[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

TEJEDA	JOSE		[redacted]	E6
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

MESS MANAGEMENT SPECIALIST WASH., DC	United States Navy	WASHINGTON, DC
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by COMMANDANT

(Title of Convening Authority)

NAVAL DISTRICT WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Washington Navy Yard, Washington, DC On 17, 19, 23 and 24 February, 2021

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

Companion and other cases NONE

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

[redacted]

CONVENING ORDER

DEPARTMENT OF THE NAVY
NAVAL DISTRICT WASHINGTON
1343 DAHLGREN AVE SE
WASHINGTON NAVY YARD DC 20374-5161

13 Jan 20

GENERAL COURT-MARTIAL CONVENING ORDER 1-20

Pursuant to authority contained in Article 22, UCMJ, and paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7F, CH-2, of 26 August 2019, a general court-martial is convened with the following members:

Captain [redacted] U.S. Navy;
Captain [redacted] U.S. Navy;
Captain [redacted] U.S. Navy;
Captain [redacted] U.S. Navy;
Captain [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy.

Alternative members are not authorized.

[redacted]
C. A. LAHTI
Rear Admiral, U.S. Navy
Commandant

2/2

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. SSN	3. RANK/RATE	4. PAY GRADE
TEJEDA, Jose	[redacted]	CS1	E-6

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
MESS MANAGEMENT SPECIALIST WASHINGTON DC AREA	1 June 2018	4 Years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$4,297.20	N/A	$4,297.20	PTC	19 September 2019- Present

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120

Specification: In that Culinary Specialist First Class Jose Tejeda, United States Navy, on active duty, did, at or near Haymarket, Virginia and on board the Washington Navy Yard, on divers occasions between on or about 2 August 2018 to on or about 3 December 2018, commit a sexual act upon [redacted] by causing penetration of [redacted] anus with CS1 Tejeda's penis, when he reasonably should have known that [redacted] was asleep.

Knew and 17FEB21

ADDITIONAL CHARGE Ii: VIOLATION OF THE UCMJ, ARTICLE 134

Specification: In that Culinary Specialist First Class Jose Tejeda, United States Navy, on active duty, did, at or near Haymarket, Virginia and on board the Washington Navy Yard, on divers occasions between on or about 17 March 2016 to on or about 17 May 2019 knowingly and wrongfully produce child pornography, to wit: videos of CS1 Tejeda engaging in sexually explicit conduct with [redacted] a minor, and that such conduct was of a nature to bring discredit upon the armed forces.

AND NO OTHERS.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LNCS/ E-8	RLSO NDW

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20200129

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 29th day of January 2021, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

[redacted]
Typed Name of Officer

RLSO NDW
Organization of Officer

O-3
Grade

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

[redacted]
Signature

12. On 9 February , 2021 , 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.)*

C. A. LAHTI
Typed Name of Immediate Commander

NAVAL DISTRICT WASHINGTON
Organization of Immediate Commander

RDML, USN

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1400 hours, 9 Feb , 2021 at NAVAL DISTRICT WASHINGTON
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403).

C. A. LAHTI
Typed Name of Officer

~~FOR THE~~[1]
NAVAL DISTRICT WASHINGTON
Official Capacity of Officer Signing

RDML, USN

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAVAL DISTRICT WASHINGTON	WASHINGTON NAVY YARD	09 Feb 2021

Referred for trial to the General Court-Martial convened by General Court-Martial Convening Order Number 1-20 , dated 13 January 2020 , subject to the following instructions:[2]

to be joined with charges preferred on 26 AUG 2021 .

By direction of RDML Lahti [redacted] 17FEB21
Command or Order

C. A. LAHTI
Typed Name of Officer

COMMANDANT,
NAVAL DISTRICT WASHINGTON
Official Capacity of Officer Signing

RDML, USN

[redacted]
Signature

15. On 10 February , ~~2020~~ 2021, I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

Chris Cox
Typed Name of TRIAL COUNSEL

LCDR
Grade or Rank of TRIAL COUNSEL

[redacted]

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

DD Form 458 (BACK), MAY 2000

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. SSN	3. RANK/RATE	4. PAY GRADE
TEJEDA, Jose	[redacted]	CS1	E-6

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
MESS MANAGEMENT SPECIALIST WASHINGTON DC AREA	1 Jun 2018	4 Years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$4,297 [redacted] ~~$4,622~~ 27JUL21	N/A	$4,297 [redacted] ~~$4,622~~ 27JUL21	PTC ~~NONE~~ 17FEB21 [redacted]	19SEP2019 – PRESENT ~~N/A~~

II. CHARGES AND SPECIFICATIONS

10.

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120

Specification 1 (Sexual Assault, Asleep, 2018): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 13 July 2018 and on or about 3 December 2018, commit a sexual act upon [redacted] by causing penetration of [redacted] anus with CS1 Tejeda's penis, when he reasonably should have known that [redacted] was asleep.

Specification 2 (Sexual Assault, Bodily Harm, 2018): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 13 July 2018 and on or about 3 December 2018, commit a sexual act upon [redacted] by causing penetration of [redacted] anus with his penis, by causing bodily harm to [redacted] to wit: the nonconsensual sexual act.

SEE ATTACHED CONTINUATION SHEET.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LNCS/E-8	RLSO NDW

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20200826

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 26th day of August 2020, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

Latena M. Hazard *Typed Name of Officer*	RLSO NDW *Organization of Officer*
O-3 *Grade*	Judge Advocate *Official Capacity to Administer Oaths (See R.C.M. 307(b) must be commissioned officer)*
[redacted] *Signature*	

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12. on 3 September, 2020, 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.)*

C. A. LAHTI	NAVAL DISTRICT WASHINGTON
Typed Name of Immediate Commander	*Organization of Immediate Commander*
RDML, USN	
[redacted]	
Signature	

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1000 hours, 3 Sep, 2020 at NAVAL DISTRICT WASHINGTON
Designation of Command or Officer exercising Summary Court-Martial Jurisdiction (See R.C.M. 403).

C. A. LAHTI	~~FOR THE~~[1] NAVAL DISTRICT WASHINGTON
Typed Name of Officer	*Official Capacity of Officer Signing*
RDML, USN	
[redacted]	

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAVAL DISTRICT WASHINGTON	WASHINGTON NAVY YARD	22 SEP 2020

Referred for trial to the General Court-Martial convened by General Court-Martial Convening Order Number 1-20, dated 13 January 2020, subject to the following instructions:[2]

By _____ of _____
Command or Order

C. A. LAHTI	COMMANDANT NAVAL DISTRICT WASHINGTON
Typed Name of Officer	*Official Capacity of Officer Signing*
RDML, USN	
[redacted]	

15. on 24 September, 2020, I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

Chris Cox	LCDR
[redacted]	*Grade or Rank of TRIAL COUNSEL*

...der signs personally, inapplicable words are stricken.
...instructions. If none, so state.

DD Form 458 (BACK), MAY 2000

CONTINUATION OF DD FORM 458 ICO CSI JOSE TEJEDA, [redacted]

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120

Specification 3 (Sexual Assault, Asleep, 2019): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 4 February 2019 and on or about 17 May 2019, commit a sexual act upon [redacted] by penetrating [redacted] anus with CS1 Tejeda's penis, when he reasonably should have known that [redacted] was asleep.

Specification 4 (Sexual Assault, Without Consent, 2019): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 4 February 2019 and on or about 17 May 2019, commit a sexual act upon [redacted] to wit: penetrating [redacted] anus with his penis, without the consent of [redacted]

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120b

Specification 1 (Rape of a Child, 2018): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on or about 21 June 2018, commit a sexual act upon [redacted], a child who had attained the age of [redacted] years but had not attained the age of [redacted] years, by causing penetration of [redacted] anus with his penis, by administering to [redacted] a drug, to wit: Zolpidem Tartrate (Ambien), a schedule IV controlled substance

Specification 2 (Sexual Assault of a Child, 2018): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on or about 21 June 2018, commit a sexual act upon [redacted] a child who had attained the age of [redacted] years but had not attained the age of [redacted] years, by causing penetration of [redacted] anus with his penis.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 120c

Specification (Indecent Recording): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on or about 2 January 2019, knowingly make a recording of the private area of [redacted] without her consent and under circumstances in which she had a reasonable expectation of privacy.

CHARGE IV: VIOLATION OF UCMJ, ARTICLE 134

Specification 1 (Producing Child Pornography): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 21 June 2018 and 3 December 2018, knowingly and wrongfully produce child pornography, to wit: video of CS1 Tejeda engaging in sexually explicit conduct with [redacted] a minor, and that said conduct was of a nature to bring discredit upon the armed forces.

Specification 2 (Producing Child Pornography): In that Culinary Specialist First Class (CS1) Jose Tejeda, United States Navy, on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 4 February 2019 and on or about 17 May 2019, knowingly and wrongfully produce child pornography, to wit: video of CS1 Tejeda engaging in sexually explicit conduct with [redacted] a minor, and that said conduct was of a nature to bring discredit upon the armed forces.

AND NO OTHERS.

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES OF AMERICA **v.** **JOSE TEJEDA** **CS1/E-6 USN**	**Defense Motion for Appropriate Relief for an Unreasonable Multiplication of Charges** **10 November 2020**

1. Nature of Motion

Pursuant to Rule for Courts-Martial 906(b)(12), the defense, in the above-captioned case, respectfully moves this Court to merge Specifications 1 and 3 of Charge I; merge Specifications 2 and 4 of Charge I; and merge Specifications 1 and 2 of Charge IV.

2. Burden of Proof

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

3. Facts

a. CS1 Tejeda is charged with violating Article 120, Uniform Code of Military Justice (UCMJ) with four Specifications thereunder; violated Article 120b, UCMJ with two Specifications thereunder, violated Article 120c, with one Specification thereunder, and violated Article 134, UCMJ, with two specifications thereunder. The date range of these charges and specifications range from 21 June 2018 to 17 May 2019.

b. In Specification 1 of Charge I, the government alleges that CS1 Tejeda violated Article 120, when he:

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…on active duty, did, on board, the Washington Navy Yard, on divers occasions between on or about 13 July 2018 and on or about 3 December 2018, commit a sexual act upon [redacted] by causing penetration of [redacted]'s anus with CS1 Tejeda's penis, when he reasonably should have known that [redacted] was asleep.

c. In Specification 2 of Charge I, the government alleges that CS1 Tejeda violated Article 120 when he:

…on active duty, did, on board, the Washington Navy Yard, on divers occasions between on or about 13 July 2018 and on or about 3 December 2018, commit a sexual act upon [redacted] by causing penetration of [redacted]'s anus with his penis, by causing bodily harm to [redacted] to wit: the nonconsensual sexual act.

d. In Specification 3 of Charge I, the government alleges that CS1 Tejeda violated Article 120 when he:

…on active duty, did, on board, the Washington Navy Yard, on divers occasions between on or about 4 February 2019 and on or about 17 May 2019, commit a sexual act upon [redacted] by penetrating [redacted]'s anus with CS1 Tejeda's penis, when he reasonably should have known that [redacted] was asleep.

e. In Specification 4 of Charge I, the government alleges that CS1 Tejeda violated Article 120 when he:

…on active duty, did, on board, the Washington Navy Yard, on divers occasions between on or about 4 February 2019 and on or about 17 May 2019, commit a sexual act upon [redacted] to wit: penetrating [redacted]'s anus with his penis, without the consent of [redacted]

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f. In Specification 1 of Charge IV, the government alleges that CS1 Tejeda violated Article 134 when he:

> ...on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 21 June 2018 and 3 December 2018, knowingly and wrongfully produce child pornography, to wit: video of CS1 Tejeda engaging in sexually explicit conduct with [redacted], a minor, and that said conduct was of a nature to bring discredit upon the armed forces.

g. In Specification 2 of Charge IV, the government alleges that CS1 Tejeda violated Article 134 when he:

> ...on active duty, did, on board the Washington Navy Yard, on divers occasions between on or about 4 February 2018 and on or about 17 May 2019, knowingly and wrongfully produce child pornography, to wit: video of CS1 Tejeda engaging in sexually explicit conduct with [redacted], a minor, and that said conduct was of a nature to bring discredit upon the armed forces.

h. On 1 January 2019, the Military Justice Act 2016 (MJA 16) was implemented. As a result, changes to the Manual for Courts-Martial (MCM), including the Uniform Code of Military Justice (UCMJ) went into effect. These changes included some revisions to Article 120, UCMJ and Article 134, UCMJ.

4. Law

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

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001). This prohibition against unreasonable multiplication of

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charges "has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *Quiroz*, 55 M.J. at 338 (contrasting multiplicity and unreasonable multiplication doctrines); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (same).

A military judge must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds*, *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009). In service of this obligation, a trial court considers four-factors in testing whether charges are unreasonably multiplied:

- Is each charge and specification aimed at distinctly separate criminal acts?
- Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?
- Does the number of charges and specifications unfairly increase the accused's punitive exposure?
- Is there evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (citing *Quiroz*, 55 M.J. at 338) (approving "in general" factors as non-exhaustive "guide" for analysis).

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

When charges are unreasonably multiplied, the military judge has wide latitude to craft a

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remedy, including dismissing offenses, merging them for findings, or merging offenses only for sentencing. *United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014) (citing *Campbell*, 71 M.J. at 25) (concluding military judge had discretion to not dismiss or merge specifications for findings but to merge them for sentencing).

