term. One of the most important cases on this issue is *People v. Williams*, a California Supreme Court case that cautioned against using the word victim in jury instructions because, "the word victim... is an unguarded expression, calculated... to create prejudice against the accused... The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression."[1] The time honored principle and rule of criminal procedure is that a person accused of a crime is presumed innocent unless and until proven guilty beyond a reasonable doubt.[2] Because labels such as "victim" can be conclusory in nature, there is a risk of improper burden shifting and the undermining of the presumption of innocence.[3]

In several cases the determination of whether the use of the word "victim" hinged on two factors; whether the defendant is contesting whether a crime was actually committed at all and whether the complaining witness suffered injuries. In a case where a defendant is contesting whether a crime actually occurred, the use of the label victim can have a prejudicial impact on the defendant's presumption of innocence and the use of such labels should be prohibited.[4] This issue is further spelled out in rape and sexual assault trials where consent is the primary issue and main defense.[5] Specifically, courts have held that the use of the label victim constituted reversible error when the sole issue was whether the complainant consented to the sexual intercourse.[6] The core

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[1] *People v. Williams*, 17 Cal. 142, 147 (1860).
[2] U.S. Const. amend XIV; *In re Winship*, 397 U.S. 358, 364-68 (1970).
[3] *Jackson v. State*, 600 A.2d 21, 24 (Del. 1991); *See State v. Dewey*, 138 P.3d 90 (Utah App. 2006)
[4] *Id.*; *State v. Albino*, 24 A.3d 602, 615 (conn. App. 2011).
[5] *Mason v. State*, No. 203, 1996, 1997 WL 90780 at 2 (Del. Feb. 25, 1997).
[6] *Talkington v. State*, 682 W.2d 674, 674-75 (Tex. App. 1984).

issue of using the label victim is that it suggests a bias by the court and witnesses against the defendant before the government has proven a "victim" truly exists.[7] With a greater understanding of implicit bias and its potential effect on juries, courts should, when able, use less prejudicial labels to ensure the rights of the defendant are not violated and the fairness of a trial where whether or not a crime has been committed is not put in to question.[8]

In cases where a complaining witness has suffered injuries some courts have held the use of the label "victim" is adequate because the complaining witness has suffered injuries as a result of a crime.[9] However, this is different when the defense contents the injuries are not a part of a crime. For example, in *State v. Albino*, the use of the word "victim" was held as improper in a murder trial because the defense asserted self-defense and "there was a challenge as to whether a crime had occurred."[10] As such, there is a discernable difference between an injured complaining witness who clearly received those injuries as a result of a crime and an injured complaining witness whose injuries may not be the result of a crime at all, making them not an injured victim.

Another issue with using the label "victim" is that it allows the government to improperly express a personal belief that the defendant is guilty and could constitute improper vouching for the credibility of the government's primary witness. It is a long standing rule that a "covered attorney shall not… state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."[11] The Supreme

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[7] *State v. Wright*, No. 02CA008179, 2003 WL 215509033, at 2 (Ohio Ct. App. July 2, 2003).
[8] *See, e.g., United States v. Ray*, 803 F.3d 244, 259-260 (6th Cir. 2015) (noting the potential for unfair prejudice by the repeated use of the word "felon" when "there is no reason a court could not use alternative language.").
[9] *See Bradham v. State*, 250 S.E.2d 801, 806 (Ga. Ct. App. 1978); *Barger v. State*, 202 A.2d 344, 348 (Md. 1964); *State v. Plain*, 898 N.W.2d 801, 817, 820 (Iowa 2017).
[10] *Supra* note 4.
[11] JAGINST 5803-1E, Rules of Professional Conduct, Rule 3.4

Court upheld this principle 35 years ago in *United States v. Young*.[12] Further, C.A.A.F. recently supported this position when it held it was clear and obvious error when a trial counsel "improperly expressed his personal opinion about Appellant's guilt, utilized personal pronouns, bolstered his own credibility, and vouched for government witnesses."[13] As such, the use of the label and pronoun "victim" by the prosecutor could result in an improper expression of guilt and bolstering of the witness.

B. Application of Law

In the present case, the issue of whether a crime has been committed is yet to be determined. Furthermore, the issue of consent is one to be determined at trial. Private First Class Tapp vehemently denies the charged offense of sexual assault without consent. This falls directly in line with the case law outlined above. In a case, such as this, where the issue of consent and whether a crime has been even been committed, to call [redacted] a victim is presupposing that she is a victim. At this time, [redacted] is not victim of Private First Class Tapp, which is for the trier of fact to determine. The burden of proving that to the trier of fact is on the government. Allowing the government to use a label that implies more than that what the current status of the evidence shows will lead to unfair burden shifting and will undermine Private First Class Tapp's constitutionally guaranteed right to the presumption of innocence. The government must prove [redacted] is a victim of a crime. Labelling her as a victim before that has been proven will create an unfair prejudice to Private First Class Tapp.

Additionally, the government may argue that because [redacted] suffered injuries, she can be called a victim. However, her injuries are discernable from the case law above because it is

[12] 470 U.S. 1, 18-19 (1985)
[13] *See United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

disputed whether these are the injuries of a crime or consensual behavior. In fact, [redacted] did not even consider herself a victim until she was told she was. If the victim does not believe she is a victim and has to be told so, that issue should be resolved by the trier of fact. Until it is proven beyond a reasonable doubt that [redacted] injuries are the result of a crime, she is not a crime victim and her injuries are not the result of a crime. To label her as such presupposes on the trier of fact that these injuries must have come from nonconsensual behavior and Private First Class Tapp must have committed a crime. This again improperly shifts the burden to the Defense and allows the government diminish Private First Class Tapp's presumption of innocence.

Allowing the government to label [redacted] a victim and use that label in opening and closing arguments along with witness direct and cross examinations improperly bolster's the government's arguments, the testimony of [redacted] and allows the government to inject their personal opinion about the guilt or innocence of Private First Class Tapp. This type of bolstering and personal opinion in front of the members is exactly what JAGINST 5803-1E was trying to prohibit. The government has less prejudicial labels, like [redacted] name, that could be used to ensure the fairness of the trial and limit the impact on Private First Class Tapp's rights.

It is likely the government will argue that the MCM and UCMJ use the word victim in describing elements of crimes. They will also likely argue that nowhere in the MCM or UCMJ does it prohibit the use of the label victim. This is true, the MCM and UCMJ do utilize the term victim throughout. However, that is because the MCM and UCMJ are general documents not specific to any one case. They cannot put a specific name in the MCM or UCMJ. On the contrary, [redacted] specific name can be used in this court-martial. Additionally, nowhere in the MCM or UCMJ does it say you cannot use an individual's name and the label victim must be used. Just because there is little case law on this issue and it is not specifically prohibited or endorsed by the UCMJ or military courts does not mean it is not a permissible and correct action. Protecting the rights of the Private First Class Tapp and ensuring he receives a fair and impartial trial are

paramount. Given the inherent problems with potential terms used to identify a party, and the significant effects it can have on the trier of fact, the best solution is to simply refer to the parties by their names. This will ensure the rights of all parties are protected and eliminates any risk of error at trial. The use of names, and not labels such as victim, avoid confusion of the issue. Therefore, the decision to use labels such as victim should not be taken lightly, and simply using the party's name should be considered as the reasonable solution.

4. **Evidence Offered**. The Defense offers the following documentary evidence in support of this motion:

Encl (A): CWS Report Pages 1-2 of 8 (BS 000710-000711)
Encl (B): NCIS ROI Interview of [redacted] (BS 000090- 000092)

5. **Burden of Proof**: As the moving party, the Defense bears the burden of proof by a preponderance of the evidence under R.C.M. 905.

6. **Relief Requested.** The Defense respectfully moves this Court for an order that, (1) prohibits the use of the prejudicial labels set forth above before the members; (2) directs the Government to admonish its witnesses to refrain from using the prejudicial labels identified above; (3) prohibits the use of these prejudicial labels in jury instructions, special interrogatories, or findings worksheets.

7. **Argument**. The Defense requests oral argument.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was uploaded to the Western Judicial Sharepoint on the 3rd day of December 2020.

[redacted]
B. J. ROBBINS
First Lieutenant, U.S. Marine Corps
Defense Counsel

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

UNITED STATES **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **U.S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Prejudicial Labels)** **10 December 2020**

1. **Nature of Motion.**

As the Uniform Code of Military Justice (U.C.M.J.) repeatedly uses the term "victim" the Defense has failed to show how PFC Tapp would be prejudiced and thus their motion should be denied.

2. **Burden of Proof and Standard of Review.**

As the moving party, defense bears the burden in this motion by a preponderance of the evidence.

4. **Argument.**

a. The Term "Victim" is Codified in the Uniform Code of Military Justice.

Defense's whole argument is that the word "victim" is, in and of itself, prejudicial to PFC Tapp. That term along with "Victim's Legal Counsel" and "Victim Advocate" are terms codified and used throughout the U.C.M.J. *See* Article 6b. "Victim" is specifically used in the U.C.M.J. to describe someone in [redacted] position and not only in the case where an individual is convicted of a crime. Throughout the U.C.M.J. there is reference to the rights of "a victim of an alleged offense" which demonstrates that the drafters of the U.C.M.J. did not only consider an individual a "victim" at the time the accused is convicted, but after an offense is alleged. *See* R.C.M. 305(i)(2)(A)(iv); R.C.M. 806(b)(3); R.C.M. 906(b)(8). The Defense cites to state court cases, where those court's found that the term "victim" was prejudicial. It is unclear whether those states also have a body of law that specifically references people in [redacted] position as a victim and creates the position of "Victim's Legal Counsel." It is likely that had this body of law existed, Defense would have referenced it, as they have not, these cases are all distinguishable and offer not even persuasive authority.

the commission of an offense under this chapter." There is no time or requirement of post-findings of guilt to be labeled a 'victim' under the UCMJ.

The writers of the rules and the UCMJ had the opportunity to change the label of "Victim" to some other label like "complaining witness" but chose not to with the Military Justice Act 2016. Defense's argument is weak and gets weaker with further analysis. Not only is "Victim" and "Special victim's counsel" the proper terminology under the UCMJ but the fears that Defense professes are easily addressed by standard practices in Court-Martial procedure. First, the presumption of innocence is well-known and reiterated by the Military Judge, Defense Counsel, and often the Trial Counsel throughout entire Court-Martial as it is the Government's burden to prove guilt of the offenses beyond a reasonable doubt. Further, there are specific instructions given before deliberation that reiterate the presumption of innocence. The use of identifying labels like "trial counsel," "defense counsel," "victim's legal counsel," "military judge" or "victim" do not improperly impede on the providence of the members as the fact-finders in a Court-Martial nor do they suggest improper personal vouching, and any risk thereof is mitigated through standard procedure like instructions. Defense's argument regarding vouching is an illogical conflation that does not deserve further analysis. For these reasons VLC respectfully asks the Court to deny Defense's motion in full as Defense has failed to meet its burden.

4. **Relief Requested**. VLC respectfully requests the Court deny Defense's motion in its entirety.

5. **Burden of Proof**. As the moving party, the burden of persuasion rests on the Defense. The burden of proof on any factual issue, the resolution of which is necessary to decide this motion, is by a preponderance of evidence under R.C.M. 905(c)(1).

6. **Evidence**. VLC does not present any additional evidence.

7. **Oral Argument**. Victim's Legal Counsel DOES NOT request oral argument on this motion.

[redacted]

M. T. KIEFER
Captain, U.S. Marine Corps
Victim's Legal Counsel

APPELLATE EXHIBIT XXXIII
PAGE 4 OF 5

CERTIFICATE OF SERVICE

This motion was served upon defense counsel and the court electronically on 10 December 2020.

[redacted]

M. T. KIEFER
Captain, U.S. Marine Corps
Victim's Legal Counsel

APPELLATE EXHIBIT XXXIII
PAGE 5 OF 5

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

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF (Continuance) 5 January 2020

I. Nature of Motion

On 5 January, 2021, the defense learned that its court-ordered expert consultant would need to obtain emergency surgery on 13 January, 2021, and would need a minimum of seven days to recover. Furthermore, the Government notified the defense on 5 January, 2021 that the co-accused in this case would now be testifying as a witness under a grant of testimonial immunity. Accordingly, pursuant to Rule for Courts-Martial 906(b)(1), the Defense requests a continuance of this trial from 15-22 January 2021 to 12-19 February 2021.

II. Summary of Facts

1. On 25 November 2020, in response to a defense request for an expert consultant in forensic pathology, the Government provided the defense with LT Amanda [redacted] a Sexual Assault Medical Forensic Examiner, as an adequate government substitute. The court affirmed that LT [redacted] was an adequate government substitute in this field.
2. By providing and reaffirming the adequate substitute, both the government and the court recognized that LT [redacted] expertise was relevant and necessary to PFC Tapp's ability to present an adequate defense.

3. On 24 November 2020, LT [redacted] told trial counsel that she would be available for the dates of the trial, 15 January through 22 January 2021.[1]

4. After being provided LT [redacted] as an expert consultant, the defense has utilized her and obtained her opinion on various topics.

5. The defense will utilize LT [redacted] at trial as an expert consultant and expert witness.

6. On 5 January, 2021, LT [redacted] notified defense counsel that she would be undergoing emergency surgery to remove a kidney stone. Due to the current COVID-19 pandemic, the earliest time LT [redacted] can obtain this surgery is on 13 January, 2021. After the surgery, LT [redacted] will also require 7 days of convalescent leave followed by 14 days of light duty. Finally, there is a possibility that LT [redacted] may require follow-on surgery.[2]

7. The defense has contacted its other expert witnesses and has ensured they are available for the proposed new trial dates of 12-19 February 2021.

8. Additionally, at approximately 2010 on 5 January, 2021, the government notified the defense that a plea agreement had been reached in the companion case of *United States v.* [redacted] which involves the co-accused in this case, PFC [redacted] Before 5 January, PFC [redacted] was also being prosecuted by the government for allegedly sexually assaulting [redacted] at the same time as PFC Tapp.

9. On 5 January, the government provided the defense with a hard copy of the plea agreement, a withdrawal letter, and grant of testimonial immunity for PFC [redacted] The government notified defense that as a result of this agreement and grant of testimonial immunity, PFC [redacted] will now testify as a witness against PFC Tapp in this court-martial (*United States v. Tapp*).

[1] Enclosure 1
[2] Enclosure 2

10. Previously, in response to defense's first discovery request, the government had disclosed the names of the witnesses that it intended to call in its case-in-chief in this court-martial. PFC [redacted] was not listed as a potential witness.[3]

11. As of 2200 on 5 January, the defense has not yet received a stipulation of fact or a Rule 410 proffer from PFC [redacted]. Based on discussions with PFC [redacted] defense counsel, the defense believes both of these documents exist.

12. As the co-accused, PFC [redacted] is a material witness and the addition of his testimony to the government's case will have a significant impact on this court-martial. The defense requires an opportunity to interview PFC [redacted] as his knowledge of events and expected testimony will likely shift the defense's theory and strategy in this case.

13. Furthermore, the defense has not been able to fully investigate PFC [redacted] character and reputation for truthfulness. Now that PFC [redacted] will be testifying, the defense requires a chance to do so by interviewing Marines from his unit.

14. According to the Trial Management Order, the last motions filing deadline was on 3 December, 2020. However, good cause exists to file this motion outside of the motions deadline due to recently-developing facts surrounding LT [redacted] availability, and the recent disclosure by the government of a significant witness in this court-martial. Both the addition of this new government witness and the medical emergency causing LT [redacted] need for immediate surgery occurred after the last motions deadline.

15. The court has not previously granted a continuance in this case.[4]

III. Discussion of Law

According to the discussion to Rule for Courts-Martial 906(b)(1), the military judge "should, upon a showing of reasonable cause, grant a continuance to any party for as long and

[3] Enclosure 3 at page 2.

[4] In November 2020, the Defense requested a continuance because of delays in receiving DNA evidence, but the court denied that request.

as often as is just." The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994)).

A delay is in order in the present case due to emergent facts surrounding the unavailability of a pivotal expert witness for the defense. LT [redacted] will be used at trial to evaluate the testimony of the alleged victim and the government SAMFE, provide the defense with the necessary tools to cross-examine the witnesses about medical issues, and provide expert testimony of her own. This continuance is necessary not only to ensure LT [redacted] is present at trial, but also to allow her enough time to fully heal, cease medication, and be prepared for trial. Further, this time is necessary to allow for the possibility of follow-on surgery and to allow the defense expert to completely heal from that surgery. Finally, this continuance will allow the defense time to interview PFC [redacted] and evaluate its theory in light of the testimony and new facts that he shares. Both of these facts are not overcome by judicial convenience. A failure to grant a continuance under these circumstance would be an "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *Id.*

IV. Relief Requested.

The Defense respectfully requests that the Military Judge continue the previously scheduled trial to the following dates:

- Trial – 12 February through 19 February, 2021

V. Enclosures

(1) Email regarding LT [redacted] availability, dated 23 Nov 2021

(2) Email regarding LT [redacted] need for emergency surgery, dated 5 Jan 2021

(3) Government Response to Discovery Request, dated 28 Oct 2020

VI. Argument: Oral argument is requested.

Dated this 5th day of January 2021

[redacted]

M. J. Grange
Captain, U.S. Marine Corps
Detailed Defense Counsel

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

Dated this 5th day of January 2021.

[redacted]

M. J. GRANGE
Captain, U.S. Marine Corps

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (CONTINUANCE) 7 JANUARY 2020

1. Nature of Motion. This is a response to a defense motion for appropriate relief made in accordance with R.C.M. 906(b)(1), requesting a continuance of the trial dates to 12-19 February 2021. The Government does not oppose the Defense's motion.

2. Burden of Proof. As the movant, the Defense has the burden of persuasion on any factual issue necessary to decide this motion. R.C.M. 905(c).

3. Summary of Facts. Any necessary facts are provided below in paragraph 5.

4. Law. Per R.C.M. 906(b)(1), the military judge should grant a continuance upon a showing of reasonable cause. In evaluating "reasonable cause," the military judge should consider whether more time is needed for either party to prepare for trial, the availability of witnesses, the length of the continuance, impact of the delay on the victim, and prejudice to the opposing party. See e.g. discussion to R.C.M. 906(b)(1); *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).

5. Analysis. The Accused is in pretrial confinement, and it is the intent of the Government that the Accused be afforded a fair and speedy trial, as soon as possible. However, the Government recognizes that the non-availability of a Defense expert consultant and witness, LT [redacted], due to medical issues is a reasonable cause justifying a continuance in this case. Additionally, the Government recognizes that Defense has already consulted with LT [redacted] and relied on her advice. Therefore, the Government does not oppose the continuance of trial dates in this case from 15-22 January to 12-19 February, a continuance of twenty-eight days.

6. Relief Requested. The Government does not oppose the Defense's motion. The parties have already filed final pretrial matters. If the Court does grant the continuance requested by the Defense, then the Government would respectfully request that the Court allow the parties to file amended final pretrial matters no later than 3 February 2021.

7. Evidence. None.

8. Oral Argument. The Government does not request oral argument.

[redacted]

N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel via SharePoint on 7 January 2021.

[redacted]

N. E. MICHEL
Major, U.S. Marine Corps
Trial Counsel

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

UNITED STATES vs. THOMAS H. TAPP Private First Class U.S. Marine Corps	**DEFENSE MOTION IN LIMINE** (EXCLUDE EVIDENCE OF COMMAND INVESTIGATION) 10 February 2021

Issue Presented

Military Rule of Evidence 402 prevents the admission of irrelevant evidence, while Rule 403 prevents the admission of evidence if its probative value is substantially outweighed by unfair prejudice or confusion of the issues. Evidence of an expert witness's being the subject of a command investigation unrelated to this case, with no resulting criminal conviction or sanction, is irrelevant and should be excluded.

1. **Summary of Relevant Facts**:

The defense previously requested Dr. [redacted] as an expert consultant in forensic pathology. LT [redacted] was provided as government adequate substitute. The expert issue was litigated at a pervious Article 39(a) session. LT [redacted] is currently the Defense's expert consultant, and may testify at trial as an expert witness on issues regarding the examination conducted on [redacted]

On 10 February 2021, Defense Counsel received a phone call from LT [redacted] asking if it would be an issue, or if the Government would cross her on the fact that she was recently the subject of a [redacted]. The complaint leading to the investigation was filed on 26 December 2020. Defense was not aware of this issue until LT [redacted] called to discuss it on 10 February.

Defense Counsel went and spoke to the Government about the issue. The Defense then notified the court and asked permission to file a Motion in Limine.

Good Cause To File:

Defense was notified of this issue on 10 February 2021. Upon learning of this issue, the Defense notified the Government and the court. Defense sent an email to the court requesting permission to file, which the court granted.

2. Discussion of the Law:

Evidence must be relevant to be admissible at trial, and its probative value must not substantially outweigh its unfair prejudice. M.R.E. 402, 403. In this case, LT [redacted] a potential expert witness, who was provided by the government as an adequate substitute for the defense, has been the subject of a [redacted] for unrelated charges, which have not resulted in any criminal conviction or administrative sanction. This [redacted] has nothing to do with Private First Class Tapp's case, and mentioning this [redacted] would unfairly prejudice the defense and confuse the issues at stake in this trial. As such, it should be excluded.

4. Relief Requested: The defense respectfully requests the court prevent any discussion or introduction of the fact that LT [redacted] has been the subject of a [redacted], during the trial.

5. Burden of Proof and Standard of Proof: The defense, as the moving party, carries the burden of persuasion. R.C.M. 905(c)(2). The burden of proof with respect to any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1).

6. Argument: The defense requests oral argument only if this motion is opposed.

Dated this 10th day of February 2021.

[redacted]

A. M. ROBERT

APPELLATE EXHIBIT LXXII
PAGE 3 OF 4

Captain, U.S. Marine Corps
Defense Counsel

****

I certify that I caused a copy of this document to be served on the Court and opposing counsel this 10th day of February 2021.

Dated this 10th day of February 2021.

[redacted]

A. M. ROBERT
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	)	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE (Exclude Evidence of Command Investigation) 11 February 2021

1. **Nature of Motion.** Defense filed a motion in limine to preclude the Government from introducing evidence that Defense's adequate government substitute, Lieutenant [redacted] USN, was the subject of a recent [redacted]. The Government does not oppose said motion.

2. **Burden of Proof and Standard of Review.** As the moving party, defense bears the burden in this motion by a preponderance of the evidence.

3. **Relief Requested.** The Government does not oppose the Defense motion.

4. **Oral Argument.** The Government does not request oral argument.

[redacted]
S. L. BRIDGES
First Lieutenant, U.S. Marine Corps
Trial Counsel

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CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 11 February 2021.

[redacted]
S/L. BRIDGES
First Lieutenant, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT LXXIII
PAGE 2 OF 2

CERTIFICATE OF SERVICE

I, the undersigned, hereby attest that a copy of the foregoing was electronically served on the Court and opposing counsel on 26 March 2021.

[redacted]

R. L. CHIRIBOGA
Major, U.S. Marine Corps
Senior Trial Counsel

APPELLATE EXHIBIT CXIV
PAGE 14 OF 14

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. Marine Corps	MOTION FOR APPROPRIATE RELIEF - TO COMPEL PRODUCTION OF LAY WITNESS 8 APRIL 2021

1. Nature of Motion.

a. Pursuant to Article 46 of the Uniform Code of Military Justice and Rules for Courts-Martial (R.C.M.) 703 and 906, the Defense respectfully requests this Court to compel the production of Colonel [redacted] for in-person testimony during the upcoming post-trial Article 39(a) on Thursday, 15 April 2021 aboard Camp Pendleton, California.

2. Statement of Relevant Facts.

a. On Saturday, 20 February 2021 the court-martial in the above captioned case adjourned. [Record of Trial (ROT), Statement of Trial Results; Encl 1, Stipulation of Fact].

b. Defense Counsel, PFC Tapp, Victim Legal Counsel, and individuals in the gallery subsequently exited the courtroom. [Encl 2, Major (Maj) Michel Memorandum for the Record (MFR).]

c. Present in the courtroom after the aforementioned parties exited were the military judge, LtCol Norman, the detailed trial counsels, the court reporter, and the bailiff. [Encl 2.]

d. Major Michel, trial counsel, asked LtCol Norman if he would be willing to provide an after-action brief to the parties. Lieutenant Colonel Norman stated, "no." [Encl 2.]

e. Before the detailed trial counsels could exit the courtroom, LtCol Norman asked Maj Michel if he had seen worse sexual assault cases. This question then led to numerous comments by LtCol Norman over the next 30 - 40 minutes. [Encl 2.]

APPELLATE EXHIBIT CXVI
PAGE 2 OF 45

f. Lieutenant Colonel Norman's comments included: his displeasure with trial counsel asking for 11 years confinement during their sentencing argument; trial counsel unilaterally deciding to cap the potential sentence at 11 years confinement; displeasure with the Defense filing untimely motions and forcing the Government and Court to respond mid-trial; his opinion that trial counsel should be angry when the Defense files late or untimely motions; his opinion that the Defense has no incentive to avoid contested trials and no price to pay for their earlier decisions when the trial counsel caps the potential sentence. [Encl 2.]

g. Major Michel called the Regional Trial Counsel (RTC), LtCol [redacted] after exiting the courtroom on Saturday, 20 February 2021 to inform him of LtCol Norman's comments. [Encl 1.]

h. The RTC called Colonel [redacted], Officer-in-Charge (OIC), Legal Services Support Section - West (LSSS - West) to inform him of what Maj Michel told the RTC. [Encl 1.]

i. The LSSS - West OIC subsequently called the Circuit Military Judge, and LtCol Norman's supervisor, Colonel [redacted], during the week of 22 - 26 February 2021 to voice his concerns with LtCol Norman's statements and demeanor. [Encl 1.]

j. On Monday, 1 March 2021, the Government disclosed Maj Michel's Memorandum for the Record to the Defense. The Government did not disclose it to the judiciary. [Encl 1.]

k. On Friday, 5 March 2021, LtCol Norman emailed all parties and ordered them to appear in court for an Article 39(a) on Monday, 8 March. *Lieutenant Colonel Norman did not disclose the Article 39(a)'s purpose and there were no substantive matters pending with the Court.* [Encl 3.]

l. On Saturday, 6 March 2021 the Defense filed Defense Motion for Appropriate Relief, Appellate Exhibit 111. In it, the Defense requests that LtCol Norman be disqualified from further participation in this case and dismissal with prejudice of the findings due in part to LtCol Norman's statements to the trial counsel on Saturday, 20 February 2021. [AE 111.] *The Defense had not notified the Court before 6 March of its intention to file a post-trial motion.*

m. On Monday, 8 March 2021, the Defense moved to disqualify the military judge and objected twice to the military judge placing any comments on the record related to the Defense's Motion for Appropriate Relief (AE 111). Lieutenant Colonel Norman did not permit voir dire or evidence on the Defense's request to disqualify the military judge and did not rule on two Defense objections to him placing his comments on the record. [Encl 4, Unofficial Transcript of 8 March 21 Article 39(a), pp. 3 - 5; ROT Audio File: TappTH8Mar21Herm1 at 04:20 - 07:36.]

n. On Monday, 8 March 2021, LtCol Norman stated on the record that, "The only procedural development that has taken place since this court adjourned on 20 February 2021 is that the court finalized and signed the statement of trial results, and sent out to the parties on the same day, that was 20 February 2021. Now, let's turn our attention to why we are here today. On 6 March 2021, the defense filed a post-trial motion for appropriate relief, which has been marked as Appellate Exhibit 111. I will briefly address that, and then direct the way forward." [Encl 4, p. 3]

o. On Monday, 8 March 2021, LtCol Norman also stated that, "I do not believe that there is an appearance of bias, [but] based on the personal nature of the allegations in the Defense motion, and to ensure that the Accused has confidence in the post-trial process. I have decided to recuse myself from any further post-trial matters..." [Encl 4, p. 6.] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Encl 4.]

p. On Tuesday, 16 March 2021, the Defense emailed LtCol Norman and requested to interview him. On Wednesday, 17 March 2021, LtCol Norman emailed the Defense and Government to inform them that he respectfully declines to be interviewed. [Encl 5, Emails with LtCol Norman and TC of DC 16 - 17 Mar 2021.]

q. On Monday, 22 March 2021, the Government emailed LtCol Norman to inform him that the Government had approved a Defense request to produce him as a witness for the 15 April 2021 Article 39(a). On 26 March 2021, LtCol Norman informed the Government and Defense that he

does not intend to testify because he believes there are various privileges involved (NFI). [Encl 6, Emails with LtCol Norman and TC and DC of 22 - 26 Mar 21.]

r. On Tuesday, 30 March 2021, the defense counsel emailed Colonel [redacted] and requested to interview him. That same day, Colonel [redacted] responded to defense counsel and stated that he was not available for an interview, but invited defense counsel to send him their question(s). On Wednesday, 31 March 2021, defense counsel emailed Colonel [redacted] his questions and asked him to please respond no later than Wednesday, 7 April 2021. [Encl 7, Emails with Colonel [redacted] TC, and DC of 30 Mar - 7 Apr 21; Encl 8, DC Questions to Colonel [redacted]

s. On Wednesday, 30 March 2021, the Defense submitted a witness production request for Colonel [redacted] to the Government. [Encl 9, Defense Witness Production Request of 30 Mar 21.]

t. On Wednesday, 7 April 2021, Colonel [redacted] emailed defense counsel. In the email, he stated that LtCol Norman was informed of a professional responsibility complaint on 9 March 2021. Colonel [redacted] also stated that he does not recall speaking with Judge Advocate Division about this matter. [Encl 7, Emails with Colonel [redacted], TC, and DC of 30 Mar - 7 Apr 21.] Colonel [redacted] did not answer defense counsel's questions pertaining to whether he notified LtCol Norman of the LSSS West OIC's complaint or others listed in Enclosure 8. Defense counsel responded to Colonel [redacted] email of 7 April and asked him two follow-up questions: 1) After speaking with Colonel [redacted] did you share his concerns with LtCol Norman; and, 2) If so, when, approximately, did that occur? Colonel [redacted] had not responded to defense counsel's follow-up questions at the time this motion was filed.

u. On Wednesday, 7 April 2021, the Government denied the Defense's request. [Encl 10.]

3. Discussion of Law.

a. Witness Production. Article 46, UCMJ, 10 USC § 846, provides all parties to a court-martial with "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Similarly, R.C.M. 703(a) states that, "The prosecution

and Defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to R.C.M. 701, including the benefit of compulsory process." "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an *interlocutory* question would be relevant and necessary." R.C.M. 703(b) [Emphasis added.] Testimony is relevant if it has the tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. R.C.M. 703(b)(1), Discussion; Mil. R. Evid. 401. Testimony is necessary within the meaning of this rule when it is not cumulative and "when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *U.S. v. Reveles*, 41 M.J. 388, 394 (CAAF 1995) (citing R.C.M. 703(b)(1), Discussion.)

b. Additionally, "Under the Sixth Amendment to the Constitution, one accused of a crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the accused and his counsel. He may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the Defense." *U.S. v. Sweeney*, 14 U.S.C.M.A. 599, 602 (C.M.A. 1964) (citing *U.S. v Seeger*, 180 F Supp 467 (SD NY) (1960); *U.S. v McGaha*, 205 F Supp 949 (ED Tenn) (1962). This right is not absolute, but the military judge has a duty "to assure to the greatest degree possible…equal treatment for every litigant before the bar." *U.S. v. Manos,* 17 U.S.C.M.A. 10, 15-16 (C.M.A. 1967) (citing *Coppedge v. United States*, 369 U.S. 438, 446 (1962).

c. The CAAF "has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. It has, however, identified some relevant factors, such as: the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and, the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony."

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U.S. v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978). These factors are not exhaustive nor can any one factor be identified as necessarily determinative of the issue. *Tangpuz* at 429.

d. In *Allen*, the Navy-Marine Corps Court of Criminal Appeals, in accordance with Tangpuz, cemented the minimum seven factors that the military judge, in exercising his discretion, must balance in determining whether a material witness must be produced. Those seven factors are: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by non-amenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. *U.S v. Allen*, 31 M.J. 572, 610-611 (N.M.C.M.R. 1990). Additionally, the *Allen* court stated that considerations other than materiality, such as distance, inconvenience, and cost, have no role in determining whether the Government must produce the requested witness. *Id.*

4. Analysis of the Law

a. Colonel [redacted], Western Judicial Circuit, Camp Pendleton, California. This witness is relevant and necessary because, during the week of 22 - 26 February 2021, the LSSS West OIC called Colonel [redacted] to voice his concerns about LtCol Norman's statements and behavior. [Encl 1.] This phone call occurred prior to the Government disclosing Maj Michel's MFR to the Defense on 1 March 2021. [Encl 2.] Additionally, it is a fact that the Government did not disclose Maj Michel's MFR to any military judge assigned to the Western Judicial Circuit. [Encl 1.] Therefore, it is reasonable to infer that Colonel [redacted] who is LtCol Norman's supervisor, informed LtCol Norman of the LSSS West OIC's concerns. Evidence revealing who notified

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LtCol Norman that his behavior and statements were reported to the LSSS West leadership, and when that notification occurred, are relevant to whether LtCol Norman was actually biased or prejudiced during the court-martial as described in the following paragraphs.

b. *Allen* Factors.

(1) Issues involved in the case and the importance of the requested witness to those issues. The issue involved in this post-trial matter is whether LtCol Norman was actually biased or prejudiced, or his statements and behavior create an appearance of bias or prejudice. Colonel [redacted] is an important witness to this issue because he is the missing link in a timeline that will tell the Court when LtCol Norman was notified of the LSSS - West OIC's concerns. Colonel [redacted] must be asked to disclose whether he informed LtCol Norman of the LSSS West OIC's concerns and, if he did, when did that conversation occur. This is relevant because the facts suggest that LtCol Norman intended to read an unsworn statement into the record on 8 March that favorably characterized his behavior in an attempt to avoid the potential for appellate and professional responsibility scrutiny. If true, this would be highly probative of a guilty mind.

(a) The facts that support this assertion are: 1) LtCol Norman had an ex parte conversation with the trial counsel minutes after this court-martial adjourned; 2) Major Michel's MFR depicts a military judge who was critical of trial counsel for capping the potential sentence in a serious sexual assault trial and not making the accused pay a price for filing motions and contesting this case; 3) the trial counsels believed these comments were serious enough to immediately report them to their supervisors; 4) the LSSS West OIC, during 22 - 26 February, believed LtCol Norman's behavior was serious enough to call Colonel [redacted] and express his concerns with LtCol Norman's behavior; 5) the Court was silent about any matter related to this case from at least 26 February until 5 March; 6) LtCol Norman emailed all parties on Friday, 5 March and ordered them to appear in court on Monday, 8 March; 7) LtCol Norman's email of 5 March was in the afternoon, shortly before weekend liberty, one day before the 14-day post-trial motions

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deadline under R.C.M. 1104, and silent as to the Article 39(a)'s purpose; 8) the Government never disclosed Maj Michel's MFR to any military judge assigned to the Western Judicial Circuit; 9) the Defense did not file, or notify the Court of its intention to file, a post-trial motion until 6 March; 10) On 8 March, LtCol Norman stated on the record, "Now let's turn our attention to why we are here today. On 6 March 2021, the defense filed a post-trial motion for appropriate relief, which has been marked as Appellate Exhibit 111", a statement that was not accurate because it omitted the fact that he ordered an Article 39(a) prior to the Defense filing its motion; 11) LtCol Norman has refused to be interviewed or testify; and, 12) defense counsel's questions to Colonel [redacted] remain unanswered.