In *Quiroz*, where the factors originated, the Navy-Marine Corps Court of Criminal Appeals dismissed a conviction for wrongfully disposing of military property by selling C-4, which was the same act that led to a conviction for violating 18 U.S.C. § 842. *United States v. Quiroz*, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999)(where 18 U.S.C. § 842 criminalizes the unlawful distribution and transportation of explosive materials). Later, in *United States v. Roderick*, the Court of Appeals for the Armed Forces reiterated that dismissal is an available and appropriate remedy for unreasonable multiplication. 62 M.J. 425, 433-34 (C.A.A.F. 2006). The *Roderick* court dismissed indecent liberties convictions that arose from the same criminal acts—taking photographs of underage girls—as the appellant's child pornography convictions under 18 U.S.C. § 2251(a). *Id.*[1]

Finally, when convictions result from specifications that were charged for exigencies of proof, a military judge must "'consolidate or dismiss [the contingent] specification[s],' not merely merge then for sentencing purposes. *Thomas*, 74 M.J. at 568 (quoting *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014)) (additional citation omitted). Where consolidation is impractical, military judges are encouraged to conditionally dismiss

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

convictions, *id.* at 570, mindful that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation." *Doss*, 15 M.J. at 412 (citing *O'Clair v. United States*, 470 F.2d 1199, 1203 (9th Cir. 1972), *cert. denied*, 412 U.S. 921 (1973).

5. Argument

a. Because the four trial-level *Quiroz* factors weigh in favor of the Defense, relief from these unreasonably multiplied charges is warranted.

The alleged facts in Specifications 1 and 3 and 2 and 4 of Charge I and Specifications 1 and 2 of Charge IV demonstrate that this charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*.

(1) All of the Specifications under Charge I are aimed at a single course of conduct; the multiple specifications exaggerates the possible criminality; and unfairly increases CS1 Tejeda's punitive exposure.

The Government alleges that CS1 Tejeda sexually assaulted [redacted] on divers occasions from on or about 13 July 2018 to on or about 17 May 2019. Despite this being a single course of conduct, the government has broken this out into four specifications. The charging scheme appears to allow the government to present two alternate theories of liability for a single course of conduct: (1) CS1 Tejeda allegedly engaged in a sexual act with [redacted] when he reasonably should have known she was asleep and in the alternative, (2) CS1 Tejeda engaged in a sexual act with [redacted] without her consent. Additionally, the government has further doubled the number of specifications to account for a change in Article 120, UCMJ, as part of MJA 16. The defense concedes that the government is required to account for any changes to Article 120, UCMJ, on the chargesheet; however, doing so unnecessarily expands CS1 Tejeda's punitive exposure and criminality for a

single course of conduct, which results in the unreasonable multiplication of charges. The only reason for Specifications 3 and 4 under Charge I is because of the implementation of MJA 16 in the middle of the alleged course of conduct. However, on chargesheet, it appears CS1 Tejeda's criminality is greater than reality. In addition, this charging scheme doubles CS1 Tejeda's punitive exposure. Each specification under Charge I has a maximum punishment of 30 years of confinement. With all four specifications under Charge I, the maximum punitive exposure is now quadrupled to 120 years. This is an unnecessary exaggeration of CS1 Tejeda's punitive exposure. Lastly, the defense does not believe the charge scheme is the result of prosecutorial overreaching or abuse, but the defense believes this charging scheme is an unintended consequence of charging a course of conduct that spans across the implementation of a change to the UCMJ. These factors thus weigh in favor of the defense.

(2) All of the Specifications under Charge IV are aimed at a single course of conduct; the multiple specifications exaggerates the possible criminality; and unfairly increases CS1 Tejeda's punitive exposure.

Similar to the argument above, Specifications 1 and 2 under Charge IV are aimed at a single course of conduct, alleged production of child pornography, that the government alleges begins on 21 June 2018 through 17 May 2019. The only reason the government has broken out this single course of conduct into two specifications is the implementation of MJA 16 in the middle of that course of conduct. The current charging scheme misrepresents and exaggerates the criminality for CS1 Tejeda and doubles CS1 Tejeda's punitive exposure. These factors thus weigh in favor of the defense. Lastly, the defense does not believe the charge scheme is the result of prosecutorial overreaching or abuse, but the defense believes this charging scheme is an unintended consequence of charging a course of conduct that spans across the implementation of

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a change to the UCMJ.

6. Relief Requested

The defense respectfully requests the court merge Specifications 1 and 3 and Specifications 2 and 4 of Charge 1 as well as Specifications 1 and 2 of Charge IV for sentencing.

7. Evidence

The Defense offers the following evidence:

- Charge Sheet

8. Oral Argument

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

[redacted]
V. L. LUCE
LCDR, JAGC, USN
Defense Counsel

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

UNITED STATES v. **JOSE TEJEDA** **E6/CS1** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY** **17 NOV 2020**

MOTION

The Government respectfully submits to the Court that no order to compel any of the evidentiary items at issue in this Motion is necessary because the Government has either facilitated the Defense's discovery and production requests or is attempting to do so.

FACTS

1. Charges in U.S. v. Tejeda were referred against the Accused on 22 September 2020 by Commandant, Naval District Washington, the Convening Authority.

2. The Government received Defense's Initial Discovery Request on 16 October 2020.

3. The Government provided a responses to Defense's Initial Discovery Request on 23 October 2020.

4. The Government received Defense's Second Discovery Request on 9 November 2020.

5. The Government will provide a Response to Defense's Second Discovery Request by 19 November 2020.

BURDEN

5. Defense bears the burden of proof on their motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

6. Article 46 of the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) 701-703 govern Defense access to evidence. Specifically, R.C.M. 701 covers discovery and R.C.M. 703 addresses production of witnesses and evidence.

APPELLATE EXHIBIT XI
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7. Pursuant to R.C.M. 701, the Government shall disclose items that are within the Government's "possession, custody, or control" and the item is "relevant to defense preparation."[1] Additionally, R.C.M. 703 provides that "[e]ach party is entitled to the production of evidence which is relevant and necessary.[2]

8. The Government's obligation under Article 46 is to "remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the Defense has an equal opportunity to obtain evidence."[3] However, the Government's obligations "do not relieve the defense of its responsibility to specify the scope of its discovery request."[4]

9. When determining what evidence should be produced, R.C.M. 703 specifically states, any defense request for production of evidence shall: (1) list the items of evidence to be produced; and (2) shall include: (a) a description of each item sufficient to show its relevance and necessity; (b) a statement where it can be obtained; and (c) if known, the name, address, and telephone number of the custodian of the evidence.[5]

10. When files are unrelated to the investigation of the matter that is subject to the court-martial, "there is no readily identifiable standard as to how extensive the review must be conducted by the prosecutor in preparation of the case."[6] Furthermore, the defense is in the best position to know which files outside of the investigation are of significance.[7] Thus, Article 46 protects the equal opportunity of defense to obtain evidence by requiring 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."[8]

11. The Military Rule of Evidence (M.R.E.) 401 provides the test for relevant evidence as any evidence that: (a) has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

ARGUMENT

12. The Defense requested the following:

a. <u>A written list of all items of evidence seized from the person or property of the accused.</u>

The Government has requested and discovered all records pertaining to evidence seized from the person or property of the accused via DoD SAFE on 13 November 2020.

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[1] R.CM. 701(a)(2)(A).
[2] R.C.M. 703(e)(1). Emphasis added.
[3] *United States v. Williams*, 50 M.J. 436, 442-43 (C.A.A.F. 1999).
[4] *Id.* Emphasis added.
[5] R.C.M. 703(f). Emphasis added. *See also United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) ("The Government is obligated to produce by compulsory process evidence requested by the defense that is "relevant and necessary." However, it was the defense, as the moving party, who was required as a threshold matter to show that the requested material existed.")
[6] *Williams* at 443
[7] *Id.*
[8] *Id.*

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b. Any evidence of the revocation or suspension of the credentials of any investigators involved in this case, or evidence that any investigator was a subject or suspect in an internal affairs investigation.

During the week of this filing, the Government will send *Henthorn* requests to all government agents and civilian law enforcement employees involved in the above mentioned case. The Government will send all responses to the Defense once they are obtained.

c. Access to identification photographs presented to the complaining witness by the Prince William County Police Department (PWCPD).

Under R.C.M. 701(a)(2), after service of charges, upon request of the defense, "the Government shall permit the defense to inspect any books, papers, documents, data …within the possession, custody, or control of military authorities." The requested evidence contains child pornography and other content of a contraband nature. The Government has afforded the Defense equal opportunity to inspect the evidence they seek. The Government ensured that the Defense had opportunities to meet with the NCIS case agent. Further, it is Government's understanding that the Defense has met with NCIS twice and is coordinating a third time to look at seized evidence. This evidence includes the photographs presented to the witness by the PWCPD. Additionally, the Government has provided the Defense with the point of contact information for the PWCPD Detective on the case who can provide access to the identification photographs they requested.

d. All material produced by Apple, Inc., in response to a search warrant issued by the Commonwealth of Virginia for CS1 Tejeda's iCloud account.

Trial Counsel is attempting to contact Apple, Inc., in order to obtain a newly authenticated copy of the iCloud content the Defense seeks. In the event Trial Counsel is successful, Trial Counsel will provide unfettered access to all information thereby obtained. In the meantime, Trial Counsel positively endorsed the Defense's request for an expert witness in digital forensics. The Convening Authority approved the Defense's request to include travel. Trial Counsel has spoken with the Prince Williams County Assistant Commonwealth's Attorney who informed Trial Counsel that they will make all material produced via the search warrant by Apple, Inc., available to the Defenses expert consultant and to Defense Counsel for their unfettered inspection.

e. A complete copy of all Child Protective Services Investigations and Records pertaining to CS1 Tejeda and his family.

The Government has not had adequate time to produce this requested evidence. The Government will facilitate this request and seek any documentation pertaining to this case from the Child Protective Services Department in Prince William's County.

f. Court Records, hearing transcripts, filings, and court orders relating to current and expired civilian restraining or protective orders filed against CS1 Tejeda by [redacted] or by [redacted]

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Under R.C.M. 703(f), any defense requests for the 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, statement where it can be obtained, and if known, the name, address, and telephone number of the custodian of the evidence. However, per the court's opinion in *Williams*, the Defense has not asserted where this specific evidence can be obtained.[9] Additionally, the Government is in the process of discovering open sourced website pages regarding the relevant state court criminal case against the accused but does not otherwise have access to any current or expired civilian restraining or protective orders filed against CS1 Tejeda by [redacted] or [redacted]

Moreover, Trial counsel is in the process of drafting a R.C.M. 701 memo that will disclose that the former victim's legal counsel (VLC) for [redacted] relayed there was a protective order against the accused but was unable to disclose additional information. The Government will convey all information from the VLC to Defense relating to this request. However, the Defense has failed to provide a statement as to where these requested documents could be found, or reasonably could know where they could be obtained. Therefore, without adequate information, as required by R.C.M. 703, the Government cannot obtain this requested documents. Further, the requested documents are not within the control of military authorities. Trial Counsel confirmed with VLC for [redacted] that [redacted] has never requested a civilian or military protective order. The requested records are public records held by the clerks of whichever state court had jurisdiction, and thus the Defense has equal access and ability to obtain these court records. This does not require production efforts by the Government, such as a warrant or subpoena, and the Government has exercised its due diligence by making relevant inquiries and disclosing that information to the Defense.

g. All law enforcement notes, and interview logs and records from NCIS, PWCPD, and Haymarket Police Department related to the charged allegations.

The Government does not object to producing this information. Trial Counsel is in the process of scheduling a meeting with Prince William County Police Detective, [redacted] in order to obtain and produce all requested documents.

h. Notice of any forensic or scientific testing that may destroy evidence, all laboratory reports, and copies of inspections by accrediting bodies of any laboratory that conducted forensic or scientific testing in this case.

The Government is aware of its discovery obligations under *United States v. Garries,* 22 M.J. 288 (CMA 1986) and 701(a)(2)(B). However, Trial Counsel is not aware of any performance of any forensic or scientific tests on any of the evidence collected. On 15 October 2020, Trial Counsel traveled to the NCIS Agency in Quantico, Virginia, in order to meet discovery obligations and copy all documents within NCIS possession. During this trip, Trial Counsel asked if any scientific or forensic tests had been done on any evidence collected and was informed by NCIS Special Agent [redacted] that no such inspections had been done.

[9] *Williams* at 443

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Therefore, the Government has exercised its due diligence by making relevant inquiries and disclosing that information to the Defense.

i. Contact information for specific civilian law enforcement personnel.

On 13 November 2020, the Government provided Defense with the contact information for the Prince William County Police Detective, [redacted] and Forensic Examiner, [redacted] The Government continues to comply with its discovery obligations and has sent requests for the remaining witnesses contact information to NCIS Special Agent [redacted] and Prince William County Assistant Commonwealth's Attorney (ACA) [redacted] The Government will disclose this information when it is obtained.

j. Discovery relating to witness bias and credibility.