(b) The only facts missing in this timeline are who notified LtCol Norman that his behavior had been reported to the LSSS leadership and when did that notification occur. These facts would help explain why LtCol Norman ordered a 39(a) prior the Defense filing its post-trial motion and when the Government had not disclosed Maj Michel's MFR to the Court. Colonel [redacted] can help provide the Court with that answer.

b. Is the witness desired on the merits or on sentencing? Colonel [redacted] is requested for a short direct examination to resolve one post-trial motion.

c. Is the witness' testimony cumulative? No, he is the only witness other than LtCol Norman that can testify about this matter. Lieutenant Colonel Norman has refused to be interviewed or testify.

d. Are there alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony? No, Colonel [redacted] has not testified previously. He is stationed aboard Camp Pendleton and his office is located near the building that will host the Article 39(a) on 15 April; thus, depositions and interrogatories are less practical than personal appearance for only a few minutes.

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e. Is the witness unavailable? The Defense does not have any information suggesting that Colonel [redacted] is unavailable to testify for what is likely to be five minutes or less of testimony.

f. Is the witness in the armed forces and/or subject to military orders? Yes.

g. What is the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service? None. The Defense believes that Colonel [redacted] testimony will be very brief and he will only be away from his duties for 5-10 minutes.

5. Evidence Offered.

a. Encl 1: Stipulation of Fact
b. Encl 2: Maj Michel MFR
c. Encl 3: Email from LtCol Norman of 5 Mar 21
d. Encl 4: Unofficial Transcript of 8 Mar 21 Article 39(a)
e. Encl 5: Emails with LtCol Norman, TC, and DC of 16 - 17 Mar 21
f. Encl 6: Emails with LtCol Norman, TC, and DC of 22 - 26 Mar 21
g. Encl 7: Emails with Colonel [redacted] TC, and DC of 30 Mar - 7 Apr 21
h. Encl 8: DC questions to Colonel [redacted] of 31 Mar 21
i. Encl 9: Defense Witness Production Request of 30 Mar 21
j. Encl 10: Government Response to Defense Witness Production Request of 7 Apr 21

6. Burden of Proof: As the moving party, the Defense bears the burden of proof by preponderance of the evidence.

7. Relief Requested. The Defense respectfully requests the Court to order the Government to produce Colonel [redacted] for in-person testimony at the upcoming post-trial Article 39(a) on Thursday, 15 April 2021.

8. Argument. The Defense does not request oral argument.

9. Certificate of Service. I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel on Thursday, 8 April 2021.

[redacted]
R. ACOSTA

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

U N I T E D S T A T E S	)	
	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE MFAR**
	)	**(COMPEL PRODUCTION OF LAY**
	)	**WITNESS)**
THOMAS H. TAPP	)	
PRIVATE FIRST CLASS	)	**13 April 2021**
UNITED STATES MARINE CORPS	)	

1. **Nature of Motion**. The Government requests the Court **DENY** the Defense Motion for Appropriate Relief Pursuant to R.C.M. 905 (c).

2. **Facts**.

a. On 19 February 2021, a general court-martial composed of officer and enlisted members convicted the Accused, contrary to his pleas, of one specification of violating a lawful general order and one specification of sexual assault in violation of Articles 92 and 120, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. §§ 892, 920.

b. On 20 February 2021, the parties presented sentencing arguments. Although the members could have adjudged up to 32 years confinement, the Government argued that 11 years was appropriate given the specific facts of the case.[1] For their part, the Defense argued that 19 months was an appropriate period of confinement.[2]

c. After deliberations, the members sentenced the Accused to be dishonorably discharged, to be confined for a period of 3 years, to forfeit all pay and allowances, and to be reduced to the grade of E-1.

d. Following adjournment, the Defense Counsel, the Accused, and several spectators in the gallery departed the courtroom. At some point, only the Military Judge (Lieutenant Colonel John

[1] Trial audio, TappTH20Feb21Hue1, at 5:07. (TC: "Now you're going to hear in a little while that the maximum possible punishment for the crimes that the convicted has committed is 32 years confinement. 32 years. The Government is not asking for the full maximum punishment of 32 years. We're not asking for half of that. 11 years confinement. About a third of that punishment. A third of what the max punishment for confinement could be. That is appropriate in this case.").

[2] As of 20 February 2021, the Accused had been in pretrial confinement for 7 months. The Defense argued for an additional year of confinement from the date of sentencing—19 total months. *See* Trial audio, TappTH20Feb21Hue1, at 24:30.

Norman), the Trial Counsel (Major Nate Michel, Captain Gage O'Connell, and First Lieutenant Sarah Bridges), the Court Reporter (Lance Corporal [redacted]), and the Bailiff (Corporal [redacted]) remained.[3]

e. Before departing the courtroom, Major Michel asked Lieutenant Colonel Norman if he would be willing to conduct a case after-action review with all the parties at some later date. Lieutenant Colonel Norman stated "no," but then proceeded to criticize the Government's sentencing argument. Specifically, Lieutenant Colonel Norman expressed his view that the Government's argument for 11 years confinement was too low in light of aggravating factors in the case,[4] and worked as an artificial cap on the period of confinement the members considered in sentencing. Lieutenant Colonel Norman further explained that "when Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and that there is then no 'price' to be paid by the Defense for their earlier decisions."[5]

f. Major Michel informed the RTC that LtCol J. P. Norman made comments to him and the other two trial counsels detailed to U. S. v. Tapp, Captain G. O'Connell and First Lieutenant S. Bridges, outside the presence of the Defense.[6]

g. Shortly after speaking with Major Michel, the RTC called Colonel [redacted], Officer-in-Charge, LSSS - West to inform him that LtCol Norman made the above referenced comments to trial counsels Major Michel, Captain O'Connell, and First Lieutenant Bridges.[7]

h. Colonel [redacted] remembers the RTC telling him that: 1) LtCol Norman's statements occurred after the court-martial adjourned and defense counsel and PFC Tapp had left the courtroom; 2) LtCol Norman was upset and taking out his angst on the detailed trial counsel during the post-adjournment discussion; 3) LtCol Norman was upset, at least in part, by the detailed trial counsel not asking for the maximum confinement during their sentencing argument; and, 4) LtCol Norman told the detailed trial counsel that the Defense should pay a price for filing late motions, or words to that effect.[8]

i. The RTC reported this information to Colonel [redacted] because Colonel [redacted] is the RTC's direct supervisor.[9]

j. During the week of 22 - 26 February 2021, Colonel [redacted] called the Circuit Military Judge (CMJ), Colonel [redacted], to voice his concern with LtCol Norman's statements and demeanor.[10]

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[3] Def. Mot., enclosures 2.
[4] Def. Mot., enclosure 2.
[5] Def. Mot., enclosure 2.
[6] Def. Mot., enclosure 1.
[7] Def. Mot., enclosure 1.
[8] Def. Mot., enclosure 1.
[9] Def. Mot., enclosure 1.
[10] Def. Mot., enclosure 1.

k. Colonel [redacted] relayed the information provided to him by the RTC to the CMJ. [11]

l. Colonel [redacted] called the CMJ because the CMJ is LtCol Norman's supervisor and he wanted the CMJ to be aware of LtCol Norman's comments.[12]

m. On 1 March 2021, Major Michel provided the Defense with a memorandum detailing Lieutenant Colonel Norman's above-referenced post-trial comments regarding sentencing.[13]

n. The Government has not disclosed Major Michel's Memorandum for the Record to any military judge assigned to the Western Judicial Circuit.[14]

o. On 5 March 2021, LtCol Norman ordered a post-trial Article 39(a) session for 8 March 2021.[15]

p. On 6 March 2021, the Defense filed a motion seeking Lieutenant Colonel Norman's disqualification from further participation in the case, the appointment of a Military Judge from outside the Western Judicial Circuit, dismissal with prejudice of the findings and sentence or, in the alternative, a mistrial.[16]

q. On 8 March 2021, the Court conducted a brief post-trial Article 39(a) session. During this session of Court, and on the record, Lieutenant Colonel Norman stated that he had a post-adjournment conversation with the Trial Counsel where he provided "direct, stern feedback" regarding the Government's sentencing case.[17]

r. Lieutenant Colonel Norman stated that during this conversation, he told Trial Counsel that they seemed to "undervalue [the] case" based on "significant aggravating evidence." Lieutenant Colonel Norman stated that during this conversation, he told the Trial Counsel that "zealous advocacy on sentencing supports effective pretrial negotiations," and that "[i]n most systems, the Accused gets some sentencing benefit for an early pre-trial agreement." Lastly, Lieutenant Colonel Norman stated that "[i]n retrospect, after the Defense departed the courtroom, and although the court had adjourned, I would have asked if all counsel were able to come back in the courtroom before giving any feedback and will do so in the future."[18]

s. At the close of the 8 March 2021 post-trial Article 39(a) session, Lieutenant Colonel Norman recused himself from presiding over any further post-trial matters in this case due to "the personal nature of the allegations in the defense motion and to ensure that the Accused has confidence in the post-trial process."[19]

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[11] Def. Mot., enclosure 1.
[12] Def. Mot., enclosure 1.
[13] Def. Mot., enclosure 2.
[14] Def. Mot., enclosure 1.
[15] Def. Mot., enclosure 3.
[16] AE 111.
[17] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 5:55.
[18] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 8:03.
[19] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 10:05.

t. On 11 March 2021, Colonel Scott Woodard informed the parties that the Chief Judge, Navy-Marine Corps Trial Judiciary, detailed him to preside over all remaining post-trial matters in this case.

u. On 17 March 2021, LtCol Norman declined a request to be interviewed.[20]

v. On 30 March 2021, the defense emailed the CMJ, Colonel [redacted] and requested to interview him.[21]

w. On 7 April 2021, Colonel [redacted] responded to the defense request as follows: "CJDON, CAPT Purnell, in his role as Rules Counsel for the judiciary, provided me notice of the complaint on 9 March 21 when he notified LtCol Norman. Per paragraph 5.c. of Enclosure (2) to JAGINST 5801.1E, Rules Counsel is required to notify the subject's supervisory attorney. In late February or early March while I was TAD to Quantico, Col [redacted] notified me that Maj Michael had taken issue with LtCol Norman's debrief following adjournment in the U.S. v. Tapp trial. I do not recall discussing this matter with anyone at JAD. I don't believe I have. I don't think your questions have any relevance to this matter but I hope that is the information you wanted."[22]

3. **Applicable Law**.

R.C.M. 703(b) states that each party is entitled to the production of any witness whose testimony on a matter in issue on the mertis or on an interlocutory question would be relevant and necessary. R.C.M. 703(b); *see also United States v. Allen*, 31 M.J. 572, 610 (N.M.C.C.R. 1990). The defense shall submit to trial counsel a written list of witnesses whose production by the Government the defense requests. R.C.M. 703(c)(2)(A). The defense is required to provide "a synopsis of the expected testimony sufficient to show its relevance and necessity." R.C.M. 703(c)(2)(B)(i).

M.R.E. 401 defines relevancy as "any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. R.C.M. 703(b) discussion. The moving party has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

In *Allen*, the Court named seven factors the military judge must balance in determining whether a material witness must be produced: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or sentencing; (3) whether the witness' testimony would be merely cumulative; (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness such as that occasioned by the nonamenability to the court's process; (6) whether or not the requested witness

[20] Def. Mot., enclosure 5.
[21] Def. Mot., enclosure 7.
[22] Def. Mot. enclosure 7.

is in the armed forces and/or subject to military orders; and (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. *Allen*, 31 M.J. at 610-611 (citing *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)); R.C.M. 703(c)(2)(c).

b. Judicial Privilege.

The deliberations of military judges are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of deliberations are not privileged. M.R.E. 509.[23] The presiding military judge may not testify as a witness at any proceeding of that court-martial. M.R.E. 605.[24] In *Fayerweather v. Ritch,* the court held that "a judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought *never* to be overthrown or limited by the oral testimony of a judge ... *of what he had in mind at the time of the decision.*" 195 U.S. 276, 307 (1904). [25]

In *United States v. Matthews*, the court held that M.R.E. 509 protects the deliberative process of judges from disclosure. 68 M.J. 29, 38 (C.A.A.F. 2009). [26] Only in the extraordinary cases where there is a "strong showing of bad faith or improper behavior by a judge . . . may a judge be questioned as to matters within the scope of his adjudicative duties." *Id.* (citing *Roebuck*, 271 F.Supp.2d at 718). "While the case law is often inconsistent in its terminology, whether describing the limitation on deliberative process testimony as a privilege, a protection, inadmissible evidence, or some other characterization, the operation and application of the limitation is the same—*courts will not review the deliberative process of a judge.*" *Matthews*, 68 M.J. at 39 (C.A.A.F. 2009) (citing *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978).

In *Roebuck*, the defendant sought to compel a judge's testimony to create a factual record in support of their motion for recusal. 271 F.Supp.2d 712, 719 (VI Dt. Ct. 2003). The defendant not only sought testimony from the presiding judge, but issued subpoenas to every federal judge in the Territory to testify at the hearing or to produce certain records. *Id.*[27] The Court held that most, if not all, of Defendant's proposed questions attempt to elicit the underlying reasons for the

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[23] M.R.E. 509 incorporates the federal common law protection of a judge's deliberative process. *United States v. Matthews*, 68 M.J. 29, 43 (C.A.A.F. 2009) (concluding that a military trial judge's testimony regarding his deliberative process is unreviewable as inadmissible evidence).

[24] M.R.E. 605 which addresses the military judge's competency as a witness, "is generally one of exclusion, rather than inclusion." *Matthews*, 68 M.J. at 42 (C.A.A.F. 2009) (citing *United States v. Roth*, 332 F. Supp. 2d 565, 566 (S.D.N.Y. 2004).

[25] *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (emphasis added) (finding that a trial judge was not a competent witness "in respect to the matters he considered and passed upon" in a trial six years earlier, and cautioning that "no testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides").

[26] *United States v. Matthews* 68 M.J. 29, 38 (C.A.A.F. 2009). A military judge may testify about factual matters "when a sufficient basis exists for calling the judge to testify and those facts are unavailable from other sources" and as long as the factual questions do not "probe into the mental processes employed in formulating the judgment in question." *Id.* at 40 (citing *United States v. Roebuck*, 271 F.Supp.2d 712, 719 (VI Dt. Ct. 2003)).

[27] The Government vehemently opposed the defense request to compel the testimony of the presiding judge and the other judges in the Territory because it was an attempt to probe into the mental processes of the presiding judge's decision to recuse himself. *Id.*

Judge's decisions. *Id.*[28] Judges are under no obligation to divulge the reasons that motivated them in their official acts; the mental processes employed in formulating the decision may not be probed." *Id.* citing *United States v. Cross*, 516 F. Supp. 700, 707 (M.D. Ga.1981), *aff'd,* 742 F.2d 1279 (11th Cir. 1984).[29] In finding that the judge could not be compelled to testify, the Court held the law is clear that "a judge is not required to explain any of his decisions nor to divulge reasons which may have motivated his actions or opinion." *Id.* citing *United States v. Edwards*, 39 F. Supp. 2d 692, 706 (M.D. La. 1999).

4. **Analysis**.

The defense request fails to provide a synopsis of expected testimony from Colonel [redacted] sufficient to show its relevance and necessity. It is clear from the stipulation of fact, that Colonel [redacted] called Colonel [redacted] during the week of 22-26 February 2021 to "voice his concerns with LtCol Norman's post-trial statements and behavior to trial counsel. Def. mot. enclosure 1. This is corroborated by Colonel [redacted] email response to defense on 7 April 2021, where he states that in late February or early March, Colonel [redacted] notified him "that Maj Michael had taken issue with LtCol Norman's debrief following adjournment in the U.S. v. Tapp trial." Def. Mot. enclosure 7. The defense request for the production of Colonel [redacted] states that "it is reasonable to believe that Colonel [redacted] informed LtCol Norman about Colonel [redacted] phone call." Def. Mot. However, that conclusion is purely speculation. Without more, the synopsis of Colonel [redacted] testimony is not sufficient to show its relevance and necessity.[30]

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[28] Below are some of the defense proposed questions in *Roebuck.* Of note, the opinion states "defendant indicated that similar questions would be asked" of the other judges in the Territory. 271 F.Supp.2d 712, 719 (VI Dt. Ct. 2003)).

- Whether he has ever made any extrajudicial statements regarding Lee J. Rohn or her firm, when, to whom, and the substance of the statements?
- Whether he has received statements from third parties about Lee J. Rohn or the members of her firm made outside the context of a court proceeding and if so when, from whom and the substance?
- Whether there came a time Judge Moore learned that Lee J. Rohn had written a letter to the editor contrary to his reappointment, if so when, how it was brought to his attention, whether he discussed it with others and what was the substance of all such conversations?
- All extrajudicial discussions concerning Lee J. Rohn or members of her firm in the past 3 years, the approximate date, who with, and the substance of such conversations.
- The facts considered before recusing himself from all of the cases on his docket of which Lee J. Rohn or her office were counsel of record. The facts considered to nullify the recusal in the *Selkridge* mater and then to dismiss all that Plaintiff's claims.
- Any statement made or correspondence as to the reasons for the recusals, when made, to whom and the substance.
- The facts as to whether Judge Moore is offended by the several motions to recuse Judge Moore filed by the Law Offices of Lee J. Rohn and whether he has discussed the same with anyone, and if so who, when and the substance.
- The factual basis to quash the subpoenas issued to the judges' law clerks *sua sponte* and the factual basis to state without a hearing that the subpoenas were unreasonable and oppressive. To whom Judge Moore discussed such subpoenas or the belief that Attorney Rohn was oppressive in having issued the same, when, and the substance, the factual basis to make such a statement without a hearing, and whether the issuance of such subpoenas cause Judge Moore any personal feeling, and if so what.

[29] The Court found that even though a inquiry is factually directed, it may still be objectionable if it invades upon a judge's decision-making prerogative. *Id.*

[30] Moreover, Colonel [redacted] wrote that "CAPT Purnell, in his role as Rules Counsel for the judiciary, provided me notice of the complaint on 9 March 21." Enclosure 7.

Where the defense moves to compel production of a witness over government objection, the burden lies with defense to prove the relevance and necessity of each witness by a preponderance of the evidence. R.C.M. 905(c). The defense has failed to show the relevance of Colonel [redacted] and the request for his production should be denied. M.R.E. 401. The defense states that Colonel [redacted] "must be asked to disclose whether he informed LtCol Norman of Colonel [redacted] concerns." Def. mot. Defense argues that the answer to that question will show LtCol Norman's "guilty mind." Even if Colonel [redacted] notified LtCol Norman about Colonel [redacted] concerns, that does not have any relevance to whether LtCol Norman was "actually biased or prejudiced during the court-martial" or "his statements and behavior create an appearance of bias or prejudice." Def. motion.[31]

b. Judicial Privilege.

Most, if not all, of the defense questions seek information on what Colonel [redacted] was told and whether he discussed that with LtCol Norman prior to the 8 March 2021 Article 39(a).[32] Like *Roebuck*, the proposed defense questions to Colonel [redacted] are aimed at eliciting the underlying reasons for why LtCol Norman recused himself.[33] Those questions are inextricably linked with the military judge's deliberative process because the answers will probe into what, if anything, impacted LtCol Norman's decision to recuse himself, which is protected from disclosure under M.R.E. 509, *Roebuck*, and *Matthews*.

5. **Burden of Proof**. Pursuant to R.C.M. 905(c), the burden is on the Defense as the movant by a preponderance of the evidence.

6. **Evidence**.

Enclosure: Trial audio (previously provided to the Court).

7. **Relief Requested**. The Government respectfully requests this Court **DENY** the Defense motion.

8. **Argument**. The Government does not request oral argument.

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[31] Military judges are encouraged to consult with other military judges on issues regarding the performance of their duties. This is especially true of supervisory military judges and their subordinates. In *United States v. Upshaw* (NMCCA No. 201600053 December 2019) the trial judge stated: "[t]he law is the law is the law, and consulting other military judges about what they think the law is is certainly within the bounds of propriety." The Court held "we agree as a general matter that military judges can and should consult other military judges."

[32] Def. Mot. Enclosure 8.

[33] Proposed defense questions to Colonel [redacted] include: did you provide a copy of the MFR to, or discuss its contents with LtCol Norman? When did that occur?; did you discuss the contents of the MFR with any other member of the Western Judicial Circuit, if so who was that person and when did that occur?; did you share any discussions you had with anyone assigned to the LSSS West with LtCol Norman or any other member of the Western Judicial Circuit. Def Mot. Enclosure 8.

[redacted]

C. L. MCMAHON
Major, U.S. Marine Corps
Senior Trial Counsel

CERTIFICATE OF SERVICE

I, the undersigned, hereby attest that a copy of the foregoing was electronically served on the Court and opposing counsel on 13 April 2021.

[redacted]

C. L. MCMAHON
Major, U.S. Marine Corps
Senior Trial Counsel

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF - COMPEL PRODUCTION OF EVIDENCE 6 APRIL 2021

1. Nature of Motion.

a. Pursuant to Article 46 of the Uniform Code of Military Justice and Rules for Courts-Martial (R.C.M.) 701(a)(2), 701(a)(6), 703(e), 703(f), and 906(b)(7), the Defense respectfully requests this Court to compel the production of:

(1) Lieutenant Colonel (LtCol) J. P. Norman's Lexis Nexis legal research history from his government issued Lexis Nexis account beginning Saturday, 20 February 2021, after adjournment of U.S. v. Tapp, and ending on Monday, 8 March 2021, when the Court was called back to order. The Defense's request is limited to the aforementioned dates and only for cases, statutes, rules, and secondary sources with the words or phrases: reasonable person, totality of the circumstances, disqualification, recusal, judicial bias, impartiality, public confidence, appearance, ex parte, comments, personal bias, prejudice, Rules for Courts-Martial 902, 915, or 1104, ethical or professional duty to disclose ex parte comments, or synonyms and other forms of the aforementioned words; and,

(2) Any deleted search history related to items described in the previous paragraph.

2. Statement of Relevant Facts.

a. On Saturday, 20 February 2021 the court-martial in the above captioned case adjourned. [Record of Trial (ROT), Statement of Trial Results; Encl 1, Stipulation of Fact].

b. Defense Counsel, PFC Tapp, Victim Legal Counsel, and individuals in the gallery exited the

courtroom shortly after adjournment. [Encl 2, Major (Maj) Michel Memorandum for the Record.]

c. Present in the courtroom after the aforementioned parties exited were the military judge, LtCol Norman, the detailed trial counsels, the court reporter, and the bailiff. [Encl 2.]

d. Major Michel, trial counsel, asked LtCol Norman if he would be willing to provide an after-action brief to the parties. Lieutenant Colonel Norman stated, "no." [Encl 2.]

e. Before the detailed trial counsels could exit the courtroom, LtCol Norman asked Maj Michel if he had seen worse sexual assault cases. This question then led to numerous comments by LtCol Norman over the next 30 - 40 minutes. [Encl 2.]

f. Lieutenant Colonel Norman's comments included: his displeasure with trial counsel asking for 11 years confinement during their sentencing argument; trial counsel unilaterally deciding to cap the potential sentence at 11 years confinement; displeasure with the Defense filing untimely motions and forcing the Government and Court to respond mid-trial; his opinion that trial counsel should be angry when the Defense files late or untimely motions; his opinion that the Defense has no incentive to avoid contested trials and no price to pay for their earlier decisions when the trial counsel caps the potential sentence. [Encl 2.]

g. Major Michel called the Regional Trial Counsel (RTC), LtCol [redacted] after exiting the courtroom on Saturday, 20 February 2021 to inform the RTC of LtCol Norman's comments. [Encl 1.]

h. The RTC called Colonel [redacted], Officer-in-Charge (OIC), Legal Services Support Section - West (LSSS - West) to inform him of what Maj Michel told the RTC. [Encl 1.]

i. The LSSS - West OIC subsequently called the Circuit Military Judge (CMJ), and LtCol Norman's supervisor, Colonel [redacted] during the week of 22 - 26 February 2021 to voice his concern with LtCol Norman's statements and demeanor. [Encl 1.]

j. On Monday, 1 March 2021, the Government disclosed Maj Michel's Memorandum for the Record to the Defense. The Government did not disclose the Memorandum for the Record to any

military judge assigned to the Western Judicial Circuit. [Encl 1.]

k. On Friday, 5 March 2021, LtCol Norman emailed all parties and ordered them to appear for an Article 39(a) on Monday, 8 March. *Lieutenant Colonel Norman did not disclose the purpose of the Article 39(a), there were no post-trial motions pending with the Court, and the only remaining action for the Court was entry of judgment.* [Encl 3.]

l. On Saturday, 6 March 2021 the Defense filed Defense Motion for Appropriate Relief, AE 111. In AE 111, the Defense requests that LtCol Norman be disqualified from further participation in this case and the findings be dismissed with prejudice due to LtCol Norman's statements to the trial counsel on Saturday, 20 February 2021. [AE 111.] *The Defense had not notified the Court before 6 March of its intention to file a post-trial motion.*

m. On Monday, 8 March 2021, the Defense moved to disqualify the military judge and objected twice to the military judge placing any comments on the record related to AE 111. Lieutenant Colonel Norman did not permit voir dire or evidence on the Defense's request to disqualify the military judge and did not rule on two Defense objections to him placing his comments on the record. [Encl 4, Unofficial Transcript of 8 March 21 Article 39(a), pp. 3 - 5; ROT Audio File: TappTH8Mar21Herm1 at 04:20 - 07:36.]

n. On Monday, 8 March 2021, LtCol Norman stated on the record that, "I do not believe that there is an appearance of bias, [but] based on the personal nature of the allegations in the Defense motion, and to ensure that the Accused has confidence in the post-trial process. I have decided to recuse myself from any further post-trial matters…" [Encl 4, pp. 6.] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Encl 4.]

o. On Tuesday, 16 March 2021, the Defense emailed LtCol Norman and requested to interview him. On Wednesday, 17 March 2021, LtCol Norman emailed the Defense and Government to inform them that he respectfully declines to be interviewed. [Encl 5, Emails with LtCol Norman

and TC of DC 16 - 17 Mar 2021.]

p. On Monday, 22 March 2021, the Government emailed LtCol Norman to inform him that the Government has approved a Defense request to produce him as a witness for the 15 April 2021 Article 39(a). On 26 March 2021, LtCol Norman informed the Government and Defense that he does not intend to testify because he believes there are various privileges involved (NFI). [Encl 6, Emails with LtCol Norman and TC and DC of 22 - 26 Mar 21.]

q. On Tuesday, 30 March 2021, the Defense emailed the CMJ and requested to interview him. That same day, the CMJ responded to the Defense and stated that he was not available for an interview, but invited the Defense to send him questions. On Wednesday, 31 March 2021, the Defense emailed the CMJ their questions and asked him to please respond no later than Wednesday, 7 April 2021. To date, the CMJ has not responded to the Defense's questions. [Encl 7, Emails with Colonel [redacted] and TC and DC of 30 - 31 Mar 21; Encl 8, DC Questions to CMJ.]

r. On Wednesday, 31 March 2021, the Defense submitted a discovery request for LtCol Norman's Lexis Nexis legal research history. [Encl 9, Defense Discovery Request of 31 Mar 21.]

s. On Monday, 6 April 2021, the Government denied the Defense's request. [Encl 10.]

3. Discussion of Law.

a. Intent of Congress and C.A.A.F. regarding discovery. Article 46, UCMJ, 10 USC § 846, provides all parties to a court-martial with an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Congress enacted Article 46 so that generous discovery would be made available to a military accused. *U.S. v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986). In *Eshalomi*, C.A.A.F. explained why generous discovery for the accused is vital to the military justice system. "Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgments about the merits of the case and encourages early decisions concerning withdrawal of charges, *motions*, pleas, and composition of court-martial. In short, experience has

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shown that *broad discovery contributes substantially to the truth finding process and to the efficiency with which it functions.* [Emphasis added.] The C.A.A.F. also tells us that parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of Article 46's liberal mandate. *U.S. v. Luke*, 69 M.J. 309, 319 (C.A.A.F. 2011). This liberal mandate includes disclosing materials that would assist the Defense in formulating a Defense strategy and not just evidence that would be known to be admissible at trial. *Luke*, 69 MJ. at 319 (citing *U.S. v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) and *U.S v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)).

b. Disclosure by Trial Counsel. The President, through R.C.M. 701, requires that the trial counsel make several disclosures to the Defense. The trial counsel shall provide all papers accompanying the charges when they were referred to court-martial. R.C.M. 701(a)(1). Trial counsel shall, upon request of the Defense, permit the Defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, mental and physical examinations, and scientific tests, or copies of portions of these items, if the item is within the possession, custody, or *control of military authorities* and: the item is relevant to Defense preparation; the Government intends to use the item in the case-in-chief at trial; the Government anticipates using the item in rebuttal; or, the item was obtained from or belongs to the accused. R.C.M. 701(a)(2). Most importantly, the trial counsel shall, as soon as practicable, disclose evidence favorable to the Defense. R.C.M. 701(a)(6)

c. Disclosure of Evidence Favorable to the Defense. Trial counsel's disclosure obligations under R.C.M. 701(a)(6) includes disclosure of evidence that: tends to negate the guilt of the accused of an offense charged; reduce the degree of guilt of the accused of an offense charged; reduce the punishment; or, adversely affects the credibility of any prosecution witness or evidence. The Government must exercise due diligence in reviewing the files of other Government entities to determine whether such files contain discoverable information. *U.S. v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). The scope of the due diligence requirement with

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respect to Governmental files beyond the prosecutor's own files is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and, (3) *other files, as designated in a Defense discovery request, that involved a specified type of information within a specified entity*. *Williams*, 50 M.J. at 441. [Emphasis added.]

d. In *Williams*, the C.A.A.F. provided clarification on the trial counsel's obligation under Article 46 to remove obstacles to Defense access to information and provide such other assistance as may be needed to ensure that the Defense has an equal opportunity to obtain evidence. *Id.* at 442. Trial counsel must review prosecutorial files or the files of an investigative agency acting on the Government's behalf in the case at bar even without a great deal of specificity in the Defense discovery request. *Id.* The reasoning behind this obligation is that these are the files that are subject to the direct supervision or oversight by the prosecution. *Id.*

e. With respect to files not related to the prosecution's investigation, the Defense need for such files are likely to vary significantly from case to case, and the Defense is likely to be in the best position to know what matters outside the investigative files may be of significance. *Id.* at 443. Thus, "[t]he Article 46 interest in equal opportunity of the Defense to obtain such information can be protected adequately by requiring the Defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request." *Id.* at 443. Finally, whether reviewing prosecutorial files, files of an investigative agency acting on the Government's behalf, or records outside the prosecution's investigation, trial counsel's obligation to disclose favorable evidence applies equally to exculpatory and impeachment evidence. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). Impeachment evidence is evidence favorable to the accused because if used effectively it may make the difference between conviction and acquittal. *Bagley*, 473. U.S. at 676.

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f. Legal standard for evidence production. The standard for evidence production, which is the same as witness production, is whether the item is relevant and necessary. R.C.M. 703(c) and (f). Evidence is relevant if it has the tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Mil. R. Evid. 401. The legal test for logical relevance has an extremely low threshold. *U.S. v. Schlamer*, 47 M.J. 670, 681 (N.M.C.C.A. 1997). "Thus, 'relevance' is whether the questioned item of evidence has any tendency-whatsoever-to affect the logical consideration of any fact of consequence." *U.S. v. Will*, 2002 CCA LEXIS 218, *14-15[1]. Evidence is necessary within the meaning of this rule when it is not cumulative and "when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *U.S. v. Reveles*, 41 M.J. 388, 394 (C.A.A.F. 1995).

g. Military Rule of Evidence 509. Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged. The C.A.A.F. has stated that the deliberative process of judges is protected; however, it is not absolute. *U.S. v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009). In reviewing and adopting federal common law, C.A.A.F. highlighted case-by-case exceptions to the deliberative process protection. *Matthews*, 68 M.J. at 38 - 40. These exceptions include open and tangible facts, facts unavailable from other sources, or occasions where there is a strong showing of bad faith or improper behavior by a judge. *Matthews*, 68 M.J. at 39 - 41.

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[1] This case is unpublished; however, pursuant to NMCCA Rules of Appellate Procedure 30.2 it may be cited as persuasive authority.

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4. **Analysis of the Law.**

a. The Court should order the production of the information listed in paragraphs 1(a)(1-2) because it is relevant and necessary to whether LtCol Norman: 1) researched the law related to disqualification and recusal after the CMJ was notified by the LSSS West OIC and prior to ordering an Article 39(a) on 5 March; 2) intended to read a prepared, unsworn statement into the record on 8 March and later invoke "privileges" to shield himself from being interviewed by the parties or having to testify at a subsequent session of court; and, 3) intended to read a prepared, unsworn statement into the record in an attempt to decrease this Court's, and an appellate court's, scrutiny of his behavior.

b. The Government has an obligation to search for this information pursuant to a specific Defense request. *Williams*, 50 M.J. 436, 443. The Government has the ability to obtain this information under R.C.M. 703(g)(2) by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence. The Defense informed the Government that this information may be obtained by contacting the Legal Administrative Officer (LAO) of the Marine Corps, LSSS West LAO, or specific Lexis Nexis representatives. [Encl 9.]

c. This information will answer several relevant questions that are germane to whether LtCol Norman was actually biased and/or prejudiced against the Defense during the court-martial proceedings. In courts-martial, military judges often allow the Government to admit evidence of acts committed by an accused post-offense to show the accused's guilty mind. *U.S. v. Stanton*, 69 M.J. 228, 231 (C.A.A.F. 2010); Mil. R. Evid 404(b), *Manual for Courts-Martial* (2019 ed.). Similarly, the Defense seeks LtCol Norman's post-adjournment legal research – during a time when no substantive matters were before the Court and the Defense had not informed the Court of its intention to file a post-trial motion – to determine whether there is direct or circumstantial

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evidence of LtCol Norman's guilty mind. The evidence requested will provide answers, or partial answers, to the following questions:

(1) What was the approximate date that LtCol Norman was informed of the LSSS West OIC's concerns;

(2) How much time passed between LtCol Norman's initial search entries related to disqualification and recusal and his email to all parties on 5 March;

(3) Why LtCol Norman did not immediately inform the parties of potential evidence for disqualification, invite voir dire, and allow time for post-trial motions and the submission of evidence related to disqualification, recusal, or other matters;

(4) Why LtCol Norman ordered an Article 39(a) on 5 March when the Defense had not filed, nor given notice to the Court that it intended to file, a post-trial motion;

(5) Why LtCol Norman omitted the purpose for the 8 March Article 39(a) in his email to all parties on 5 March;

(6) Whether LtCol Norman used the time between notification of the LSSS West OIC's concerns and his email of 5 March to produce a statement that he could read into the record on 8 March;

(7) Why LtCol Norman did not allow the Defense to voir dire him or submit evidence during the Article 39(a) on 8 March;

(8) Why LtCol Norman did not rule on two Defense objections to him providing statements into the record related to AE 111 on 8 March; and,

(9) Why LtCol Norman refuses to be interviewed or testify in this case?

d. This information is necessary because the Defense has the burden of proof for AE 111 and it must be afforded an equal opportunity to access evidence to show that LtCol Norman was actually biased or prejudiced towards the Defense. *Williams*, 50 M.J. at 441. Additionally, LtCol Norman has refused to be interviewed or testify and the CMJ, to date, has not answered the Defense's

questions or made himself available for interview; thus, there is no alternative source of information available to answer the aforementioned questions.

e. This information is also necessary because it is favorable to the Defense under R.C.M. 701(a)(6). On page 10 of the Government's Response to AE 111, it asserts that "even if Lieutenant Colonel Norman's statement that Defense must 'pay a price' for going to a contested trial was inappropriate, when viewed in context and in light of all the circumstances, the 'legality, fairness, and impartiality' of the court-martial were not put into doubt." It is reasonable to assume that the Government will seek to elicit testimony from witnesses, submit documents, and/or provide argument consistent with this position at the 15 April Article 39(a). So, LtCol Norman's legal research history for a time period that: had no substantive matters pending before the Court; includes days after the judiciary had been notified of the LSSS West OIC's concerns and before LtCol Norman ordered an Article 39(a) that did not inform the parties of its purpose; that occurred before he read a statement into the record despite objections and which contained terms such as "totality of the circumstances" and "reasonable person"; and, that occurred prior to his refusal to testify or be interviewed, may only undermine the Government's evidence by revealing LtCol Norman's guilty mind. Therefore, the Government has an obligation to search for this type of evidence and disclose it if found. *Williams*, 50 M.J. at 443.

f. Finally, LtCol Norman's Lexis Nexis legal research history does not involve his deliberative process because the court-martial was adjourned between 20 February and 8 March, there were no substantive matters before the Court between 20 February and 5 March, the Defense had not given notice of its intent to file a motion prior to 5 March, and the Government has never served a copy of Maj Michel's Memorandum for the Record on any military judge assigned to the Western Judicial Circuit. Even if an argument can be made that LtCol Norman's legal research history during this time period and only for the terms listed in paragraphs 1(a)(1-2) should be protected by MRE 509, there has been a strong showing of bad faith or improper behavior by this military

judge in Maj Michel's Memorandum for the Record. Therefore, the deliberative process protection does not apply under these circumstances.

5. Evidence Offered.

a. Encl 1: Stipulation of Fact of 6 April 2021
b. Encl 2: Maj Michel Memorandum for the Record
c. Encl 3: Email from LtCol Norman of 5 Mar 21
d. Encl 4: Unofficial Transcript of 8 Mar 21 Article 39(a)
e. Encl 5: Emails with LtCol Norman, TC, and DC of 16 - 17 Mar 21
f. Encl 6: Emails with LtCol Norman, TC, and DC of 22 - 26 Mar 21
g. Encl 7: Emails with CMJ, TC, and DC of 30 - 31 Mar 21
h. Encl 8: DC questions to CMJ of 31 Mar 21
i. Encl 9: Defense Discovery Request of 31 Mar 21
j. Encl 10: Government Response to Defense Discovery Request of 6 April 21

6. Burden of Proof: As the moving party, the Defense bears the burden of proof by preponderance of the evidence.

7. Relief Requested. The Defense respectfully requests that the Court order the Government to produce the information listed in paragraphs 1(a) (1-2). **Alternatively, the Defense respectfully requests that the Court order the Government to obtain and seal the requested information without reviewing it and then provide it to the Court for an in-camera review.**

8. Argument. The Defense does not request oral argument.

9. Certificate of Service. I hereby attest that a copy of the foregoing motion was served on the Court and all parties on 6 April 2021.

[redacted]
R. ACOSTA

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

U N I T E D S T A T E S **v.** **THOMAS H. TAPP** **PRIVATE FIRST CLASS** **UNITED STATES MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MFAR (COMPEL PRODUCTION OF EVIDENCE)** **12 April 2021**

1. **Nature of Motion**. The Government requests the Court **DENY** the Defense Motion for Appropriate Relief Pursuant to R.C.M. 905 (c).

2. **Facts**.

a. On 19 February 2021, a general court-martial composed of officer and enlisted members convicted the Accused, contrary to his pleas, of one specification of violating a lawful general order and one specification of sexual assault in violation of Articles 92 and 120, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. §§ 892, 920.

b. On 20 February 2021, the parties presented sentencing arguments. Although the members could have adjudged up to 32 years confinement, the Government argued that 11 years was appropriate given the specific facts of the case.[1] For their part, the Defense argued that 19 months was an appropriate period of confinement.[2]

c. After deliberations, the members sentenced the Accused to be dishonorably discharged, to be confined for a period of 3 years, to forfeit all pay and allowances, and to be reduced to the grade of E-1.

d. Following adjournment, the Defense Counsel, the Accused, and several spectators in the gallery departed the courtroom. At some point, only the Military Judge (Lieutenant Colonel John

[1] Trial audio, TappTH20Feb21Hue1, at 5:07. (TC: "Now you're going to hear in a little while that the maximum possible punishment for the crimes that the convicted has committed is 32 years confinement. 32 years. The Government is not asking for the full maximum punishment of 32 years. We're not asking for half of that. 11 years confinement. About a third of that punishment. A third of what the max punishment for confinement could be. That is appropriate in this case.").

[2] As of 20 February 2021, the Accused had been in pretrial confinement for 7 months. The Defense argued for an additional year of confinement from the date of sentencing—19 total months. *See* Trial audio, TappTH20Feb21Hue1, at 24:30.

Norman), the Trial Counsel (Major Nate Michel, Captain Gage O'Connell, and First Lieutenant Sarah Bridges), the Court Reporter (Lance Corporal [redacted]), and the Bailiff (Corporal [redacted]) remained.[3]

e. Before departing the courtroom, Major Michel asked Lieutenant Colonel Norman if he would be willing to conduct a case after-action review with all the parties at some later date. Lieutenant Colonel Norman stated "no," but then proceeded to criticize the Government's sentencing argument. Specifically, Lieutenant Colonel Norman expressed his view that the Government's argument for 11 years confinement was too low in light of aggravating factors in the case,[4] and worked as an artificial cap on the period of confinement the members considered in sentencing. Lieutenant Colonel Norman further explained that "when Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and that there is then no 'price' to be paid by the Defense for their earlier decisions."[5]

f. Major Michel informed the RTC that LtCol J. P. Norman made comments to him and the other two trial counsels detailed to U. S. v. Tapp, Captain G. O'Connell and First Lieutenant S. Bridges, outside the presence of the Defense.[6]

g. Shortly after speaking with Major Michel, the RTC called Colonel [redacted], Officer-in-Charge, LSSS - West to inform him that LtCol Norman made the above referenced comments to trial counsels Major Michel, Captain O'Connell, and First Lieutenant Bridges.[7]

h. Colonel [redacted] remembers the RTC telling him that: 1) LtCol Norman's statements occurred after the court-martial adjourned and defense counsel and PFC Tapp had left the courtroom; 2) LtCol Norman was upset and taking out his angst on the detailed trial counsel during the post-adjournment discussion; 3) LtCol Norman was upset, at least in part, by the detailed trial counsel not asking for the maximum confinement during their sentencing argument; and, 4) LtCol Norman told the detailed trial counsel that the Defense should pay a price for filing late motions, or words to that effect.[8]

i. The RTC reported this information to Colonel [redacted] because Colonel [redacted] is the RTC's direct supervisor.[9]

j. During the week of 22 - 26 February 2021, Colonel [redacted] called the Circuit Military Judge (CMJ), Colonel [redacted] to voice his concern with LtCol Norman's statements and demeanor.[10]

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[3] Def. Mot., enclosures 2.
[4] Def. Mot., enclosure 2.
[5] Def. Mot., enclosure 2.
[6] Def. Mot., enclosure 1.
[7] Def. Mot., enclosure 1.
[8] Def. Mot., enclosure 1.
[9] Def. Mot., enclosure 1.
[10] Def. Mot., enclosure 1.

k. Colonel [redacted] relayed the information provided to him by the RTC to the CMJ. [11]

l. Colonel [redacted] called the CMJ because the CMJ is LtCol Norman's supervisor and he wanted the CMJ to be aware of LtCol Norman's comments.[12]

m. On 1 March 2021, Major Michel provided the Defense with a memorandum detailing Lieutenant Colonel Norman's above-referenced post-trial comments regarding sentencing.[13]

n. The Government has not disclosed Major Michel's Memorandum for the Record to any military judge assigned to the Western Judicial Circuit.[14]

o. On 5 March 2021, LtCol Norman ordered a post-trial Article 39(a) session for 8 March 2021.[15]

p. On 6 March 2021, the Defense filed a motion seeking Lieutenant Colonel Norman's disqualification from further participation in the case, the appointment of a Military Judge from outside the Western Judicial Circuit, dismissal with prejudice of the findings and sentence or, in the alternative, a mistrial.[16]

q. On 8 March 2021, the Court conducted a brief post-trial Article 39(a) session. During this session of Court, and on the record, Lieutenant Colonel Norman stated that he had a post-adjournment conversation with the Trial Counsel where he provided "direct, stern feedback" regarding the Government's sentencing case.[17]

r. Lieutenant Colonel Norman stated that during this conversation, he told Trial Counsel that they seemed to "undervalue [the] case" based on "significant aggravating evidence." Lieutenant Colonel Norman stated that during this conversation, he told the Trial Counsel that "zealous advocacy on sentencing supports effective pretrial negotiations," and that "[i]n most systems, the Accused gets some sentencing benefit for an early pre-trial agreement." Lastly, Lieutenant Colonel Norman stated that "[i]n retrospect, after the Defense departed the courtroom, and although the court had adjourned, I would have asked if all counsel were able to come back in the courtroom before giving any feedback and will do so in the future."[18]

s. At the close of the 8 March 2021 post-trial Article 39(a) session, Lieutenant Colonel Norman recused himself from presiding over any further post-trial matters in this case due to "the personal nature of the allegations in the defense motion and to ensure that the Accused has confidence in the post-trial process."[19]

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[11] Def. Mot., enclosure 1.
[12] Def. Mot., enclosure 1.
[13] Def. Mot., enclosure 2.
[14] Def. Mot., enclosure 1.
[15] Def. Mot., enclosure 3.
[16] AE 111.
[17] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 5:55.
[18] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 8:03.
[19] Def. Mot., enclosure 4. Trial audio, TappTH8Mar21Herm1, at 10:05.

t. On 11 March 2021, Colonel Scott Woodard informed the parties that the Chief Judge, Navy-Marine Corps Trial Judiciary, detailed him to preside over all remaining post-trial matters in this case.

u. On 17 March 2021, LtCol Norman declined a request to be interviewed.[20]

v. On 30 March 2021, the defense emailed the CMJ, Colonel [redacted] and requested to interview him.[21]

w. On 7 April 2021, Colonel [redacted] responded to the defense request as follows: "CJDON, CAPT Purnell, in his role as Rules Counsel for the judiciary, provided me notice of the complaint on 9 March 21 when he notified LtCol Norman. Per paragraph 5.c. of Enclosure (2) to JAGINST 5801.1E, Rules Counsel is required to notify the subject's supervisory attorney. In late February or early March while I was TAD to Quantico, Col [redacted] notified me that Maj Michael had taken issue with LtCol Norman's debrief following adjournment in the U.S. v. Tapp trial. I do not recall discussing this matter with anyone at JAD. I don't believe I have. I don't think your questions have any relevance to this matter but I hope that is the information you wanted."[22]

x. On 8 April 2021, the defense filed a motion to compel the production of LtCol Norman's Lexis search history. [23]

3. **Applicable Law**.

a. Discovery Production

In general, each party is entitled to the production of evidence which is relevant and necessary. R.C.M. 701; R.C.M. 703(e)(1); R.C.M. 703(f). Military Rules of Evidence (M.R.E.) 401 defines relevancy as "any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(e)(1) (discussion). The moving party has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

Any defense request for production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence. R.C.M. 703(f). As a threshold matter, in order to be entitled to production of evidence, the defense must first demonstrate that the requested material exists. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); see also *United States v. Watkins*, 2018 CCA Lexis 315 (N.M.C.C.A. 2018).

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[20] Def. Mot., enclosure 5.
[21] Def. Mot., enclosure 7.
[22] Def. Mot. to compel production of witnesses dtd 8 April 2021, enclosure 7.
[23] Def. Mot.

b. Judicial Privilege.

The deliberations of military judges are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of deliberations are not privileged. M.R.E. 509.[24] The presiding military judge may not testify as a witness at any proceeding of that court-martial. M.R.E. 605.[25] In *Fayerweather v. Ritch,* the court held that "a judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought *never* to be overthrown or limited by the oral testimony of a judge *... of what he had in mind at the time of the decision."* 195 U.S. 276, 307 (1904). [26]

In *United States v. Matthews*, the court held that M.R.E. 509 protects the deliberative process of judges from disclosure. 68 M.J. 29, 38 (C.A.A.F. 2009). [27] Only in the extraordinary cases where there is a "strong showing of bad faith or improper behavior by a judge . . . may a judge be questioned as to matters within the scope of his adjudicative duties." *Id.* (citing *Roebuck*, 271 F.Supp.2d at 718). "While the case law is often inconsistent in its terminology, whether describing the limitation on deliberative process testimony as a privilege, a protection, inadmissible evidence, or some other characterization, the operation and application of the limitation is the same—*courts will not review the deliberative process of a judge.*" *Matthews*, 68 M.J. at 39 (C.A.A.F. 2009) (citing *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978). The law is clear that "a judge is not required to explain any of his decisions nor to divulge reasons which may have motivated his actions or opinion." *United States v. Edwards*, 39 F. Supp. 2d 692, 706 (M.D. La. 1999).

4. **Analysis**.

a. Discovery production

Defense has failed in their burden because they have not demonstrated that the Lexis search history exists. *Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). The only evidence defense has presented supporting the existence of LtCol Norman's Lexis search history are words he

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[24] M.R.E. 509 incorporates the federal common law protection of a judge's deliberative process. *United States v. Matthews*, 68 M.J. 29, 43 (C.A.A.F. 2009) (concluding that a military trial judge's testimony regarding his deliberative process is unreviewable as inadmissible evidence).

[25] M.R.E. 605 which addresses the military judge's competency as a witness, "is generally one of exclusion, rather than inclusion." *Matthews*, 68 M.J. at 42 (C.A.A.F. 2009) (citing *United States v. Roth*, 332 F. Supp. 2d 565, 566 (S.D.N.Y. 2004).

[26] *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (emphasis added) (finding that a trial judge was not a competent witness "in respect to the matters he considered and passed upon" in a trial six years earlier, and cautioning that "no testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides").

[27] *United States v. Matthews* 68 M.J. 29, 38 (C.A.A.F. 2009). A military judge may testify about factual matters "when a sufficient basis exists for calling the judge to testify and those facts are unavailable from other sources" and as long as the factual questions do not "probe into the mental processes employed in formulating the judgment in question." *Id.* at 40 (citing *United States v. Roebuck*, 271 F.Supp.2d 712, 719 (VI Dt. Ct. 2003)).

used during the 8 March 2021 Article 39(a).[28] These words alone are insufficient to establish that LtCol Norman conducted a Lexis search. Like *Rodriguez*, the defense assumes the existence of evidence and its evidentiary value with no showing that the evidence existed. 60 M.J. 239, 246 (C.A.A.F. 2004).[29]

The defense has failed in its burden not only to show the evidence existed, but how it would contribute to their presentation of the case in some positive way on a material issue. R.C.M. 703(e)(1) discussion). Conducting legal research is a primary work responsibility for a military judge. Even if LtCol Norman searched Lexis on the issue of recusal, that does not make it more or less likely that he was biased. The Government is left guessing at how LtCol Norman's Lexis search history, if it exists, has any relevance to LtCol Norman's alleged bias or his decision to recuse himself. As such, the defense has failed to meet their burden.

b. Judicial Privilege.

LtCol Norman's search history, if it exists, is protected by M.R.E. 509. In *Matthews*, the court made clear that "whether describing the limitation on deliberative process testimony as a privilege, a protection, inadmissible evidence, or some other characterization, the operation and application of the limitation is the same—***courts will not review the deliberative process of a judge***." *Matthews*, 68 M.J. at 39 (C.A.A.F. 2009) (citing *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978).[30] The defense request is aimed at learning if LtCol Norman conducted any research on Lexis prior to his decision to recuse himself from further post-trial action. The content of a military judge's legal research, in aid of his determinative process on whether he should recuse himself, is inextricably linked with the military judge's deliberative process. The defense request is a direct attempt to circumvent the protections under M.R.E. 509 because the Lexis search histoy will probe into LtCol Norman's mental processes used in formulating his decision to recuse himself. Thus, his Lexis history is protected from disclosure under M.R.E. 509 and *Matthews*. 68 M.J. 29, 38 (C.A.A.F. 2009).

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[28] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Def Encl 4.]

[29] See also, *United States v. Watkins*, 2018 CCA Lexis 315 (N.M.C.C.A. 2018) "The defense, as the moving party, was required as a threshold matter to show that the cell phone tower data existed. They failed to do so. The military judge asked the defense how long the cell phone carrier maintained the cell phone tower data. The defense did not know. Applying R.C.M. 703, the military judge concluded that the defense had failed in their burden to show the existence of the data. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (noting that the appellant assumed the existence of evidence and its evidentiary value with no showing that the evidence existed). We agree with the military judge—the appellant did not carry his burden as the moving party to demonstrate that the cell phone tower data actually existed."

[30] *See also Roebuck*, 271 F.Supp. 2d 712 at 718 ("The overwhelming authority concludes that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or reasons that motivated him in the performance of his official duties."

5. **Burden of Proof**. Pursuant to R.C.M. 905(c), the burden is on the Defense as the movant by a preponderance of the evidence.

6. **Evidence**.

Enclosure: Trial audio (previously provided to the Court).

7. **Relief Requested**. The Government respectfully requests this Court **DENY** the Defense motion.

8. **Argument**. The Government does not request oral argument.

[redacted]

C. L. MCMAHON
Major, U.S. Marine Corps
Senior Trial Counsel

CERTIFICATE OF SERVICE

I, the undersigned, hereby attest that a copy of the foregoing was electronically served on the Court and opposing counsel on 12 April 2021.

[redacted]

C. L. MCMAHON
Major, U.S. Marine Corps
Senior Trial Counsel

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

UNITED STATES v. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	MOTION FOR APPROPRIATE RELIEF - COMPEL PRODUCTION OF EVIDENCE 6 APRIL 2021

1. Nature of Motion.

a. Pursuant to Article 46 of the Uniform Code of Military Justice and Rules for Courts-Martial (R.C.M.) 701(a)(2), 701(a)(6), 703(e), 703(f), and 906(b)(7), the Defense respectfully requests this Court to compel the production of:

(1) Lieutenant Colonel (LtCol) J. P. Norman's Lexis Nexis legal research history from his government issued Lexis Nexis account beginning Saturday, 20 February 2021, after adjournment of U.S. v. Tapp, and ending on Monday, 8 March 2021, when the Court was called back to order. The Defense's request is limited to the aforementioned dates and only for cases, statutes, rules, and secondary sources with the words or phrases: reasonable person, totality of the circumstances, disqualification, recusal, judicial bias, impartiality, public confidence, appearance, ex parte, comments, personal bias, prejudice, Rules for Courts-Martial 902, 915, or 1104, ethical or professional duty to disclose ex parte comments, or synonyms and other forms of the aforementioned words; and,

(2) Any deleted search history related to items described in the previous paragraph.

2. Statement of Relevant Facts.

a. On Saturday, 20 February 2021 the court-martial in the above captioned case adjourned. [Record of Trial (ROT), Statement of Trial Results; Encl 1, Stipulation of Fact].

b. Defense Counsel, PFC Tapp, Victim Legal Counsel, and individuals in the gallery exited the

courtroom shortly after adjournment. [Encl 2, Major (Maj) Michel Memorandum for the Record.]

c. Present in the courtroom after the aforementioned parties exited were the military judge, LtCol Norman, the detailed trial counsels, the court reporter, and the bailiff. [Encl 2.]

d. Major Michel, trial counsel, asked LtCol Norman if he would be willing to provide an after-action brief to the parties. Lieutenant Colonel Norman stated, "no." [Encl 2.]

e. Before the detailed trial counsels could exit the courtroom, LtCol Norman asked Maj Michel if he had seen worse sexual assault cases. This question then led to numerous comments by LtCol Norman over the next 30 - 40 minutes. [Encl 2.]

f. Lieutenant Colonel Norman's comments included: his displeasure with trial counsel asking for 11 years confinement during their sentencing argument; trial counsel unilaterally deciding to cap the potential sentence at 11 years confinement; displeasure with the Defense filing untimely motions and forcing the Government and Court to respond mid-trial; his opinion that trial counsel should be angry when the Defense files late or untimely motions; his opinion that the Defense has no incentive to avoid contested trials and no price to pay for their earlier decisions when the trial counsel caps the potential sentence. [Encl 2.]

g. Major Michel called the Regional Trial Counsel (RTC), LtCol [redacted] after exiting the courtroom on Saturday, 20 February 2021 to inform the RTC of LtCol Norman's comments. [Encl 1.]

h. The RTC called Colonel [redacted], Officer-in-Charge (OIC), Legal Services Support Section - West (LSSS - West) to inform him of what Maj Michel told the RTC. [Encl 1.]

i. The LSSS - West OIC subsequently called the Circuit Military Judge (CMJ), and LtCol Norman's supervisor, Colonel [redacted] during the week of 22 - 26 February 2021 to voice his concern with LtCol Norman's statements and demeanor. [Encl 1.]

j. On Monday, 1 March 2021, the Government disclosed Maj Michel's Memorandum for the Record to the Defense. The Government did not disclose the Memorandum for the Record to any

military judge assigned to the Western Judicial Circuit. [Encl 1.]

k. On Friday, 5 March 2021, LtCol Norman emailed all parties and ordered them to appear for an Article 39(a) on Monday, 8 March. *Lieutenant Colonel Norman did not disclose the purpose of the Article 39(a), there were no post-trial motions pending with the Court, and the only remaining action for the Court was entry of judgment.* [Encl 3.]

l. On Saturday, 6 March 2021 the Defense filed Defense Motion for Appropriate Relief, AE 111. In AE 111, the Defense requests that LtCol Norman be disqualified from further participation in this case and the findings be dismissed with prejudice due to LtCol Norman's statements to the trial counsel on Saturday, 20 February 2021. [AE 111.] *The Defense had not notified the Court before 6 March of its intention to file a post-trial motion.*

m. On Monday, 8 March 2021, the Defense moved to disqualify the military judge and objected twice to the military judge placing any comments on the record related to AE 111. Lieutenant Colonel Norman did not permit voir dire or evidence on the Defense's request to disqualify the military judge and did not rule on two Defense objections to him placing his comments on the record. [Encl 4, Unofficial Transcript of 8 March 21 Article 39(a), pp. 3 - 5; ROT Audio File: TappTH8Mar21Herm1 at 04:20 - 07:36.]

n. On Monday, 8 March 2021, LtCol Norman stated on the record that, "I do not believe that there is an appearance of bias, [but] based on the personal nature of the allegations in the Defense motion, and to ensure that the Accused has confidence in the post-trial process. I have decided to recuse myself from any further post-trial matters…" [Encl 4, pp. 6.] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Encl 4.]

o. On Tuesday, 16 March 2021, the Defense emailed LtCol Norman and requested to interview him. On Wednesday, 17 March 2021, LtCol Norman emailed the Defense and Government to inform them that he respectfully declines to be interviewed. [Encl 5, Emails with LtCol Norman

and TC of DC 16 - 17 Mar 2021.]

p. On Monday, 22 March 2021, the Government emailed LtCol Norman to inform him that the Government has approved a Defense request to produce him as a witness for the 15 April 2021 Article 39(a). On 26 March 2021, LtCol Norman informed the Government and Defense that he does not intend to testify because he believes there are various privileges involved (NFI). [Encl 6, Emails with LtCol Norman and TC and DC of 22 - 26 Mar 21.]

q. On Tuesday, 30 March 2021, the Defense emailed the CMJ and requested to interview him. That same day, the CMJ responded to the Defense and stated that he was not available for an interview, but invited the Defense to send him questions. On Wednesday, 31 March 2021, the Defense emailed the CMJ their questions and asked him to please respond no later than Wednesday, 7 April 2021. To date, the CMJ has not responded to the Defense's questions. [Encl 7, Emails with Colonel [redacted] and TC and DC of 30 - 31 Mar 21; Encl 8, DC Questions to CMJ.]

r. On Wednesday, 31 March 2021, the Defense submitted a discovery request for LtCol Norman's Lexis Nexis legal research history. [Encl 9, Defense Discovery Request of 31 Mar 21.]

s. On Monday, 6 April 2021, the Government denied the Defense's request. [Encl 10.]

3. Discussion of Law.

a. Intent of Congress and C.A.A.F. regarding discovery. Article 46, UCMJ, 10 USC § 846, provides all parties to a court-martial with an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Congress enacted Article 46 so that generous discovery would be made available to a military accused. *U.S. v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986). In *Eshalomi*, C.A.A.F. explained why generous discovery for the accused is vital to the military justice system. "Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgments about the merits of the case and encourages early decisions concerning withdrawal of charges, *motions*, pleas, and composition of court-martial. In short, experience has

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shown that *broad discovery contributes substantially to the truth finding process and to the efficiency with which it functions.* [Emphasis added.] The C.A.A.F. also tells us that parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of Article 46's liberal mandate. *U.S. v. Luke*, 69 M.J. 309, 319 (C.A.A.F. 2011). This liberal mandate includes disclosing materials that would assist the Defense in formulating a Defense strategy and not just evidence that would be known to be admissible at trial. *Luke*, 69 MJ. at 319 (citing *U.S. v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) and *U.S v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)).

b. Disclosure by Trial Counsel. The President, through R.C.M. 701, requires that the trial counsel make several disclosures to the Defense. The trial counsel shall provide all papers accompanying the charges when they were referred to court-martial. R.C.M. 701(a)(1). Trial counsel shall, upon request of the Defense, permit the Defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, mental and physical examinations, and scientific tests, or copies of portions of these items, if the item is within the possession, custody, or *control of military authorities* and: the item is relevant to Defense preparation; the Government intends to use the item in the case-in-chief at trial; the Government anticipates using the item in rebuttal; or, the item was obtained from or belongs to the accused. R.C.M. 701(a)(2). Most importantly, the trial counsel shall, as soon as practicable, disclose evidence favorable to the Defense. R.C.M. 701(a)(6)

c. Disclosure of Evidence Favorable to the Defense. Trial counsel's disclosure obligations under R.C.M. 701(a)(6) includes disclosure of evidence that: tends to negate the guilt of the accused of an offense charged; reduce the degree of guilt of the accused of an offense charged; reduce the punishment; or, adversely affects the credibility of any prosecution witness or evidence. The Government must exercise due diligence in reviewing the files of other Government entities to determine whether such files contain discoverable information. *U.S. v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). The scope of the due diligence requirement with

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respect to Governmental files beyond the prosecutor's own files is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and, (3) *other files, as designated in a Defense discovery request, that involved a specified type of information within a specified entity*. *Williams*, 50 M.J. at 441. [Emphasis added.]

d. In *Williams*, the C.A.A.F. provided clarification on the trial counsel's obligation under Article 46 to remove obstacles to Defense access to information and provide such other assistance as may be needed to ensure that the Defense has an equal opportunity to obtain evidence. *Id.* at 442. Trial counsel must review prosecutorial files or the files of an investigative agency acting on the Government's behalf in the case at bar even without a great deal of specificity in the Defense discovery request. *Id.* The reasoning behind this obligation is that these are the files that are subject to the direct supervision or oversight by the prosecution. *Id.*

e. With respect to files not related to the prosecution's investigation, the Defense need for such files are likely to vary significantly from case to case, and the Defense is likely to be in the best position to know what matters outside the investigative files may be of significance. *Id.* at 443. Thus, "[t]he Article 46 interest in equal opportunity of the Defense to obtain such information can be protected adequately by requiring the Defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request." *Id.* at 443. Finally, whether reviewing prosecutorial files, files of an investigative agency acting on the Government's behalf, or records outside the prosecution's investigation, trial counsel's obligation to disclose favorable evidence applies equally to exculpatory and impeachment evidence. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). Impeachment evidence is evidence favorable to the accused because if used effectively it may make the difference between conviction and acquittal. *Bagley*, 473. U.S. at 676.

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f. Legal standard for evidence production. The standard for evidence production, which is the same as witness production, is whether the item is relevant and necessary. R.C.M. 703(c) and (f). Evidence is relevant if it has the tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Mil. R. Evid. 401. The legal test for logical relevance has an extremely low threshold. *U.S. v. Schlamer*, 47 M.J. 670, 681 (N.M.C.C.A. 1997). "Thus, 'relevance' is whether the questioned item of evidence has any tendency-whatsoever-to affect the logical consideration of any fact of consequence." *U.S. v. Will*, 2002 CCA LEXIS 218, *14-15[1]. Evidence is necessary within the meaning of this rule when it is not cumulative and "when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *U.S. v. Reveles*, 41 M.J. 388, 394 (C.A.A.F. 1995).

g. Military Rule of Evidence 509. Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged. The C.A.A.F. has stated that the deliberative process of judges is protected; however, it is not absolute. *U.S. v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009). In reviewing and adopting federal common law, C.A.A.F. highlighted case-by-case exceptions to the deliberative process protection. *Matthews*, 68 M.J. at 38 - 40. These exceptions include open and tangible facts, facts unavailable from other sources, or occasions where there is a strong showing of bad faith or improper behavior by a judge. *Matthews*, 68 M.J. at 39 - 41.

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[1] This case is unpublished; however, pursuant to NMCCA Rules of Appellate Procedure 30.2 it may be cited as persuasive authority.

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4. **Analysis of the Law.**

a. The Court should order the production of the information listed in paragraphs 1(a)(1-2) because it is relevant and necessary to whether LtCol Norman: 1) researched the law related to disqualification and recusal after the CMJ was notified by the LSSS West OIC and prior to ordering an Article 39(a) on 5 March; 2) intended to read a prepared, unsworn statement into the record on 8 March and later invoke "privileges" to shield himself from being interviewed by the parties or having to testify at a subsequent session of court; and, 3) intended to read a prepared, unsworn statement into the record in an attempt to decrease this Court's, and an appellate court's, scrutiny of his behavior.

b. The Government has an obligation to search for this information pursuant to a specific Defense request. *Williams*, 50 M.J. 436, 443. The Government has the ability to obtain this information under R.C.M. 703(g)(2) by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence. The Defense informed the Government that this information may be obtained by contacting the Legal Administrative Officer (LAO) of the Marine Corps, LSSS West LAO, or specific Lexis Nexis representatives. [Encl 9.]

c. This information will answer several relevant questions that are germane to whether LtCol Norman was actually biased and/or prejudiced against the Defense during the court-martial proceedings. In courts-martial, military judges often allow the Government to admit evidence of acts committed by an accused post-offense to show the accused's guilty mind. *U.S. v. Stanton*, 69 M.J. 228, 231 (C.A.A.F. 2010); Mil. R. Evid 404(b), *Manual for Courts-Martial* (2019 ed.). Similarly, the Defense seeks LtCol Norman's post-adjournment legal research – during a time when no substantive matters were before the Court and the Defense had not informed the Court of its intention to file a post-trial motion – to determine whether there is direct or circumstantial

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evidence of LtCol Norman's guilty mind. The evidence requested will provide answers, or partial answers, to the following questions:

(1) What was the approximate date that LtCol Norman was informed of the LSSS West OIC's concerns;

(2) How much time passed between LtCol Norman's initial search entries related to disqualification and recusal and his email to all parties on 5 March;

(3) Why LtCol Norman did not immediately inform the parties of potential evidence for disqualification, invite voir dire, and allow time for post-trial motions and the submission of evidence related to disqualification, recusal, or other matters;

(4) Why LtCol Norman ordered an Article 39(a) on 5 March when the Defense had not filed, nor given notice to the Court that it intended to file, a post-trial motion;

(5) Why LtCol Norman omitted the purpose for the 8 March Article 39(a) in his email to all parties on 5 March;

(6) Whether LtCol Norman used the time between notification of the LSSS West OIC's concerns and his email of 5 March to produce a statement that he could read into the record on 8 March;

(7) Why LtCol Norman did not allow the Defense to voir dire him or submit evidence during the Article 39(a) on 8 March;

(8) Why LtCol Norman did not rule on two Defense objections to him providing statements into the record related to AE 111 on 8 March; and,

(9) Why LtCol Norman refuses to be interviewed or testify in this case?

d. This information is necessary because the Defense has the burden of proof for AE 111 and it must be afforded an equal opportunity to access evidence to show that LtCol Norman was actually biased or prejudiced towards the Defense. *Williams*, 50 M.J. at 441. Additionally, LtCol Norman has refused to be interviewed or testify and the CMJ, to date, has not answered the Defense's

questions or made himself available for interview; thus, there is no alternative source of information available to answer the aforementioned questions.

e. This information is also necessary because it is favorable to the Defense under R.C.M. 701(a)(6). On page 10 of the Government's Response to AE 111, it asserts that "even if Lieutenant Colonel Norman's statement that Defense must 'pay a price' for going to a contested trial was inappropriate, when viewed in context and in light of all the circumstances, the 'legality, fairness, and impartiality' of the court-martial were not put into doubt." It is reasonable to assume that the Government will seek to elicit testimony from witnesses, submit documents, and/or provide argument consistent with this position at the 15 April Article 39(a). So, LtCol Norman's legal research history for a time period that: had no substantive matters pending before the Court; includes days after the judiciary had been notified of the LSSS West OIC's concerns and before LtCol Norman ordered an Article 39(a) that did not inform the parties of its purpose; that occurred before he read a statement into the record despite objections and which contained terms such as "totality of the circumstances" and "reasonable person"; and, that occurred prior to his refusal to testify or be interviewed, may only undermine the Government's evidence by revealing LtCol Norman's guilty mind. Therefore, the Government has an obligation to search for this type of evidence and disclose it if found. *Williams*, 50 M.J. at 443.

f. Finally, LtCol Norman's Lexis Nexis legal research history does not involve his deliberative process because the court-martial was adjourned between 20 February and 8 March, there were no substantive matters before the Court between 20 February and 5 March, the Defense had not given notice of its intent to file a motion prior to 5 March, and the Government has never served a copy of Maj Michel's Memorandum for the Record on any military judge assigned to the Western Judicial Circuit. Even if an argument can be made that LtCol Norman's legal research history during this time period and only for the terms listed in paragraphs 1(a)(1-2) should be protected by MRE 509, there has been a strong showing of bad faith or improper behavior by this military

judge in Maj Michel's Memorandum for the Record. Therefore, the deliberative process protection does not apply under these circumstances.

5. Evidence Offered.

a. Encl 1: Stipulation of Fact of 6 April 2021
b. Encl 2: Maj Michel Memorandum for the Record
c. Encl 3: Email from LtCol Norman of 5 Mar 21
d. Encl 4: Unofficial Transcript of 8 Mar 21 Article 39(a)
e. Encl 5: Emails with LtCol Norman, TC, and DC of 16 - 17 Mar 21
f. Encl 6: Emails with LtCol Norman, TC, and DC of 22 - 26 Mar 21
g. Encl 7: Emails with CMJ, TC, and DC of 30 - 31 Mar 21
h. Encl 8: DC questions to CMJ of 31 Mar 21
i. Encl 9: Defense Discovery Request of 31 Mar 21
j. Encl 10: Government Response to Defense Discovery Request of 6 April 21

6. Burden of Proof: As the moving party, the Defense bears the burden of proof by preponderance of the evidence.

7. Relief Requested. The Defense respectfully requests that the Court order the Government to produce the information listed in paragraphs 1(a) (1-2). **Alternatively, the Defense respectfully requests that the Court order the Government to obtain and seal the requested information without reviewing it and then provide it to the Court for an in-camera review.**

8. Argument. The Defense does not request oral argument.

9. Certificate of Service. I hereby attest that a copy of the foregoing motion was served on the Court and all parties on 6 April 2021.