The Government has disclosed all evidence within its possession pertaining to the PWCPD and Haymarket Police Department investigations. Aside from the victim, there is no evidence that any potential witness consumed alcohol or drugs prior to witnessing the events that give rise to any potential testimony. Aside from the victim, there was no evidence that tended to show that a potential witness was impaired or lacked ability to perceive, remember, or communicate, or was diagnosed with any substance abuse issues, or received mental health treatment.

k. Unredacted copies of evidence.

Trial Counsel will make themselves available to hand over the unredacted copies of the evidence prior to the motions hearing.

l. Evidence in possession of PWCPD.

On 13 Nov 2020, the Government provided the Defense with the contact information for the Prince William County Police Detective responsible for their counterpart investigation against the accused in order to facilitate the copying of evidence within the possession of PWCPD.

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RELIEF REQUESTED

The Government respectfully submits to the Court that no order to compel any of the evidentiary items at issue in this Motion is necessary because the Government has either facilitated the Defense's discovery and production requests or is attempting to do so.

Respectfully submitted,

[redacted]
Latena M. Hazard
LT, JAGC, USN
Trial Counsel

I certify that I have served a true copy (via e-mail) of the above on Military Judge, CDR Angela Tang, and Defense Counsel, LCDR Jennifer Luce and LT Daniel Phipps on 17 November 2020.

[redacted]
Latena M. Hazard
LT, JAGC, USN
Trial Counsel

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

UNITED STATES v. JOSE TEJEDA E-6/CS1 USN	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF FOR AN UNREASONABLE MULTIPLICATION OF CHARGES** **17 NOV 20**

MOTION

The Government respectfully requests that this Court deny the Defense's motion and leave the Charges and Specifications unchanged because there is no unreasonable multiplication of charges in this case and, therefore, merging of any specifications is not required by law.

SUMMARY

The accused is charged with four specifications of violating Article 120, UCMJ, two specifications of violating Article 120b, UCMJ, one specification of violating Article 120c, UCMJ, and two specifications of producing child pornography in violation of Article 134, UCMJ. The Defense moved this Court to merge Specifications 1 and 3 of Charge I, Specifications 2 and 4 of Charge I, and Specifications 1 and 2 of Charge IV. When viewing the Charges and Specifications through the lens of reasonableness, four of the five *Quiroz* Factors weigh in favor of the Government. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N-M. Ct. Crim. App. 2002), *aff'd without opinion*, 58 M.J. 183 (C.A.A.F. 2003). Therefore, no unreasonable multiplication of charges exist, and the Government should be permitted to present and prove the Charges and Specifications in the manner referred by the Convening Authority pursuant to its prosecutorial discretion.

FACTS

1. The Government adopts the facts listed in the Defense's motion and adds the following additional facts:

2. Given the breadth of evidence and long duration of the accused's criminal acts in this case,

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the Government contemplated breaking apart specific criminal acts into separate charges and specifications to encompass additional, overlapping theories of criminality but decided to bring the current Charges and Specifications in the interest of justice. This is memorialized in a draft charge sheet. (Appellate Exhibit VI.a.).

3. The accused is also under indictment by the Commonwealth of Virginia for similar acts against the same victim in a different location, but the Government chose to introduce evidence of those acts pursuant to Military Rules of Evidence 404(b), 413, and 414, instead of invoking the dual sovereignty doctrine and charging the accused with additional, legally valid charges and specifications. (Appellate Exhibit VI.b.).

BURDEN

4. The burden of proof and persuasion rests on the Defense for this motion. RCM 905(c)(2). The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

LAW

5. Multiple offenses may be preferred at the same time. Rule for Courts-Martial (RCM) 307(c)(4). Further, "two or more offenses charged against an accused may be referred to the same court-martial for trial, *whether serious* or minor *offenses* or both, *regardless whether related*." RCM 601(e)(2) (emphasis added). The only conditions imposed by the Rules for Courts-Martial are that "each specification shall state only one offense," and "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." *See* RCM 307(c)(4).

6. *United States v. Quiroz*, established the test for determining whether there is an unreasonable multiplication of charges (UMC) in a specific case with a non-exhaustive list of factors to consider:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 57 M.J. 583, 585-86 (N-M. Ct. Crim. App. 2002), *aff'd without opinion*, 58 M.J. 183 (C.A.A.F. 2003).

7. The purpose of the doctrine against UMC is to ensure that prosecutors do not needlessly

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"pile on" charges against a military accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds, United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

8. Application of the *Quiroz* factors involves a determination of "reasonableness." *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010). Further, there is not an unreasonable multiplication of charges where: (1) an accused completes any number of independent actions that alone would have been sufficient to support specifications in addition to the ones charged; (2) an offense charged already carries a maximum punishment of life in confinement and does not unreasonably increase punitive exposure thereby; and (3) the Government could break up specifications into multiple different specifications. *Id.*

9. There is also no unreasonable multiplication of charges where the Government could charge multiple, distinct criminal acts occurring on different dates as separate specifications under one charge on the charge sheet but instead chooses to charge that criminal conduct within a specification that alleges criminal conduct on divers occasions. *See United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012).

ARGUMENT

10. There is no unreasonable multiplication of charges in this case because the charges and specifications are aimed at distinctly separate criminal acts; the number of charges and specifications do not misrepresent or exaggerate the accused's criminality; the number of charges and specifications do not unreasonably increase the accused's punitive exposure; and there is no evidence of prosecutorial overreaching or abuse in the drafting of the charges.[1]

a. Second *Quiroz* Factor – Specifications 1 and 3 of Charge I, Specifications 2 and 4 of Charge I, and Specifications 1 and 2 of Charge IV are aimed at distinctly separate criminal acts.

A series of criminal acts with the same theory of criminal liability can still facially be distinct criminal acts when separated temporally. *See Campbell*, 71 M.J. at 25. In *Campbell*, the Court noted that the accused engaged in 31 distinct acts of larceny over several weeks and that the Government could have charged "thirty-one separate and distinct larcenies" despite the fact that accused was stealing the same types of controlled medication in the same manner from the same hospital. *See id.* Likewise, in this case, the three sets of specifications placed in issue in this Motion are linked by the same theories of criminal liability but are distinct from each other temporally. The evidence that the Government has obtained demonstrates that there was a distinct two-month break in the accused's course of sexually assaulting [redacted] and also filming those sexual assaults.

[1] The Government concedes that the first *Quiroz* factor is met because the accused has raised an objection alleging an unreasonable multiplication of specifications by filing the underlying motion at issue. *Quiroz*, 57 M.J. at 585.

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Further, as the Defense noted in their Motion, the Military Justice Act of 2016 (MJA16) resulted in revisions to both Articles 120 and 134, UCMJ. (Def. Mot. Para. 3.h.). Most notably, the elements that the Government must prove under Article 120 changed from the need to prove bodily harm to the need to prove a lack of consent. *Compare* Electronic Benchbook Instruction 3-45-14 (version 2.14.1) *with* Electronic Benchbook Instruction 3a-44-2 (version 2.14.1). The accused's acts occurred both in 2018 and 2019, which cross the threshold of when the MJA16 changes became effective. Because the military is a notice pleading jurisdiction, it was necessary for the Government to put the accused on notice of exactly which theories of criminal liability were being alleged and under which iteration of the law those theories were being alleged.

Based on the Court's opinion in *Campbell*, and the appreciable changes in the law from 2018 to 2019, when viewed through the lens of objective "reasonableness" – as instructed by the Court in *Anderson* – breaking up two series of sexually-related crimes that were separated by a two month cessation into merely two specifications is not unreasonable. *See id.*; *Anderson*, 68 M.J. at 386. Two specifications of a series of similar sexual crimes spanning close to a year on divers occasions is hardly a "pile on" by the Government under the facts of this case. *Foster*, 40 M.J. at 144 n.4. Therefore, the Charges and Specifications at issue in this Motion are aimed at distinctly separate criminal acts, and this *Quiroz* Factor weighs in favor of the Government. *Quiroz*, 57 M.J. at 585.

b. Third and Fifth *Quiroz* Factors - Specifications 1 and 3 of Charge I, Specifications 2 and 4 of Charge I, and Specifications 1 and 2 of Charge IV do not misrepresent or exaggerate the accused's criminality, and the Government exercised appropriate prosecutorial discretion given the range of charging options available in this case.

Where an accused completes any number of independent actions that alone would have been sufficient to support specifications in addition to the ones charged, and where the Government could break up specifications into multiple different specifications, an unreasonable multiplication of charges does not arise. *See Anderson*, 68 M.J. at 386. In *Anderson*, the Government chose to consolidate multiple attempts of communicating with the enemy and multiple attempts of aiding the enemy when, as the Court explicitly noted, each attempt could have been broken up into its own specification. *See id.* The Anderson Court held that the four specifications of attempts of then-Article 104 was not an unreasonable multiplication of charges. *Id.* Like the 31 distinct acts of larceny in *Campbell*, discussed above, or the multiple attempts of communicating and aiding the enemy tried by the accused in *Anderson*, the Government could have charged separate specifications for each day the accused committed a sexual act upon [redacted] or each day he filmed himself doing so, but declined to engage in such a charging scheme. *See Campbell*, 71 M.J. at 25; *Anderson*, 68 M.J. at 386. Indeed, as evidenced in Appellate Exhibit VI.a., Trial Counsel contemplated breaking up these incidents into many additional specifications. Further, the Government could have additionally charged the accused with the same crimes for which he is under indictment by the Commonwealth of Virginia pursuant to the dual sovereignty doctrine. Instead, the Government intends only to introduce evidence of those acts at trial pursuant to M.R.E. 404(b), 413, and 414. This shows that the Government decided to choose a "middle ground" by charging only two specifications of each set of crimes on divers occasions, similar to what the Government did in *Campbell*. *See*

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Campbell, 71 M.J. at 25.[2] Therefore, the final referred Charge Sheet in this case demonstrates that the Government exercised its prosecutorial discretion appropriately by not exaggerating the accused's criminality and consolidating the similar theories of criminality into two specifications for each category of crimes instead of dozens. Both of these *Quiroz* Factors weigh in favor of the Government. *Quiroz*, 57 M.J. at 585.

c. Fourth *Quiroz* Factor - Specifications 1 and 3 of Charge I, Specifications 2 and 4 of Charge I, and Specifications 1 and 2 of Charge IV do not unreasonably increase the accused's punitive exposure.

In addition to the charges and specifications at issue in this motion, the accused is also charged with raping [redacted] in June of 2018, when she was still under 16 years of age, in violation of Article 120b, UCMJ. This charge alone carries a maximum possible punishment of life in confinement without the eligibility of parole, total forfeiture of all pay and allowances, reduction to paygrade E-1, and a mandatory dishonorable discharge. *Manual for Courts-Martial* (2016 ed.), Part IV, ¶45b.e.(1); Appendix 12. Notably, this Charge and Specification is not at issue in this Motion. If this Court were to deny the Defense's Motion, either in whole or in part, the accused's punitive exposure would not unreasonably increase. In fact, regardless of the Court's ultimate ruling on this Motion, the accused's punitive exposure would neither increase nor decrease because Specification 1 of Charge II, and the maximum possible punishment that it carries, would remain unchanged. Therefore, this *Quiroz* factor also weighs in the Government's favor. *Quiroz*, 57 M.J. at 585.

EVIDENCE

11. The Government submits the following documentary evidence in support of its Response:

Appellate Exhibit VI.a.: Draft charge sheet.
Appellate Exhibit VI.b.: Commonwealth of Virginia Indictment.

RELIEF REQUESTED

12. The Government respectfully requests that this Court deny the Defense's motion and leave the Charges and Specifications unchanged.

ORAL ARGUMENT

[2] While the larcenies in *Campbell* were consolidated into one specification on divers occasions, that was appropriate in that case because the timeframe spanned only several weeks, whereas in this case, the crimes span nearly a year. *See id.*

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13. The Government requests oral argument on this motion.

Respectfully submitted,

[redacted]

Raymond E. Bilter
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy via e-mail of this motion on Defense Counsel on 17 November 2020.

[redacted]

Raymond E. Bilter
LT, JAGC, USN
Trial Counsel

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

UNITED STATES OF AMERICA **v.** **JOSE TEJEDA** **CS1/E-6 USN**	**DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM ICLOUD ACCOUNT** 9 January 2021

MOTION

Pursuant to Military Rule of Evidence (M.R.E.) 311, the Fourth Amendment of the United States Constitution, and Rules for Courts-Martial (R.C.M.) 905(b)(3) the defense respectfully moves this court to suppress the electronic evidence in this case, namely the data acquired as a result of the search warrant to Apple, Inc., including but not limited to the iCloud storage. Additionally, the *plain view* doctrine, *good faith* doctrine, and *inevitable discovery* doctrine do not apply to this case. To do so, would render the Fourth Amendment and M.R.E. 311 meaningless.