[redacted]
R. ACOSTA

NAVY-MARINE CORPS TRIAL JUDICIARY

WESTERN JUDICIAL CIRCUIT

GENERAL COURT MARTIAL

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	BENCH BRIEF- MRE 509 PRIVILEGE 12 April 2021

I. Background

a. Lieutenant Colonel (LtCol) John P. Norman, U.S.M.C., presided over pretrial and merits portions of this General Court-Martial. Immediately after adjournment of sentencing, LtCol Norman made numerous *ex parte* comments which undermine the impartiality of the military judge. The Defense filed a Motion for Appropriate Relief and requested that the Government produce LtCol Norman as a witness. The Government agreed that LtCol Norman is both relevant and necessary to the proceeding and granted him as a witness. LtCol Norman informed the Government that "there are various privileges that are likely involved" and that he does "not intend to testify." The parties informed the Military Judge of LtCol Norman's response and requested the Military Judge compel LtCol Norman's presence and testimony. The Military Judge indicated that he would take the issue under consideration and a bench brief was acceptable regarding this issue.

II. Statement of Relevant Facts

a. On Saturday, 20 February 2021 the court-martial in the above captioned case adjourned. [Record of Trial (ROT), Statement of Trial Results; Encl 1, Stipulation of Fact].

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b. Defense Counsel, PFC Tapp, Victim Legal Counsel, and individuals in the gallery exited the courtroom shortly after adjournment. [Encl 2, Major (Maj) Michel Memorandum for the Record (MFR).]

c. Present in the courtroom after the aforementioned parties exited were the military judge, LtCol Norman, the detailed trial counsels, the court reporter, and the bailiff. [Encl 2.]

d. Major Michel, trial counsel, asked LtCol Norman if he would be willing to provide an after-action brief to the parties. Lieutenant Colonel Norman stated, "no." [Encl 2.]

e. Before the detailed trial counsels could exit the courtroom, LtCol Norman asked Maj Michel if he had seen worse sexual assault cases. This question then led to numerous comments by LtCol Norman over the next 30 - 40 minutes. [Encl 2.]

f. Lieutenant Colonel Norman's comments included: his displeasure with trial counsel asking for 11 years confinement during their sentencing argument; trial counsel unilaterally deciding to cap the potential sentence at 11 years confinement; displeasure with the Defense filing untimely motions and forcing the Government and Court to respond mid-trial; his opinion that trial counsel should be angry when the Defense files late or untimely motions; his opinion that the Defense has no incentive to avoid contested trials and no price to pay for their earlier decisions when the trial counsel caps the potential sentence. [Encl 2.]

g. Major Michel called the Regional Trial Counsel (RTC), LtCol [redacted] after exiting the courtroom on Saturday, 20 February 2021 to inform the RTC of LtCol Norman's comments. [Encl 1.]

h. The RTC called Colonel [redacted], Officer-in-Charge (OIC), Legal Services Support Section - West (LSSS - West) to inform him of what Maj Michel told the RTC. [Encl 1.]

i. The LSSS - West OIC subsequently called the Circuit Military Judge (CMJ), and LtCol

Norman's supervisor, Colonel [redacted] during the week of 22 - 26 February 2021 to voice his concern with LtCol Norman's statements and demeanor. [Encl 1.]

j. On Monday, 1 March 2021, the Government disclosed Maj Michel's MFR to the Defense. The Government did not disclose the MFR to any military judge assigned to the Western Judicial Circuit. [Encl 1.]

k. On Friday, 5 March 2021, LtCol Norman emailed all parties and ordered them to appear for an Article 39(a) on Monday, 8 March. *Lieutenant Colonel Norman did not disclose the purpose of the Article 39(a), there were no post-trial motions pending with the Court, and the only remaining action for the Court was entry of judgment.* [Encl 3.]

l. On Saturday, 6 March 2021 the Defense filed Defense Motion for Appropriate Relief, Appellate Exhibit E CX1 (AE 111). In AE 111, the Defense requests that LtCol Norman be disqualified from further participation in this case and the findings be dismissed with prejudice due to LtCol Norman's statements to the trial counsel on Saturday, 20 February 2021. *The Defense had not notified the Court before 6 March of its intention to file a post-trial motion.*

m. On Monday, 8 March 2021, the Defense moved to disqualify the military judge and objected twice to the military judge placing any comments on the record related to AE 111. Lieutenant Colonel Norman did not permit *voir dire* or evidence on the Defense's request to disqualify the military judge and did not rule on two Defense objections to him placing his comments on the record. [Encl 4, Unofficial Transcript of 8 March 21 Article 39(a), pp. 3 - 5; ROT Audio File: TappTH8Mar21Herm1 at 04:20 - 07:36.]

n. On Monday, 8 March 2021, LtCol Norman stated on the record that, "I do not believe that there is an appearance of bias, [but] based on the personal nature of the allegations in the Defense motion, and to ensure that the accused has confidence in the post-trial process, I have

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decided to recuse myself from any further post-trial matters..." [Encl 4, pp. 6.] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Encl 4.]

o. On Tuesday, 16 March 2021, the Defense emailed LtCol Norman and requested to interview him. On Wednesday, 17 March 2021, LtCol Norman emailed the Defense and Government to inform them that he respectfully declines to be interviewed. [Encl 5, Emails with LtCol Norman and TC of DC 16 - 17 Mar 2021.]

p. On Monday, 22 March 2021, the Government emailed LtCol Norman to inform him that the Government has approved a Defense request to produce him as a witness for the 15 April 2021 Article 39(a). On 26 March 2021, LtCol Norman informed the Government and Defense that he does not intend to testify because he believes there are various privileges involved (NFI). [Encl 6, Emails with LtCol Norman and TC and DC of 22 - 26 Mar 21.]

q. On Thursday, 1 April 2021, the Government emailed the Court and informed him of LtCol Norman's intent to not testify. The Government requested that the Court "issue a Court order for Lieutenant Colonel Norman to appear at the Article 39(a) motions session scheduled for 15 April 2021." [Encl 7, Emails with TC, DC, and the Court of 1 Apr 21.]

III. <u>Discussion of The Law - Military Rule of Evidence 509</u>

a. Military Rule of Evidence 509 states: Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged. In *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009), a military judge, sitting alone as a general court-martial, convicted the

defendant after a defense witness invoked the right against self-incrimination thirteen times. *Id.* at 30-31. The Army Court of Criminal Appeals ("A.C.C.A.") ordered an evidentiary hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (1967), at which the trial military judge testified extensively about his deliberative process. *Matthews*, 68 M.J. at 30-35. Ultimately, the C.A.A.F. held that the A.C.C.A. should not have considered the trial military judge's testimony "to the extent it revealed his deliberative process." *Id.* at 30. Yet, the C.A.A.F. did not find that calling the military judge to testify for other purposes at the *DuBay* hearing was improper. *Id.* To the contrary, the C.A.A.F., in adopting federal common law to support its ruling in *Matthews*, found that "federal courts have stopped short of prohibiting judicial testimony entirely and have employed a 'case-by-case' evaluation to delineate between protected and unprotected testimony. *Matthews*, 68 M.J. at 39. The C.A.A.F. also found that federal courts have permitted a judge to testify where a credible showing of judicial misconduct exists. *Id.* at 40-41.

c. Shortly after deciding *Matthews*, the C.A.A.F. set aside the decision of the Navy and Marine Corps Court of Criminal Appeals ("N.M.C.C.A.") on the issue of "exhibition of bias, after trial, in announcing his personal distaste" for both the defendant and the issues involved in the case. *United States v. Hayes*, 2009 C.A.A.F. LEXIS 945 (C.A.A.F. 2009.) The military judge's statements were made in a post-trial session with counsel for both parties present. On remand, the N.M.C.C.A. set aside the sentence because "the perception that a military judge has predetermined a certain punishment for a certain act or crime is, simply, unacceptable." *United States v. Hayes*, 2010 CCA LEXIS 364, *15 (N.M.C.C.A. Oct. 28, 2010.) The trial military judge was called to testify at the *DuBay* hearing and did provide testimony regarding his views of the defendant and the subject matter of the case. *Hayes*, 2010 CCA Lexis 364 at *14-15. The N.M.C.C.A. analyzed the trial military judge's *Dubay* testimony and was particularly concerned

about the timing of the trial military judge's statements to counsel, as they "suggest that the military judge held these views while presiding over this case and failed to compartmentalize them from his judicial conduct." *Id.* at *14. The N.M.C.C.A. considered the military judge's statements at the DuBay hearing that "his intent during the post-trial debrief was to convey that homosexual conduct, not homosexuality in general, has no place in the Armed Forces." *Id.* at *14. Then, N.M.C.C.A. held "In the context of this entire record of trial, this explanation includes the unfortunate inference that he believed, at the time of trial and at the time of adjudging a punitive discharge, that homosexual conduct should lead to a discharge, even if that conclusion was not his actual intent." *Id.* at *14-15.

d. Similarly, in *United States v. Kish*, 2013 CAAF Lexis 280 (C.A.A.F. March 14, 2013), the C.A.A.F. set aside the decision of the N.M.C.C.A., returned the case to the Navy JAG, and ordered a remand to the appropriate convening authority for a *DuBay* hearing to make findings of fact and conclusions of law related to what, if any, statements that the military judge made during a Professional Military Education (PME) meeting with junior officers regarding the practice of military justice. At the *DuBay* hearing, the military judge who gave the PME was called to testify and his testimony was considered by the presiding *DuBay* judge for his findings of fact. *United States v. Kish*, N.M.C.C.A. 2014 CCA Lexis 358 *16-18 (N.M.C.C.A. 17 June 2014). This included a finding of fact that the military judge who gave the PME admitted almost all of the statements alleged by law students attending the PME. *Kish*, 2014 CCA Lexis 358 *32, para. 45. After the DuBay hearing the record was returned to N.M.C.C.A. and the Court relied on the DuBay judge's findings of fact to conclude that the military judge's comments during the PME viewed in tandem with his actions during trial give rise to the appearance of bias in the case. *Kish*, 2014 CCA Lexis 358 *13.

e. Finally, the individual invoking MRE 509 must specifically show the need for secrecy. Judicial privilege exists in military court-martial to the extent the privilege exists in federal courts. *See* Mil. R. Evid. 509 ("[T]he deliberations of . . . military judges . . . are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts..."). Federal courts have firmly held that judicial privilege is not absolute, and cannot be asserted generally. *Cain v. New Orleans*, 15-4479 at *9 (E.D. La. Dec. 8, 2016) (noting that "unlike some state courts [which] have held that judicial deliberative process privilege is absolute," the "leading case in the federal courts" holds that the privilege is a "qualified one, which does not prevent disclosure in every instance.") Rather, the judge asserting the privilege not only must show that the sought-after information was "deliberative" but also some "specific need for secrecy over and above those needs which normally apply and give rise, in the first place, to a privilege." *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488 (11th Cir. 1986.)

IV. Analysis of the Law.

a. The deliberative process protection provided by M.R.E. 509 is not absolute; thus, LtCol Norman cannot use that privilege to avoid being called as a witness in this case. This case is more akin to *Kish* and *Hayes* than it is to *Matthews*. In both *Hayes* and *Kish* the military judge was called as a fact witness to discuss events that took place after those courts-martial had adjourned. In both cases, the N.M.C.C.A. relied on the military judge's statements in determining whether the appellant was entitled to relief. In contrast to *Hayes* and *Kish*, during the *DuBay* hearing in *Matthews*, the military judge–who sat as a military judge alone court-martial–was called to testify about whether he drew a negative inference under the interests of justice exception in M.R.E. 512 after a witness invoked his right against self-incrimination and

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how the military judge assessed the credibility of that witness. *Matthews*, 68 M.J. at 32-33.

b. The Defense does not intend to ask questions that require LtCol Norman to explain his reasoning and deliberative process for reaching a decision on an objection or motion. Instead, he is being called as a fact witness. In *Matthews*, the C.A.A.F., in relying on federal common law to reach its conclusion, discovered that the most common line of demarcation for determining whether the privilege applies is between factual testimony and testimony about a judge's deliberative process...and a judge may testify to the extent the testimony contains personal knowledge of historical facts or expert opinion. *Matthews*, 68 M.J. at 39. In this case, LtCol Norman will not be asked to reveal his thoughts and impressions regarding witness credibility, inferences drawn from evidence presented during an Article 39(a) motions session, or his reasoning when granting or denying objections at trial. Instead, LtCol Norman will be called as a percipient witness for matters related to his post-trial comments; knowledge about LSSS-West structure, resources, and manpower; when he learned that his actions had been reported to the LSSS West; and, comments made in open court to the trial counsel or defense counsel throughout the course of the court-martial. These subjects do not require him to reveal his thoughts and impressions during his deliberative process on motions or objections; thus, he should be ordered to testify.

c. Finally, even if the Defense changes course and intends to ask questions that may reveal the military judge's deliberative process, it is not precluded from doing so and neither is the military judge or trial counsel because there is evidence of judicial bad faith. In holding that A.C.C.A. was not permitted to consider portions of the military judge's testimony that revealed his deliberative process, the C.A.A.F. reasoned that "this case is not one involving issues about which federal courts have previously permitted trial judges to testify -- this is not habeas corpus,

there is no evidence of judicial bad faith or misconduct, and inquiry was not limited to material factual matters about which the military judge was uniquely or specially situated to testify." *Matthews*, 68 M.J. at 40-41. This means that C.A.A.F. recognizes that a military judge could be ordered to testify about his deliberative process if there is evidence of judicial bad faith or misconduct.

d. There exists evidence of judicial bad faith or misconduct in this case as supported by the facts that: 1) LtCol Norman had an ex parte conversation with the trial counsel minutes after this court-martial adjourned; 2) Major Michel's MFR depicts a military judge who was critical of trial counsel for capping the potential sentence in a serious sexual assault trial and not making the accused pay a price for filing motions and contesting this case; 3) the trial counsels believed these comments were serious enough to immediately report them to their supervisors; 4) the LSSS West OIC, during 22 - 26 February, believed LtCol Norman's behavior was serious enough to call Colonel [redacted] and express his concerns with LtCol Norman's behavior; 5) LtCol Norman was silent about any matter related to this case after the ex parte conversation on 20 February until he emailed on parties on 5 March; 6) LtCol Norman emailed all parties on Friday, 5 March and ordered them to appear in court on Monday, 8 March; 7) LtCol Norman's email of 5 March was in the afternoon, shortly before weekend liberty, one day before the 14-day post-trial motions deadline under R.C.M. 1104, and silent as to the Article 39(a)'s purpose; 8) the Government never disclosed Maj Michel's MFR to any military judge assigned to the Western Judicial Circuit; 9) the Defense did not file, or notify the Court of its intention to file, a post-trial motion until 6 March; 10) On 8 March, LtCol Norman stated on the record, "Now let's turn our attention to why we are here today. On 6 March 2021, the Defense filed a post-trial motion for appropriate relief, which has been marked as Appellate Exhibit 111", a statement that was not

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accurate because it omitted the fact that he ordered an Article 39(a) prior to the Defense filing its motion; and, 11) LtCol Norman has refused to be interviewed or testify. Thus, one reasonable view of these facts is that LtCol Norman, despite knowing he had an ex parte conversation with the trial counsel, purposefully hid this information the Defense until 8 March 2021. Then, on 8 March, when he revealed it to the Defense for the first time on the record, he did so by reading a prepared, unsworn statement. He also ignored a Defense motion asking for his disqualification from the case and two objections to him reading the unsworn statement into the record. This was an attempt to cast his post-trial actions in a favorable light to reduce scrutiny of his statements and behavior during future sessions of this court-martial and on appeal.

V. Conclusion

a. For all the aforementioned reasons, this Court should order the production of LtCol Norman for in-person testimony at the Article 39(a) scheduled for Thursday, 15 April 2021.

VI. Evidence.

a. Encl 1: Stipulation of Fact of 6 April 2021
b. Encl 2: Maj Michel Memorandum for the Record
c. Encl 3: Email from LtCol Norman of 5 Mar 21
d. Encl 4: Unofficial Transcript of 8 Mar 21 Article 39(a)
e. Encl 5: Emails with LtCol Norman, TC, and DC of 16 - 17 Mar 21
f. Encl 6: Emails with LtCol Norman, TC, and DC of 22 - 26 Mar 21
g. Encl 7: Emails with TC, DC, and the Court of 1 Apr 21

VII. Certificate of Service.

a. I hereby attest that a copy of the foregoing brief was served on the court and opposing counsel on Monday, 12 April 2021.

[redacted]
R. ACOSTA

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

UNITED STATES v. THOMAS H. TAPP Private First Class / E-2 U.S. Marine Corps	**GOVERNMENT BENCH BRIEF** **(Judicial Privilege)** 12 April 2021

1. **Issue**. Whether this Court should order Lieutenant Colonel Norman to testify in light of Military Rule of Evidence (M.R.E.) 509 and the relevant federal common law regarding judicial privilege.

2. **Conclusion**. This Court should order Lieutenant Colonel Norman to provide brief, strictly factual testimony about matters not falling within the scope of his deliberative processes.

3. **Principles of Law**.

- Except as provided in M.R.E. 606, the deliberations of … military judges … are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged. *Military Rule of Evidence 509.*
- M.R.E. 509 incorporates the federal common law protection of a judge's deliberative process. *United States v. Matthews*, 68 M.J. 29, 43 (C.A.A.F. 2009) (concluding that a military trial judge's testimony about his deliberative process is unreviewable as inadmissible evidence absent a "strong showing of bad faith or improper behavior.").
- "A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought *never* to be overthrown or limited by the oral testimony of a judge … of what he had in mind at the time of the decision." *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (emphasis added) (finding that a trial judge was not a competent witness "in respect to the matters he considered and passed upon" in a trial six years earlier, and cautioning that "no testimony should be received except of open and tangible facts—matters which are susceptible of evidence on both sides").
- Under federal common law, a judge may testify to factual matters outside his deliberative process if: (1) he possesses factual knowledge of the issue; (2) that knowledge is highly pertinent to the factfinder's task; and (3) he is the only possible source of testimony on the relevant factual information. *United States v. Frankenthal*, 582 F.2d 1102, 1108 (7th Cir. 1978); *see also United States v. Roth*, 332 F. Supp. 2d 565 (S.D.N.Y. 2004); *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009) (noting that courts have previously permitted trial judges to testify in habeas cases, where there is evidence of judicial bad faith or misconduct, and "inquiry … limited to material factual matters about which the military judge was uniquely or specially situated to testify").

- "While the case law is often inconsistent in its terminology, whether describing the limitation on deliberative process testimony as a privilege, a protection, inadmissible evidence, or some other characterization, the operation and application of the limitation is the same—courts will not review the deliberative process of a judge." *Matthews*, 68 M.J. at 39 (C.A.A.F. 2009) (citing *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978)).
- Oral examination of a judicial officer as to matters within the scope of his adjudicative duties should be permitted only upon a strong showing of bad faith or improper behavior. *United States v. Roebuck*, 271 F. Supp. 2d 712 (D.V.I. 2003); *United States v. Ianniello*, 740 F. Supp. 171, 187 (S.D.N.Y. 1990).
- Where not otherwise proscribed by the Manual for Courts-Martial and not inconsistent with or contrary to the UCMJ or the Manual, courts should look to the federal rules and the common law for guidance on evidentiary issues. M.R.E. 101(b); *Matthews*, 68 M.J. at 38 n. 2.
- Federal courts have not prohibited judicial testimony outright, but rather have employed a case-by-case evaluation to determine whether testimony is protected. *Matthews*, 68 M.J. at 39 (citing *Standard Packing Corp. v. Curwood, Inc.*, 365 F. Supp. 134, 135 (N.D. Ill. 1973).

4. Facts.

On 24 February 2021, at a contested general court-martial, members convicted PFC Thomas Tapp, U.S. Marine Corps, of, among other things, sexual assault. In its sentencing argument, the Government asked the members to sentence PFC Tapp to eleven years. Instead, the members sentenced PFC Tapp to three years. The Court then dismissed the members and adjourned the court-martial.

After the court-martial adjourned, PFC Tapp, his defense team, and the Victim's Legal Counsel exited the courtroom. Left in the courtroom were the military judge, the three trial counsel, the bailiff, and the court reporter. The trial counsel asked whether the military judge would be willing to give a post-trial brief. The military judge declined. Despite this initial declination, the military judge began to discuss the case with the trial counsel. In particular, the military judge expressed displeasure with the Government's sentencing argument, and questioned the Government's decision to ask for eleven years, as opposed to the maximum allowed under the law. The military judge stated that doing so did not incentivize the defense to avoid contested litigation because there was no "price" to be paid by the defense for not pursuing a plea agreement. The lead trial counsel captured these statements in a Memorandum for the Record, which he served on the defense.

On 8 March 2021, following a defense Motion for Appropriate Relief seeking a mistrial based on the military judge's post-trial comments, the military judge held a post-trial 39(a) hearing. During this hearing, the military judge addressed on the record the post-trial comments that he made to trial counsel. Among other things, the military judge acknowledged that he gave the Government "stern, direct feedback." He stated that his feedback was designed to impress upon the Government the importance of not undervaluing the case, and incentivizing the defense to engage in effective pre-trial negotiations. He further acknowledged that he should have taken

steps to include the defense in his post-trial feedback, but stated that his comments did not support a finding of bias. He then recused himself from any further post-trial matters and turned the case over to the Circuit Military Judge for detailing to a different military judge.

5. Discussion and Analysis.

In *United States v. Matthews*, 68 M.J. 29, 42 (C.A.A.F. 2009), the Court of Appeals for the Armed Forces (CAAF) held that portions of a military judge's testimony regarding his deliberative process described during a hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (1967) was unreviewable by the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) under Military Rule of Evidence (M.R.E.) 509. Although CAAF adopted the strong federal common law protection of a judge's deliberative process, it was largely silent on other instances in which a trial judge may be called to testify. Specifically, the *Matthews* court noted that federal courts have permitted trial judges to testify in three general scenarios: 1) in *habeas corpus* cases;[1] 2) where the inquiry is limited to material factual matters about which the military judge was uniquely or specially situated to testify; and 3) where there is evidence of judicial bad faith or misconduct. *Id* at 40-41.[2] Although *Matthews* cited approvingly to federal civilian cases supporting each of these propositions, it did not specifically apply any of these common law concepts.

Here, M.R.E. 509 and *Matthews* are the controlling law on the issue of whether Lieutenant Colonel Norman can testify as to his deliberative process. However, there is still no definitive military case law on judicial testimony regarding factual matters. CAAF in *Matthews* based its analysis on *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904) which held, in pertinent part, that judicial testimony should be limited to "open and tangible facts." But the *Matthews* Court also approvingly cited the test from *United States v. Frankenthal*, 582 F.2d 1102 (7th Cir. 1978)—that a judge may testify to factual matters only where he or she is the sole possible source of such testimony. *See also United States v. Roth*, 332 F.Supp.2d 565, 568 (S.D.N.Y. 2004) (noting that in *Frankenthal*, "the judge's testimony was only permitted because the judge was only required to give 'brief, strictly factual testimony.'"). The *Matthews* Court also largely cited cases where the judge was protected from being compelled to testify, even on factual matters.

Despite this, CAAF, citing *Matthews*, nonetheless ordered affidavits be obtained from military judges regarding factual matters in *United States v. Hayes*, 2009 CAAF LEXIS 945 (C.A.A.F. 2009) and *United States v. Riverarosado*, 2012 CAAF LEXIS 18 (C.A.A.F. 2012). Because CAAF did not specifically apply the *Frankethal* test, or provide any analysis on this issue in *Hayes* and *Riverarosado*, it is unclear why CAAF took such action. In the face of this uncertainty, and for the reasons discussed below, this Court should order Lieutenant Colonel

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[1] *But see Matthews*, 68 M.J. 29, 40 n. 10 (CAAF 2009) (noting that while judges have been permitted to testify in *habeas* cases, the practice "appears more akin to a remand for further analysis or factfinding," and may be outmoded in light of subsequent Congressional legislation).

[2] CAAF specifically noted that, up to that point, there was "no definitive military law from this Court" on the issue of judicial testimony, and "sparse federal case law."

Norman to provide limited testimony in the interests of judicial economy; namely, to avoid later fact-finding at a *DuBay* hearing and to provide factual certainty in the record.

a. Lieutenant Colonel Norman's deliberative process is not subject to inquiry.

A judgement is a "solemn record," that should not be disturbed by testimony as to the judge's mental processes at the time. *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). "It is well-settled law that testimony revealing the deliberative thought processes of judges ... is inadmissible." *Matthews*, 68 M.J. at 42 (citations omitted); *see also United States v. Roebuck*, 271 F. Supp. 2d 712, 718 (U.S.D.V.I. 2003) ("The overwhelming authority concludes that a judge may not be compelled to testify concerning the mental processes used in formulating official judgements or the reasons that motivated him in the performance of his official duties") (citations omitted). Except for the express exceptions in M.R.E. 606,[3] none of which are applicable here, M.R.E. 509 *protects* the judge's deliberative process, rather than establishing a privilege that may be invoked or waived. *Id* at 38.[4] Simply put, testimony received by Lieutenant Colonel Norman regarding his thought process as a military judge is inadmissible.

b. Although Lieutenant Colonel Norman would be protected from testifying under the legal regime of *Frankenthal* and *Roebuck*, which were cited by *Matthews*, CAAF in *Hayes* and *Riverarosado* ordered the applicable appellate courts to compel affidavits from the military judges in each case.

In *Matthews*, CAAF noted, but did not hold, that federal courts have allowed judicial testimony where "a sufficient basis exists for calling the judge to testify and those facts are unavailable from other sources." *Matthews*, 68 M.J. at 40. The *Matthews* court cited to *United States v. Frankenthal*, 582 F.2d 112 (7th Cir. 1978) and *United States v. Roebuck*, 271 F. Supp 2d 712 (D.V.I. 2003) to support the proposition that judicial testimony may be appropriate where a judge is uniquely situated to provide necessary facts. Since *Matthews*, CAAF has not expanded its reasoning, nor has it ruled on a case that is dispositive in this regard. Two subsequent cases, *United States v. Hayes*, 2009 CAAF LEXIS 945 (CAAF 2009), and *United States v. Riverarosado*, 2012 CAAF LEXIS 18 (CAAF 2012), were remanded for additional fact-finding, including ordering affidavits from the military judges regarding their post-trial comments. In both, CAAF's order cited *Matthews*, but offered no analysis of its application. Thus, there is no

[3] M.R.E. 606(b)(2) grants an exception for members or a military judge to testify about whether:

(A) extraneous prejudicial information was improperly brought to members' attention;

(B) unlawful command influence or any other outside influence was imrproperly brought to bear on any member; or

(C) a mistake was made in entering the finding or sentence on the finding or sentence forms.

[4] *Matthews* and M.R.E. 509 are coterminous. *See* Rule 509, App. 22, Analysis of the Military Rules of Evidence (MCM 2012 ed.) ("The committee added the language "courts-martial, military judges" to this rule in light of CAAF's holding in *United States v. Matthews*.... The changes simply express what the court found had previously been implied").

readily available binding military case law on whether a military judge may testify regarding factual matters *not* related to his deliberative process.[5]

In *United States v. Frankenthal*, 582 F.2d 112 (7th Cir. 1978), the Seventh Circuit Court of Appeals established a three-pronged analysis to determine whether a judge could be required to testify. Specifically, the Court held that a party must show that: (1) the judge possesses factual knowledge of the issue; (2) that knowledge is highly pertinent to the factfinder's task; and (3) the judge is the only possible source of the factual knowledge. *Id* at 1108. Each prong must be answered in the affirmative to compel a judge to testify on a matter. Here, although the first two prongs would be met, the third prong—that Lieutenant Colonel Norman is the *only possible source* of the information—cannot be established, and therefore Lieutenant Colonel Norman could not be compelled to testify.

The defendant in *United States v. Roebuck*, 271 F. Supp. 2d 712 (D.V.I. 2003), sought the trial judge's testimony regarding potential bias he had for the defense attorney, who had published articles advocating for the trial judge's removal from the bench. During an unrelated appellate case, the trial judge made statements from the bench that the attorney's writings had angered him, which was why he had initially recused himself from all of her cases, but that he was now less angry and could now continue hearing her cases. *Id* at 716. The attorney sought to compel the trial judge's testimony, as well as that of all of the other witnesses, after the audio recording proved inaudible. Specifically, the attorney sought to question the judge about his decision to recuse himself and his decision to withdraw his recusal later. Citing *United States v. Morgan*, 313 U.S. 409, 421-422 (1941), the district court found that the trial judge could not be compelled to answer the defendant's proposed questions. *Id* at 721. The court found that there were several non-judicial witnesses to the trial judge's statements, whose sworn statements could be used to reconstruct the record for the defendant's argument.

Despite citing *Frankenthal* and *Roebuck* in *Matthews*, CAAF subsequently ordered judicial testimony in *United States v. Hayes*, 2009 CAAF LEXIS 945 (CAAF 2009) (ordering N-M.C.C.A. to obtain affidavits for the limited purpose of determining "whether statements were made by the military judge ... and, if so, what was said") and *United States v. Riverarosado*, 2012 CAAF LEXIS 18 (CAAF 2012) (ordering A.C.C.A. to obtain affidavits "from the military judge and other appropriate persons" "limited to determining what statements were made by the military judge in the ["Bridging the Gap"] session"). In both, CAAF directed the appellate court's attention to the *Matthews* decision without providing any analysis or explication. Both *Hayes* and *Riverarosado*, as here, addressed post-trial comments made by a military judge. However, unlike the case here, judicial testimony was necessary to determine what, exactly, the military judge said.

Citing *Matthews*, CAAF in *Hayes* ordered the appellate court to obtain limited affidavits from the military judge "and other appropriate persons, if any," to determine whether the military judge made statements in a post-trial brief regarding the appellant's homosexuality. *Hayes*, 2009

[5] Additionally, while not part of the *Matthews* case law, in *United States v. Kish*, 2014 CCA LEXIS 358 (N-M.C.C.A. 2014), a military judge was called to testify in a *DuBay* hearing regarding comments he made to Marine law students in a Professional Military Education session, after two of the officers took issue with the judge's comments regarding zealous Government advocacy. The comments were not made in a post-trial debrief, as here, but were used on appeal to support the appellant's argument that, the military judge exhibited bias during trial when he essentially took on the role of prosecutor by engaging in intense and at times irrelevant questioning of a witness.

CAAF LEXIS 945 (CAAF 2009). Following the accused's conviction for indecent acts[6] in *United States v. Hayes*, 2007 CCA LEXIS 416, (N-M.C.C.A. 2007), the military judge in a post-trial debrief made comments to the effect of "Marines shouldn't have to live in the barracks with people like" the accused, and that "homosexuality has no place in the armed forces." *Id* at 12. The accused cited these comments in his unsworn clemency matters, with little indication as to their veracity. *Id* at 22 ("We do not know if the comments were quoted verbatim, or in what context they were made, or if they were made at all"). The trial defense counsel subsequently submitted an affidavit affirming the claims made in the clemency matters, however, the trial counsel's affidavit stated that she did not recall any comments made by the military judge, and indicated "that she may have been in Iraq when the case was adjudicated." *United States v. Hayes*, 2008 CCA LEXIS 505 (N-M.C.C.A. 2008). CAAF then required N-M.C.C.A. to "obtain affidavits from the military judge and other appropriate persons, if any, relating to what, if any, statements the military judge made concerning the accused in a 'Bridging the Gap' session with counsel after the trial," and authorized a hearing pursuant *United States v. DuBay*, 17 C.M.A. 147 (1967).[7]

Again citing *Matthews*, CAAF in *Riverarosado* ordered the appellate court to obtain limited affidavits "from the military judge and other appropriate persons" to determine what statements were made by the military judge during a post-trial "Bridging the Gap" session. *Riverarosado*, 2012 CAAF LEXIS 18 (CAAF 2012). The accused in *Riverarosado* claimed in post-trial clemency matters that the military judge made comments in a post-trial feedback session that indicated that the military judge's finding of guilt for some specifications improperly spilled over into another. The appellate court, based on CAAF's ruling, ordered limited affidavits from all parties to determine what the military judge said during the post-trial session. *Riverarosado*, 2012 CCA LEXIS 101 (A.C.C.A. 2012). The trial counsel who were present stated in their affidavit that they did not recall the military judge's comments. *Id* at 4. The defense counsel in their affidavit also stated that they did not recall the comments, however, they affirmed the issue raised in the clemency matter. *Id*. Ultimately, the military judge's recollections were the sole source of information on the issue. *Id* at 3-4. Based on the affidavits, the A.C.C.A. determined, based on the affidavits received, that a *DuBay* hearing was unnecessary. *Id* at 3.

In both *Hayes* and *Riverarosado*, CAAF cited *Matthews* but did not offer any analysis for why the Court required the trial military judges to submit affidavits. In both cases, CAAF simply directed the appellate courts to obtain affidavits to determine what statements were made during the respective post-trial "Bridging the Gap" sessions. In both, there were critical deficiencies in the record, which required reconstruction. Curiously, while it was clear in *Hayes* that the military judge was the sole source of information, it was not apparent until the A.C.C.A.'s decision in *Riverarosado* that that was the case. Nonetheless, in both, the critical issue was what the military

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[6] The accused pled guilty at special court-martial for indecent acts after being charged with forcible sodomy for entering the victim's room while the victim was asleep, placing his mouth on the victim's penis, and inserting the victim's penis into his anus.

[7] Despite N-M.C.C.A. finding no bias in *United States v. Hayes*, 2007 CCA LEXIS 416 (N-M.C.C.A. 2007) and *United States v. Hayes*, 2008 CCA LEXIS 505 (N-M.C.C.A. 2008), N-M.C.C.A. in *United States v. Hayes*, 2010 CCA LEXIS 356 (N-M.C.C.A. 2010) found that the post-trial statements made by the military judge indicated bias, and ordered that the sentence set aside. CAAF did not review the decision.

judge actually said, which issue could only be resolved by asking the military judge.[8] Even if done unintentionally, the decision to require an affidavit in *Riverarosado* comports with the *Frankenthal* and *Roebuck* reasoning implicit in *Matthews*.

The Court in *Matthews* cited *Frankenthal* and *Roebuck* in support of the proposition that factual judicial testimony may be permissible where a sufficient basis exists for calling the judge to testify and those facts are unavailable from other sources. *Matthews*, 68 M.J. at 40. Despite this, without clear analysis or a finding that no other source for the information was available, CAAF in *Hayes* and *Riverarosado* ordered the appellate courts to obtain affidavits from the military judges in each case to determine what the military judge actually said. Further, although factually distinguishable from this case, CAAF in *Kish* ordered a *DuBay* hearing to determine what a military judge said in a PME session despite substantial already-existing evidence, including testimony and statements from five law student witnesses and the military judge himself. Under the law as described in *Matthews* and in light of the test from *Frankenthal*, Lieutenant Colonel Norman arguably should not be compelled to testify given the availability of other witnesses and his own statements on the record at the 8 March 2021 recusal hearing. However, CAAF's orders for additional fact finding in *Hayes*, *Riverarosado*, and *Kish*, suggest otherwise. In the face of this uncertainty, this Court should order Lieutenant Colonel Norman to provide limited testimony in the interests of judicial economy, to avoid later fact-finding at a *DuBay* hearing and to provide factual certainty in the record.

c. Because the central issue here is whether Lieutenant Colonel Norman's comments indicated bias, there is not a *prima facie* demonstration of impropriety that would warrant Lieutenant Colonel Norman being called to testify as to matters within the scope of his adjudicative duties.

Judges "are presumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941) (comparing cabinet officers and judges). Were a judge vulnerable to subpoena for every action that he took, the judiciary would be subject to "frivolous attacks upon its dignity and integrity, and ... interruption of its ordinary and proper functioning." *United States v. Ianniello*, 740 F. Supp. 171, 187 (S.D.N.Y. 1990) (quoting *United States v. Dowdy Co.*, 440 F. Supp. 894, 896 (W.D.Va. 1997); *United States v. Valenti*, 120 F. Supp. 80, 83 (D.N.J. 1954)). "[A] judge may be permitted to testify where a credible showing of judicial misconduct exists." *Matthews*, 68 M.J. at 40 (CAAF 2009) (quoting *Roebuck* as allowing a judge to be questioned as matters within the scope of his adjudicative duties "only in the most extraordinary of cases" where there is "a strong showing of bad faith or improper behavior").

The *Matthews* court cited to *Roebuck*, 271 F. Supp 2d. 712, 719-21, as demonstrating that a credible showing of judicial misconduct may permit judicial testimony regarding "matters within the scope of his adjudicative duties." *Matthews*, 68 M.J. at 40. As discussed above, the *Roebuck* court found that a defendant could not compel testimony from a military judge where there were non-judicial witnesses whose sworn statements could be used to support the defendant's argument.

[8] Contrary to CAAF's direction to obtain limited affidavits, N-M.C.C.A. in *United States v. Hayes* 2010 CCA LEXIS 364 (N-M.C.C.A. 2010) noted that the trial judge testified during the *DuBay* hearing. *See id* at n. 3.

In turn, the *Roebuck* court cited the proposition to *Ianniello*, 740 F. Supp at 178. In *Ianniello*, organized crime associates convicted of racketeering moved for a new trial and for recusal of the district judge in deciding the motion, arguing, among other things, that alleged ex parte communications between the judge and jury denied the defendants a fair trial. The allegations were supported by affidavits from three separate jurors that had been procured by a private investigator hired by the defendants. In particular, the foreperson in her affidavit alleged that the judge appeared in the deliberation room and stated that she wanted either a conviction or an acquittal, but no hung jury. *United States v. Ianniello*, 866 F.2d 540, 541 (2d Cir. 1989). The foreperson claimed that on a second occasion, while the foreperson was in the judge's "room" making a telephone call, "the Judge admonished that [the foreperson] must pull the others together and reach a verdict ..., again stating that she did not want a hung jury." *Id.* The two other affidavits supported the foreperson's assertion that the judge had made statements indicating that she preferred that there not be a hung jury. *Id.* Faced with these allegations, but unclear on what occurred, the Second Circuit remanded the case for further factfinding. In its instructions to the District Court, the Second Circuit largely left the conduct of the hearing to the lower court, but recommended that the court take the testimony of the jurors who supplied the affidavits, the investigator who took the affidavits, and the marshal who acted as bailiff (and was also accused of making prejudicial comments to jurors). The Second Circuit granted broad discretion to the lower court as to whether the military judge should be *asked* to testify, suggesting, "Perhaps [the trial judge]'s account of the facts may be adequately set forth in an affidavit." *Id* at 544.

On remand, the district court took the testimony of the jurors, the bailiff, and the investigators who collected the affidavits. *See generally Ianniello*, 740 F. Supp. 171 (S.D.N.Y. 1990). Rather than calling the trial judge to testify, the district court wrote a letter to the judge requesting that—if she felt that she had "material evidence which bears on the issue"—she supply any relevant information in the manner she saw fit. *Id* at 186. The trial judge then provided an affidavit in which she denied ever counseling a jury as alleged in the foreperson's affidavit. *Id* at 186-87. She further recounted two instances in which she communicated ex parte with the jury: once when she asked an ill juror whether the juror was feeling better; and once when the jury requested blankets and pillows, and the trial judge responded, "either the jury deliberates or they will be sent home." *It* at 187.

In response to defendants' arguments that the trial judge should take the stand, the district court declined, on the grounds that the oral testimony from the trial judge would be cumulative and unnecessary. *Id* at 188. The district court in *Ianniello* noted that Article III judges have no "absolute express constitutional immunity from giving testimony," but that there was "a strong prudential interest ... in favor of protecting the court and its judges from harassment and interference with the performance of their duties." *Id* at 188-89. The district court concluded that its analysis of whether the trial judge could be called by stating:

> The first point to be considered ... is one of necessity. If there is no necessity to call the trial judge as a witness, a discretionary call weighing the implied Constitutional privilege to be free of subpoenas arising out of judicial duties against the degree of the necessity for the testimony is not required.

Id at 189. Ultimately, the district court concluded that there was no credible evidence that the trial judge interfered with the deliberations of the jurors or attempted to influence or coerce the trial jury.

Ianniello represents the proposition that a trial judge may testify where there is a strong showing of judicial misconduct. Nonetheless, neither *Matthews* nor *Ianniello* defines judicial misconduct.[9] Further, neither *Matthews* nor *Ianniello* mandates testimony from the trial judge. On the contrary, both the 2d Circuit and the district court approached the issue of the trial judge's testimony deferentially, with the district court leaving to the trial judge's to decide whether and how she would provide information. After accepting the trial judge's affidavit, the district court deferred to the military judge's statement of the facts,[10] and evaluated the allegations based primarily on the in-person testimony of the jurors who had signed the affidavits.

The statements made by Lieutenant Colonel Norman do not rise to the level of those allegedly made by the trial judge in *Ianniello*. Neither *Matthews* nor *Ianniello* define judicial misconduct. Nonetheless, *Ianniello* deals with ex parte comments made by the presiding judge. Different from this case, however, is to whom and when the comments were made. In *Ianniello*, the comments were allegedly made to the jurors in an attempt—according to the affidavits of the three jurors—to influence the jurors' decision. According to the affidavits, the trial judge expressly stated a preference for either acquittal or conviction, rather than hung jury, in the midst of the jury's deliberation. Here, Lieutenant Colonel Norman expressed displeasure with the Government's sentencing argument to the Government *after* adjournment. Unlike the allegations in *Ianniello*, Lieutenant Colonel Norman's feedback could not have an impact on the proceedings, which had already concluded.

Similar to *Ianniello*, however, Lieutenant Colonel Norman provided evidence as to what comments he said. During the 8 March 2021 39(a), Lieutenant Colonel Norman acknowledged that he provided "stern, direct feedback" to the Government, and reiterated on the record the points he made in the post-trial briefing, which aligned with the MFR submitted by the Government. He also corroborated the affidavit provided by the court reporter. Unlike the affidavits in *Ianniello*, there is broad agreement in the statements provided in this case by the Government, the court reporter, and Lieutenant Colonel Norman. Even if the statements at issue here rose to the level in *Ianniello*, Lieutenant Colonel Norman's testimony here would likely be as cumulative as that in *Ianniello* due to the broad agreement between the Government and Lieutenant Colonel Norman's statements. Further, because the unresolved issue here is whether Lieutenant Colonel Norman's statements evidence prior bias, the facts do not support a prima

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[9] Black's Law Dictionary defines "misconduct" as, "A dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." *Misconduct*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Official misconduct" is defined as, "A public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance." *Official misconduct*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] The district court summarily dismissed the utility of defense requests to cross-examine the trial judge, stating, "[The trial judge]'s affidavit is plain, and there is no practical reason to believe that calling her as a witness would increase her recollection of this lengthy and undoubtedly burdensome trial concluded almost two years ago. Moreover, calling the Judge as a witness solely to assess her credibility would be pointless because *the burden of proof of an element of a claim or defense cannot be satisfied by calling a witness who testifies to the contrary of the fact sought to be proved*, and then arguing that by demeanor the witness is implausible or incredible." *Id* at 188 (emphasis added).

facie case of judicial misconduct that would overcome the presumption of regularity to compel Lieutenant Colonel Norman to be questioned as to matters within the scope of his adjudicative duties. As result, this Court should not allow inquiry into Lieutenant Colonel Norman's deliberative process.

6. **Conclusion**. This Court should order Lieutenant Colonel Norman to provide brief, strictly factual testimony about matters not falling within the scope of his deliberative processes. Specifically, this Court should order Lieutenant Colonel Norman to testify for the limited purpose of determining what, if any, post-trial statements he made to the trial counsel, outside the presence of the defense. In the alternative, this Court should order Lieutenant Colonel Norman to provide an affidavit for the same limited purpose. Such a Court order is in the interests of judicial economy, to avoid later fact-finding at a *DuBay* hearing and to provide factual certainty in the record.

[redacted]
I. M. LAMB
First Lieutenant, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this response was electronically served upon the Court and Defense on this date: 12 April 2021.

[redacted]
I. M. LAMB
First Lieutenant, U.S. Marine Corps
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY

WESTERN JUDICIAL CIRCUIT

GENERAL COURT MARTIAL

UNITED STATES vs. THOMAS H. TAPP PRIVATE FIRST CLASS U.S. MARINE CORPS	BENCH BRIEF- MRE 509 PRIVILEGE 12 April 2021

I. Background

a. Lieutenant Colonel (LtCol) John P. Norman, U.S.M.C., presided over pretrial and merits portions of this General Court-Martial. Immediately after adjournment of sentencing, LtCol Norman made numerous *ex parte* comments which undermine the impartiality of the military judge. The Defense filed a Motion for Appropriate Relief and requested that the Government produce LtCol Norman as a witness. The Government agreed that LtCol Norman is both relevant and necessary to the proceeding and granted him as a witness. LtCol Norman informed the Government that "there are various privileges that are likely involved" and that he does "not intend to testify." The parties informed the Military Judge of LtCol Norman's response and requested the Military Judge compel LtCol Norman's presence and testimony. The Military Judge indicated that he would take the issue under consideration and a bench brief was acceptable regarding this issue.

II. Statement of Relevant Facts

a. On Saturday, 20 February 2021 the court-martial in the above captioned case adjourned. [Record of Trial (ROT), Statement of Trial Results; Encl 1, Stipulation of Fact].

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b. Defense Counsel, PFC Tapp, Victim Legal Counsel, and individuals in the gallery exited the courtroom shortly after adjournment. [Encl 2, Major (Maj) Michel Memorandum for the Record (MFR).]

c. Present in the courtroom after the aforementioned parties exited were the military judge, LtCol Norman, the detailed trial counsels, the court reporter, and the bailiff. [Encl 2.]

d. Major Michel, trial counsel, asked LtCol Norman if he would be willing to provide an after-action brief to the parties. Lieutenant Colonel Norman stated, "no." [Encl 2.]

e. Before the detailed trial counsels could exit the courtroom, LtCol Norman asked Maj Michel if he had seen worse sexual assault cases. This question then led to numerous comments by LtCol Norman over the next 30 - 40 minutes. [Encl 2.]

f. Lieutenant Colonel Norman's comments included: his displeasure with trial counsel asking for 11 years confinement during their sentencing argument; trial counsel unilaterally deciding to cap the potential sentence at 11 years confinement; displeasure with the Defense filing untimely motions and forcing the Government and Court to respond mid-trial; his opinion that trial counsel should be angry when the Defense files late or untimely motions; his opinion that the Defense has no incentive to avoid contested trials and no price to pay for their earlier decisions when the trial counsel caps the potential sentence. [Encl 2.]

g. Major Michel called the Regional Trial Counsel (RTC), LtCol [redacted] after exiting the courtroom on Saturday, 20 February 2021 to inform the RTC of LtCol Norman's comments. [Encl 1.]

h. The RTC called Colonel [redacted], Officer-in-Charge (OIC), Legal Services Support Section - West (LSSS - West) to inform him of what Maj Michel told the RTC. [Encl 1.]

i. The LSSS - West OIC subsequently called the Circuit Military Judge (CMJ), and LtCol

Norman's supervisor, Colonel [redacted] during the week of 22 - 26 February 2021 to voice his concern with LtCol Norman's statements and demeanor. [Encl 1.]

j. On Monday, 1 March 2021, the Government disclosed Maj Michel's MFR to the Defense. The Government did not disclose the MFR to any military judge assigned to the Western Judicial Circuit. [Encl 1.]

k. On Friday, 5 March 2021, LtCol Norman emailed all parties and ordered them to appear for an Article 39(a) on Monday, 8 March. *Lieutenant Colonel Norman did not disclose the purpose of the Article 39(a), there were no post-trial motions pending with the Court, and the only remaining action for the Court was entry of judgment.* [Encl 3.]

l. On Saturday, 6 March 2021 the Defense filed Defense Motion for Appropriate Relief, Appellate Exhibit E CX1 (AE 111). In AE 111, the Defense requests that LtCol Norman be disqualified from further participation in this case and the findings be dismissed with prejudice due to LtCol Norman's statements to the trial counsel on Saturday, 20 February 2021. *The Defense had not notified the Court before 6 March of its intention to file a post-trial motion.*

m. On Monday, 8 March 2021, the Defense moved to disqualify the military judge and objected twice to the military judge placing any comments on the record related to AE 111. Lieutenant Colonel Norman did not permit *voir dire* or evidence on the Defense's request to disqualify the military judge and did not rule on two Defense objections to him placing his comments on the record. [Encl 4, Unofficial Transcript of 8 March 21 Article 39(a), pp. 3 - 5; ROT Audio File: TappTH8Mar21Herm1 at 04:20 - 07:36.]

n. On Monday, 8 March 2021, LtCol Norman stated on the record that, "I do not believe that there is an appearance of bias, [but] based on the personal nature of the allegations in the Defense motion, and to ensure that the accused has confidence in the post-trial process, I have

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decided to recuse myself from any further post-trial matters..." [Encl 4, pp. 6.] During his 8 March statement, LtCol Norman also used the words or phrases: impartial, reasonable appearance of bias, totality of the circumstances, and reasonable person observing the proceedings. [Encl 4.]

o. On Tuesday, 16 March 2021, the Defense emailed LtCol Norman and requested to interview him. On Wednesday, 17 March 2021, LtCol Norman emailed the Defense and Government to inform them that he respectfully declines to be interviewed. [Encl 5, Emails with LtCol Norman and TC of DC 16 - 17 Mar 2021.]

p. On Monday, 22 March 2021, the Government emailed LtCol Norman to inform him that the Government has approved a Defense request to produce him as a witness for the 15 April 2021 Article 39(a). On 26 March 2021, LtCol Norman informed the Government and Defense that he does not intend to testify because he believes there are various privileges involved (NFI). [Encl 6, Emails with LtCol Norman and TC and DC of 22 - 26 Mar 21.]

q. On Thursday, 1 April 2021, the Government emailed the Court and informed him of LtCol Norman's intent to not testify. The Government requested that the Court "issue a Court order for Lieutenant Colonel Norman to appear at the Article 39(a) motions session scheduled for 15 April 2021." [Encl 7, Emails with TC, DC, and the Court of 1 Apr 21.]

III. <u>Discussion of The Law - Military Rule of Evidence 509</u>

a. Military Rule of Evidence 509 states: Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged. In *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009), a military judge, sitting alone as a general court-martial, convicted the

defendant after a defense witness invoked the right against self-incrimination thirteen times. *Id.* at 30-31. The Army Court of Criminal Appeals ("A.C.C.A.") ordered an evidentiary hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (1967), at which the trial military judge testified extensively about his deliberative process. *Matthews*, 68 M.J. at 30-35. Ultimately, the C.A.A.F. held that the A.C.C.A. should not have considered the trial military judge's testimony "to the extent it revealed his deliberative process." *Id.* at 30. Yet, the C.A.A.F. did not find that calling the military judge to testify for other purposes at the *DuBay* hearing was improper. *Id.* To the contrary, the C.A.A.F., in adopting federal common law to support its ruling in *Matthews*, found that "federal courts have stopped short of prohibiting judicial testimony entirely and have employed a 'case-by-case' evaluation to delineate between protected and unprotected testimony. *Matthews*, 68 M.J. at 39. The C.A.A.F. also found that federal courts have permitted a judge to testify where a credible showing of judicial misconduct exists. *Id.* at 40-41.

c. Shortly after deciding *Matthews*, the C.A.A.F. set aside the decision of the Navy and Marine Corps Court of Criminal Appeals ("N.M.C.C.A.") on the issue of "exhibition of bias, after trial, in announcing his personal distaste" for both the defendant and the issues involved in the case. *United States v. Hayes*, 2009 C.A.A.F. LEXIS 945 (C.A.A.F. 2009.) The military judge's statements were made in a post-trial session with counsel for both parties present. On remand, the N.M.C.C.A. set aside the sentence because "the perception that a military judge has predetermined a certain punishment for a certain act or crime is, simply, unacceptable." *United States v. Hayes*, 2010 CCA LEXIS 364, *15 (N.M.C.C.A. Oct. 28, 2010.) The trial military judge was called to testify at the *DuBay* hearing and did provide testimony regarding his views of the defendant and the subject matter of the case. *Hayes*, 2010 CCA Lexis 364 at *14-15. The N.M.C.C.A. analyzed the trial military judge's *Dubay* testimony and was particularly concerned

about the timing of the trial military judge's statements to counsel, as they "suggest that the military judge held these views while presiding over this case and failed to compartmentalize them from his judicial conduct." *Id.* at *14. The N.M.C.C.A. considered the military judge's statements at the DuBay hearing that "his intent during the post-trial debrief was to convey that homosexual conduct, not homosexuality in general, has no place in the Armed Forces." *Id.* at *14. Then, N.M.C.C.A. held "In the context of this entire record of trial, this explanation includes the unfortunate inference that he believed, at the time of trial and at the time of adjudging a punitive discharge, that homosexual conduct should lead to a discharge, even if that conclusion was not his actual intent." *Id.* at *14-15.

d. Similarly, in *United States v. Kish*, 2013 CAAF Lexis 280 (C.A.A.F. March 14, 2013), the C.A.A.F. set aside the decision of the N.M.C.C.A., returned the case to the Navy JAG, and ordered a remand to the appropriate convening authority for a *DuBay* hearing to make findings of fact and conclusions of law related to what, if any, statements that the military judge made during a Professional Military Education (PME) meeting with junior officers regarding the practice of military justice. At the *DuBay* hearing, the military judge who gave the PME was called to testify and his testimony was considered by the presiding *DuBay* judge for his findings of fact. *United States v. Kish*, N.M.C.C.A. 2014 CCA Lexis 358 *16-18 (N.M.C.C.A. 17 June 2014). This included a finding of fact that the military judge who gave the PME admitted almost all of the statements alleged by law students attending the PME. *Kish*, 2014 CCA Lexis 358 *32, para. 45. After the DuBay hearing the record was returned to N.M.C.C.A. and the Court relied on the DuBay judge's findings of fact to conclude that the military judge's comments during the PME viewed in tandem with his actions during trial give rise to the appearance of bias in the case. *Kish*, 2014 CCA Lexis 358 *13.

e. Finally, the individual invoking MRE 509 must specifically show the need for secrecy. Judicial privilege exists in military court-martial to the extent the privilege exists in federal courts. *See* Mil. R. Evid. 509 ("[T]he deliberations of . . . military judges . . . are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts..."). Federal courts have firmly held that judicial privilege is not absolute, and cannot be asserted generally. *Cain v. New Orleans*, 15-4479 at *9 (E.D. La. Dec. 8, 2016) (noting that "unlike some state courts [which] have held that judicial deliberative process privilege is absolute," the "leading case in the federal courts" holds that the privilege is a "qualified one, which does not prevent disclosure in every instance.") Rather, the judge asserting the privilege not only must show that the sought-after information was "deliberative" but also some "specific need for secrecy over and above those needs which normally apply and give rise, in the first place, to a privilege." *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488 (11th Cir. 1986.)

IV. Analysis of the Law.

a. The deliberative process protection provided by M.R.E. 509 is not absolute; thus, LtCol Norman cannot use that privilege to avoid being called as a witness in this case. This case is more akin to *Kish* and *Hayes* than it is to *Matthews*. In both *Hayes* and *Kish* the military judge was called as a fact witness to discuss events that took place after those courts-martial had adjourned. In both cases, the N.M.C.C.A. relied on the military judge's statements in determining whether the appellant was entitled to relief. In contrast to *Hayes* and *Kish*, during the *DuBay* hearing in *Matthews*, the military judge–who sat as a military judge alone court-martial–was called to testify about whether he drew a negative inference under the interests of justice exception in M.R.E. 512 after a witness invoked his right against self-incrimination and

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how the military judge assessed the credibility of that witness. *Matthews*, 68 M.J. at 32-33.

b. The Defense does not intend to ask questions that require LtCol Norman to explain his reasoning and deliberative process for reaching a decision on an objection or motion. Instead, he is being called as a fact witness. In *Matthews*, the C.A.A.F., in relying on federal common law to reach its conclusion, discovered that the most common line of demarcation for determining whether the privilege applies is between factual testimony and testimony about a judge's deliberative process...and a judge may testify to the extent the testimony contains personal knowledge of historical facts or expert opinion. *Matthews*, 68 M.J. at 39. In this case, LtCol Norman will not be asked to reveal his thoughts and impressions regarding witness credibility, inferences drawn from evidence presented during an Article 39(a) motions session, or his reasoning when granting or denying objections at trial. Instead, LtCol Norman will be called as a percipient witness for matters related to his post-trial comments; knowledge about LSSS-West structure, resources, and manpower; when he learned that his actions had been reported to the LSSS West; and, comments made in open court to the trial counsel or defense counsel throughout the course of the court-martial. These subjects do not require him to reveal his thoughts and impressions during his deliberative process on motions or objections; thus, he should be ordered to testify.

c. Finally, even if the Defense changes course and intends to ask questions that may reveal the military judge's deliberative process, it is not precluded from doing so and neither is the military judge or trial counsel because there is evidence of judicial bad faith. In holding that A.C.C.A. was not permitted to consider portions of the military judge's testimony that revealed his deliberative process, the C.A.A.F. reasoned that "this case is not one involving issues about which federal courts have previously permitted trial judges to testify -- this is not habeas corpus,

there is no evidence of judicial bad faith or misconduct, and inquiry was not limited to material factual matters about which the military judge was uniquely or specially situated to testify." *Matthews*, 68 M.J. at 40-41. This means that C.A.A.F. recognizes that a military judge could be ordered to testify about his deliberative process if there is evidence of judicial bad faith or misconduct.

d. There exists evidence of judicial bad faith or misconduct in this case as supported by the facts that: 1) LtCol Norman had an ex parte conversation with the trial counsel minutes after this court-martial adjourned; 2) Major Michel's MFR depicts a military judge who was critical of trial counsel for capping the potential sentence in a serious sexual assault trial and not making the accused pay a price for filing motions and contesting this case; 3) the trial counsels believed these comments were serious enough to immediately report them to their supervisors; 4) the LSSS West OIC, during 22 - 26 February, believed LtCol Norman's behavior was serious enough to call Colonel [redacted] and express his concerns with LtCol Norman's behavior; 5) LtCol Norman was silent about any matter related to this case after the ex parte conversation on 20 February until he emailed on parties on 5 March; 6) LtCol Norman emailed all parties on Friday, 5 March and ordered them to appear in court on Monday, 8 March; 7) LtCol Norman's email of 5 March was in the afternoon, shortly before weekend liberty, one day before the 14-day post-trial motions deadline under R.C.M. 1104, and silent as to the Article 39(a)'s purpose; 8) the Government never disclosed Maj Michel's MFR to any military judge assigned to the Western Judicial Circuit; 9) the Defense did not file, or notify the Court of its intention to file, a post-trial motion until 6 March; 10) On 8 March, LtCol Norman stated on the record, "Now let's turn our attention to why we are here today. On 6 March 2021, the Defense filed a post-trial motion for appropriate relief, which has been marked as Appellate Exhibit 111", a statement that was not

APPELLATE EXHIBIT CXX
PAGE 10 OF 36

accurate because it omitted the fact that he ordered an Article 39(a) prior to the Defense filing its motion; and, 11) LtCol Norman has refused to be interviewed or testify. Thus, one reasonable view of these facts is that LtCol Norman, despite knowing he had an ex parte conversation with the trial counsel, purposefully hid this information the Defense until 8 March 2021. Then, on 8 March, when he revealed it to the Defense for the first time on the record, he did so by reading a prepared, unsworn statement. He also ignored a Defense motion asking for his disqualification from the case and two objections to him reading the unsworn statement into the record. This was an attempt to cast his post-trial actions in a favorable light to reduce scrutiny of his statements and behavior during future sessions of this court-martial and on appeal.

V. Conclusion

a. For all the aforementioned reasons, this Court should order the production of LtCol Norman for in-person testimony at the Article 39(a) scheduled for Thursday, 15 April 2021.

VI. Evidence.

a. Encl 1: Stipulation of Fact of 6 April 2021
b. Encl 2: Maj Michel Memorandum for the Record
c. Encl 3: Email from LtCol Norman of 5 Mar 21
d. Encl 4: Unofficial Transcript of 8 Mar 21 Article 39(a)
e. Encl 5: Emails with LtCol Norman, TC, and DC of 16 - 17 Mar 21
f. Encl 6: Emails with LtCol Norman, TC, and DC of 22 - 26 Mar 21
g. Encl 7: Emails with TC, DC, and the Court of 1 Apr 21

VII. Certificate of Service.

a. I hereby attest that a copy of the foregoing brief was served on the court and opposing counsel on Monday, 12 April 2021.

[redacted]
R. ACOSTA

REQUESTS

THERE ARE NO REQUESTS

NOTICES

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

UNITED STATES	)	
	)	VICTIM'S LEGAL COUNSEL
V.	)	NOTICE OF APPEARANCE
	)	ON BEHALF OF
THOMAS H. TAPP	)	MS. [redacted]
PRIVATE FIRST CLASS	)	
USMC	)	
	)	

1. I am Captain Matthew T. Kiefer, U.S. Marine Corps, Victims' Legal Counsel, Marine Corps Air Station Miramar. I am admitted to practice law and currently in good standing in the state of Mississippi, and am certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice. I hereby enter my appearance in the above captioned court-martial on behalf of Ms. [redacted] (a minor), and a named victim in this case.

2. The Regional Victims' Legal Counsel, Major [redacted] detailed me to represent Ms. [redacted] and I have entered into an attorney-client relationship with her. I have not acted in any manner which might disqualify me in the above-captioned court-martial.

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

4. To permit a meaningful exercise of Miss [redacted] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and any other matter in which Miss [redacted] rights and privileges are addressed (if not already shared with VLC).

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

6. My current contact information is as follows:

[redacted]

Respectfully submitted this 18 day of October 2020.

[redacted]

M. T. KIEFER
Captain, USMC

APPELLATE EXHIBIT II
PAGE 1 OF 2

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on _18_ October 2020.

[redacted]
M. T. KIEFER

APPELLATE EXHIBIT II
PAGE 2 OF 2

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

UNITED STATES	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
THOMAS H. TAPP	)	MS. [redacted]
Private First Class, USMC	)	

1. I, Captain Jhonathan J. Morales Najera, USMC, Victims' Legal Counsel, Marine Corps Base Camp Pendleton, CA, admitted to practice law and currently in good standing in the state of Georgia and, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of Ms. [redacted] a named victim in the charges.

2. Major [redacted], Regional Victims' Legal Counsel-West, Marine Corps Victims' Legal Counsel Organization, detailed me to represent Ms. [redacted] and I have entered into an attorney-client relationship with Ms. [redacted] I have not acted in any manner which might disqualify me in the above captioned court-martial.

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

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

5. To permit a meaningful exercise of Ms. [redacted] rights and privileges, I respectfully request informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which Ms. [redacted] rights and privileges are addressed.

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

7. My current contact information is as follows:

[redacted]

Respectfully submitted this 6th day of January 2021.

[redacted]
J. J. MORALES NAJERA
Captain, USMC

APPELLATE EXHIBIT XXXVII (37)
PAGE 1 OF 2

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was uploaded to the Western Judicial Circuit SharePoint on the 6th day of January 2021.

[redacted]

J. J. MORALES NAJERA
Captain, USMC

APPELLATE EXHIBIT XXXVII
PAGE 2 OF 2

COURT RULINGS & ORDERS

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

UNITED STATES v. TAPP, Thomas A. Private First Class/E-1 U.S. Marine Corps	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(R.C.M. 902 Recusal of Military Judge and Set Aside Findings and Sentence)** **COURT'S ESSENTIAL FINDINGS, CONCLUSIONS OF LAW AND RULING**

1. **Nature of Ruling**. In its Motion for Appropriate Relief, the Defense, pursuant to R.C.M.s 902, 915, and 1104 moved the Court to set aside the findings and sentence and dismissal of all charges with prejudice based on alleged violations of the accused's constitutional right to an impartial military judge, legal insufficiency, and the military judge's failure to disqualify or recuse himself. Alternatively, the Defense seeks the declaration of a mistrial. The Government opposes the motion.

The motion was litigated on 15-16 April 2021. After careful consideration of the pleadings, the evidence before the Court, the entirety of the record of trial, and the arguments of counsel, the Court **DENIES** the Defense Motion.

2. **Findings of Fact**.

a. Lieutenant Colonel John P. Norman, USMC, (LtCol Norman) is a military judge assigned to the Western Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, California.

b. LtCol Norman was the detailed military judge in the General Court-Martial case of United States v. Private First Class Thomas H. Tapp, USMC (PFC Tapp).

c. PFC Tapp was charged with one specification of violating a lawful general order in violation of Article 92, UCMJ, and one specification of sexual assault without consent in violation of Article 120, UCMJ.

d. LtCol Norman presided over all sessions of the court-martial with the exception of the

arraignment Article 39(a) and the post-trial Article 39(a) session at which this motion was litigated.[1]

e. At the Article 39(a) session on 23 November 2020, LtCol Norman offered counsel the opportunity to voir dire or challenge him. Both parties declined to do so.

f. Throughout the pretrial sessions and trial of the accused, neither the Defense nor the Government ever requested to voir dire or challenge LtCol Norman.

g. With the exception of exception of the motions dealing with the scheduling of the arraignment and the post-trial motions filed by the Defense, LtCol Norman heard and ruled upon all motions in this case.

h. Several times during the pre-trial litigation, and during the trial itself, LtCol Norman expressed his frustration and dissatisfaction with defense counsel team for their failure to meet or abide by trial ordered deadlines. However, despite expressing his frustration and dissatisfaction, without fail, LtCol Norman thoroughly considered the merits of the issue raised.

i. During pretrial litigation, and during the trial itself, LtCol Norman also expressed his frustration and dissatisfaction with trial counsel and victim's legal counsel (VLC) for their failure to follow Circuit Rules.

j. LtCol Norman has very high standards for all trial litigants and expects counsel who practice before him to meet his high standards.

k. At trial the Government was represented by Major Nathan Michel (Maj Michel), Captain Gage O'Connell (Capt O'Connell), and First Lieutenant Sarah Bridges (1stLt Bridges).

l. 1stLt Bridges and Capt O'Connell are both first tour judge advocates.

m. Maj Michel is an experienced, multi-tour judge advocate having previously served in both trial and defense counsel billets.

n. At trial PFC Tapp was represented by Captain Matthew Grange (Capt Grange), First Lieutenant Benjamin Robbins (1stLt Robbins), and Captain Ashley Robert (Capt Robert).

[1] LtCol Norman was the presiding military judge for the court-martial sessions held on 23 November 2020, 14 December 2020, 20 January 2021, 12 February 2021, 15-20 February 2021, and 8 March 2021.

o. PFC Tapp was tried by a court composed of officers with enlisted representation.

p. On 19 February 2021, contrary to his pleas, PFC Tapp was convicted of all charges and specifications.

q. PFC Tapp elected to be sentenced by the members.

r. The sole evidence presented by PFC Tapp on sentencing was his unsworn statement.

s. On 20 February 2021, the parties presented their sentencing arguments. In their sentencing arguments, the Government argued that 11 years confinement was the appropriate period of confinement to be adjudged, while the defense argued that 19 months was appropriate.

t. The members sentenced PFC Tapp to three (3) years confinement, reduction to paygrade E-1, and to be discharged with a Dishonorable Discharge.

u. The maximum punishment authorized was: reduction to paygrade E-1; forfeiture of all pay and allowances; confinement for 32 years; and a Dishonorable Discharge.

v. Prior to adjournment of the court-martial on 20 February 2021, neither the Government nor the Defense made any motion to have LtCol Norman recuse himself.

w. Although there were defense supervisory counsel present in the courtroom throughout the trial proceedings and at the time of the adjournment of the court-martial, LtCol Norman did not seek to address any concerns or frustrations he may have had with defense counsel with them.

x. Following the adjournment of the court-martial and shortly after the VLC and defense counsel left the courtroom, Maj Michel asked LtCol Norman if he would be willing to debrief with counsel. LtCol Norman indicated that he would not. However, prior to trial counsel departing the courtroom, LtCol Norman initiated a conversation with trial counsel.

y. Present in the courtroom with LtCol Norman when the conversation was initiated were the three trial counsel, the court reporter (Lance Corporal [redacted]), and the bailiff.

z. The exact words spoken by LtCol Norman during the conversation could not be established by the evidence presented for the Court's consideration. However, based upon the evidence presented, the Court finds the following has been established regarding the post-adjournment session:

1) The conversation with trial counsel took place ex parte.

2) The ex parte session lasted approximately 20-40 minutes.

3) Throughout the ex parte session, LtCol Norman remained on the bench and the trial counsel were standing at or near their counsel table.

4) LtCol Norman raised his voice on at least one occasion during the ex parte session.

5) LtCol Norman's demeanor at different times throughout the ex parte session was described as angry, frustrated, passionate, and complementary.

6) The ex parte session focused on two main points: (1) trial counsel's performance during the sentencing session, specifically the content and nature of their sentencing argument; and (2) the defense counsel's filing of late, mid-trial motions.

7) The two junior trial counsel described the focus of LtCol Norman's comments as being critical of trial counsel's performance, specifically their performance during the sentencing session.

8) Maj Michel described LtCol Norman's comments during the ex parte session as objective feedback.

9) LtCol Norman initiated the conversation by asking a Maj Michel a question.

10) This question related to whether Maj Michel believed there were factually worse sexual assault cases than this case.

11) Maj Michel indicated that he did believe there were factually worse sexual assault cases.

12) LtCol Norman then addressed a similar question to Capt O'Connell asking him whether in his experience there were factually worse cases.

13) Capt O'Connell replied that in his experience there were. It was in reply to Capt O'Connell's statement "in his experience ..." that LtCol Norman raised his voice.

14) LtCol Norman challenged Maj Michel's and Capt O'Connell's assessment of the facts by pointing out that this case had more aggravating facts than the typical sexual assault case. Specifically, where the victim was found, her level of intoxication, and the blood and vomit at the crime scene.

15) Pointing out these aggravating facts, and noting that none of these factors were ever mentioned in the trial counsel's sentencing argument, LtCol Norman challenged Maj Michel and Capt O'Connell on whether they really believed arguing for an 11 year confinement sentence was appropriate in this case.

16) Maj Michel and Capt O'Connell both agreed that in their opinion it was. They also informed LtCol Norman that they had discussed their sentencing argument parameters with their supervisory counsel, LtCol [redacted] the Regional Trial Counsel-West, as well as the Government's Civilian Attorney Advisor/Highly Qualified Expert.

17) LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement. Nor did LtCol Norman ever state what he believed counsel should have argued for in sentencing. Instead, he focused his comments on the impact of trial counsel arguing for a sentence in a contested members case that is far below the maximum authorized punishment. He explained that when doing so, the trial counsel, in effect, places an artificial cap on the members' consideration of the confinement that may be adjudged.

18) LtCol Norman also explained that when trial counsel, on its own accord, places such artificial caps on confinement in their arguments in contested cases, it effectively reduces any incentive the Defense may have to avoid a contested trial.

19) LtCol Norman did not express and displeasure or disagreement with the adjudged sentence. He made no comment on the sentence actually adjudged by the members. His comments and displeasure instead focused on the content, or lack thereof, of trial counsel's sentencing argument.