FACTS

a. CS1 Jose Tejeda is charged with sexually assaulting [redacted] in violation of Article 120, Uniform Code of Military Justice (UCMJ) and Article 120b, UCMJ. CS1 Tejeda is also charged with videoing the private area of [redacted] without her consent and producing child pornography in violation of Article 120c, and Article 134, UCMJ, respectively.

b. On 27 June 2019, the Haymarket Police Department received a complaint that CS1 Jose Tejeda had taken photographs of [redacted] in a state of undress while she was asleep. *Appellate Exhibit V.i*

c. [redacted] told the Haymarket Police Department and later the Prince William County Police Department (PWCPD) that he found four pictures on [redacted] (CS1 Tejeda's) iPad of [redacted] asleep with her underwear pulled down. [redacted] informed PWCPD that he told CS1 Tejeda to delete the images from his iPad, and he confirmed that CS1 Tejeda did in fact delete the images as requested. *Appellate Exhibit V.i*

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d. [redacted] was interview by the Haymarket Police Department on 27 June 2019 as well. During this interview, she stated, reported that [redacted] found pictures of [redacted] on CS1 Tejeda's iPad asleep with her skirt pulled down. [redacted] denied ever seeing any other pictures. [redacted] also stated CS1 Tejeda had never done anything sexual with her. *Appellate Exhibit V.i*

e. [redacted] was also interviewed by the Haymarket Police Department. During her interview she stated that she saw the pictures of [redacted] and stated they contained her "backside" and that she believed [redacted] vagina was exposed. The police detective asked [redacted] if she ever seen any images of children on CS1 Tejeda's devices, to which she stated, "No." *Appellate Exhibit V.i*

f. Prince William County Police Department interviewed the entire [redacted] on 28 June 2019. *Appellate Exhibit V.h*

g. During their interview of Ms. [redacted], she reported that she observed three photographs of [redacted] on [redacted] She reported that two of the three photos were of a girl laying on her side on a bed with a bare back with underwear on. She reported the third photograph contained a light skinned vagina and light-skinned penis. [redacted] reported that she did not know who was in the photograph, but [redacted] was sure it was [redacted] *Appellate Exhibit V.h*

h. [redacted] told Detective [redacted] that he was looking at the photographs on CS1 Tejeda's iPad when he noticed four photographs of [redacted] buttocks. [redacted] reported that the photographs were in a hidden album and were taken on 27 June 2019 at 0930. *Appellate Exhibit V.h*

i. Detective [redacted] interrogated CS1 Tejeda on 28 June 2019. During this interrogation, CS1 Tejeda denied taking any photographs of [redacted] CS1 Tejeda admitted to having an addiction to pornography and that the photographs on his iPad could have been pornography. CS1 Tejeda denied every searching for child pornography. *Appellate Exhibit V.h*

j. During his interrogation, CS1 Tejeda consented to the search of his cell phone. In addition, CS1 Tejeda provided Detective [redacted] with his iCloud username and password. *Appellate Exhibit V.h*

k. Prince William County detectives reviewed the content of CS1 Tejeda's cell phone and did not find any pornographic photographs or videos. The police report does not mention if anyone logged into CS1 Tejeda's iCloud account using the information he provided. *Appellate Exhibit V.h*

l. After his interrogation, CS1 Tejeda was released and no charges were brought against him. *Appellate Exhibit V.h*

m. On 16 July 2019, Detective [redacted] submitted an application for a search warrant to obtain the Apple iCloud account belonging to CS1 Jose Tejeda. Attached to the application for a search warrant is "Addendum A," which provides the details of what information was being sought from the iCloud account. *Appellate Exhibit V.m*

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n. The Addendum A states, "Based on the aforementioned information, your affiant respectfully requests a search warrant for the Apple Account associated with [redacted] from 1 June 2019 and 1 July 2019, for specific evidence and instrumentalities to wit:

> [...] 2. iCloud data, including but not limited to: [...] iOS device backups, which may be a copy of the user's apple device to include photos and videos in the user's camera roll, device settings, app data and other iCloud content, including but not limited to Photostream.
>
> 3. All records, data, and information, including but not limited to, images/photographs, videos, data documenting the device location, and the date and time that any digital images were taken. [...] *Appellate Exhibit V.m*

o. To support the request for the search warrant, Detective [redacted] provided the following material facts constituting probable cause:

> The victim, [redacted] reported she and her [redacted] saw pictures of the victim in a state of undress with exposed buttocks. The suspect admitted to the victim and the rest of [redacted] that he took the photos of the victim while they were at his work. The victim did not know the photos were being taken, due to the suspect giving her medication to make her sleep. The photos were seen by the victim's brother on the suspect's iPad. The suspect states all of his devices are linked to his iCloud account [redaction] and any photos would automatically back up to this account. *Appellate Exhibit V.m*

p. The following additional information was provided

> The victim's [redacted], and [redacted] told me they saw the photo of the victim in a state of undress. The [redacted] had seen the photo on [redacted] iPad with date 6/27/19 as the date they were taken. The victim had confirmed to her [redacted] the person in the photos were her due to the clothing. *Appellate Exhibit V.m*

q. The Magistrate signed the search warrant on 16 July 2019. *Appellate Exhibit V.m*

r. On 27 August 2019, Apple notified Prince William County that the information on CS1 Tejeda's iCloud account was too large to be sent through a .zip file and an external hard drive was needed to be mailed to them for the account to be downloaded. Prince William County complied and sent an external hard drive to Apple. *Appellate Exhibit V.h*

s. On 11 September 2019, Prince William County received the hard drive with the contents of CS1 Tejeda's iCloud account. *Appellate Exhibit V.h*

t. Upon receipt of CS1 Tejeda's iCloud account from Apple, PWCPD identified 91 videos that the government alleges contain CS1 Tejeda engaging in sexual acts with [redacted] from on or about 5 February 2016 to on or about 17 May 2019. *Appellate Exhibit V.h*

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u. None of the 91 videos identified were created during the month of June 2019. *Appellate Exhibit V.h*

BURDEN

The burden of proof and persuasion rests on the Government. *See* M.R.E. 311(d)(5)(A).

LAW

1. A search warrant (authorization is required for any search of personal digital data.

A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution. *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017). The Fourth Amendment states, "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Military Rules of Evidence have implemented the Fourth Amendment through M.R.E. 311-17. "Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if: (1) the accused makes a timely motion to suppress or an objection under this rule; (2) the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or the evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." M.R.E. 311(a).

Cell phone searches require search warrants absent exceptional circumstances. *See Riley v. California,* 134 S. Ct. 2473, 2493 (2014). Today's digital era complicates the application of the Fourth Amendment. *United States v. Morales*, 77 M.J. 567, 575 (A. Ct. Crim. App. 2017). With regard to cell phones, the Supreme Court, in *Riley v. California*, instructs: "modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. . . [as] a significant majority of American adults now own such phones." 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014). The Supreme Court's conclusion is equally forceful: "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id.* at 2494-95.

2. The Search Warrant Must be Supported by Probable Cause.

The Military Rules of Evidence provide that when a seizure is made pursuant to a search authorization, the search authorization "must be based upon probable cause." M.R.E. 315(f)(1); M.R.E. 316(c)(5)(A); see also *United States v. Hester*, 47 M.J. 461, 463 (C.A.A.F. 1998).

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Probable cause to seize exists if there is "a reasonable belief that the property or evidence is ... evidence of crime." M.R.E. 316(c)(1); cf. M.R.E. 315(f)(2). "[P]robable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself," and "probable cause is founded ... upon the overall effect or weight of all factors presented to the magistrate." *Leedy*, 65 M.J. at 213. Stated differently, in order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized. See *Rogers*, 67 M.J. at 166; *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001) (stating that probable cause "definition encompasses showing a nexus"). "The question of nexus focuses on whether there was a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Clayton*, 68 M.J. at 424 (quoting Leedy, 65 M.J. at 213). A nexus may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept. *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017)

3. The Search Warrant Must be Narrowly Tailored.

"The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). "The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." United States v. Carey, 172 F.3d 1268, 1272 (10th Cir. 1999).

Despite the importance of preserving this particularity requirement, considerable support can be found in federal law for the notion of achieving a balance by not overly restricting the ability to search electronic devices. *Richards*, 76 M.J. at 369. The Court in *Richards* states, "In charting how to apply the Fourth Amendment to searches of electronic devices, we glean from our reading of the case law a zone in which such searches are expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent." *United States v. Richards*, 76 M.J. 365, 370 (C.A.A.F. 2017). "On one hand, it is clear that because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required.... On the other hand, ... granting the Government a carte blanche to search every file on the hard drive impermissibly transforms a limited search into a general one." *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) (citations omitted).

4. Evidence searched that was beyond the scope of the search authorization must be excluded.

"Evidence seized by an officer engaging in a search beyond the scope of the search warrant may be excluded." *See Horton v. California*, 496 U.S. 128, 140 (1990). "Searches conducted after obtaining a warrant or authorization are presumptively reasonable where

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warrantless searches a presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions." *United States v. Gurcynski,* 76 M.J. 381, 386 (C.A.A.F. 2017) (*quoting United States v. Hoffman,* 75 M.J. 120, 123-24 (C.A.A.F. 2016)).

5. The "Plain View" Doctrine is not applicable, and should not be applied to digital evidence.

"The Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Missouri v. McNeely,* 133 S.Ct. 1552, 1564 (2013). C.AA.F. has not decided whether the "plain view" exception should be applied to digital evidence. Our higher court did, however, express concern and caution in the implications of this legal application to digital evidence. *See United States v. Gurczynski,* 76 M.J. 381, 387-388 (C.A.A.F. 2017) ("Courts have struggled to apply the plain view doctrine to searches of digital devices, given the vast amount of information they are capable of storing. In light of these difficulties, the application of the plain view doctrine in a digital context poses a serious risk that every warrant for electronic information will become a general warrant rendering the Fourth Amendment Irrelevant.") The Ninth Circuit categorically rejected the "plain view" exception to the over-seizure of digital data. *See United States v. Comprehensive Drug Testing Inc. (CDT),* 621 F. 3d 1162, 1170-71 (9th Cir. 2010). "There is good reason not to apply the plain view doctrine to examinations of nonresponsive digital data that is not within the scope of the original warrant. When police make subsequent use of nonresponsive data, they are treating that as though it was described within the scope of the original search warrant. This eliminates the particularity requirement of the Fourth Amendment and enables every computer warrant that is not in theory to become general in fact." *United States v. Hulscher,* 2017 U.S. Dist. LEXIS 23096 (D.S.D. 2017).

6. This evidence is not subject to the exception of Inevitable Discovery.

Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made. *See* M.R.E. 311(c)(2). "For inevitable discovery doctrine to apply, the Government must establish by a preponderance of the evidence that when the illegality occurred the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Nieto,* 76 M.J. 101, 106 (C.A.A.F. 2017).

7. The Good-Faith Doctrine would not allow the admission of this evidence.

For the good-faith doctrine to apply, the Government must establish that law enforcement's reliance on a defective authorization is objectively reasonable. *United States v. Nieto,* 76 M.J. 101, 107 (C.A.A.F. 2017). In the military, the good-faith doctrine applies if: (1) the seizure resulted from a search and seizure authorization issued, in relevant part, by a military magistrate; (2) the military magistrate had a substantial basis for determining probable cause

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existed; and (3) law enforcement reasonably and in good faith relied on the authorization. M.R.E. 311(c)(3); see also *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001).

ARGUMENT

Here, the data at issue is CS1 Tejeda's iCloud data that was retrieved via a search warrant. iCloud data is akin to all data arising from a cell phone. This data is voluminous, highly personal, and represents an extreme expectation of privacy. Therefore, a search authorization was required. However, the search warrant used in this case was not carefully tailored to the Prince William County's justification to invade CS1 Tejeda's privacy and ultimately resulted in a wide-ranging exploratory searches of his entire iCloud account.

On 16 July 2019, the date when Detective [redacted] requested the search warrant, the only information she had was that [redacted] had seen four photographs on CS1 Tejeda's iPad that he believed were of [redacted] *Appellate Exhibit V.h.* [redacted] confirmed that these photographs were taken on 27 June 2019 at 0930. [redacted] transferred these four photographs to his cell phone and showed them to [redacted] and [redacted] the photographs from his cell phone. At the time when law enforcement began their investigation, the photographs had all been deleted. However, CS1 Tejeda reported that all of his photographs and videos automatically backup to his iCloud. Based on this information, Detective [redacted] had probable cause to believe that the four photographs taken on 27 June 2019 may be on CS1 Tejeda's iCloud. At no point during their investigation was there ever any indication that other videos or photographs of a contraband nature existed on CS1 Tejeda's iCloud account. *Appellate Exhibit V.h.*

Based on this information, Detective [redacted] submitted an application for a search warrant to obtain the Apple iCloud account belonging to CS1 Jose Tejeda from **1 June 2019 and 1 July 2019,** for specific evidence and instrumentalities to wit:

> […] 2. iCloud data, including but not limited to: […] iOS device backups, which may be a copy of the user's apple device to include photos and videos in the user's camera roll, device settings, app data and other iCloud content, including but not limited to Photostream.
>
> 3. All records, data, and information, including but not limited to, images/photographs, videos, data documenting the device location, and the date and time that any digital images were taken. […] *Appellate Exhibit V.m.*

This warrant application could be interpreted in two different ways: (1) provide all requested data that was in existence from 1 June 2019 and 1 July 2019 or (2) provide all requested data that was created from 1 June 2019 and 1 July 2019.

Looking at the interpretation that the search warrant authorized Apple to provide all videos, photographs, and corresponding data that existed from 1 June 2019 and 1 July 2019, this search warrant is overly broad and such a broad search warrant was not supported by probable cause. As stated above, the only photographs that Detective [redacted] had probable cause to

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believe existed were the four photographs that [redacted] said were taken on 27 June 2019 at 0930. No one that Detective [redacted] interviewed ever indicated that CS1 Tejeda looked at child pornography or that he had ever taken pictures of [redacted] on any other occasion other than the incident that [redacted] alleged. Looking for any and all photographs and videos that were on CS1 Tejeda's iCloud account is a significant invasion of CS1 Tejeda's privacy and Detective [redacted] did not have the probable cause necessary to invade his privacy.

Looking at the interpretation that the search warrant was limited to all requested data that was created from 1 June 2019 and 1 July 2019, would be a much more appropriately narrow search warrant that would strike a balance that has been sought by many courts. However, when the search warrant was executed by Prince William County, the digital forensic detective went well beyond the scope of the search warrant when he extracted the 91 videos in question as none of these videos were created in June 2019.

The plain view doctrine should not apply in this case because the nature of digital data like that stored in an iCloud account is much different from the physical items that are often seen in plain view in a home or a car. When digital data is reviewed, it is generally analyzed using various forensic extraction software such as Cellebrite. Using these systems, a digital forensic examiner can easily constrain their search to photographs and videos created on a particular date or within a date range. Allowing the government to rely on the plain view doctrine simply removes a person's rights under the Fourth Amendment.

The inevitable discovery doctrine is also not applicable here because when the illegal search occurred, the government did not possess and were not actively pursuing evidence or leads that would have inevitably led to the discovery of the 91 videos obtained from CS1 Tejeda's iCloud account. Prior to seeking the search warrant and executing it, Detective [redacted] had seized all electronic devices from the Tejeda residence, including the iPad in question. This search warrant was the last step in their investigation. And at that time, they were not in possession of anything else that would have led them to these 91 videos.

Lastly, the good-faith exception does not apply here. First, the magistrate did not have a substantial basis for determining that probable cause existed for anything beyond photographs or videos created from 1 June 2019 and 1 July 2019. "Regardless of who drafts the authorization it is the military magistrate's responsibility to ensure particularity. Although not required, it will often be useful for a magistrate to understand law enforcement's search capabilities, the intended method of search, and the technical language endemic to a particular field of investigation. This understanding will help ensure an authorization is crafted such that is both clear and 'expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent. *United States v. Morales*, 77 M.J. 567, 575 (A. Ct. Crim. App. 2017). (citing, *Richards*, 76 M.J. at 370.) Here, the Magistrate was responsible for removing any ambiguity that existed in the search warrant to correspond to only what evidence was supported by probable cause. Second, the digital forensic examiner could have easily restricted his search to photographs and videos created from 1 June 2019 and from 1 July 2019. Allowing the government to assert that because Apple provide all photographs and videos that existed on CS1 Tejeda's iCloud account does not give the government authorization to unlawfully invade CS1

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Tejeda's right to privacy and essentially conduct a free-for-all general search.

RELIEF REQUESTED

The Defense requests that the inculpatory evidence found from Apple, Inc. be excluded from the Government's case-in-chief because it is result of an unlawful search warrant.

EVIDENCE

The Defense offers the following evidence:

- Appellate Exhibit V.h – Prince William County Police Department dated 26 July 2019
- Appellate Exhibit V.i – Haymarket Police Report
- Appellate Exhibit V.m – Apple Search Warrant and Affidavit

ORAL ARGUMENT

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

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

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

UNITED STATES	)	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS ICLOUD EVIDENCE**
v.	)	
JOSE TEJEDA CS1/USN	)	

1. Nature of the Motion. The Defense seeks the court to exclude evidence seized pursuant to a warrant issued by a magistrate asserting the warrant was too broad and/or the detective exceeded the scope of the warrant.

2. Findings of Fact.

a. The Government concurs with the Defense's statement of facts, and adds the following additional information.

b. iCloud storage is a service provided by Apple Inc. to allow users to remotely store information otherwise stored on other electronic devices, such as iPads, iPhones, and computers. AE.VI.F.

c. iCloud automatically creates a "backup" of the information stored on iCloud. iCloud backups are available for 180 days after the user no longer uses the iCloud storage service.

d. A user can then restore an electronic device from the backup. Additionally, the user can restore the device from an earlier version of the backup. AE.VI.F.

e. Detective [redacted] submitted a preservation request for the Accused's iCloud account on 28 June 2019. AE V.h, page 5 of 5.

f. Apple extracted the iCloud account on 28 June 2019. AE.VI.G.

g. The extracted iCloud account shows the last backup date as 26 June 2019. AE.VI.G.

h. The videos found in the Accused's iCloud backup existed in his iCloud storage in June 2019.

i. Specifically, the responsive material provided by Apple consisted only of the iCloud backup that occurred on the Accused's device on 26 June 2019, the day before [redacted] found them on his device. AE.VI.H.

j. Moreover, when Detective [redacted] received the iCloud backup files from Apple Inc., she reasonably believed that the contents consisted only of those materials responsive to the warrant. AE.VI.I.

k. Specifically, Detective [redacted] believed the contents of the iCloud backup file consisted of those files that would have been stored on the Accused's iCloud storage during the month of June 2019. AE.VI.I.

l. Knowing and wrongful possession of child pornography in an iCloud backup, regardless of the "creation date of the file" is a crime.

3. **Statement of Law**.

Probable Cause

"Probable cause" is defined as "more than a bare suspicion but less than evidence that would justify a conviction."[1] Others view probable cause as "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true."[2]

The probable cause standard has been described as a "practical, nontechnical conception."[3] Because probable cause "deals with probabilities and depends on the totality of the circumstances,"[4] it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules."[5] Probable cause "is not a high bar."[6] In assessing probable cause, a reviewing court must not view each individual fact in isolation and dismiss circumstances susceptible to an innocent explanation.[7]

The "totality of the circumstances" requires courts to consider "the whole picture," recognizing that the whole is often greater than the sum of its parts.[8] As the Supreme Court cautioned, "probable cause does not demand the certainty we associate with formal trials."[9] Probable cause may be based on a fair probability that the accused committed the alleged offense after a practical, common-sense consideration of the totality of circumstances presented. Thus, the assessment of probable cause is always a fact-intensive.

Military courts have likewise opined on the term's meaning. For example, the Court of Appeals for the Armed Forces views probable cause as "inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself."[10] It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[11] MRE 315(f)(2) defines probable cause as "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." This Court's duty is to "ensure that the magistrate had a 'substantial basis for. . . [concluding]' that probable cause existed."[12] This Court should apply three factors when assessing probable cause: (1) substantial deference to the magistrate's probable cause determination, (2) close cases should be resolved in favor of the magistrate's decision, and (3) use a commonsense approach.[13] While application of MRE 315 and military case law as it relates to constitutional concerns is necessary, MRE 311(b)(2) states that the analytical inquiry revolves around the rules applicable to federal district courts and the

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[1] *Black's Law Dictionary*, 1321 (9th ed. 2009).
[2] *Ballentine's Law Dictionary, 431 (Legal Assistant ed. 1994).*
[3] *Brinegar v. United States*, 338 U.S. 160, 176 (1949).
[4] *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).
[5] *Illinois v. Gates*, 462 U.S. 213, 232 (1983).
[6] *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Kaley v. United States*, 571 U. S. 320, 338 (2014)).
[7] *Id.* at 588.
[8] *Id.*
[9] *Gates*, 462 U.S. at 246.
[10] *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007).
[11] *Id.* at 243–44, n.13.
[12] *U.S. v. Huntzinger*, 69 M.J. 1 (C.A.A.F. 2010) citing to *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).
[13] *Id.*

Constitution.

Inevitable Discovery

Even where a search is unlawful, if the search would have inevitably occurred, though lawfully, at a later time then the evidence should not be suppressed.[14] Furthermore, evidence obtained from an unlawful search should only be suppressed when it would result in an "appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system."[15] Evidence obtained from an unlawful search or seizure is still admissible when that evidence would have been obtained regardless of the unlawful search or seizure.[16] This rule embodies the inevitable discovery exception to the exclusionary rule established in *Nix v. Williams*, 467 U.S. 431 (1984).[17] This exception applies when the Government "demonstrates by a preponderance of the evidence that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner."[18]

In *United States v. Epps*, Air Force Office of Special Investigations agents applied for a search warrant to search the accused's person, personal bags, and car, but the search warrant issued by a military magistrate left out search authorization for the bags, and the agents searched the accused bags anyway.[19] Finding by assumption that the discrepancy in the actual warrant was a scrivener's error and that the agents likely would have applied for another search warrant had the discrepancy been discovered, the CAAF held that the evidence in the accused's bags would have been inevitably discovered lawfully because the agents were actively pursuing leads in the form of other lawful searches that yielded related documents.[20] The CAAF also explicitly held that the inevitable discovery "doctrine may apply where it is reasonable to conclude officers would have obtained a valid authorization had they known their actions were unlawful."[21]

In *United States v. Wallace*, Air Force Office of Special Investigations agents seized the accused's computer from his residence pursuant to the accused's consent because they had reason to believe that he was communicating with a 15 year-old and pursuing a sexual relationship with her over email.[22] The agents searched the computer for e-mails but also found other files containing child pornography.[23] The CAAF held that the accused's consent was obtained involuntarily, but still held that the inevitable discovery applied because, had they known the consent was involuntary, the agents would have sought and received a search authorization for the e-mails on the computer.[24] Moreover, the Court went further to hold that the "investigators would have had to sift through all the captured data to find relevant e-mail traffic . . . [so] the files containing child pornography would have been inevitably discovered through this valid search."[25]

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[14] U.S. v. *Eppes*, 77 M.J. at 347.
[15] M.R.E. 311(a)(3).
[16] M.R.E. 311(c)(2).
[17] *United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008).
[18] *United States v. Epps*, 77 M.J. 339, 347 (C.A.A.F. 2018) (quoting *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014); *see also United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012); *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982) (quoting the same).
[19] 77 M.J. at 343.
[20] *Id.* at 348-49.
[21] *Id.* at 347.
[22] *United States v. Wallace*, 66 M.J. 5, 6-7 (C.A.A.F. 2008).
[23] *Id.* at 7.
[24] *Id.* at 10.
[25] *Id.*

Good Faith Exception

Evidence obtained from an unlawful search or seizure is still admissible when: (1) the search and seizure was executed pursuant to a search warrant issued by competent civilian authority; (2) the individual issuing the search warrant had a substantial basis for determining the existence of probable cause; and (3) the officials seeking and executing the warrant reasonably and with objective good faith relied on the issuance of the warrant.[26] M.R.E. 311 was intended to incorporate the good faith exception to the exclusionary rule first articulated in *United States v. Leon*, 468 U.S. 897 (1984).[27] The CAAF and the U.S. Supreme Court articulated four circumstances where the good faith exception does not apply:

> (1) *False or reckless affidavit*--Where the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;
>
> (2) *Lack of judicial review*--Where the magistrate wholly abandoned his judicial role or was a mere rubber stamp for the police;
>
> (3) *Facially deficient affidavit*--Where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) *Facially deficient warrant*--Where the warrant is so facially deficient -- *i.e.*, in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.[28]

Under Fourth Amendment jurisprudence, the exclusionary rule only applies when it "results in appreciable deterrence."[29] Deterrence *per se* is not the only trigger for the exclusionary rule because the "benefits of deterrence must outweigh the costs."[30] To the extent the exclusionary rule deters law enforcement actions, the "possible benefit [of the exclusionary rule] must be weighed against its substantial social costs."[31] "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'"[32] This "presents a high obstacle" to overcome in order to impose the exclusionary rule.[33] "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[34] The determination of good faith on the part of the law enforcement conduct at issue is an objective

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[26] M.R.E. 311(c)(3)
[27] *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001).
[28] *Id.* at 419-20 (italics in original) (internal quotations and citations omitted).
[29] *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 909).
[30] *Id.* (quoting *Leon*, 468 U.S. at 910).
[31] *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987) (internal alterations omitted)).
[32] *Id.* (quoting *Leon*, 468 U.S. at 908).
[33] *Id.*
[34] *Id.* at 144.

standard of "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." [35]

In *United States v. Maxwell*, the CAAF declined to apply the good faith exception to evidence obtained from an electronic search of files associated with an America Online screen name that was not one of the screen names listed in the search warrant even though the screen name was used by the accused.[36]

In *United States v. Leon*, police executed a search of the accused's residence and seized illegal drugs pursuant to a warrant issued by a state magistrate judge.[37] Appellate review determined that the magistrate's warrant lacked probable cause because the information from an informant used to apply for the warrant was "fatally stale" and there was no way to determine the credibility of the informant.[38] Despite this, the U.S. Supreme Court held that "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate."[39]

4. **Analysis of Law**.

Probable cause existed for the search warrant to include videos in its list of seizable items.

Defense argues that Detective [redacted] "only had probable cause for the four photographs taken on 27 June 2019" therefore, including videos in the search warrant violated the defendants Fourth Amendment rights.