20) In addition to discussing their sentencing argument, LtCol Norman also asked trial counsel how it made them feel when they had to respond to motions filed out of time and mid-trial. He went on to explain that if that did not upset them, it should. And that he did not appreciate having to address untimely filed motions.

21) At some point during the ex parte session, LtCol Norman referenced the defense counsel paying a price for their earlier actions during trial. However, LtCol Norman never stated or

suggested that any accused or specifically the accused in this case, PFC Tapp, should pay a price.

22) The ex parte discussion concluded with LtCol Norman telling the trial counsel "just some things for you guys to think about."

aa. At no point during their ex parte session with LtCol Norman did any counsel believe that, given the nature of the conversation—objective feedback and criticism of their performance, they should attempt to end the conversation.

bb. It was not until after the ex parte conversation had ended that the trial counsel discussed amongst themselves whether or not they should report their ex parte conversation with LtCol Norman to supervisory counsel. The trial counsel decided that, regardless of the content of the conversation, they should at least report it to their supervisory counsel, LtCol [redacted].

cc. After the ex parte session concluded, Maj Michel called LtCol [redacted] Maj Michel's primary purpose for calling LtCol [redacted] to report the results of the sentencing portion of the case. Maj Michel's secondary purpose was to inform LtCol [redacted] about the ex parte conversation with LtCol Norman.

dd. During the phone call with LtCol [redacted] Maj Michel expressed concern regarding whether or not they should disclose to the Defense the ex parte communications with LtCol Norman. The decision was made to memorialize the ex parte conversation in a Memorandum for the Record and disclose it to the Defense.

ee. Shortly after speaking with Maj Michel, LtCol [redacted] called Col [redacted] OIC LSSS-West, to inform him of the ex parte discussion between trial counsel and LtCol Norman.

ff. During the week of 22-26 February 2021, Col [redacted] called the Circuit Military Judge of the Western Judicial Circuit, Col [redacted] to voice his concerns regarding LtCol Norman.

gg. Col [redacted] also called Col [redacted] JAD HQMC, to inform him of LtCol Norman's interactions with trial counsel.

hh. On 1 March 2021, Maj Michel prepared, signed, and served on the Defense the Memorandum

for the Record detailing the post-trial ex parte conversation between trial counsel and LtCol Norman.

ii. On 5 March 2021, LtCol Norman ordered a post-trial Article 39(a) session in the case to be held on 8 March 2021.

jj. On 6 March 2021, the Defense filed the motion that is the subject of this post-trial litigation seeking LtCol Norman's disqualification from further participation in this case, the appointment of a military judge from outside the Western Judicial Circuit to preside over this post-trial litigation, and dismissal with prejudice of the findings and sentencing in the case, or in the alternative, declaration of a mistrial.

kk. On 8 March 2021, LtCol Norman conducted a post-trial Article 39(a) session in this case. At this Article 39(a) session, the Defense did not request to voir dire LtCol Norman but twice moved to have LtCol Norman disqualify himself before proceeding any further with the post-trial hearing. However, prior to recusing himself from any further post-trial matters in the case LtCol Norman addressed several matters on the record:

1) that had remained impartial throughout the trial and that he was still impartial;
2) that after adjournment, he had a conversation with trial counsel wherein he provided trial counsel direct, stern feedback;
3) that he addressed trial counsel's sentencing presentation including that, in his opinion, they seemed to undervalue the case in their sentencing argument, and explained why he believed they undervalued their case;
4) that during the trial he had expressed concern on the record when informed that the defense did not intend to put on a sentencing case, that he had urged them to call witnesses and to present a robust sentencing case, and that he would give them more time, if needed, to do so;
5) that he did this in order to give PFC Tapp the best possibility to get a lower or more mitigated sentence;
6) that he had concerns that both sides in the trial were not properly approaching sentencing in

this serious case for the benefit of their respective clients;

7) that in this case his foremost concern was a fair trial to all involved;

8) that based upon the personal nature of the allegations in the Defense motion, and to ensure PFC Tapp had confidence in the post-trial process he would recuse himself from further action in the case.

ll. Between 1-9 March 2021, the Chief Defense Counsel of the Marine Corps, Col [redacted] filed a professional responsibility/judicial ethics complaint against LtCol Norman. The gravamen of the complaint surrounds the circumstances surrounding this case.[2]

mm. On 8 March 2021, I (Col Woodard) was detailed as the presiding military judge to this case by the Chief Trial Judge, Navy-Marine Corps Trial Judiciary for all further post-trial litigation and action.

nn. On 15-16 April 2021, a 39(a) post-trial session was held to litigate the subject motion.

oo. At that post-trial 39(a) session held to litigate the subject motion, LtCol Norman was called as a witness. However, based upon the pending professional responsibility/judicial ethics complaint pending against him and on the advice of counsel, he declined to answer any questions posed to him concerning this case.

3. Statement of the Law.

"An accused has a constitutional right to an impartial judge." *United States v. Martinez,* 70 M.J. 154, 157 (C.A.A.F.) (quoting *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla,* 56 M.J. 37, 43 (C.A.A.F. 2001). "When a military judge's impartiality is challenged ..., the test is whether, taken as a whole in the context of th[e] trial, a court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions. *United States v. Burton,* 52 M.J. 223, 226 (C.A.A.F. 2000).

[2] The Court was not provided with the professional responsibility/judicial ethics complaint. However, prior to LtCol Norman taking the stand, his counsel detailed to represent him through the professional responsibility/judicial ethics inquiry (CAPT [redacted] informed the Court of the identity of the person who had filed the complaint and the nature of the complaint filed.

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves action taken in conjunction with judicial proceedings." *Quintanilla,* 56 M.J.. at 44. "The moving party has the burden of establishing a reasonable factual basis for disqualification. More than surmise or conjecture is required." *Wilson v. Quelette,* 34 M.J. 798 (N.M.C.M.R. 1991) (citing *United States v. Allen,* 31 M.J. 572, 601 (N.M.C.M.R 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991)).

There are two grounds for disqualification of a military judge, actual bias and apparent bias. R.C.M. 902; *Quintanilla,* 56 M.J. at 45. R.C.M. 902(b) lists various circumstances where actual bias may require disqualification, to include when a military judge has a personal bias or prejudice concerning a party. R.C.M. 902(a) requires a military judge to "disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned." In order to be disqualifying under either R.C.M. 902(a) or (b), the "interest or bias must be personal, not judicial, in nature." *Burton,* 52 M.J. at 226 (internal quotation marks and citations omitted). Moreover, non-personal bias or prejudice, that which does not stem from an extrajudicial source, will not require disqualification "unless it is so egregious as to destroy all semblance of fairness." *United States v. Wright,* 52 M.J. 136, 141 (C.A.A.F. 1999) (citations omitted). A military judge's disclaimer of partiality carries great weight. *United States v. Kratzenberg,* 20 M.J. 670, 672 (A.F.C.M.R. 1985).

Whether apparent bias exists is reviewed objectively and is tested under the standard set forth in *United States v. Kincheloe,* i.e., "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." 14 M.J. 40, 50 (C.M.A. 1982); *see also Wright,* 52 M.J. at 141; *Quintanilla,* 56 M.J. at 78. Recusal based on the appearance of bias is intended to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Services Acquisition Corp,* 486 U.S. 847, 858 (1988).

The remarks, comments, and rulings of a judge do not constitute bias or partiality "unless they display a deep-seated favoritism or antagonism that would make fair judgement impossible." *Liteky v. United States,* 510 U.S. 540, 555 (1994). When considering the remarks and comments of a military

judge, the remarks and comments are viewed objectively through the prism of the context of trial. "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Likely,* 510 U.S. at 555. "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men ... sometimes display" do not establish bias or partiality. *Id.* at 555-56. Further, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* at 555. It is the rare occasion when, in the absence of extrajudicial bias, a military judge's rulings evidence the degree of favoritism or antagonism required. *Brown v. United States,* 79 M.J. 833, 843 (N.M.C.C.A. 2020).

Ex parte communication with counsel does not necessitate recusal under R.C.M. 902(a), particularly if that communication does not involve substantive issues or exhibit favoritism for one side over the other. However, ex parte communications which might have the effect or give the appearance of granting an undue advantage to one party cannot be tolerated. *Quintanilla,* 56 M.J. at 79.

While military judges are obliged to disqualify themselves when they lack impartiality, they are equally obligated not to disqualify themselves when there is no reasonable basis for doing so. *Burton,* 52 M.J. at 226. When, during the trial proceedings, the defense fails to challenge the impartiality of the presiding military judge, an inference may be drawn that the defense believed the military judge remained impartial during those proceedings. *Id.* (citing *United States v. Hill,* 45 M.J. 245, 249 (C.A.A.F. 1996)).

"In short, R.C.M. 902 . . . requires consideration of disqualification under a two-step analysis. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias." *Quintanilla,* 53 M.J. at 45. Even if the answer to that second question is yes, that does not end the issue. There must then be a determination made of whether a remedy is warranted and, if so, what remedy should be applied.

R.C.M. 902 does not mandate a specific remedy for a military judge's erroneous failure to recuse him or herself. *See Butcher,* 56 M.J. at 92. Further, not every judicial disqualification requires reversal,

i.e. declaration of a mistrial at the trial stage. The three-part test articulated by the Supreme Court in *Liljeberg* is used "to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *Martinez*, 70 M.J. at 158 (citing *Butcher*, 56 M.J. at 92). When a military judge has erred in failing to recognize that his or her disqualification was required because the judge's impartiality might reasonably be questioned, the *Liljeberg* factors to consider are: (1) the risk of injustice to the parties; (2) the risk that denial of relief will result in injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process. *Liljeberg*, 486 U.S. at 864.

Article 39(a) and R.C.M. 1104 authorize a military judge to direct a post-trial hearing prior to entry of judgment to resolve matters that substantially affect the legal sufficiency of any findings of guilty or the sentence. A military judge's authority to resolve such matters grants the military judge the authority to "take whatever remedial action is appropriate." *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008). Dependent upon the matter affecting the legal sufficiency of any finding of guilty or the sentence, appropriate remedial action may include dismissal of offenses or the declaration of a mistrial.

Dismissing an offense "is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

R.C.M. 915 authorizes a military judge, as a matter of discretion, to declare a mistrial when "such action is manifestly necessary in the interest of justice." However, like a dismissal, a mistrial is a drastic remedy and declaring a mistrial should only be done to prevent a miscarriage of justice under urgent circumstances and for plain and obvious reasons. *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

4. <u>Discussion and Conclusions of Law</u>.

The Defense contends LtCol Norman's demeanor and/or comments during trial and in the post-trial ex parte conversation with trial counsel demonstrate an actual bias on his part and that he should have recused himself during trial, when his impartiality in fact departed. And, because he did not, justice now requires that the findings and sentence be set aside and the charges be dismissed with prejudice, or,

alternatively, that a mistrial be declared.

The Government takes the position that during the trial proceedings, LtCol Norman was firm but fair to both sides and applied the law correctly and even-handedly, and even if his post-trial ex parte comments were inappropriate, they do not overcome the strong presumption of his judicial impartiality. Alternatively, should this Court should find that the military judge's actions created an appearance of bias, they argue, upon consideration of the *Lijeberg* factors, neither a dismissal with prejudice nor a mistrial is warranted.

Here, because LtCol Norman has recused himself, the issue before this Court for determination is whether, taken as a whole in the context of this trial, this court-martial's legality, fairness, and impartiality were put into doubt by LtCol Norman's post-trial ex parte comments to trial counsel and/or his actions and rulings during trial.

Although the Court does not condone or approve of LtCol Norman's post-trial ex parte communications with the trial counsel, the Court finds that neither his post-trial ex parte comments nor his actions and rulings during trial, when taken as a whole in the context of this trial, placed in doubt this court-martial's legality, fairness, and impartiality.

Article 26(d), UCMJ provides that "no person is eligible to act as military judge in a court-martial if he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or a counsel in the same case." The President has supplemented Article 26 with R.C.M. 902. R.C.M. 902(a) governs appearance of bias, and R.CM. 902(b) governs specific disqualifying circumstances which include having a personal bias or prejudice concerning a party.

The facts of this case do not implicate any Article 26(d) disqualifier. Instead, the circumstances of this case calls into question whether LtCol Norman held an R.C.M. 902(b) disqualifying personal bias or prejudice against the Defense and/or PFC Tapp and R.C.M. 902(a)'s requirement that a military judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

R.C.M. 902(a) was enacted to maintain public confidence in the judicial system by avoiding even the appearance of partiality. *See Butcher,* 58 M.J. at 90. This appearance standard is necessary because, "in matters of bias, the line between appearance and reality is often barely discernible." *Id.*

a. R.C.M. 902 Bias

As evidence of an actual or apparent bias by LtCol Norman, the Defense points to his comments to the Defense during the multiple 39(a) sessions, his repeated denial of their motions, and his comments in the post-trial ex-parte session concerning his displeasure with the Government's sentencing argument and his "a price to be paid" comment.

Upon consideration of the entirety of the evidence before the Court, LtCol Norman's comments to counsel—trial counsel, defense counsel, and VLC alike—were firm but fair. All comments to counsel made prior to adjournment of the court-martial were made on the record and involved matters related to the litigation of the case before him. He was both complimentary and critical of all counsel throughout the trial process.

Although not approved of or condoned by this Court, LtCol Norman's post-trial ex parte comments to trial counsel did not focus on the accused, but instead focused on what he viewed as the litigants' short-comings in the representation of their respective clients. The Court finds that the post-trial ex parte session with trial counsel was a misguided attempt by LtCol Norman to provide objective but pointed critical feedback.

Although the Defense may not agree with LtCol Norman's rulings upon issues raised for his determination, all matters raised for his determination were fully litigate, even if the issues were raised out-of-time and mid-trial.

When addressing what he viewed as late filings or gamesmanship on the part of the defense counsel, even when he found that the Defense had not established good cause for the late filing, LtCol Norman still heard the motion in light of the accused's risks at state, and his desire to protect those rights in order to ensure that the accused received a fair and impartial trial.

In the determination of all issues put before him for his consideration, LtCol Norman's findings of fact were supported by the evidence before him and not clearly erroneous. Further his application of the law to the facts did not exhibit an erroneous view of the law.

Further, the Court notes that, while the members were in deliberations on findings, LtCol Norman learned that the Defense intended to only present an unsworn statement from PFC Tapp in its

sentencing case, if sentencing became necessary. LtCol Norman expressed concern that PFC Tapp may not have fully understood the import of putting on a robust sentencing case. To ensure that PFC Tapp fully understood his rights, appreciated the import of a robust sentencing case, and was making a free and voluntary decision not to put on a robust sentencing case, LtCol Norman confirmed for a second time that PFC Tapp understood his sentencing rights, explaining in detail what extenuation and mitigation entailed and how PFC Tapp could put evidence before the members for their consideration.

Although the record reveals that LtCol Norman expressed his impatience, dissatisfaction, annoyance, and even potentially anger towards counsel on both sides of the aisle, when viewed objectively through the prism of the context of the trial, these emotions are within the bounds of what imperfect persons, like military judges, sometimes display. His comments, both prior to adjournment and after, did not exhibit favoritism for one side over the other. Considering his ex parte comments to trial counsel were made after the members had rendered their verdicts on both findings and sentence, the comments cannot be reasonably viewed as giving the appearance of granting an undue advantage to either party. All that all that remained for LtCol Norman to do in the trial was to issue the Statement of Trial Results and make Entry of Judgment. This Court finds that his remarks, comments, and rulings did not display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Accordingly, the Court finds LtCol Norman possessed no personal bias or prejudice against PFC Tapp or the Defense, and when viewed objectively, a reasonable person knowing all the facts and circumstances would not reasonably question his impartiality.

b. *Lijeberg* Test

However, even assuming arguendo LtCol Norman's actions in this trial created an apparent bias, the Court finds upon consideration of the *Liljeberg* factors, no remedy would be warranted.

The first *Liljeberg* factor requires consideration of the risk of injustice to the parties. Here, the Defense has not identified any specific injustice PFC Tapp suffered at the hands of LtCol Norman. The Defense points to a number of adverse rulings, but the mere fact that LtCol Norman ruled adversely on some Defense motions and objections does not necessarily demonstrate any risk of injustice. As noted above, in this Court's view, LtCol Norman's rulings did not exhibit any personal bias on his part. He

did not rule uniformly in the Government's favor and he also sustained many of the Defense's objections during the course of the trial.

Further, any risk of injustice was considerably diminished because the event giving rise to the disqualification motion (the ex parte communication session) occurred after the members had rendered their verdicts on findings and sentence. At that point, there remained no matter of significance in this case where LtCol Norman would be called upon to exercise discretion.

Additionally, when considering the risk of injustice to the parties, the Court considers not only the risk to an accused for potential partiality or bias if no remedy is granted, but also the risk of injustice to the Government if a remedy such as dismissal or mistrial is granted. This was a nine-day trial that required considerable expenditure of resources. *See United States v. Goodell,* 79 M.J. 614, 619 (C.G.C.C.A. 2019) citing *United States v. Cerceda,* 172 F.3d 806, 812-814 (11th Cir. 1999). Finally, the Government's case was strong and included PFC Tapp's recorded admission.

The second *Liljeberg* factor requires consideration of the risk that denial of relief will produce injustice in other cases. As stated above, this Court does not endorse, condone, or approve of LtCol Norman's post-trial ex parte communication with trial counsel. However, as a general matter, judges are very sensitive to the problems posed by ex parte communications with counsel. Given the fallout from his ex parte communications in this case, which include the filing of a professional responsibility/judicial ethics complaint against him, this Court is certain that if LtCol Norman did not previously appreciate the problems posed by such contacts, he certainly does now and will refrain from any such interactions in the future. Further, this Court has no doubt that this case will be a teaching point to all military judges and counsel who practice in the circuits of the Navy-Marine Corps Trial Judiciary and beyond. Thus, granting a remedy would not be necessary to ensure that LtCol Norman or other military judges exercise the appropriate degree of discretion in the future.

The final *Lijeberg* factor addresses the risk posed by the apparent bias of undermining the public's confidence in the judicial process. Although similar to the R.C.M. 902(a) inquiry conducted above, the analysis under this factor differs in that it is not limited to only the facts relevant to recusal, but instead involves a review of the entirety of the proceedings, to include the post-trial proceedings in the case,

and other facts relevant to the *Liljeberg* test. *Martinez,* 70 M.J. at 160. Upon consideration of the entirety of the proceedings, even if LtCol Norman's actions in this case resulted in an appearance of bias, that appearance would not create an intolerable risk of undermining the public's confidence in the judicial process. As previously observed, throughout the trial LtCol Norman referenced taking actions—to include hearing untimely filed motions despite there being no good cause shown for their untimeliness and going back over in detail with PFC Tapp his sentencing proceeding rights—because he believed it was necessary to ensure PFC Tapp's right to a fair and impartial trial were protected. Prior to learning of LtCol Norman's post-trial ex parte interaction with trial counsel, the Defense had made no demand for LtCol Norman to recuse himself for an actual or appearance of bias. The post-trial ex parte interaction was a one-time, relatively brief interaction (less than 40 minutes), had no bearing on the merits of the proceedings, and occurred after the members had rendered their verdicts on findings and sentencing. Further, LtCol Norman's actions during trial and after have also been laid bare and publicly examined through the post-trial litigation on this issue.

Again, although this Court does not endorse, condone, or approve of LtCol Norman's ex parte contact with trial counsel, upon examination of the entire proceedings, this Court's decision to not set aside the findings and sentence and dismiss the charges with prejudice or grant a mistrial would not upset public confidence in the judicial process. To the contrary, a decision to grant such a remedy on the facts of this case would increase the risk "that the public will lose faith in the judicial system." *See United States v Uribe,* 80 M.J. 442, 450 (C.A.A.F. 2021) quoting *Cereda,* 172 F.3d at 815.

5. Conclusion.

The Defense Motion for Appropriate Relief is **DENIED.**

So ordered this 22nd day of July, 2021.

WOODARD.KEVIN.S COTT.[redacted] Digitally signed by WOODARD.KEVIN.SCOTT[redacted] Date: 2021.07.22 15:30:27 -04'00'

K. S. WOODARD
Colonel, U.S. Marine Corps
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	[redacted]
Tapp, Thomas H.	Marine Corps	E-2	

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
3rd Battalion, 5th Marine Regiment, 1st MarDiv	General	Enlisted Members	Feb 20, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	3 years	Total forfeitures	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
215		215 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

This was a fully contested trial before members with enlisted representation. Thus, there was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ◉ No ○
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ○ No ◉
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ◉ No ○

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Norman, John P.	Marine Corps	O-5	Feb 20, 2021	NORMAN.JOHN.P. [redacted] Digitally signed by NORMAN.JOHN.P. [redacted] Date: 2021.02.20 11:13:58 -08'00'

37. NOTES: After findings by the members, the accused elected to be sentenced by the members.

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I:	92	Specification:	Not Guilty	Guilty	MCO 1700.22G		092-A0
		Offense description	Violation of a lawful general order by consuming alcohol while under the age of 21 years old				
Charge II:	120	Specification:	Not Guilty	Guilty	N/A		120AA2
		Offense description	Sexual assault without the consent of the other person				

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
Tapp, Thomas H.	E2	1[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
3rd Battalion, 5th Marine Regiment, 1st Marine Division	16-Dec-2019	4 yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
1st Marine Division	General	Enlisted Members	20-Feb-2021

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.

- SJA consulted with the Convening Authority and explained his clemency authority under Article 60, UCMJ.

- On 12 March 2021 and 6 April 2021, the accused submitted matters pursuant to R.C.M. 1106. The accused requests that you suspend his reduction to E-1 for three months and defer his automatic and adjudged forfeitures and rank reduction.

- The victim submitted matters pursuant to R.C.M. 1106A. The Victim requests no clemency be granted.

- The accused submitted a rebuttal to the Victim's 1106A matters.

24. Convening Authority Name/Title	25. SJA Name
Major General R. B. TURNER, JR./Commanding General	Colonel [redacted]

26. SJA signature	27. Date
[redacted]	20 Aug 2021

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

I have considered all matters submitted by the accused and the victim under R.C.M. 1106 and 1106A. The accused's request (12 Mar 21) to suspend the reduction in grade to E-1 is denied. His request (6 Apr 21) to defer all adjudged and automatic forfeitures and his reduction in rank is also denied. The sentence is approved as adjudged.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:

N/A

30. Convening Authority's signature	31. Date
TURNER.ROGER.BLAIR.JR. [redacted] Digitally signed by TURNER.ROGER.BLAIR.JR.[redacted] Date: 2021.08.30 12:57:03 -07'00'	Aug 30, 2021

32. Date convening authority action was forwarded to PTPD or Review Shop. 30 Aug 2021

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
Tapp, Thomas H.	E2	1[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
3rd Battalion, 5th Marine Regiment, 1st Marine Division	16-Dec-2019	4 yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
1st Marine Division	General	Enlisted Members	20-Feb-2021

SECTION B - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

11. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

Charge I: Violation of the UCMJ, Article 92
Plea: Not Guilty Finding: Guilty
Spec: Violation of a lawful general order by consuming alcohol while under the age of 21 years old
Plea: Not Guilty Finding: Guilty

Charge II: Violation of the UCMJ, Article 120
Plea: Not Guilty Finding: Guilty
Spec: Sexual assault without the consent of the other person
Plea: Not Guilty Finding: Guilty

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.

Enlisted Members (unitary sentencing) adjudged the following sentence:
- Dishonorable Discharge, 3 years confinement, total forfeitures, and reduction in rank to E-1.

Plea Agreement:
- There was no Plea Agreement in this case.

Convening Authority's Action:
The sentence is approved as adjudged.

The accused will be credited with having served 215 days of confinement.

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 6 April 2021, Detailed Defense Counsel submitted letter 5814 DSO of 6 Apr 21, requesting that the Convening Authority defer all adjudged and automatic forfeitures; and deferral of adjudged rank reduction.

On 19 August 2021, the Commanding General of 1st Marine Division submitted letter 5000-82 CG of 19 Aug 2021, stating that he denied the accused's deferment requests.

14. Action convening authority took on any suspension recommendation from the military judge:

N/A

15. Judge's signature:	16. Date judgment entered:
HINES.GLEN.RAY.JR.[redacted] Digitally signed by HINES.GLEN.RAY.JR.[redacted] Date: 2021.09.23 17:21:27 -04'00'	Sep 27, 2021

17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

18. Judge's signature:	19. Date judgment entered:

Block 15: On 21 September 2021, the Chief Trial Judge, U.S. Navy-Marine Corps Trial Judiciary, detailed me to perform the final post-trial actions and Entry of Judgment in this case in light of Colonel Woodard's transfer from the trial judiciary. The detailing letter is attached to the record of trial.

APPELLATE INFORMATION

IN THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES *Appellee* v. **Thomas H. TAPP** Private First Class (E-2) United States Marine Corps *Appellant*	**APPELLANT'S MOTION FOR FIRST ENLARGEMENT OF TIME** NMCCA Case No. 202100299 Tried at Camp Pendleton, California, on October 19, 2020, November 23, 2020, December 14, 2020, January 20, 2021, February 12, 2021, February 15-20, 2021, March 8, 2021, and April 15, 2021 before a General Court-Martial convened by Commanding General, 1st Marine Division, LtCol John P. Norman, USMC presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS

COMES NOW the undersigned and respectfully moves for a first enlargement of time to file a Brief and Assignments of Error. The current due date of the Brief is January 3, 2022. The number of days requested is thirty. The requested due date is February 2, 2022.

Status of the case:

1. The Record of Trial was docketed on November 2, 2021.

2. The Moreno III date is May 2, 2023.

3. Appellant is confined. His normal release date is February 10, 2023.

4. The record consists of 2,420 transcribed pages and 4,503 total pages.

5. Counsel is reviewing the record.

There is good cause to grant this motion. Appellant was convicted of violating a lawful general order and sexual assault in violation of Articles 92 and 120, UCMJ. This is a lengthy record, with thirty-seven witnesses. Counsel needs additional time to finish reviewing the record.

Wherefore, undersigned counsel respectfully requests this motion for a first enlargement of time.

[redacted]

Megan E. Horst
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court on December 29, 2021, that a copy was uploaded into the Court's case management system December 29, 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on December 29, 2021.

[redacted]
Megan E. Horst
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 3 - 202100299 - US v. Tapp, Mtn for First Enlargement
Signed By: [redacted]

RECEIVED
Dec 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 3 - 202100299 - US v. Tapp, Mtn for First Enlargement

To this Honorable Court:

Please see attached Appellant's Motion for First Enlargement for electronic filing in US v. Tapp, NMCCA No. 202100299. Thank you.

V/r,

Megan E. Horst
LT, JAGC, USN
Appellate Defense Counsel (Code-45)
1254 Charles Morris Street, SE, Suite 140
Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

[redacted]

Subject: RULING - FILING - Panel 3 - 202100299 - US v. Tapp, Mtn for First Enlargement
Signed By: [redacted]

MOTION GRANTED
29 DEC 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 3 - 202100299 - US v. Tapp, Mtn for First Enlargement

To this Honorable Court:

Please see attached Appellant's Motion for First Enlargement for electronic filing in US v. Tapp, NMCCA No. 202100299. Thank you.

V/r,

Megan E. Horst
LT, JAGC, USN
Appellate Defense Counsel (Code-45)
1254 Charles Morris Street, SE, Suite 140
Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Thomas H. TAPP
Private First Class (E-2)
U. S. Marine Corps

Appellant

NMCCA NO. 202100299

Panel 3

ORDER

Amending Oral Argument

On 6 January 2023, the Court granted oral argument in this case, scheduled for 2 February 2023 at 1400. On 19 January 2023, this Court issued an order amending the scope of oral argument. Upon further consideration of the pleadings of the parties and the record of trial, it is, by the Court, this 30th day of January 2023,

ORDERED:

1. That the Court will hear oral argument on the following Assignments of Error (as restated below):

I. Was the evidence legally and factually sufficient to support a finding of guilt for sexual assault?

II. Did the military judge abuse his discretion when he prohibited the defense from presenting evidence that the complaining witness had a medical diagnosis which provided a credible alternative explanation for her injuries and deprived PFC Tapp of his constitutional right to present a complete defense?

III. Did the military judge abuse his discretion when he denied the defense's motion to compel assistance of an expert in forensic pathology, gynecology, and wound interpretation?

IV. Did the military judge err by denying defense challenges of Master Sergeant Papa and Caption Strike for their actual and implied bias?

V. Was PFC Tapp deprived of his constitutional right to an impartial judge?

VI. Did the impact of cumulative error deprive PFC Tapp of a fair court-martial?

VII. Was PFC Tapp entitled to a unanimous verdict?

2. That oral argument on AOEs I, IV, V, VI, and VII will be a regular open session of the court, the recording of which will be posted to the Court's public website. Each party will have 30 minutes to argue during this session.

3. That upon completion of the regular portion of the oral argument, the courtroom will be closed for the remainder of the argument in order to protect the sealed Mil. R. Evid. 412 matters from further disclosure. In accordance with N-M. Ct. Crim. App. R. 13.4(b)(3), the portion of the oral argument on AOEs II and III will be **CLOSED**, and the recording of the sealed portion will not be posted to the Court's public website. Each party will have 30 minutes to argue during this closed session.

4. That the parties may reference sealed portions of the record in the closed portion of the session. Attendees allowed in the courtroom during the closed session will be the victim, her legal counsel, counsel representing the Government and one supervisory counsel, counsel representing Appellant and one supervisory counsel, the Court, and its staff.

5. That the argument will be conducted on 2 February 2023, at 1400, at the U.S. Navy-Marine Corps Court of Criminal Appeals, 1254 Charles Morris Street SE, Washington Navy Yard, DC 20374-5124.

FOR THE COURT:

[redacted]

S. TAYLOR JOHNSTON
Acting Clerk of Court

Copy to: 45 (LT Horst); 46 (LT Tuosto); 02

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas H. Tapp** Private First Class (E-2) U. S. Marine Corps, Appellant	**NOTICE OF APPEARANCE** Crim.App. Dkt. No. 202100299 USCA Dkt. No. 23-0204/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rule 16 of this Court's Rules for Practice and Procedure, undersigned counsel enters his appearance on behalf of Appellant. Undersigned counsel is a member in good standing with this Court.

Undersigned counsel will be acting as lead counsel. Undersigned counsel also anticipates representing Appellant at oral argument.

Very Respectfully.

[redacted]

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]

[redacted]
CAAF Bar No. [redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to this Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 1, 2023.

[redacted]
CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]
CAAF Bar No. [redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas H. TAPP,** Private First Class (E-2) U. S. Marine Corps Appellant	**MOTION FOR EXTENSION OF TIME TO FILE BRIEF** Crim.App. Dkt. No. 202100299 USCA Dkt. No. 23-0204/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rules 19, 30 and 33 of this Court's Rules for Practice and Procedure, Appellant, through counsel, respectfully requests a fourteen-day extension of time to the deadline to file a brief. Appellant's brief is currently due 12 December 2023.[1] Oral argument is currently scheduled for 6 February 2024.[2] Appellant requests an extension until December 26, 2023.

There is good cause to grant this motion. In its most recent order granting an extension on 28 November 2023, this Court stated "no further extensions of time will be granted in this case."[3] Undersigned counsel was detailed to this case just before the issuance of this order on the morning of 28 November 2023. Prior to being

[1] Mtn. Order dated November 28, 2023.
[2] Oral Arg. Hearing Notice dated November 21, 2023.
[3] Mtn. Order dated November 28, 2023.

detailed, undersigned counsel had not reviewed the case materials or record. Undersigned counsel was detailed because the counsel of record felt he could not represent Appellant effectively and had been unable to prepare Appellant's brief. On 3 December 2023, this counsel filed a motion with this Court to withdraw from Appellant's case articulating this belief.[4]

Since being detailed, undersigned counsel has made this case his primary duty. Undersigned counsel has worked around the clock to review the record, which contains over 4,500 pages, and begin drafting a brief. To ensure counsel is adequately able to review the record, finalize the brief, and prepare a joint appendix in this case an additional two weeks may be necessary. This case and the issue assigned also involve sealed material, which undersigned counsel requires authority to review. A motion seeking this authority was filed with this Court on 3 December 2023.

A filing date of 26 December would still ensure the Government has thirty days to file an Answer with this Court (25 January) and would allow for Appellant to file a Reply within ten days and before oral argument (4 February).

Thus, good cause exists for a fourteen day enlargement of time to file Appellant's brief.

[4] Mtn. to Withdraw as Appellate Def. Counsel dated 3 December 2023.

WHEREFORE, Appellant respectfully requests an additional fourteen days until December 26, 2023, to file the brief. In the alternative, Appellant requests any additional time this Court deems appropriate.

Very Respectfully.

[redacted]
CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]
CAAF Bar No. [redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to this Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 3, 2023.

[redacted]
CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]
CAAF Bar No. [redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas H. TAPP,** Private First Class (E-2) U.S. Marine Corps Appellant	**MOTION TO EXAMINE SEALED MATERIAL** Crim.App. Dkt. 202100299 USCA Dkt. 23-0204/MC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW the undersigned and respectfully moves, pursuant to Rule 30 of the Rules of Practice and Procedure for the Court of Appeals for the Armed Forces to examine and make copies of sealed exhibits and transcription pages in the Record of Trial.

The Navy and Marine Corps Court of Criminal Appeals previously granted a motion for the previously detailed counsel, LT Megan Horst, JAGC, USN, to examine the material outlined below. Undersigned counsel is filing this motion in an abundance of caution.

Counsel requests to examine and make copies of the following:

Mil R. Evid. 412 Appellate Exhibits XIX, XX, XXIV, LII, LIII, LVIII, LIX, LXII, LXIII, LXIV, LXV, LXXXV, LXXXVI, LXXXIX, XL, XLI, CXIII, and transcription pages 242-280, 454-512, and 1438-1507.

a. Were the sealed matters:

   i. Presented or reviewed by counsel at trial? **Yes.**

   ii. Reviewed in camera and then released to trial or defense counsel? **No.**

b. Examination is necessary to a proper fulfillment of counsel's responsibilities: **Examination of the sealed transcription pages and appellate exhibits is necessary to fully and accurately brief this Court's granted issue of whether the military judge was impartial.**

c. Is the matter the subject of a colorable claim of privilege? **No.**

d. Is counsel seeking disclosure? **Yes. Counsel seeks to make a copy of the sealed material for review in his office.**

e. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **Counsel will be able to conduct a more thorough review in his office and will need to refer back to the material frequently in drafting a brief and preparing for oral argument. Counsel will destroy the material upon completion of appellate review.**

Absent further order of the Court, undersigned counsel will otherwise ensure continued compliance with any protective orders issued by the military judge in this case.

WHEREFORE, Appellant respectfully requests that this Court grant this motion to examine sealed matters in the Record of Trial.

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity

CAAF Bar No. [redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 3, 2023.

[redacted]
CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]mil
CAAF Bar No. [redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR ENLARGEMENT OF TIME TO FILE ANSWER
v.	)	
	)	Crim.App. Dkt. No. 202100299
Thomas H. TAPP, Private First Class (E-2) U.S. Marine Corps Appellant	)	USCA Dkt. No. 23-0204/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Under this Court's Rules of Practice and Procedure 19, 30, and 33, the United States respectfully requests a thirty day enlargement of time to extend the deadline to file its Answer. Appellee's Answer is currently due January 14, 2024. Appellee requests thirty days for a new due date of February 13, 2024.

There is good cause for this request. This case involves a multi-faceted challenge involving constitutional and statutory rights.

Due to the complexity of the issue, Counsel needs additional time to draft the Answer and ensure it completely and accurately represents the United States' settled position on the issue.

Conclusion

The United States respectfully requests this Court grant this Motion and extend the time to file its Answer to February 13, 2024.

[redacted]
MICHAEL A. TUOSTO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]7
Bar no. [redacted]

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon Appellate Defense Counsel, Christopher B. DEMPSEY, JAGC, U.S. Navy, on January 08, 2024.

[redacted]
MICHAEL A. TUOSTO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]
Bar no. [redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas H. TAPP,** Private First Class (E-2) U.S. Marine Corps Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. 202100299 USCA Dkt. 23-0204/MC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

CHRISTOPHER B. DEMPSEY
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
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CAAF Bar No. [redacted]

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Introduction

[redacted]

Later, after Appellant was convicted and the trial ended, defense counsel left the courtroom and trial counsel was gathering their things. Trial counsel asked the military judge if he was interested in conducting a later debrief with all counsel and he declined. But then the military judge launched into a forty-minute, *ex parte* "blasting" of trial counsel where his anger against the Defense erupted again.[3] The military judge was outraged with the low sentence in the case and thought trial

[1] J.A. at 1459-60.
[2] J.A. at 1460.
[3] J.A. at 587.

counsel needed to ask for more punishment. He thought the trial counsel had "undervalue[d] this case."[4]

He cited what he saw as the aggravating factors in Appellant's case and asserted that "when the Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and *then there is no 'price' to be paid by the Defense* for their earlier decisions," such as filing motions late or during trial as occurred here.[5] Trial counsel, frozen by this encounter, immediately thereafter spoke to supervisory counsel and provided a memorandum to defense counsel outlining the military judge's outburst.

The military judge later recused himself in a post-trial 39(a) where he defended his impartiality despite his pretrial comments, his *ex parte* outburst, and several troubling comments he made throughout the record about the evidence that demonstrated he had a preconceived notion about the case. And after a hearing where all the witnesses during the *ex parte* lecture testified except the military judge, a follow-on military judge ruled he was impartial.

But this ruling, which found no bias and no justification for setting aside the

[4] J.A. at 503.
[5] J.A. at 1382 (emphasis added).

findings, was an abuse of discretion littered with several clearly erroneous findings of fact. The military judge's actions before, during, and after trial demonstrate partiality for the Government. Aside from his biased view of the facts of the case, the military judge critically [redacted] And when Appellant was not required to pay a "price" in sentencing for the actions of his counsel, he "blasted" the trial counsel for letting that happen. The military judge was actually biased and at least apparently biased. This case should be reversed to restore public confidence in military justice.

Statement of Statutory Jurisdiction

Private First Class (PFC) Tapp's approved sentence includes a dishonorable discharge and three years' confinement.[6] The Navy and Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[7] Thus, this Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.

[6] J.A. at 92, 497.
[7] 10 U.S.C. § 866(b)(3) (2018).

Statement of the Case

A general court-martial composed of members with enlisted representation convicted PFC Thomas H. Tapp, contrary to his pleas, of one specification of violating a lawful general order and one specification of sexual assault in violation of Articles 92 and 120, Uniform Code of Military Justice (UCMJ).[8] The members sentenced him to three years' confinement, total forfeitures, reduction in rank to E-1, and a dishonorable discharge.[9] The NMCCA affirmed the findings and sentence.[10] Appellant timely petitioned this Court on June 16, 2023, and this Court granted review.

Statement of Facts

A. Appellant, PFC [redacted] and [redacted] drank alcohol and engaged in sexual activity in Appellant's barracks room. [redacted] was too drunk to remember anything after consensually kissing Appellant in response to his question "[d]o you want more?"[11]

Appellant (age twenty) and PFC [redacted] (age eighteen) were both involved in a sexual encounter with [redacted] (age sixteen) after drinking alcohol.[12] [redacted] later alleged she could not recall some of the sexual activity and would not have

[8] 10 U.S.C. § 892 (2018); 10 U.S.C. § 920 (2018).
[9] J.A. at 497.
[10] J.A. at 1-35.
[11] J.A. at 357.
[12] J.A. at 249-67, 328-29, 359-61.

consented because it was not her "intention."[13] PFC [redacted] testified for the Government.[14] He was granted immunity and the offenses charged against him were dismissed.[15]

Appellant was ultimately convicted of drinking underage and sexually assaulting [redacted] without her consent.[16]

1. [redacted] testified she engaged in consensual sexual activity in the Uber and at the barracks.

On the afternoon of July 18, 2020, [redacted] and her mom met Appellant and PFC [redacted] at Oceanside Beach.[17] [redacted]'s mom left shortly after they introduced themselves.[18] The Marines flirted with [redacted] and gave her a piggy back ride.[19] Appellant and PFC [redacted] then asked [redacted] if she wanted to come to their place, drink, and hang out.[20] [redacted] agreed and let her mom know she would be "out with some friends."[21] Her mom told her to be home by 8:30 p.m.[22]

[redacted] told the Marines she wanted to "get a bottle of Henny" and "go

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[13] J.A. at 249-67, 328-29, 359-61.
[14] J.A. at 239.
[15] J.A. at 270-71.
[16] J.A. at 89-90, 496.
[17] J.A. at 195, 307.
[18] J.A. at 195-96.
[19] J.A. at 272-73.
[20] J.A. at 273, 308-11.
[21] J.A. at 310-11.
[22] J.A. at 195-96, 311.

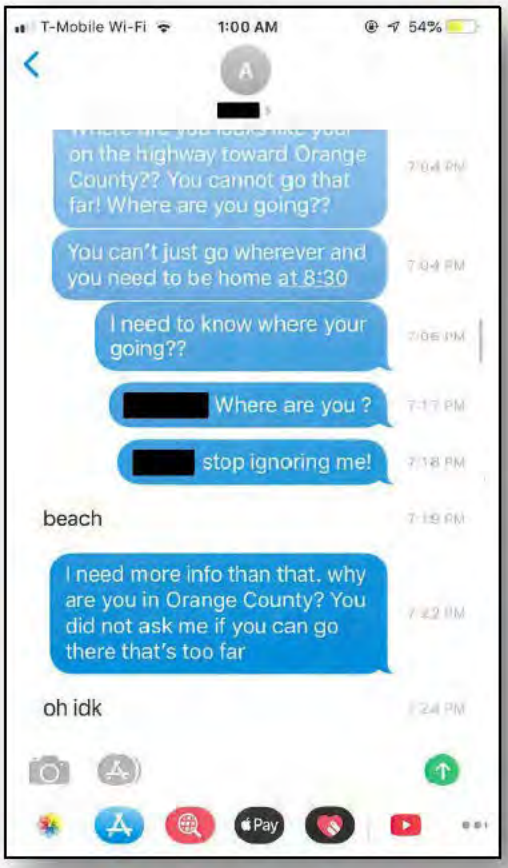
drinking."[23] She initially said she needed to be home by 11:00 p.m., but later told the Marines she would spend the night.[24] [redacted] also falsely told the Marines she was nineteen years old.[25]

After getting some alcohol at a liquor store, Appellant, PFC [redacted] another Marine, and [redacted] shared an Uber ride from Oceanside Beach to the barracks on Camp Pendleton.[26] Right before the Uber ride, PFC [redacted] discussed with [redacted] that they would "[m]ess around a little bit."[27] [redacted] drank "less than half" a beer while they waited.[28] During the ride, the occupants were drinking a bottle of vodka.[29] PFC [redacted] and [redacted] began "flirting a lot" and "making out."[30] [redacted] ran her fingers through his hair.[31] PFC [redacted] unbuttoned [redacted]'s skirt and digitally penetrated her vulva for two to five minutes.[32] [redacted] later told NCIS and the Sexual Assault Nurse Examiner (SANE) that this sexual activity was

[23] J.A. at 241, 273.
[24] J.A. at 273.
[25] J.A. at 241.
[26] J.A. at 242, 313-15.
[27] J.A. at 275.
[28] J.A. at 313-14.
[29] J.A. at 316.
[30] J.A. at 230, 242-43, 276.
[31] J.A. at 276.
[32] J.A. at 242, 276, 319.

consensual.[33] At trial, [redacted] testified, "he just did it, and I allowed it."[34]

Despite testifying that she was uncomfortable in the Uber, [redacted] lied to her mom about where she was going:[35]



Appellant, PFC [redacted], and [redacted] went to PFC [redacted]'s room to drink beer and vodka and later moved to Appellant's room.[36] In total, [redacted] had approximately

[33] J.A. at 380, 416.
[34] J.A. at 347.
[35] J.A. at 666-67.
[36] J.A. at 244-45, 320-23.

eight drinks.[37]

Just moments before Appellant and [redacted] had sex, they were hugging and taking selfies in the bathroom.[38] [redacted] took this video at 7:55 p.m.:[39]

Appellant kissed her and asked, "[d]o you want more?"[40] [redacted] testified that

[37] J.A. at 388.
[38] J.A. at 247, 324-38, 665.
[39] J.A. at 665.
[40] J.A. at 357.

after hearing that question, she consensually kissed him back.[41]

2. While having sex with Appellant, [redacted] moaned pleasurably, actively participated, and stimulated PFC [redacted]'s penis with her tongue.

[redacted].'s last memory of the evening was consensually kissing Appellant.[42] Her next memory was waking up in a hospital bed.[43]

PFC [redacted] (the Government's witness) testified that after Appellant and [redacted] kissed in the bathroom and took pictures together, [redacted] returned to the bedroom.[44] All three of them started "making out" and getting undressed.[45] [redacted] took off Appellant's shirt.[46] She "shimmied" her hips to help them remove her skirt and swimsuit bottom.[47] [redacted] put her arms around Appellant and continued kissing him once they were all naked and standing.[48] [redacted] and Appellant moved back to the bed, "slipped to the ground" together, and continued kissing.[49] Appellant and [redacted] had "missionary style" sex for ten minutes on the floor.[50]

While having sex with Appellant, [redacted] masturbated PFC [redacted]'s penis

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[41] J.A. at 357.
[42] J.A. at 327-28, 359.
[43] J.A. at 328.
[44] J.A. at 245-49, 282.
[45] J.A. at 248-49.
[46] J.A. at 249, 283.
[47] J.A. at 284.
[48] J.A. at 286.
[49] J.A. at 249, 286.
[50] J.A. at 249, 251-52; 286.

with her hand for two minutes.[51] She did so without assistance and while fully "gripping" PFC [redacted]'s penis.[52] PFC [redacted] testified that she was "awake, participating, and making pleasurable moans," and that her eyes were closed.[53] This all occurred while she was still having sex with Appellant.[54]

PFC [redacted] then tapped [redacted].'s cheek and asked her to perform oral sex on him, and she lifted her head in response.[55] [redacted] actively engaged in oral sex with PFC [redacted] making "sex noises" while "using her tongue" around PFC [redacted]'s penis.[56] During PFC [redacted]'s testimony, one panel member asked, "was she giving you oral sex or were you moving her head?"[57] He answered, "[i]t was both. She had—had made a squeal and was using her tongue, but I was, also, like, moving her head back and forth."[58]

PFC [redacted] then asked Appellant to switch positions.[59] At this point, Appellant and [redacted] stopped having sexual intercourse.[60]

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[51] J.A. at 252, 287.
[52] J.A. at 287, 295.
[53] J.A. at 253, 287.
[54] J.A. at 287.
[55] J.A. at 254, 288.
[56] J.A. at 289-90, 296-97.
[57] J.A. at 297.
[58] J.A. at 297.
[59] J.A. at 255, 290.
[60] J.A. at 290.

PFC [redacted] explained his perception *at the time*:[61]

> **Questions by the trial counsel continued:**
>
> Q. What was your perception of [redacted] when PFC Tapp was penetrating her, based on your observations?
>
> A. At the time, seemed normal. Just like a drunk hookup.

PFC [redacted] was the only witness who testified about what occurred during this time. Appellant did not testify, but told NCIS the sex was consensual, and [redacted] did not remember anything about this part of their sexual encounter.[62]

When Appellant moved, PFC [redacted] stated he saw a red area on Appellant's crotch that he believed was a colored condom.[63] He thought later, at trial, it "might have been blood."[64] Nonetheless, a later forensic analysis indicated no blood from [redacted] on Appellant's penis or scrotum despite [redacted]'s DNA being present.[65]

After Appellant moved, PFC [redacted] positioned himself between [redacted]'s legs.[66] PFC [redacted] attempted to penetrate her vulva with his penis, but could not,

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[61] J.A. at 269.
[62] J.A. at 327-28, 1297, 1301-04, 1316, 1325-28, 1331, 1336.
[63] J.A. at 256-57.
[64] J.A. at 256-57.
[65] J.A. at 228, 383, 384-85. The examiner also did not observe visible blood on his penis. J.A. at 229.
[66] J.A. at 257.

so he began digitally penetrating her vulva and masturbating himself for three minutes.[67] He testified [redacted] continued "moaning" while PFC [redacted] digitally penetrated her, and she was "into it."[68] PFC [redacted] explained he did not have long fingernails because he bites them.[69] After three minutes, PFC [redacted] noticed blood on his hands and attempted to show [redacted], but she did not respond.[70] PFC [redacted] looked to Appellant and did not notice any blood on Appellant even though he was naked and standing up facing him.[71]

Until he tried to show his fingers to [redacted], PFC [redacted] agreed that [redacted] "was fully, enthusiastically participating" in the sexual encounter.[72]

3. [redacted] was likely menstruating. This caused a significant amount of blood to pool under her in the barracks room. A Sexual Assault Forensic Exam (SAFE) revealed two lacerations to the exterior of her vagina, which could have contributed to the blood at the scene.

PFC [redacted] started "freaking out" because of the blood.[73] He made sure she was breathing and rubbed his knuckles on her sternum.[74] She responded with a

[67] J.A. at 257.
[68] J.A. at 257, 291-92.
[69] J.A. at 259.
[70] J.A. at 258, 292.
[71] J.A. at 292-93.
[72] J.A. at 293-94.
[73] J.A. at 259-61.
[74] J.A. at 259-61.

groan.[75] She would not stop bleeding from her vagina so Appellant and PFC [redacted] wiped her with a damp paper towel.[76] They tried repeatedly to wake her.[77] Finally, they clothed her, moved her to a recovery position, and PFC [redacted] went to get a friend, PFC [redacted] who had medical training.[78]

When PFC [redacted] walked into the room, [redacted] and Appellant were both unconscious.[79] There was a pool of blood in the middle of the carpet with several "very small, fleshy pieces" in the center and vomit everywhere.[80] PFC [redacted] believed it was possibly period blood and proceeded to check [redacted]'s airway, breathing, and circulation.[81] She started making puking sounds so he turned her on her side.[82]

In the meantime, [redacted]'s mom had contacted the Camp Pendleton police, told them she was worried about her daughter, and asked them to do a welfare check.[83] The iPhone location she provided eventually led the police to Appellant's barracks

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[75] J.A. at 261.
[76] J.A. at 262.
[77] J.A. at 263.
[78] J.A. at 264-65.
[79] J.A. at 231. PFC [redacted] also testified with immunity. J.A. at 238.
[80] J.A. at 201, 204, 210, 219, 231.
[81] J.A. at 232-33, 236-37.
[82] J.A. at 235.
[83] J.A. at 202.

room.[84]

The Emergency Medical Technicians (EMTs) arrived on the scene around 11:00 p.m.—approximately three hours after Appellant and [redacted] had sex.[85] The police told the EMTs that the room was a potential crime scene.[86] The EMTs observed that both [redacted] and Appellant appeared unconscious.[87] Because of the blood on the floor and on [redacted]'s skirt, the EMT thought she might be injured.[88] After the use of painful stimuli, [redacted] "opened her eyes a little bit" and gave limited answers to questions the EMT asked her.[89] In the ambulance, [redacted] told the EMT she had started her menstrual cycle and that she was not in pain.[90]

At the hospital, [redacted] told the nurse she had started her menstrual cycle, as reflected in the nurse's chart.[91] When she woke up the next day, unprompted, the nurses told her she "may have been sexually assaulted" and [redacted] was taken for a Sexual Assault Forensic Exam (SAFE).[92] [redacted] testified she felt a sharp pain in her vagina when she first got out of the hospital bed and the pain continued to occur

[84] J.A. at 202.
[85] J.A. at 209.
[86] J.A. at 209.
[87] J.A. at 209.
[88] J.A. at 211.
[89] J.A. at 213.
[90] J.A. at 216-17.
[91] J.A. at 223-224.
[92] J.A. at 329, 364.

over a period of about two weeks.[93]

The Sexual Assault Nurse Examiner (SANE), Ms. [redacted], testified that [redacted] said she was on her period and that this was the "normal time" for it.[94] [redacted] had a twenty-eight day cycle and experienced her next period approximately twenty-eight days after this.[95] Ms. [redacted] testified that period blood could contain fleshy tissue from the uterine lining and it does not clot (unlike blood from a laceration).[96] Ms. [redacted] testified that [redacted] said she felt pain when Ms. [redacted] touched her during the genital exam but that alcohol could dull pain at the time of an injury.[97] The Government's forensic toxicologist confirmed that intoxication increases pain tolerance.[98] Ms. [redacted] observed external genital lacerations that "seep[ed]" blood—not gushed blood—and saw blood that appeared to be menstrual blood: "drip down and bright red."[99]

But at a follow-up appointment three days later, [redacted] told Ms. [redacted]

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[93] J.A. at 328-31, 333.
[94] J.A. at 366, 380-81.
[95] J.A. at 332, 363. [redacted] testified she bled for approximately two and a half weeks after the incident and then got her period two weeks later. J.A. at 332.
[96] J.A. at 378.
[97] J.A. at 365-67, 381.
[98] J.A. at 386-87, 394. The Defense expert SANE also confirmed alcohol increases pain tolerance. J.A. at 448.
[99] J.A. at 366-68, 455-56, 461-62.

she was not actually menstruating at the time of the alleged incident.[100] Ms. [redacted] then changed her assessment of the blood based on [redacted]'s new claim, but still testified that the blood, even during her follow-up exam, "could have been . . . her menstruation."[101] Ms. [redacted] testified the bleeding, since it was not menstruation according to [redacted] (although it was consistent with menstruation), was instead likely from an internal injury to the vaginal wall—despite never actually observing it during the initial or follow-up appointments.[102] She thus believed that the blood at the scene was likely from a combination of this unobserved injury to her vaginal wall as well as the blood from her external lacerations, which could not have alone been the cause.[103]

A government-provided defense expert testified and agreed that the observed lacerations alone could not have caused the blood at the scene.[104] She testified instead that the blood at the scene could have been menstrual blood that pooled in [redacted]'s vagina and gushed out upon her moving.[105] Specifically, the Defense expert articulated that while sex cannot start a woman's period, when the cervix is

[100] J.A. at 369-71.
[101] J.A. at 370, 460-61.
[102] J.A. at 458-61.
[103] J.A. at 458-62.
[104] J.A. at 424.
[105] J.A. 424-25.

stimulated from sex, it may trigger menstrual blood being released.[106]

B. The Government pursued a theory that nonconsent was evidenced by the bleeding and follow-on pain that [redacted] experienced, regardless of the testimony of PFC [redacted] and her prior consensual conduct.

In an early Article 39(a) hearing, the Government told the military judge: "[s]o part of the government theory is that the injuries [redacted] had would have been so painful when made that no reasonable person would have consented, sir."[107]

[redacted] During trial, the Government's theory of the case was similarly that blood, pain, and [redacted]'s unobserved and observed injuries were evidence of a nonconsensual sexual encounter.[109]

[redacted]

[106] J.A. at 452-53.
[107] J.A. at 197.
[108] J.A. at 1501.
[109] J.A. at 182-94, 198-200, 203, 205-06, 209, 214, 218, 221, 225-26, 465-95, 668.
[110] J.A. at 672-964, 999-1242, 1503-72, 1615-30.

[redacted]

C. [redacted]

[redacted]

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[111] J.A. at 672-964, 999-1242, 1503-72, 1615-30.
[112] J.A. at 1459.
[113] J.A. at 146.
[114] J.A. at 1440-96, 1557-72.
[115] J.A. at 669-71, 1440-96. A continuance of the trial date was requested by the Defense for various reasons, the Government did not oppose, and the court granted the motion. J.A. at 151-52. A third Article 39(a) was then held. J.A. at 145-52.
[116] J.A. at 1440-65, 1557-73.
[117] J.A. at 1458-59.
[118] J.A. at 1440-65.

[redacted]

[119] J.A. at 1458.
[120] J.A. at 1456-57.
[121] J.A. at 146.
[122] J.A. at 1459.
[123] J.A. at 1459-60 (emphasis added).
[124] J.A. at 1460.

[redacted][5]

D. In ruling on other motions, the military judge made his opinion on the evidence in this case apparent through several on-record comments.

The Defense litigated several other motions to rebut the Government's theory of the case. In weighing and ruling on these motions, the military judge regularly offered his views on the evidence.

1. [redacted]

[125] J.A. at 1465-98, 1589-1604.
[126] J.A. at 1586.
[127] J.A. at 1512.
[128] J.A. at 1513.
[129] J.A. at 1575, 1628.

[redacted]

[130] J.A. at 1575.
[131] J.A. at 1430-36, 1586.
[132] J.A. at 1585.
[133] J.A. at 1586. The lower court similarly found the majority of the bleeding was "undoubtedly caused" by the observed lacerations, "possibly with menstrual blood added." J.A. at 14.

[redacted]

2. [redacted]

[redacted]

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[134] J.A. at 1586-87.
[135] J.A. at 1587.
[136] J.A. at 1587.
[137] J.A. at 1586, 1588 (emphasis in orginal). The lower court found this finding to be clearly erroneous. J.A. at 14.
[138] J.A. at 1556.
[139] J.A. at 1556
[140] J.A. at 1607-14.

[redacted]

[141] J.A. at 1607-14.
[142] J.A. at 1607.
[143] J.A. at 1607.
[144] J.A. at 1578, 1586, 1588.
[145] J.A. at 1374, 1605.
[146] J.A. at 1605.
[147] J.A. at 299-301.
[148] J.A. a t 1605.

[redacted] He concluded, before reviewing the Defense's motion, that "frankly, the Court is not convinced . . . a motion to reconsider is even applicable here" and "[t]here is zero impact on the defense's ability to defend itself."[150]

[redacted]

[149] J.A. at 304.
[150] J.A. at 304-06.
[151] J.A. at 1615-30.
[152] J.A. at 1616.
[153] J.A. at 1623.
[154] J.A. at 1607.
[155] J.A. at 1499.

[redacted]

3. The military judge denied the Defense's request for an expert consultant in forensic pathology, gynecology, and wound interpretation. He explained "[w]ell, most people don't participate in an activity that causes that much injury . . . voluntarily."[158]

The Government's theory was also that this was a "forensic" case.[159] Trial counsel argued they proved lack of consent simply based on the "uncontroverted medical, scientific, and forensic evidence."[160]

Pre-trial, the Defense filed a motion to compel the Government to employ Dr. [redacted] as a confidential expert consultant in forensic pathology and gynecology to dispute the Government's contentions.[161] The Defense argued that because [redacted] suffered injuries to her vaginal area, and the Government's theory was that Appellant allegedly caused those injuries, understanding the bleeding and lacerations was crucial for the Defense.[162] The Defense argued Dr. [redacted] would conduct a wound interpretation analysis by reviewing [redacted]'s SAFE and photos of

[156] J.A. at 1502.
[157] J.A. at 1500.
[158] J.A. at 130.
[159] J.A. at 465-66.
[160] J.A. at 465.
[161] J.A. at 871, 873.
[162] J.A. at 873.

her injuries.[163] Dr. [redacted] testified in support of the motion.[164]

The military judge denied the motion, concluding "[t]here is a lot of faulty analysis by the defense with respect to Dr. [redacted]."[165] He found [redacted]'s menstruation cycle was "a very simple issue to understand, that a SANE could, frankly, help with."[166] He concluded this case did not involve "the type of fact pattern that's so complicated that a forensic pathologist is needed to diagnose or to interpret wounds that are out of the ordinary."[167] Finally, the military judge said, "the Court completely agrees with the government's response and adopts its analysis as the Court's own."[168] The military judge directed the Government to provide the Defense with an adequate substitute SANE or SAMFE, explaining "they need to be qualified and equivalent and competent" to what the Government will present.[169]

After the Government provided LT [redacted] as the Defense's SANE consultant, the defense filed a motion for reconsideration to compel Dr.

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[163] J.A. at 874.
[164] J.A. at 95.
[165] J.A. at 107.
[166] J.A. at 107.
[167] J.A. at 109.
[168] J.A. at 111.
[169] J.A. at 112.

[redacted].[170] Lieutenant [redacted] had only performed three female SAFE exams and made no findings of injury in all three.[171] In contrast, the government's SAMFE, Ms. [redacted], had conducted 103 examinations, made findings of injuries forty percent of the time, and had done more than 500 peer reviews of SAFEs.[172]

The military judge was unconcerned that LT [redacted] was significantly less experienced than Ms. [redacted]: "when comparing [LT [redacted]'] expertise to the facts of this case and the government SANE, this will be a very equal situation where the defense is well-position to learn everything it needs to learn in preparation for trial."[173] The military judge said that because LT [redacted] had seen injuries to the female genitalia during childbirth, her experience would help with injuries resulting from alleged sexual assault.[174]

The military judge took the trial counsel at his word when he claimed the Government will not engage in a "battle of the experts."[175] The military judge found this was "not even expected in this case, and that makes sense in a case primarily about consent and not complicated or unique medical opinions."[176] In

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[170] J.A. at 1127-1242.
[171] J.A. at 1129.
[172] J.A. at 125-27.
[173] J.A. at 133-34.
[174] J.A. at 131.
[175] J.A. at 138.
[176] J.A. at 138.

response to the Defense's argument that they would need an expert to explain [redacted].'s injuries, the military judge said, "[w]ell, most people don't participate in an activity that causes that much injury . . . voluntarily."[177] He said, "[p]enetration and the injuries that it may have caused is not the central issue, and frankly, not that difficult to understand."[178]

The military judge then again denied the Defense's motion, concluding "[t]his is absolutely noncontroversial [and] how alcohol-facilitated sexual assault cases like this are tried all the time in the Marine Corps."[179]

E. After the trial adjourned and defense counsel left the courtroom, the military judge chastised the trial counsel for forty minutes. He said this case had significant "aggravating evidence" and stated there is "no price to be paid by the Defense" for going to a contested trial or litigating motions when the Government fails to ask for the maximum sentence.[180]

After the military judge adjourned the court-martial and the trial defense counsel left the courtroom, Major Michel (lead trial counsel) asked the military judge if he would be willing to set up a debrief with all counsel.[181] The military judge said "no."[182]

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[177] J.A. at 130.
[178] J.A. at 140-41 (emphasis added).
[179] J.A. at 142.
[180] J.A. at 503, 1381-82.
[181] J.A. at 1381.
[182] J.A. at 634, 1381.

But while trial counsel were packing up to leave, the military judge asked Major Michel if he "felt that there were worse sexual assault cases" than Appellant's.[183] Major Michel responded in the affirmative.[184] The military judge disagreed based on the "aggravating factors," such as the blood, alcohol, vomit, and [redacted]'s age.[185] He chastised trial counsel about their "undervalue[d]" assessment of Appellant's case for forty minutes.[186]

First, he criticized Major Michel for asking for eleven years of confinement rather than the maximum sentence (thirty-two years) or at least "more than what [the Government] had asked for."[187] In an affidavit, the court reporter explained "LtCol Norman [(the military judge)] seemed upset that Appellant was sentenced to only 3 years of confinement."[188] The military judge said, "I don't know if you guys [(trial counsel)] know what right looks like."[189] Captain Gage O'Connell (another trial counsel) testified the military judge said he wished Captain O'Connell had done the Government's sentencing argument, recognizing that he

[183] J.A. at 1381.
[184] J.A. at 635, 1381.
[185] J.A. at 587, 594, 635-36.
[186] J.A. at 1381.
[187] J.A. at 586, 597, 635-36, 1381.
[188] J.A. at 1384
[189] J.A. at 629.

was "aggressive."[190] Captain O'Connell explained the military judge "takes military justice very seriously, *particularly when you're a trial counsel and you[']re] representing the government*."[191]

Then, he complained that when the government artificially "caps" the sentence by asking for less than the maximum, "the Defense has no incentive to avoid contested trials."[192] [redacted] said there is ***"no price to be paid by the Defense"*** for "their prior tactics during trial"—such as going to trial or filing untimely motions.[193]

The court reporter testified the military judge appeared upset, disappointed, raised his voice, and "blasted" the trial counsel.[194] All three trial counsel testified that the military judge was "chastising" them, angry, "pretty aggressive," and raised his voice.[195] Everyone stood for the duration of the forty-minute lecture.[196] None of the trial counsel felt comfortable enough to ask him to stop or request to leave.[197]

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[190] J.A at 627.
[191] J.A. at 620.
[192] J.A. at 618, 1382.
[193] J.A. at 640, 1381-82, 1460.
[194] J.A. at 586-588.
[195] J.A. at 591, 595, 612, 618-19, 623, 636.
[196] J.A. at 637.
[197] J.A. at 599-600, 628, 640-41.

F. Trial counsel immediately prepared a memorandum and provided it to the Defense. The Defense filed a motion seeking either dismissal with prejudice or a mistrial.

Once the trial counsel left the courtroom, they determined these *ex parte* comments "need[ed] to be reported" and called their supervisor.[198] On March 1, 2021, Major Michel provided a memorandum detailing the *ex parte* lecture to the Defense.[199]

On March 5, the military judge emailed the parties directing a post-trial Article 39(a) session, but did not explain why.[200]

The next day, the Defense filed a motion seeking the military judge's disqualification from further proceedings and dismissal with prejudice, or a mistrial in the alternative.[201] The motion was based on the military judge's demeanor and comments during trial and his *ex parte* post-trial lecture.

On March 8 the trial defense counsel objected to moving forward with the post-trial Article 39(a) without the military judge first ruling on whether he should be disqualified.[202] While repeatedly ignoring the defense's objection, the military

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[198] J.A. at 625, 643-44, 646.
[199] J.A. at 643, 1381.
[200] J.A. at 1390.
[201] J.A. at 1353-90.
[202] J.A. at 498-507.

judge explained his impartiality in a statement that takes up six transcript pages.[203] He corroborated much of what the trial counsel said.[204]

He explained that this case had "significant aggravating . . . evidence" and that he believed trial counsel "undervalue[d] this case."[205] He also stated that "zealous advocacy on sentencing supports effective pretrial negotiations."[206] "[W]hen the government undervalues a case in sentencing, like I believe they had here . . . it acts like a self-imposed cap on the sentence . . . ."[207] He argued he assisted both sides because before the *ex parte* counseling he had "already strongly encouraged the defense to put on a robust sentencing case."[208] He said four times, "I've remained completely impartial throughout this trial and remain impartial now."[209]

The military judge said he does "not believe there is a reasonable appearance of bias based on the totality of the circumstances."[210] But looking back, he would have asked all counsel "to come back in the courtroom before giving any

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[203] J.A. at 502-07.
[204] J.A. at 502-07.
[205] J.A. at 503.
[206] J.A. at 503.
[207] J.A. at 503-04.
[208] J.A. at 505.
[209] J.A. at 502-03, 506-07.
[210] J.A. at 503, 505.

feedback."[211] Despite claiming to be impartial, he ended his monologue by recusing himself from any further post-trial matters.[212]

G. Colonel Woodard, the post-trial military judge, denied the Defense's post-trial motion.

Shortly after the first military judge—LtCol Norman—adjourned the post-trial session, ColWoodard became the presiding judge.[213] After conducting voir dire, the Defense challenged Col Woodard based on his professional relationship with LtCol Norman as giving the appearance of bias.[214] Colonel Woodard denied this challenge.[215]

Before LtCol Norman was called to testify, Col Woodard brought in LtCol Norman's defense counsel to give him a rundown about what questions were going to be asked.[216] Colonel Woodard then allowed LtCol Norman's defense counsel to consult with LtCol Norman.[217] Instead of allowing Appellant's defense counsel to question LtCol Norman, Col Woodard decided he should ask the questions.[218]

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[211] J.A. at 503, 505.
[212] J.A. at 506-07.
[213] J.A. at 577-79.
[214] J.A. at 508-70.
[215] J.A. at 570.
[216] J.A. at 571-72.
[217] J.A. at 573-77.
[218] J.A. at 577-78.

Colonel Woodard then ordered LtCol Norman to testify, but LtCol Norman invoked his right against self-incrimination and refused to answer any questions.[219] At this hearing, Col Woodard heard testimony from everyone present during the *ex parte* lecture (except LtCol Norman).[220]

Colonel Woodard later denied the defense's motion for dismissal with prejudice.[221] He found that the court-martial's legality, fairness, and impartiality were not put into doubt by LtCol Norman's post-trial *ex parte* comments and his actions and rulings during trial.[222] He found the *ex parte* comments "did not focus on the accused," but instead focused on counsels' shortcomings in representing their clients.[223] He found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement."[224]

Colonel Woodard wrote the *ex parte* comments were a "misguided attempt by LtCol Norman to provide objective but pointed critical feedback."[225] He found LtCol Norman's comments during and after trial "did not exhibit favoritism for

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[219] J.A. at 579-82.
[220] J.A. at 584, 590, 614, 631.
[221] J.A. at 1411-27.
[222] J.A. at 1423.
[223] J.A. at 1424.
[224] J.A. at 1415.
[225] J.A. at 1424.

one side over the other."[226] Finally, he concluded "granting a remedy would not be necessary to ensure that LtCol Norman or other military judges exercise the appropriate degree of discretion in the future."[227]

Summary of Argument

Appellant was denied a fair trial because of LtCol Norman's actual bias against Appellant. Before trial, [redacted]

After trial, his *ex parte* lecture and unsworn statement prior to recusal revealed his anger with trial counsel for not teaching the Defense that lesson. And when this raw insight into LtCol Norman's perception of the case is examined alongside comments he made about the evidence throughout trial and his disparate treatment of counsel, there is no doubt that LtCol Norman meant what he said. He saw the case as egregious and he wanted the Defense (including Appellant) to pay a "price" in the form of more confinement for their actions in litigating it.[229] He was thus actually biased and at a minimum his "impartiality might reasonably be questioned."[230]

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[226] J.A. at 1425.
[227] J.A. at 1426.
[228] J.A. at 1460.
[229] J.A. at 1381-82.
[230] R.C.M. 902(a).

Colonel Woodard made clearly erroneous findings of fact and rested on incorrect conclusions of law when he denied the Defense's motion to set aside the findings and sentence. He therefore abused his discretion. A standard of impartiality should be set. Lieutenant Colonel Norman's bias undercuts public confidence in military justice and presents a significant risk of injustice for other accused as well. As such, this bias warrants reversal.

Argument

Appellant was deprived of his constitutional right to an impartial judge.

Standard of Review

The standard of review of a military judge's impartiality is abuse of discretion.[231] "A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable . . . (4) he fails to consider important facts.[232]

[231] *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).
[232] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F 2017) (internal citations omitted).