In *Orona*[40], agents seized the contents of computer servers maintained for a company that provided billing services for child pornography websites. The defendant's information was found in the customer transaction records. A magistrate granted an agent authorization to search appellant's computers, where agents found approximately 40 images of child pornography.[41] The defendant moved to suppress the images stating that the images were a result of an unlawful search and seizure. The Court held that "a probable cause determination by a neutral and detached magistrate is entitled to substantial deference."[42] Furthermore, the court "interpreted the Supreme Court's guidance to require that resolution of doubtful or marginal cases should be largely determined by the preference for warrants and that close calls will be resolved in favor of sustaining the magistrate's decision"[43] The court stated, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place."[44] In determining whether the magistrate had a "substantial basis" for determining that probable cause existed, the Court looked at the information made known to the magistrate at

[35] *Id.* at 145 (citing *Leon*, 468 U.S. at 922, n 23) (internal quotations omitted).
[36] 45 M.J. 406, 413-14, 421 (C.A.A.F. 1996).
[37] *Leon*, 468 U.S. at 902-03.
[38] *Id.*
[39] *Id.* at 926.
[40] *United States v. Orona*, No. ACM 36968, 2009 CCA LEXIS 345 (A.F. Ct. Crim. App. Sep. 14, 2009)
[41] *Id.* at 1
[42] *Id.*
[43] *Id.*
[44] *Id.*

the time of his decision and analyzed the manner in which the facts became known to the magistrate.[45] The court held that the magistrate did have a substantial bases for determining that probable cause existed.[46]

Analogous to *Orona*, under a totality of circumstances, there is a fair probability that child pornography would be found in the defendant's iCloud account given the information made available to the magistrate at the time of the decision. First, the affidavit specifically stated the "Accused admitted to [redacted] and the rest of [redacted] that he took the photos of [redacted] while they were at his work." Second, the accused informed the investigating agent that all his devices were linked to his iCloud account, providing the account name and password. Here, the accused tied his illicit act, photographing [redacted] in various stages of undress, to his iCloud account. Therefore, it is reasonable to believe that evidence of the specific crime would be found on the requested iCloud.

In *U.S. v. Rogers*, the Court agreed with the magistrate judge that the term "photos" reasonably included images captured on videotapes or by a digital camera and that "given the current state of technology, looking at a computer's hard drive to find photos is no more inappropriate than opening a photo album" and that "current technology also permits 'photos' to be stored on homemade videotapes.[47] Accordingly, the court held that it was reasonable to believe that the seized videotapes could have contained the victim and the seizure and subsequent search of the videotape did not exceed the scope of the first search warrant, and there was no basis for suppressing the evidence discovered thereafter.[48] Additionally, the Supreme Court recognized that it is necessary to look at "innocuous documents …in order to determine whether they are, in fact, among those papers authorized to be seized."[49] The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before them there is a fair probability that contraband or evidence of a crime will be found in a particular place.[50] Therefore, given today's technological advancements, a common-sense assumption can be made that a photo can be taken from a video. Thus, Defense has failed to provide any evidence that the magistrate did not have a substantial basis for determining that probable cause existed for the videos.[51]

The Defense also argues there is not a sufficient nexus between the alleged crime and the specific items seized. This assertion fails to take in the totality of the information provided to the

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[45] *Id.*
[46] *Id.*
[47] *United States v. Rogers*, 521 F.3d 5, 6 (1st Cir. 2008) (On appeal, defendant argued that the seizure and search of a videotape exceeded the scope of the first search warrant because the warrant referenced "photos of DW" should have been limited to developed print photographs. The appellate court found that the district court did not err when it denied defendant's motion to suppress the videotape because the warrant authorized the seizure of all "photos of DW", and since the term "photos" reasonably included images captured on videotapes or by a digital camera, it was reasonable to believe that the seized videotapes could have contained "photos of DW." Accordingly, the seizure and subsequent search of the videotape did not exceed the scope of the first search warrant, and there was no basis for suppressing the evidence discovered thereafter.).
[48] *Id.*
[49] *Andresen v. Maryland*, 427 U.S. 463, 482 (1976), (Court noted that when search warrants authorize the seizure of documents, "responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.").
[50] *Id* at 11.
[51] *Id.* at 8 (citing *U.S. v. Macomber, 67 M.J. at 218* (citing *Gates, 462 U.S. at 238-39; United States v. Carter, 54 M.J. 414, 418 (C.A.A.F. 2001)).*

magistrate. This case is more analogues to *Macomber*.[52] In *Macomber*, the servicemember argued there was an insufficient nexus between the child pornography discovered in his possession at a post office and his dorm room and that evidence presented to the magistrate did not support a fair inference the defendant owned a computer, on which child pornography might be held.[53] The Court disagreed and stated that "common sense would suggest a fair probability that any child pornography the defendant might possess would be located in his dorm room and once the agents had probable cause to search the dorm room, agents were also authorized to search where the items sought might reasonably be located, and therefore the computer was within the scope of the search authorization.[54] Additionally, the Court stated that "the nature of the contraband sought was such that it was highly portable, easily secreted, and often stored in the possessor's home in a variety of forms and on a variety of media."[55] Therefore, the military judge did not err in ruling that the magistrate had a substantial basis for finding probable cause.[56]

Here, the investigation revealed that the defendant had taken pictures of [redacted] on his phone. During an interview, the defendant informed the investigating agent that the items on his phone were backed up to his iCloud account. Based on this interview, the investigating agent requested a search warrant for items in relation to possession of child pornography in direct violation of a Virginia statute. As in *Macomber*, it is reasonable to believe that the defendant would store child pornography in a variety of forms and on a variety of media. Therefore, given the totality of the facts and specificity of the search warrant, it is reasonable to believe that the magistrate judge had a substantial basis to believe child pornography existed not only in the photos viewed by the [redacted] but videos held in the defendant's iCloud and thus, properly concluded that there was a nexus between the items being sought and the crime under investigation and deference should be given to this decision.[57]

In *Leedy*, there was probable cause to believe the accused possessed child pornography on his computer when his roommate saw files titled "14 year old Filipino girl" and "three black guys and one white girl". In that case, the accused argued that the description of the file, "14 year old Filipino girl" was insufficient to support probable cause that a file containing child pornography existed on the computer. The Court found that other files on the computer, such as "three black guys and one white girl" supported the inference that the files were of a pornographic nature. Applying a commonsense standard, the Court found there was probable cause to believe the computer contained child pornography.[58]

As in *Leedy*, commonsense supports probable cause existed for the search warrant to include videos in its list of seizable items. Neither the constitution nor common sense require direct evidence of the material being sought. The photos of [redacted] were viewed on the accused's iPad and the accused admitted to the [redacted] that he took the photos. The accused then informed the investigating agent items on his phone were backed up to his iCloud. Here, the search warrant was for videos and photographs backed up on the accused's iCloud account related to child pornography. Based on the information provided, a common-sense approach would indicate that child pornography would likely be found on the accused's account since he admitted taking the

[52] 67 M.J. 214 (C.A.A.F. 2009).
[53] Id.
[54] Id.
[55] Id.
[56] Id.
[57] 51 M.J. 204, 211 (C.A.A.F. 1999).
[58] 65 M.J. 208 (C.A.A.F. 2007).

photos and that all his electronics backed up to his iCloud. Thus, there was probable cause to search videos and photos. The standard for establishing probable cause is just that—"probable"[59] and the level of specificity the defense is requesting - to limit the search warrant to the four photos - is not required to establish probable cause.

The search warrant was sufficiently narrowly tailored

Defense contends that the search warrant can be interpreted in two ways: (1) provide all requested data that was in existence from 1 June to 2019 and 1 July 2019 or (2) provide all requested data that was created from 1 June 2019 and 1 July 2019. Defense argues this first interpretation is overly broad and violates the defendants Fourth Amendment rights. The Fourth Amendment's Warrants Clause provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[60] "Any search intruding upon [an individual's] privacy interest must be justified by probable cause and must satisfy the particularity requirement, which limits the scope and intensity of the search."[61] The Fourth Amendment's particularity requirement focuses on two concerns: "one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take, and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized."[62]

In *U.S. v. Farlow*, the defendant filed a motion to suppress images of child pornography discovered during a police officer's execution of a search warrant authorizing a search for evidence of the crimes of disseminating indecent materials to a minor or endangering the welfare of a child.[63] The defendant argued that the officer should have limited the initial search to the bodybuilding images that lead to the execution of the search warrant.[64] The Court disagreed and stated that "since the warrant stated the specific criminal activity likely to be found on the defendants' computer, it cannot be classified as a generic classification that would go against the particularity requirement of the Fourth Amendment."[65]

As in *Farlow*, the search warrant was limited to photos and videos related to the possession of child pornography associated with the defendant's iCloud account from 1 June 2019 to 1 July 2019. Thus, the warrant did not allow for a general search of the defendant's iCloud, it limited the search to evidence of the crime under investigation and the Accused's Fourth Amendment rights have not been violated. The warrant allowed for a search of the iCloud account for child pornography that existed there in June 2019. In this case, Detective [redacted] spoke to the Accused on 28 June 2019, after speaking to the victim and her mother. It was at this time that Detective [redacted] requested Apple preserve the iCloud account, which they did. Therefore, the evidence shows that what Detective [redacted] reviewed consisted of photos and videos that existed on the Accused's iCloud on 28 June 2019. While the Accused has been charged with crimes in addition to

[59] 45 M.J. 406, 421 (C.A.A.F. 1996).
[60] U.S. CONST. amend. IV; *United States v. Rogers*, 521 F.3d 5, 9 (1st Cir. 2008) (quoting U.S. Const. amend. IV).
[61] *United States v. Farlow*, No. CR-09-38-B-W, 2009 U.S. Dist. LEXIS 112623, at *11-12 (D. Me. Dec. 3, 2009)(citing *United States v. Bonner*, 808 F.2d 864, 867 (1st Cir. 1986))
[62] *Id.* at 12
[63] *Id.*
[64] *Id.*
[65] *Id* (citing *Upham*, 168 F.3d at 536 n.1 (stating that a search warrant with the "qualifying language" of the offense at issue "leave[s] 'little latitude' to the executing officers and [is] sufficiently particular to satisfy the Fourth Amendment");

possession of child pornography. However, all that was required in this case was probable cause for possession of child pornography within the month of June for both the magistrate's determination to be reasonable and Detective [redacted] search of the evidence to be lawful. There was more than sufficient evidence to establish probable cause that the Accused possessed child pornography on his iCloud account on or about 27 June 2019. Therefore, when Detective [redacted] searched the iCloud account that was preserved on 28 June 2019, she was well within the scope of the warrant and the warrant's allowance for this was eminently reasonable. Therefore, even if there were a construction of the magistrate's warrant that was found to be overly broad, the specific facts of this case show the actual search was closely connected to the finding of child pornography on the Accused's iPad.

In *Richards*, the Defendant filed an appeal stating the search authorization was overly broad because it did not contain a time limit on when the information was available and known to the investigators.[66] The Court applied a reasonableness standard in determining that the Government did not violate the Defendant's Fourth Amendment rights when they obtained a search warrant to seize electronic media, finding although a time limit is one possible method of tailoring a search authorization it is not a requirement.[67] Additionally, the Court noted that searches of electronic devices present distinct issues surrounding where and how incriminating evidence is located.[68] That unlike a physical object that can be immediately identified as responsive to a warrant or not, computer files may be manipulated to hide their true contents.[69] Further, in the end there is no practical substitute for actually looking in many (perhaps all) folders and the Court recognized the dangers of narrowly limiting the dangers of where investigators can go. [70]

As in *Richards*, a reasonableness standard may also be applied to this case. The search warrant included a temporal limit from 1 June 2019 to 1 July 2019 even though it was not required. Additionally, the authorization request narrowed the search to photos and videos of child pornography, directly linked to the crime being investigated. Apple's response contained only that information that was available on the Accused's iCloud on 29 June 2019. Furthermore, the Accused "created" a backup of his iCloud on 26 June 2019, which cuts against the Accused's argument that the evidence found was not created in June 2019. It was created as a backup two days before Apple Inc. preserved the evidence and the evidence existed in the Accused's iCloud storage the day after the photos were found on the iPad. Therefore, it would be reasonable to conclude the search warrant was narrowly tailored, especially as applied in this case, to avoid any violation of the accused's Fourth Amendment rights.

Furthermore, the Court has determined that reasonableness is one in which searches are expansive enough to allow investigators access to incriminating materials, yet not so broad where any search becomes a general search.[71] In *Maske*, the Defendant alleged that the authorization in was a dragnet for all digital media and the magistrate should have tailored the authorization. The Court held that "the authorization and accompanying affidavit did not give authorities carte blanche to search in areas clearly outside the scope of the crime being investigated."[72] Further, "greater specificity in the search authorizations and accompanying affidavit was not required to satisfy the particularity requirement of the Fourth Amendment." Analogous to *Maske*, the court should not

[66] 76 M.J. 365
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *United States v. Maske*, 2018 CCA LEXIS 144 (2018)
[72] *Id.* at 12

require greater specificity within the search warrant as it was limited to the crime being investigated. Here, the warrant allowed for a search of photos and videos for a storage device that stores substantially more information. Here, Detective [redacted] searched only the photos and videos and not the numerous other places she could have searched based on Apple Inc. providing the entirety of the iCloud account.

Alternatively, if this Court finds that the Fourth Amendment was violated in this case, the videos are still admissible because they would have been inevitably discovered. Similar to the lawfully obtained documents and related evidence that the court found would have led agents to the personal bags in *Epps*, Detective [redacted] actively pursued a lead for child pornography by lawfully obtaining the accused's iCloud data through a search warrant and then discovered video files in that iCloud data.[73] Just like the seizure of the personal bags in *Epps*, Detective [redacted] was already in possession of the videos, and had she known that probable cause would later be found to be lacking as to these videos, it is reasonable to assume that she would have gone back to the local magistrate, as she had done previously, and obtained another search warrant specifically to view the videos given that there was ample reason to believe that the accused had child pornography in the form of digital media in his iCloud backup.[74] This rationale for applying the inevitable discovery doctrine is explicitly permissible and was used by the CAAF in both *Epps* and *Wallace*.[75]

Additionally, Detective [redacted] search of the iCloud data sent to her from Apple is analogous to the agents' search through the computer data in order to find e-mails in *Wallace*.[76] The CAAF held in *Wallace* that sifting through the data on the computer to find the relevant e-mails would have inevitably led the agents to find the child pornography.[77] This is exactly what happened in this case during Detective [redacted] search of the accused's iCloud for child pornography. Therefore, the videos in this case are admissible under the inevitable discovery exception to the exclusionary rule because Detective [redacted] already possessed the videos and was actively pursuing a lead for child pornography in the very place she was already looking pursuant to the search warrant.

Alternatively, if this Court finds that the Fourth Amendment was violated in this case, the videos are still admissible because Detective [redacted] relied on the warrant in good faith and applying the exclusionary rule would not result in appreciable deterrence of future law enforcement conduct. In *Leon*, the U.S. Supreme Court found good faith reliance by law enforcement even though the intelligence used to obtain the search warrant was old and the credibility of the informant was unascertainable.[78] Yet in this case, neither of these facts are present. The information used to obtain the Virginia warrant was based upon information from the accused's [redacted] and the Accused and was based upon information given to Detective [redacted] within the previous month (but asking for a warrant to information that was preserved the day after she learned of the information she presented to the magistrate). Detective [redacted] was searching for child pornography and had a reasonable belief that there was probable cause that videos of child pornography were in the accused's iCloud backup between 1 June and 1 July 2019 in addition to the photos discovered on the accused's iPad. The magistrate had a substantial basis for determining

[73] *See Epps*, 77 M.J. at 348-49.
[74] *See id.*
[75] *Id.* at 347; *Wallace*, 66 M.J. at 10.
[76] *See Wallace*, 66 M.J. at 10.
[77] *See id.*
[78] *Leon*, 486 U.S. at 902-03, 926.

there was probable cause to believe that the child pornography could take the form of videos in addition to still pictures on the accused's iCloud. Detective [redacted] affidavit to the magistrate explained that on, based on information from the victim, that the pictures discovered were of her. Moreover, the accused told Detective [redacted] that photos would automatically back up to his iCloud account.

Based on the totality of the circumstances, there were credible reasons to believe that the photos were taken on the iPad and that other images of child pornography, such as videos, were probably in his iPad and backed up to his iCloud accordingly. This is hardly the type of "deliberate, reckless, or grossly negligent" conduct or "recurring or systemic negligence" required to apply the exclusionary rule in order to deter future, similar law enforcement conduct.[79] The seizure in this case was also from the electronic account explicitly listed in the warrant and not from another associated user account found fatal in *Maxwell*.[80] If probable cause is found not to have existed for the videos at issue, then this case is more similar to the "disagreement among thoughtful and competent judges as to the existence of probable cause" in *Leon* where good faith reliance on the magistrate's search warrant was found.[81]

Further, none of the four deficiencies articulated in *Carter* or *Leon* that would vitiate the good faith exception are present in this case: (1) there were no false or misleading statements in the affidavit based upon Detective [redacted] investigation; (2) the magistrate was not merely a rubber stamp; (3) the warrant was not "so lacking in indicia of probable cause" as discussed above; and (4) the warrant was highly particularized to specific content and data from the accused's iCloud account that was identifiable from information given to the Detective directly from the accused himself.[82]

Finally, if this Court finds that suppressing the videos of sexual assault and child pornography at issue would amount to some incremental deterrence to future law enforcement conduct, the "substantial social costs" of "letting [a] guilty and possibly dangerous defendant[] go free" would "offend basic concepts of the criminal justice system" and, thus, weigh in favor of admitting the evidence in this case.[83] The video evidence in this case is highly probative of the accused's guilt in raping and sexually assaulting [redacted] after drugging her, and then filming those very crimes for his own personal video collection and sexual gratification. Few other crimes in the spectrum of criminal conduct evince a heavier social cost than freeing such a predatory and dangerous person. Therefore, the good faith exception applies in this case and the social costs outweigh applying the exclusionary rule, making these videos admissible.

Based on the foregoing, the Government respectfully requests this Court deny the Defense motion to suppress.

Evidence.

AE.VI.F: Apple Website Information on Backups and Storage
AE.VI.G: Apple Business Record Certificate
AE.VI.H: Cellebrite Extraction Excerpt (Screenshot)

[79] *Herring*, 555 U.S. at 144.
[80] 45 M.J. at 413-14, 421.
[81] *Leon*, 486 U.S. at 926.
[82] *See Leon*, 468 U.S. at 923; *Carter*, 54 M.J. at 419-20.
[83] *Herring*, 555 U.S. at 141.

AE.VI.F: Affidavit of [redacted]

/s/
C. COX
Trial Counsel

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I certify that I have served a true copy, via e-mail, of the above on the Court and opposing counsel on 19 January 2021.

/s/
C. COX
Trial Counsel

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

UNITED STATES OF AMERICA **v.** **JOSE TEJEDA** **CS1/E-6 USN**	**Defense Motion for Appropriate Relief – Voir Dire - Unconscious Bias Video** **9 January 2021**

Nature of Motion

Pursuant to Rule for Courts-Martial 906(a), the defense requests the Court instruct the members on the topic of unconscious bias in the form of showing a video from the United States Court, Western District Washington. The requested video can be found at [redacted] Defense specifically requests this 10 minute video be played prior to the beginning of voir dire by the Court and counsel.

Burden

As the moving party, the defense bears the burden of persuasion, and the burden of proof on facts necessary to resolve the motion is by a preponderance of evidence. R.C.M. 905(c).

Statement of Facts

CS1 Jose Tejeda is charged with sexually assaulting [redacted] in violation of Article 120, Uniform Code of Military Justice (UCMJ) and Article 120b, UCMJ. CS1 Tejeda is also charged with videoing the private area of [redacted] without her consent and producing child pornography in violation of Article 120c, and Article 134, UCMJ, respectively. CS1 Tejeda faces a maximum punishment of confinement for life, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Further, every offense on the charge sheet implicates the lifetime punishment of sex offender registration. CS1 Tejeda is a Latin American male that immigrated to the United States from Peru before he joined the U.S. Navy. CS1 Tejeda [redacted]

Biases are explicit when they are consciously endorsed by the individual. Implicit biases operate outside of conscious thought. They are referred to variously as hidden, cognitive or automatic. They are not consciously accessible by the individuals who hold the bias. The biases

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often occur even in individuals who explicitly reject bias or discrimination. Social scientists have long recognized and repeatedly measured the existence of implicit biases. Social science research confirms that implicit biases often lead to unconscious discriminatory action and can affect decision making.

Law

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002) (citation omitted); *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006). Impartial court-martial members are, in fact, "a *sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). *Voir dire* examination "serves to protect [the right to an impartial trier of fact] by exposing possible biases, both known and unknown..." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *see also* R.C.M. 912. The responses elicited during *voir dire*, therefore, are fundamental to the accused's ability to "intelligently exercise" his right to challenge panel members for cause and his right to use peremptory challenges to strike panel members as well. *See* Manual for Courts-Martial, Rule for Courts-Martial 912(d), Discussion.

Within the context of *voir dire*, "[w]here a potential member is not forthcoming...the process may well be burdened intolerably." *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994). In order to prevent this result through the use of effective *voir dire*, the method and scope of *voir dire* examination is within the discretion of the military judge. R.C.M. 912(d).

"[B]ias is largely unconscious and often at odds with conscious belief."[1] One may strongly believe that all people should be treated equally and yet still suffer from an implicit bias against certain ethnic groups.[2] This kind of implicit bias is pervasive in our society.[3] It has been identified, tested and confirmed repeatedly by social scientists.[4]

Patricia Devine is credited with identifying the phenomenon of implicit bias as early as 1989.[5] In one portion of her study, Professor Devine asked white participants to watch a screen. The screen was programmed to display words so rapidly that they would be undetectable to the naked eye. Some participants were primed with 80% of the words stereotypically associated with African Americans—words like slavery, jazz, basketball. For the other participants, only

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[1] Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015)(citing Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SO. PSYCHOL. 856, 856 (2001).

[2] *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. REV. 149 (2010) for a discussion about how Judge Bennett—serving now his 20th year as a judge on the U.S. District Court in the Northern District of Iowa—discovered his own implicit racial bias after a career as a civil rights lawyer and how he implements corrective measures for himself and his jurors at trial.

[3] Kristin A. Lane, Jerry Kang & Mazarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 437 (2007).

[4] For a survey of confirmatory studies *see* Kang, Bennett, Carbado et al. 59 UCLA L. REV. 1124 (2012); *see also* Jost, Rudman, et al., *The Existence of Implicit Bias is Beyond a Reasonable Doubt*, Research in Organizational Behavior 29 (2009) 36-69.

[5] *See* Bennett, *supra* note 2 at 154.

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20% of the flashing words fell into this category. Next, all participants were asked to read a narrative and to judge the actions of the subject described in the narrative. The participants in the 80% group—primed with words related to African Americans—turned out to judge the subject of the mock scenario more harshly than the other participants. What is more, Professor Devine discovered that this behavior occurred regardless of how high or low the participants had rated on measures of explicit bias.[6]

Time and time again, scientific studies have demonstrated that implicit bias predicts discriminatory behavior towards individuals.[7] These studies show that implicit bias affects how people interpret data.[8] Perhaps most relevant to the fact-finding process of a criminal trial, social scientists have found that this phenomenon is particularly pronounced when people are evaluating data under conditions of uncertainty. These studies have described this behavior in terms of "mental shortcuts" and it includes situations wherein "the appropriate factual material may be inaccessible, it may not be gathered together in time to bear on the decision, or it may be too voluminous to be properly organized and utilized in a judgment task."[9] As others have noted, these conditions are arguably guaranteed at a criminal trial or in this case, at a court-martial.[10]

Argument

Implicit bias applies to situations beyond race, gender, or political beliefs. It applies to any situation where a person has a bias against another individual for any reason; no matter how big or small the issue may be. CS1 Tejeda is entitled to a trial by an impartial panel of members. Because CS1 Tejeda is a Latin American man that immigrated to the United States, there is a possibility members will have a bias against him. Additionally, CS1 Tejeda is charged with very serious crimes against [redacted] It is possible that allegations of this nature create biases. These can all be very emotional and sensitive topics in which people can have deeply held beliefs. The proposed video is a neutral explanation of unconscious bias and how to overcome unconscious bias. Showing the video to the members prior to group and individual voir dire would be invaluable to ensure a fair and impartial panel for CS1 Tejeda, as required by the U.S. Constitution.

Relief Requested

The defense respectfully requests the Court play the video from the United States Federal District Court, Western District of Washington, educating the panel on unconscious bias prior to beginning voir dire.

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[6] Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY AND SOC. PSYCHOL. 5 (1989).
[7] For an overview of these studies *see* Jerry Kang, *Trojan Horses of Race*, 118 HARVARD. L. REV. 1489, 1515-19 (2005).
[8] *Id.*
[9] *See* Dale Larson, *Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139 (2010)(quoting Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 191 (Daniel Kahneman et al. eds. 1982).
[10] *Id.*

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Oral Argument

The defense requests oral argument, if opposed.

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

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

UNITED STATES **v.** **JOSE TEJEDA** **CS1/E-6 USN**	**DEFENSE MOTION TO COMPEL DISCOVERY** **10 November 2020**

MOTION

Pursuant to Rule for Court-Martial (RCM) 906(b)(7), the defense respectfully moves this Court to compel the Government to provide the requested items of discovery to the defense.

SUMMARY

CS1 Tejeda has been charged with sexually assaulting and filming [redacted] on divers occasions, both before and after she attained the age of [redacted] The charges are based on digital evidence derived from data provided to civilian law enforcement by Apple, Inc in response to a search warrant. The defense has thus far not seen the complete data provided by Apple, and has limited access to the civilian law enforcement investigation. The defense now asks the Court to rule on twelve specific discovery requests addressed in this motion.

FACTS

1. The Defense submitted its initial discovery request to the government on 16 October 2020. *Appellate Exhibit V.a.*

2. The Government responded to the Defense's initial discovery request on 23 October 2020. *Appellate Exhibit V.b.*

3. On 2 November 2020, the defense requested (via email) clarification on certain items of the Government's discovery response. *Appellate Exhibit V.c.*

4. The Government responded to this email on 6 November 2020 and agreed to produce additional items of discovery. *Appellate Exhibit V.c.*

5. On 9 November 2020, the defense submitted a second discovery request to the Government. *Appellate Exhibit V.d.*

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6. Additional facts necessary to the resolution of this motion are discussed in the argument section below.