Discussion

An accused has a constitutional right to an impartial judge.[233] "The neutrality required by constitutional due process helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."[234] "The impartiality of a presiding judge is crucial, for the influence of the trial judge on the jury is necessarily and properly of great weight."[235] There is a strong presumption that judges are impartial, and the burden is on the party seeking to demonstrate bias.[236]

There are two grounds for disqualification of a military judge: actual bias and apparent bias.[237] Appellant raises both grounds. Rule for Courts-Martial 902(b) lists specific circumstances indicative of actual bias that require disqualification. This includes disqualification where the military judge "has a personal bias or prejudice concerning a party."[238]

Rule for Courts-Martial 902(a) addresses apparent bias, and requires the

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[233] *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001) (internal quotations and citations omitted).
[234] *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (internal quotations omitted)).
[235] *Quintanilla*, 56 M.J. at 43.
[236] *Id*. at 44.
[237] R.C.M. 902; *Quintanilla*, 56 M.J. at 45 (C.A.A.F. 2001).
[238] R.C.M. 902(b)(1).

disqualification of the military judge when his "impartiality might reasonably be questioned." On appeal, this Court asks whether, in the context of the entire trial, the court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.[239] "The test is objective, judged from the standpoint of a reasonable person observing the proceedings."[240] Recusal based on the appearance of bias is intended to "promote public confidence in the integrity of the judicial process."[241]

In this case, LtCol Norman's pre-trial request for the Defense to learn a "lesson" and post-trial *ex parte* counseling expressing frustration with that not having occurred demonstrated actual bias. And when this is examined alongside his treatment of the evidence and the parties before and during trial it is clear that Appellant did not receive a fair trial. At a minimum, LtCol Norman's "impartiality might reasonably be questioned."[242] Colonel Woodard abused his discretion in finding otherwise.

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[239] *Burton*, 52 M.J. at 226.
[240] *Id.*
[241] *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 858 (1988).
[242] R.C.M. 902(a)

A. Lieutenant Colonel Norman displayed a "deep-seated" bias against Appellant and the Defense.[243]

Remarks, comments, or rulings of a judge constitute bias or partiality if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[244]

1. Lieutenant Colonel Norman's biased comments on and off the record exposed his partiality.

a. Lieutenant Colonel Norman's pretrial comments set the stage for his bias against the Defense.

[redacted]

[243] *Quintanilla*, 56 M.J. at 44 (internal quotations and citations omitted).
[244] *Id*. at 44 (internal quotations and citations omitted).
[245] J.A. at 1460.
[246] J.A. at 1459-60.
[247] J.A. at 1440-65.

[redacted]. [redacted] part of his later *ex parte* tirade; an action that the Defense needed to pay a "price" for.[248]

b. Lieutenant Colonel Norman's forty-minute *ex parte* lecture revealed this actual bias toward the Defense lasted through trial.

A military judge's extra-judicial, out-of-court, and *ex parte* statements should be considered as part of the totality of the circumstances in evaluating bias.[249] *Ex parte* communications involving substantive issues or that show favoritism for one side may necessitate recusal.[250] *Ex parte* communications that might have the effect of giving the appearance of granting an undue advantage to one party cannot be tolerated.[251]

Here, Lieutenant Colonel Norman's *ex parte* lecture shed light on the bias he harbored during the entire trial. He said, while he was still the military judge on

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[248] J.A. at 1381-82

[249] *Quintanilla*, 56 M.J. at 81 (holding the military judge's "incomplete disclosures and ex parte conversation appear to have prejudiced appellant"); *United States v. Bremer*, 72 M.J. 624, 627-29 (N-M. Ct. Crim. App. May 23, 2013) (setting aside the sentence for the military judge's failure to recuse himself based largely on out-of-court statements); *United States v. Kish*, No. 201100404, 2014 CCA LEXIS 358, at *10-13 (N-M. Ct. Crim. App. June 17, 2014) (setting aside the findings and sentence based on comments the military judge made at a training post-trial).

[250] *Quintanilla*, 56 M.J. at 79.

[251] *Id*.

the case, exactly how he felt about Appellant. He felt the trial counsel's recommendation for eleven years of confinement was insufficient. He implied this was the worst sexual assault case he had seen. He assumed the role of supervisory trial counsel to remind the Government that this case involved blood, a sixteen-year-old, and genital injuries. Even the court reporter knew the military judge was upset with Appellant's sentence.

Lieutenant Colonel Norman's post-trial anger toward the Government also directly implicated Appellant's constitutional rights to due process and the assistance of counsel.[252] He encouraged the trial counsel to recommend higher sentences—if not the maximum punishment. He said that when the government asks for less than the maximum sentence, there is "no 'price' to be paid by the defense" for their earlier decisions—like going to a contested trial and filing late motions.[253] [redacted]

This connection indicates LtCol Norman held his biased view against the Defense through the entire court-martial.

[252] *See United States v Jackson*, 390 U.S. 570, 581 (1968) (explaining that due process forbids a "chill [on] the assertion of" the right to a jury trial).
[253] J.A. at 1382.
[254] J.A. at 1460.

Moreover, this "blasting" is not merely an expression of dissatisfaction with the trial counsels' performance in this court-martial.[255] It shows a deep-seated favoritism toward the prosecution at the expense of all accused, including Appellant, and antagonism toward the Constitution. Lieutenant Colonel Norman warned the Government to be better—not better in the sense of becoming better advocates, but better by advocating for harsher punishments so the Defense pays the price for litigating issues in the zealous representation of their clients. Such policy also undermines the professional responsibility tenet that "a trial counsel has the responsibility of administering justice and is not simply an advocate."[256]

Notably, despite later asserting "in retrospect" that the Defense should have been present, he declined trial counsel's express invitation to involve defense counsel prior to delivering his remarks.[257] [redacted]

[255] J.A. at 587.
[256] Judge Advocate General's Rules of Professional Conduct, JAGINST 5803.1E, Rule 3.8.e(1).
[257] J.A. at 584.
[258] J.A. at 1381-82, 1460.

c. Lieutenant Colonel Norman "bent over backwards" to make it seem as though he had not acted as a result of actual bias by making self-serving statements on the record.[259]

This Court has held that a military judge's conduct may warrant disqualification where it can be shown "that the challenged judge, in order to compensate for the appearance of such bias, has bent over backwards to make it seem as though he had not acted as a result of such bias."[260]

Here, at the post-trial Article 39(a) hearing LtCol Norman conducted, defense counsel repeatedly objected to moving forward with the hearing until he ruled on the motion to disqualified him.[261] Each time, LtCol Norman said he understood the objection, but instead of ruling on it, he "bent over backwards" explaining four times that he "remained completely impartial throughout this trial and remain impartial now."[262] He did this while knowing he was going to recuse himself. On the record, he claimed he convened the Article 39(a) to consider the Defense's motion, but when he ordered the hearing, the Defense had not yet filed

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[259] *Quintanilla*, 56 M.J. at 43-44 (internal quotations and citation omitted).
[260] *Id*. at 43-44 (internal quotations and citation omitted); *see Bremer*, 72 M.J. at 626-68 (finding that the military judge's comments in a post-trial hearing evidence that he "bent over backwards" to defend his impartiality and thereby made himself appear partial) (quoting *Quintanilla*, 56 M.J. at 43-44).
[261] J.A. at 501-02, 504.
[262] J.A. at 502-03, 506-07.

their motion.[263]

Tellingly, R.C.M. 902 provides "[t]he military judge shall broadly construe grounds for challenge *but should not step down from a case unnecessarily*." "While military judges are obliged to disqualify themselves when they lack impartiality, they are equally obliged not to disqualify themselves when there is no reasonable basis for doing so."[264] The mere fact that LtCol Norman stepped down after delivering these remarks thus underscores his true (and correct) belief about the situation: he needed to recuse himself as he was biased.

Lieutenant Colonel Norman's "attempt to fill the record with enough facts to dispel the appearance of bias only made himself look more self-interested."[265] Thus, LtCol Norman's self-serving unsworn statement underlines the necessity of his recusal, but does nothing to wash out the stain of his partiality.

2. In light of his post-trial comments about his view of the evidence in Appellant's case, LtCol Norman's biased perception of the evidence as indicated by his statements on the record further indicate partiality.

When "there is an indication of extra-judicial bias, each questionable adverse ruling . . . tends to magnify the appearance of injustice."[266] Here, LtCol

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[263] J.A. at 502, 1353-1390.
[264] *Burton*, 52 M.J. at 226.
[265] *Bremer*, 72 M.J. at 628.
[266] *United States v. Edwardo-Franco*, 885 F.2d 1002, 1006 (2d Cir. 1989); *see also Kish*, 2014 CCA LEXIS 358, at *11-14 (finding that a military judge's actions,

Norman's biased view of the case and assessment of the evidence is seen during the very first Article 39(a) session over which he presided. He repeatedly downplayed the complexity of the case and took the prosecution's side.[267] He repeatedly called the forensic issues "non-controversial,"[268] "simple,"[269] "straightforward,"[270] that it is not so complicated an expert "is needed to diagnose or to interpret the wounds,"[271] and asserted "this case is not about what happened" but instead about whether [redacted] could consent or whether there was a mistake of fact as to consent.[272]

He also made his opinion of the "aggravating factors" in the case clear to the parties. In discussing whether evidence of the blood was admissible, he said, "[i]t's hard to think of evidence of higher probative value."[273]

But this case was anything but simple. Lieutenant Colonel Norman's comments demonstrate that he had a preconceived notion about the case—that [redacted] was violently assaulted by Appellant. This colored the lens through which

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such as commenting on the evidence and ruling on objections, "are called into question by the appearance of bias.")

[267] J.A. at 103, 105-08, 111, 114-15, 142.
[268] J.A. at 105-06, 111, 142.
[269] J.A. at 107-09, 111, 114.
[270] J.A. at 115.
[271] J.A. at 108.
[272] J.A. at 108.
[273] J.A. at 143.

LtCol Norman viewed the pretrial litigation and made trial rulings. He substituted the Government's view of the evidence for his own and ignored that the Defense could offer a competing theory. He became non-receptive to medical evidence, particularly from LT [redacted]

And he simply decided the defense's requested expert, Dr. [redacted], was "overinflating his own importance with a financial motive to gain employment," despite testifying as an expert in other courts-martial.[275]

The military judge explained that menstruation is a "basic issue" [redacted]

But menstruation is not "basic" to everyone [redacted]

And LtCol Norman went further. He openly sided with the Government's theory by asserting that most women do not engage in painful sexual intercourse: "most people don't participate in an activity that causes that much injury . . .

[274] J.A. at 1586-87.
[275] J.A. at 142, 662.
[276] J.A. at 132.
[277] J.A. at 1631.

voluntarily."[278] The military judge believed "[p]enetration and the injuries it may have caused is not the central issue, and frankly, not that difficult to understand."[279] Yet the members asked, "[c]onstantly chewed nails typically are not crescent but jagged and short in nature. Could this have caused atypical lacerations?" And "[i]n your expert opinion what caused the laceration to [redacted].?"[280]

And of note, the military judge denied defense challenges for cause to two members who had family members that were victims of sexual assault.[281]

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[282] Here, his rulings are not the sole grounds for Appellant's bias claim, but they do demonstrate the military judge's bias. Even if LtCol Norman's decisions on these issues were perhaps not an abuse of discretion, that does not mean that he was not biased or that bias did not affect his rulings.[283] And LtCol Norman's comments during these hearings, when colored by his pre- and

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[278] J.A. at 130.
[279] J.A. at 140-41.
[280] J.A. at 1350-51.
[281] J.A. at 173-81.
[282] *Liteky v. United States*, 510 U.S. 540, 555 (1994).
[283] Notwithstanding the fact that the lower court found LtCol Norman did not abuse his discretion, it found at least one critical finding on the Defense's M.R.E. 412 motion was erroneous. J.A. at 14. Specifically, it found that the record did not support a finding "that it was possible that she tested positive for chlamydia later that same evening as a result of sex with Appellant or PFC [redacted] . . . ." J.A. at 14.

post-trial statements, indicate actual bias against the Defense and their theory of the case. At a minimum, LtCol Norman's "questionable adverse ruling[s] . . . tend[] to magnify the appearance of injustice."[284]

3. Lieutenant Colonel Norman treated the parties differently during the court-martial, exhibiting bias in favor of trial counsel.

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" but "may" or "will do so" in some cases.[285] Here, they should be considered as part of the totality of circumstances in light of LtCol Norman's pre-trial and post-trial comments seeking to exact a cost on the Defense for litigating the case.

The most obvious example of bias against the Defense during trial was LtCol Norman's treatment of junior government and defense counsel. When considered alongside his post-trial comments expressing distaste with Defense tactics, the specter of bias is apparent.

Lieutenant Colonel Norman assisted and encouraged Captain O'Connell, the junior trial counsel. He helped Captain O'Connell in his attempt to lay the foundation for an expert witness: "Captain O'Connell, let me interrupt you. If you

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[284] *Edwardo-Franco*, 885 F.2d at 1006.
[285] *Liteky*, 510 U.S. at 555.

want to ask him a few foundational questions for his expertise, and then, go ahead and qualify him . . . Before jumping into the facts of this case, let's get that on the record, please."[286] "[R]ecognizing talent," he told Captain O'Connell he should have done the sentencing argument and that he "seemed very comfortable" in the courtroom.[287]

In contrast, LtCol Norman continually made demeaning comments toward 1stLt Robbins, the most junior defense counsel.[288] Lieutenant Colonel Norman repeatedly interrupted 1stLt Robbins during his oral argument on the defense's request for Dr. [redacted].[289] He told 1stLt Robbins he was "twisting the law" and that his argument was "just a total proffer and a guess and a hope."[290] When 1stLt Robbins asked for one moment to review his notes, LtCol Norman responded, "No. It's your motion. I'm asking you a question. Where's your evidence? Lieutenant Robbins, I'm asking you a question."[291]

Additionally, LtCol Norman humiliated 1stLt Robbins after the Government identified that the Defense had not filed a motion to suppress Appellant's statement

[286] J.A. at 124
[287] J.A. at 626-27.
[288] J.A. at 1410.
[289] J.A. at 99-106
[290] J.A. at 101.
[291] J.A. at 102.

to NCIS (where Appellant stated the encounter was consensual):

> So, **you didn't know or couldn't understand or perceive or figure out, as a basically qualified defense counsel**, that one of the things you might want to do is suppress the accused's statement where he makes inculpatory admissions? Did you ever talk to Captain [redacted] about it, who's a little more experienced than you?"[292]

And rather than gently assisting 1stLt Robbins in refreshing a witness's recollection like he did for Captain O'Connell, LtCol Norman harshly said *in front of the members*, "[i]t's not the question, counsel, do it right."[293] While LtCol Norman was certainly not required to give 1stLt Robbins some leeway as a brand new judge advocate, an impartial judge would have at least treated these two junior counsel the same. Lieutenant Colonel Norman did not. The record is saturated with similar instances of favoritism.[294]

While "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," they do here.[295] This is because LtCol Norman's post-trial comments—where he donned the role of supervisory trial

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[292] J.A. at 121 (emphasis added).
[293] J.A. at 215.
[294] *Compare* J.A. at 129, 144, 155, 227, 464, 1453-56, 1459, 1461, 1463 *and* J.A. at 111, 113, 116, 122-23, 154, 158, 463, 1454, 1455-56, 1458.
[295] *Liteky*, 510 U.S. at 555.

counsel—together with his comments during trial collectively highlight an actual bias against the Defense.[296]

B. The post-trial military judge found LtCol Norman's ex parte lecture "did not focus on the accused."[297] This finding, among others, was clearly erroneous and resulted in an incorrect conclusion that LtCol Norman was not biased.

Colonel Woodard presided over the post-trial hearing.[298] He made at least ten findings of fact the record does not support and failed to consider important facts. This resulted in unreasonable conclusions of law and an overall abuse of discretion.

First, he erroneously found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement."[299] The Government conceded LtCol Norman "expressed his belief that the Government should have argued for a longer period of confinement based on the evidence in aggravation presented during the trial and to incentivize the Defense to 'avoid

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[296] Notably, LtCol Norman has a pattern of contemplating contempt for defense counsel for unintentional oversights. In *United States v. Kunishige*, a trial that took place six months before Appellant's trial, LtCol Norman lectured the defense counsel after trial ended for eighteen transcribed pages for the defense's factual oversight that it corrected with an email to trial counsel and the court. J.A. at 1392-1409.
[297] J.A. at 1424.
[298] J.A. at 577-79.
[299] J.A. at 1415.

contested trials.'"[300] Colonel Woodard's finding was contradicted by everyone in the courtroom and by LtCol Norman himself.[301] Lieutenant Colonel Norman admitted he said the government had "undervalue[d]" the case.[302] The record shows LtCol Norman wanted trial counsel to argue for the maximum confinement sentence, or at the very least, more than eleven years. And this erroneous finding of fact was significant. When LtCol Norman told the trial counsel they should have asked for more confinement because, in his opinion, this was one of the worst sexual assault cases that he had seen, he demonstrated that he had abandoned his role as an impartial arbiter of the facts, and became a fourth prosecutor.

Second, Col Woodard erroneously found "LtCol Norman never stated or suggested that any accused or specifically the accused in this case, PFC Tapp, should pay a price."[303] But this statement contradicts Col Woodard's preceding sentence: "LtCol Norman referenced the defense counsel paying a price for their earlier actions during trial."[304] This "price" was also seeking higher sentences when defense counsel do not "avoid contested trials" and engage in lawful motions

[300] J.A. at 1391.
[301] J.A. at 586, 597, 617, 630, 635.
[302] J.A. at 503.
[303] J.A. at 1414-15.
[304] J.A. at 1415.

practice.[305] The memorandum of the tirade read: "when the Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and then there is no 'price' to be paid by the Defense for their earlier decisions."[306] When Major Michel was asked at the Article 39(a) hearing if LtCol Norman "actually [told him] and the other trial counsel that" he replied "Yes."[307] Appellant was the only member at counsel table who would suffer "the maximum amount of confinement."[308] Only he would pay the "price" for his counsel's actions.[309] This finding was erroneous.

Third, Col Woodard's finding that "at no point . . . did any counsel believe that, given the nature of the conversation—objective feedback and criticism of their performance, they should attempt to end the conversation" was clearly erroneous.[310] Major Michel did not state LtCol Norman's comments were objective feedback and neither did any other witness. Instead, he testified: "I took it as him *trying* to give us, you know, objective feedback."[311] "That's what I

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[305] J.A. at 639.
[306] J.A. at 1382.
[307] J.A. at 648.
[308] J.A. at 1382.
[309] J.A. at 1382.
[310] J.A. at 1416. Colonel Woodard also downplayed that this lecture was *forty minutes long*. He stated" this post-trial ex parte interaction was a one-time, relatively brief interaction (less than 40 minutes) . . . ." J.A. at 1427.
[311] J.A. at 640 (emphasis added).

thought he was *trying* to do, was just give us, you know, feedback or objective criticism."[312] Importantly, Major Michel also testified that he did not feel comfortable telling LtCol Norman to stop, and during the comments, he started to wonder if he was going to need to memorialize or disclose them to the defense and expressed concern to his supervisor.[313] This took them out of the realm of objective feedback. Major Michel also distinguished this from a mentoring session.[314]

And beyond Major Michel, the court reporter testified that she was told about mentoring sessions in school, "but I didn't think that mentoring also meant something akin to this, sir."[315] When asked at the Article 39(a) if this was an "after-action brief with the trial counsel" Captain O'Connell replied "No, sir" and said he remained at parade rest throughout the tirade.[316] And, perhaps most contradictorily, Col Woodard himself later stated that this "was a misguided attempt by LtCol Norman to provide objective but pointed critical feedback."[317]

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[312] J.A. at 640, 642 (emphasis added).
[313] J.A. at 653-54.
[314] J.A. at 649.
[315] J.A. at 589.
[316] J.A. at 615, 619.
[317] J.A. at 1424.

This was an abuse of discretion. This was not "feedback," it was a request to crush defense counsel and their clients for inappropriate reasons, including Appellant.

Fourth, Col Woodard erroneously found LtCol Norman's comments "did not focus on the accused."[318] This is demonstrably false. Lieutenant Colonel Norman discussed Appellant's trial and his sentence while Appellant was not in the room. He told the trial counsel they had "undervalue[d] *this* case."[319] He implied it was the worst sexual assault case he had seen.[320] He admitted he discussed the "significant aggravating . . . evidence presented in *this* case."[321] The court reporter wrote in her affidavit that LtCol Norman seemed upset that *Appellant* was sentenced to three years' confinement.[322] Thus, LtCol Norman almost entirely focused on Appellant and demonstrated his bias in *this* case—a truth that should have significantly impacted Col Woodard's conclusions.

Fifth, Col Woodard erroneously found that "LtCol Norman did not express displeasure or disagreement with the adjudged sentence."[323] But the court reporter explicitly testified "[i]t did appear that he seemed upset about 3 years, ma'am."[324]

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[318] J.A. at 1424.
[319] J.A. at 503 (emphasis added).
[320] J.A. at 611.
[321] J.A. at 503 (emphasis added).
[322] J.A. at 1384.
[323] J.A. at 1415.
[324] J.A. at 586.

Colonel Woodard appeared to have missed this during witness testimony, as he later stated during a later witness' testimony "[t]his is the first time I'm hearing any question at all to any witness about Lieutenant Colonel Norman questioning the adjudged confinement in this case."[325] Lieutenant Colonel Norman thought this sentence was a grave injustice. Finding otherwise was erroneous.

Sixth, Col Woodard erroneously found all of "LtCol Norman's findings of fact [during the trial] were supported by the evidence before him and not clearly erroneous . . . [and he] did not exhibit an erroneous view of the law."[326] But even the NMCCA found that LtCol Norman made a clearly erroneous finding on the Defense's M.R.E. 412 motion to admit evidence of [redacted]'s chlamydia diagnosis.[327] Specifically, the NMCCA found: "his belief that it was possible that she tested positive for chlamydia later that same evening as a result of sex with Appellant or PFC [redacted]" was "unsupported by the record" and therefore "clearly erroneous."[328]

Seventh, LtCol Norman's numerous criticisms of the Defense throughout the record contradict Col Woodard's conclusion that LtCol Norman "did not exhibit

[325] J.A. at 622.
[326] J.A. at 1424.
[327] J.A. at 14. Importantly, the NMCCA misunderstood the forensic evidence in a similar manner to LtCol Norman. JA at 13-16.
[328] J.A. at 14.

favoritism for one side over the other."[329] Colonel Woodard failed to consider how often LtCol Norman complimented and assisted the trial counsel while criticizing the Defense throughout trial. Yet he calls LtCol Norman's comments "firm but fair."[330]

Eighth, Colonel Woodard's conclusion that "the Government's case was strong and included Appellant's recorded admission" is not supported by the record.[331] Primarily, he failed to explain how the Government's case was strong. The Government's key witness (and only eyewitness) agreed that while Appellant was having sex with [redacted] she "was fully, enthusiastically participating."[332] And any evidence of injury or blood was both not compelling and did not demonstrate nonconsent during sex. [redacted] herself told the EMT she was not in pain and her last memories involved consensual sexual conduct. And there was also no observation of an internal vaginal laceration and no direct evidence as to who would have caused it (which by itself would not mean nonconsent). The evidence instead indicated that [redacted] was menstruating. The only reason the Government's expert decided the bleeding was likely instead due to an unobserved internal vaginal

[329] J.A. at 1425.
[330] J.A. at 1424.
[331] J.A. at 1426.
[332] J.A. at 293-94.

injury was because she trusted [redacted] when she changed her story and said she was actually not on her period (a revision contradicted by other evidence). Nothing else supports that there was an internal injury.

Furthermore, Appellant's recorded statement *supports* the defense theory that the sexual intercourse was consensual or that Appellant reasonably believed it was consensual.[333] It is anything but an admission of guilt—it is a reasonable explanation of a consensual sexual encounter.[334] This finding was erroneous.

Ninth, Colonel Woodard focused on how "[a]ll that remained for LtCol Norman to do in the trial was to issue the Statement of Trial Results and make Entry of Judgment" to justify not setting aside the case.[335] This sentiment was repeated multiple times, including when he stated "any risk of injustice was considerably diminished because the event . . . occurred after the members had rendered their verdicts on findings and sentence."[336] But LtCol Norman made similar remarks pretrial when he asked defense counsel [redacted] This

[333] J.A. at 1297, 1301-04, 1316, 1325-28, 1331, 1336.
[334] While Appellant at first denies having sex, this is because he is afraid that [redacted] was under the legal age. J.A. at 1268. Once NCIS advises him this is not the case, he begins to explain the consensual situation. J.A. at 1277-80.
[335] J.A. at 1425.
[336] J.A. at 1426-27.
[337] J.A. at 1460.

indicates he held a bias against the Defense during trial: [redacted] by paying a "price."[338] Understanding these comments bookended the trial undermines Col Woodard's conclusory view of LtCol Norman's remarks. These statements stained the rulings and comments made by LtCol Norman throughout Appellant's case. This finding also overlooks how this commentary was directed at times towards defense counsel writ large, not just in this case. Regardless, as this Court found in *United States v. Greatting*, *ex parte* commentary about cases pending post-trial action and appeal can still amount to apparent bias.[339]

And last, Colonel Woodard's special treatment of LtCol Norman as a witness at the post-trial 39(a) calls into question his ruling and underscores the bias present in Appellant's case. He faulted LtCol Norman's inability to testify as the result of defense action: "[i]t was a defense filed professional responsibility complaint."[340] And when the defense requested to recess for the night at 11:00 p.m. to avoid "the perception that we are just rushing through this here today" and

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[338] J.A. at 1381-82, 1460.
[339] *United States v. Greatting*, 66 M.J. 226, 230-31 (C.A.A.F. 2008) (finding that an ex parte critique to the government about companion cases being sold "too low" while some were pending negotiations, clemency, and appeals constituted apparent bias).
[340] J.A. at 663.

that going further would result in ineffective representation, Colonel Woodard again blamed the Defense. He said "[w]ho requested this proceeding be scheduled for a single day? . . . the defense did."[341] Then he denied the request.[342]

Troublingly, his findings of fact are at times based on LtCol Norman's self-serving unsworn statement instead of other conflicting evidence. While LtCol Norman's statement is helpful in evaluating the issue of bias as it corroborates much of what the other witnesses said, LtCol Norman also downplayed the severity of his statements and did much to assert his impartiality. Contrary to Col Woodard's findings, this unsworn statement should be given less credibility than a room full of disinterested attorneys and a junior enlisted court reporter who exhibited courage in testifying. For instance, when Col Woodard found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement" he erroneously chose LtCol Norman's narrative over everyone else present.[343] Colonel Woodard similarly agreed with LtCol Norman that the "blasting," "ass-chewing" session where he encouraged the trial counsel to make the Defense and their clients pay a "price" was merely "objective

[341] J.A. at 659-60.
[342] J.A. at 660.
[343] J.A. at 1415.

feedback"—a fact also not supported by any witness but LtCol Norman.[344] This aversion to ruling against LtCol Norman and failure to discount his self-serving statement has skewed Col Woodard's findings.

In sum, Col Woodard's clearly erroneous findings of fact demonstrate a clear abuse of discretion and further exacerbate the harm LtCol Norman's comments caused. These facts are critical in revealing LtCol Norman's bias, undermining Col Woodard's legal conclusions otherwise. Indeed, Col Woodard's primary conclusion that "neither [LtCol Norman's] post-trial ex parte comments nor his actions and rulings during trial . . . placed in doubt the court-martial's legality, fairness, and impartiality" rests on these erroneous factual findings. He therefore "applie[d] correct legal principles to the facts in a way that is clearly unreasonable."[345]

C. The *Liljeberg* factors control whether reversal is required. Colonel Woodard abused his discretion in finding it was not.

Rule for Courts-Martial 902(a) does not require a particular remedy when bias is determined to exist.[346] Instead, this Court has adopted the three *Liljeberg* factors to determine whether a conviction should be reversed when a judge

[344] J.A. at 587, 605, 613, 1382, 1414-15.
[345] J.A. at 1423; *Commisso*, 76 M.J. at 321 (internal citations omitted).
[346] R.C.M. 902(a).

erroneously fails to recuse or disqualify himself: (1) the risk of injustice to the parties in the particular case; (2) the risk the denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process.[347] The third factor is separate from the initial inquiry under R.C.M. 902(a) because "it is not 'limit[ed] . . . to facts relevant to recusal, but rather review[s] the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the [CCA], or other facts relevant to the *Liljeberg* test."[348]

The *Liljeberg* Court conducted a prejudice analysis because, "[a]s in other areas of law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."[349] That is not what happened here—this was not an oversight. Colonel Woodard's findings of fact analyzed above bled between his analyses on bias and remedy, including into his application of the *Liljeberg* factors.[350] His erroneous findings of fact thus led to an incorrect conclusion of law in finding the case did not warrant reversal as well.

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[347] *Quintanilla*, 56 M.J. at 80-81 (citing *Liljeberg*, 486 U.S. at 864); *see also United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (internal citations omitted) (citing the *Liljeberg* factors).
[348] *Uribe*, 80 M.J. at 449 (alterations in original) (quoting *United States v. Martinez*, 70 M.J. 154, 160 (C.A.A.F. 2011)).
[349] *Liljeberg*, 486 U.S. at 862.
[350] J.A. at 1425-26.

This was an abuse of discretion.

1. Appellant suffered injustice.

First, Appellant was the victim of injustice. Lieutenant Colonel Norman ruled on several motions in this case and in doing so exhibited a one-sided, incorrect pre-disposition towards the evidence, as outlined above. This bias may have been the difference maker in the outcome of the trial. The issues he ruled on and dismissed as "simple" were issues that the court-martial members repeatedly asked questions about.[351] Indeed, the members asked six questions related to the blood, including "is the first day of the menstrual cycle the heaviest" and "could a sexual encounter bring about the beginning of the menstrual cycle?"[352] This was not "a very simple issue to understand."[353]

And as detailed above, the Government's case was weak. Most critically, the only eyewitness (a government witness with immunity) testified that [redacted] actively participated in sexual intercourse with Appellant and Appellant told NCIS it was consensual. Lieutenant Colonel Norman's influence had the biggest impact on the forensic evidence, which was undoubtedly how the Government secured a conviction in light of these bad facts in their case. And there is little doubt these

[351] J.A. at 107-08, 111.
[352] J.A. at 1339-49, 1352, 1631.
[353] J.A. at 107.

rulings could have gone in Appellant's favor. The evidence was not as clear cut as he made it seem and even the lower court found his ruling on [redacted]'s chlamydia diagnosis was premised on the clearly erroneous finding that the Marines gave it to her. [354]

Moreover, it cannot be said that his bias against the Defense for litigating these motions did not impact his rulings. Lieutenant Colonel Norman's *ex parte* statements indicated he wanted to crush the Defense and force them to pay a "price" for their litigation of the case: "he didn't enjoy [handling that late motion] either."[355] Indeed, his reactions [redacted][6] These comments paired with his rulings on case-dispositive issues demonstrate that Appellant suffered an injustice.

2. Inaction will promote injustice in other cases.

Second, denial of relief will produce injustice in other cases. Lieutenant Colonel Norman told three junior trial counsel what he expected from them: make an appellant sorry for exercising their rights not just here, but in every case. Indeed, he displayed bias against defense teams [redacted].

[354] J.A. at 14.
[355] J.A. at 602, 639.
[356] J.A. at 304-06, 1460, 1500, 1502.

[redacted] Based on his pretrial and *ex parte* comments, LtCol Norman's bias undoubtedly exists outside Appellant's case. Lieutenant Colonel Norman [redacted] Without relief here, these counsel and other counsel aware of what transpired will feel compelled to punish the Defense (and their clients) in this manner. Colonel Woodard concluded, "this Court has no doubt this case will be a teaching point to all military judges and counsel."[359] But the "teaching point" as it stands is [redacted] that the law condones making an appellant pay a "price" for exercising his or her rights.[360] Absent a remedy, the chilling effect this will have on defense counsel is incalculable.[361]

3. A failure to reverse Appellant's case will undermine public confidence in military justice.

Colonel Woodard concluded that "even if LtCol Norman's actions in this case resulted in an appearance of bias, that appearance would not create an

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[357] J.A. at 1459.
[358] J.A. at 1458.
[359] J.A. at 1426.
[360] J.A. at 1381-82, 1460.
[361] *See also United States v. Segines*, 17 F.3d 847, 852-53 (6th Cir. 1994) (reversing a case where the military judge's comments had a "chilling effect" on the defense, including a comment that the military judge would take a defense refusal to stipulate to a fact "into account on the sentencing").

intolerable risk of undermining the public's confidence in the judicial process."[362] But here a military judge (a) sought to teach the Defense a "lesson" and then coached trial counsel to make the Defense pay a "price" for taking a case to trial and litigating it appropriately, (b) demonstrably treated defense counsel differently from trial counsel on the record, (c) immediately took the Government's view on the evidence as his own when considering and denying all the critical defense motions, (d) and had another judge protect him from testifying and then rule he was actually unbiased based on nonexistent facts.[363] Knowing this, the public would undoubtedly have questions about an appellant's ability to receive a fair trial. The risk of undermining public confidence here is intolerable.

And while, as discussed above, Colonel Woodard's handling of this issue did little to assuage any concerns of reduced public confidence, the lower court's ruling on the matter only exacerbated the issue. The NMCCA adopted many of LtCol Norman's factual misunderstandings, side-stepped finding whether any of Col Woodard's factual findings were clearly erroneous, and made no comment on LtCol Norman's *ex parte* lecture.[364] Instead, it chastised the trial defense counsel for (1) arguing LtCol Norman is biased and (2) conducting voir dire of the post-

[362] J.A. at 1427.
[363] J.A. at 1381-82, 1460.
[364] J.A. at 23-33.

trial military judge who presided over the post-trial hearing.[365] The NMCCA described the trial defense counsels' arguments as "speculative, unprofessional and inflammatory."[366] Incredulously, the NMCCA wrote:

> Whether [the trial defense counsels'] statements violated Rule 3.5 of the Judge Advocate General Instruction 5803.1E, which requires that a covered attorney be respectful of the military judge, in the context of this case is a matter for Rules Counsel, not this Court, to decide.[367]

The NMCCA spent more time chastising the trial defense counsel for raising the military judge bias issue than addressing the military judge's improper and egregious conduct during and after Appellant's trial.

Notably, the NMCCA also protected LtCol Norman's identity, explaining in a footnote that it would refer to him as the "prior military judge."[368] But the court unnecessarily named the trial defense counsel whom the court insinuated violated their ethical duties for moving to protect the accused's right to be tried without an unbiased judge.[369] In doing so, the NMCCA only further undermined the public's confidence in the judicial process.

Shockingly, the NMCCA also did not think it was necessary to order LtCol

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[365] J.A. at 23-33.
[366] J.A. at 31.
[367] J.A. at 31.
[368] J.A. at 27.
[369] J.A. at 28-31.

Norman to testify.[370] The NMCCA essentially told the Navy and Marine Corps that judges are untouchable—even when they *ex parte* discuss the merits of a case over which they presided. The "lesson"—as it stands now—is that when you're a military judge, accused by the Government of making inappropriate *ex parte* comments about a case on which you are still the military judge, a senior Marine Judge Advocate will come in, hold a hearing, give the key witness the questions beforehand, and clean up the rest of the mess with clearly erroneous facts. And if the trial defense counsel objects, the lower court will name them in a published opinion and insinuate they violated their professional responsibility duties for objecting to a biased judge. Public confidence in military justice should understandably not be high in light of this ruling.

Thus, all three factors of the *Liljeberg* test were met here.[371] Colonel Woodard overlooked critical facts and "applie[d] correct legal principles to the facts in a way that is clearly unreasonable" in finding otherwise.[372] We "must continuously bear in mind that to perform its high function in the best way justice

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[370] J.A. at 33.
[371] *See also In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019) ("Ordinary appellate review on the merits cannot detect all of the ways that bias can influence a proceeding."); *Berger v. United States*, 225 U.S. 22, 36 (1921).
[372] *Commisso*, 76 M.J. at 321.

must satisfy the appearance of justice."[373] This case warrants reversal.

Conclusion

Appellant respectfully asks this Court to reverse the NMCCA's decision and set aside the findings and sentence.

[373] *Greatting*, 66 M.J. at 232 (quoting *Liljeberg*, 486 U.S. at 864).

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 15, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitations of Rule 24(c) because it contains 13,695 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)