BURDEN

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

LAW

A military accused derives the fundamental right to discovery from the U.S. Constitution, the UCMJ, and the Rules for Court-Martial.

I. CONSTITUTIONALLY REQUIRED DISCOVERY

The Constitution requires the Government to disclose evidence favorable to the defense and exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Since 1985, the Supreme Court has also held that the Constitution treats information affecting witness credibility no differently than directly exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 678 (1985). Prosecutors are required to take affirmative efforts to search for, locate, secure, and disclose evidence that is in the control of Government actors, to include closely aligned law enforcement entities. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The "individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police[,]" and this duty exists irrespective of the good faith or bad faith of the individual prosecutor. *Id* at 437-38.

II. DISCOVERY REQUIRED BY THE RULES FOR COURTS-MARTIAL

The Rules for Courts-Martial have historically required significantly boarder and more comprehensive discovery beyond that required by the Constitution. This proposition is enthusiastically reinforced by military case law, and has been expanded by the recent amendments to the Rules for Courts-Martial under Executive Order 13825.

"One of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution." *United States v. Kinney*, 56 M.J. 156, 156 (C.A.A.F. 2001). "Discovery in military practice is open, broad, liberal, and generous." *United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000). Discovery within the military justice system, "which is broader than in federal civilian criminal proceedings, is designed to eliminate gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)(quoting *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004)).

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This distinction was highlighted when the Court of Appeals for the Armed Forces analyzed *Kyles* while considering several discovery issues. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). CAAF held that "the prosecution 'must exercise due diligence' in reviewing the files of other government entities to determine whether such files contain discoverable information." *Id* at 441. *Williams* thus adopted the *Kyles* standard that prosecutors must review "the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses." *Id*. More importantly, however, *Williams* held that RCM 701 requires broader discovery than that required by *Brady* and the Constitution. *Id* at 440-41.

Standing in stark contrast to the rules for production, the rules for discovery under RCM 701 do not require the defense to show relevance – as that term is used in R.C.M. 703 – or necessity. RCM 701(a)(2)(A); *c.f.* RCM 703. The standard under RCM 701 is that the requested discovery be "relevant to defense preparation." RCM 701(a)(2)(A). This standard differs from the former requirement that discovery be "material to the preparation of the defense," and broadens the scope of discovery. Analysis of the Rules for Courts-Martial, Manual for Courts Martial (2019 ed.), A15-9; *Stellato*, 74 M.J at 473. "Relevant" in this context should not be confused with the definition of relevant within the Military Rules of Evidence. On the contrary, this term was inserted into RCM 701 to specifically broaden the scope of the government's discovery obligations, while "encouraging early and broad disclosure of information by the parties … [and to] eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial." RCM 701 discussion, Manual for Courts-Marital (2019 ed.), II-67.

"Relevant to defense preparation" under RCM 701 is such a broad standard that trial counsel will rarely have a legitimate reason to deny defense discovery requests as outside its scope. Because trial counsel is not privy to the defense's trial strategy, investigative needs, or case theory, and because discovery is used to hone and shape the defense strategy, investigation, and case theory, a trial counsel will rarely have defensible grounds to claim that certain items within the military's control are not relevant to defense preparation.

On this point, military case law contains numerous examples demonstrating the breadth of discovery that is "material to the preparation of the defense." As "relevant to defense preparation" is an even broader term, military case law still provides binding guidance on the breadth of the government's discovery obligations. Material discovery can be evidence which is unfavorable to the defense. See *United States v. Adens*, 56 M.J. 724 (A.C.C.A. 2002)(holding that even unfavorable evidence may be material to the preparation of the defense). Material discovery can be evidence which influences a decision on how to plead, or evidence which could lead the defense to pursue certain lines of investigation, defenses, or trial strategies. *Id*; *United States v. Eshalomi*, 22 M.J. 12, 27 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008). Material discovery can be evidence which the defense could use to persuade the convening authority not to refer the case to court-martial, and can also be any evidence that

could be used to impeach a government witness or help prepare for their testimony. *Eshalomi*, 22 M.J. at 28; *Williams*, 50 M.J. at 440.

There is no requirement that evidence relevant to defense preparation be admissible at trial or intended for use by the government, as discovery is broader than admissibility. See *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). Inadmissible evidence can still be material to the defense in numerous ways, such as by assisting the defense in formulating a defense strategy. *Id* at 320. Likewise, knowledge that there is an absence of evidence can also be material to the defense's preparation.

III. TRIAL COUNSEL'S DUTY AND DISCOVERY OBLIGATIONS

Trial counsel's obligations begin with the principle established by Article 46 of the UCMJ, which guarantees the defense the same opportunity as the Government to obtain evidence. Evidence favorable to the defense is required to be disclosed without a defense request. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Trial counsel must also make a good faith effort to comply with the defense's discovery requests. *Williams*, 50 M.J. at 441. "Discovery is not limited to matters within the scope of trial counsel's personal knowledge," and "trial counsel must exercise due diligence in discovering [favorable evidence] not only in his possession but also in the possession ... of other military authorities." *Jackson*, 59 M.J. at 334; *Id* (citing *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993)). The "Government cannot intentionally remain ignorant and then claim it exercised due diligence." *United States v. Trigueros*, 69 M.J. 604, 611 (A.C.C.A. 2010).

The recent amendments to the Rules for Court-Martial place additional obligations on trial counsel to discover items to the defense that the government anticipates using in rebuttal. RCM 701(a)(2)(A)(iii); RCM 701(a)(2)(B)(iii). Trial counsel are also now required to disclose to the defense any evidence that reasonably tends to adversely affect the credibility of any prosecution witness or evidence. RCM 701(a)(6)(D).

After the Government's failure to produce evidence that is specifically requested by the defense, an accused's conviction will be reversed unless the government can demonstrate that the failure to disclose discovery was harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

ARGUMENT

The Government must make good faith efforts to comply with the defense's specific requests and exercise due diligence. *Guthrie*, 53 M.J. at 105; *Williams*, 50 M.J. at 441. However, trial counsel in this case has unreasonably denied, failed to diligently search for, or in some cases not responded to the following requested items of discovery.

1. A written list of all items of evidence seized from the person or property of the accused.

While the Government has agreed to facilitate defense access to and review of seized evidence, the Government denied the defense's request for a written list of evidence seized from the accused. *Appellate Exhibit V.b. at 2-3.* The defense clarified that its request was for existing evidence control documents (ECDs) ordinarily generated and maintained by law enforcement agencies upon the seizure and storage of evidence. *Appellate Exhibit V.c. at 3-4.* To date, the defense has still not been discovered these documents and has been left to infer what may and may not have been seized from CS1 Tejeda. In order to adequately conduct a pretrial investigation and prepare its case, the defense needs a clear picture of what physical evidence actually exists in this case.

2. Any evidence of the revocation or suspension of the credentials of any investigators involved in this case, or evidence that any investigator was a subject or suspect in an internal affairs investigation.

The Government's response to this specific request was that it "is not aware of such evidence." *Appellate Exhibit V.b. at 2.* The Government then claimed it would comply with its obligations under *Henthorn, Giglio* and *Brady*. However, the defense has yet to see a single *Henthorn* request or response between the Government and the investigative agencies who worked on this case, and is unconvinced that the Government has taken any steps toward learning of and providing to the defense necessary impeachment material affecting government agents and closely aligned civilian law enforcement employees.

3. Access to identification photographs presented to the complaining witness by the Prince William County Police Department (PWCPD).

On 26 September 2019, a Commonwealth Attorney for Virginia and Detective [redacted] from the PWCPD met with the complaining witness [redacted] and reviewed some evidence with her. Detective [redacted] had made screenshots of videos purportedly retrieved from CS1 Tejeda's iCloud account and labeled these screenshots as photographs. Detective [redacted] then showed these photographs to [redacted] and documented her reaction to seeing them. [redacted] was able to identify items and people in some photographs, but not in others. *Appellate Exhibit V.e.*

The defense has been granted access to copies of videos purportedly seized from CS1 Tejeda's iCloud account and currently in possession of NCIS. However, the defense has not seen the photographs used by police to secure eyewitness identifications from [redacted] Without seeing these photographs or understanding what [redacted] could and could not identify, the defense is unable to adequately prepare to rebut government evidence or prepare its own case. At this point, the defense has not seen the evidence that was presented to [redacted] on 26 September 2019. Until the defense is granted an opportunity to see this evidence, the defense will be unable to appropriately evaluate the merits of the Government's case, and will be unable to make strategic decisions regarding pleas and defense theories.

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4. All material produced by Apple, Inc in response to a search warrant issued by the Commonwealth of Virginia for CS1 Tejeda's iCloud account.

On 27 August 2019, after receiving a warrant for CS1 Tejeda's iCloud data, Apple emailed the PWCPD to tell them that the data was too large to be sent through a zip file. On 11 September 2019, the PWCPD received an external hard drive from Apple that apparently contained complete data from CS1 Tejeda's iCloud account. This hard-drive was then analyzed by the Police Department's digital forensics unit and imaged using a UFED reader, and 98 videos from the original hard-drive were isolated and returned to the investigating detective. *Appellate Exhibit V.f.* The defense has been provided access to these 98 videos, but the defense has not been provided a complete forensic copy of the hard-drive sent to the police by Apple.

The Government's initial response to the defense's request for this specific item of discovery claimed that "all such documents in possession of the government have been made available to the defense." *Appellate Exhibit V.b. at 4.* Unfortunately, this doesn't actually appear to be the case. The defense has not seen the email sent by Apple to the PWCPD on 27 August 2019. Nor has the defense seen any formal correspondence from Apple in response to the search warrant for CS1 Tejeda's iCloud account. More importantly, the defense has not been granted access to the complete data returned by Apple. The defense will need a complete forensic copy of this data in order to consult with its digital forensic expert and understand the data extracted from CS1 Tejeda's iCloud account, such as how and when it was created, stored, and maintained, as well as the status of the data at the time of extraction. Without complete and equal access to this digital evidence, the defense cannot prepare a case.

5. A complete copy of all Child Protective Services Investigations and Records pertaining to CS1 Tejeda and [redacted]

The defense only recently requested these items of discovery, and as of the date of this filing the Government has not been provided reasonable opportunity to respond to this request. *Appellate Exhibit V.d.* The defense raises this request in this motion in case the Government denies discovery of these items.

Child Protective Services (CPS) were involved in the investigation of this case concurrently with the PWCPD. In fact, an employee of CPS spoke with CS1 Tejeda immediately after he was interrogated by detectives. *Appellate Exhibit V.f.* As a matter of common practice, CPS employees interact with and document statements from all family members involved in a potential protective services case. These statements from material witnesses, as well as any CPS investigative actions or findings, are all relevant to defense preparation and should be provided in discovery.

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6. Court records, hearing transcripts, filings, and court orders relating to current and expired civilian restraining or protective orders filed against CS1 Tejeda by [redacted]

The defense only recently requested these items of discovery, and as of the date of this filing the Government has not been provided reasonable opportunity to respond to this request. *Appellate Exhibit V.d.* The defense raises this request in this motion in case the Government denies discovery of these items.

Allegations of facts contained any request for judicial relief by either CS1 Tejeda's [redacted] be it a pleading or testimony) are relevant to defense preparation, as is any action taken by a Court in response to that evidence. This evidence has a direct bearing on the allegations against CS1 Tejeda, as well as the biases of potential witnesses against him at trial.

7. All law enforcement notes, and interview logs and records from NCIS, PWCPD, and Haymarket Police Department related to the charged allegations.

The Government agreed to collect and discover NCIS notes to the defense, however their response was silent on whether law enforcement notes and interview logs from PWCPD or Haymarket Police would also be discovered. *Appellate Exhibit V.b. at 2.* The defense requests that records from all investigative agencies who pursued allegations again CS1 Tejeda be discovered. These notes and interview logs are relevant to defense preparation and are required to allow the defense to evaluate the legal competence of evidence collected in these investigations.

8. Notice of any forensic or scientific testing that may destroy evidence, all laboratory reports, and copies of inspections by accrediting bodies of any laboratory that conducted forensic or scientific testing in this case.

The defense requested that the Government discover: (1) notice of any expected forensic or scientific testing that may destroy evidence; (2) all laboratory reports, expert conclusions or statements, chain of custody documents, forensic notes, and other evidence or documents relied upon by government experts in the performance of their services to include laboratory tests, field tests, and reports thereof including DNA, fingerprints, blood samples, handwriting exemplars, and chemical analyses of seized substances; and (3) copies of any inspections by accrediting bodies of any laboratory conducting forensic or scientific testing in this case. *Appellate Exhibit V.a. at 4.* The Government responded to this request by simply indicating that it "is not aware of any such evidence" without clarifying whether it had even asked civilian or military law enforcement agencies about the existence of such evidence. *Appellate Exhibit V.b. at 2-3.* The defense requests that the Government be compelled to clarify whether they have exercised due diligence in ascertaining whether these requested items of discovery exist.

9. Contact information for specific civilian law enforcement personnel.

On 2 November 2020, the Government agreed to provide contact information for (1) Detective [redacted] of PWCPD; (2) [redacted] of CPS; (3) Detective [redacted] of PWCPD; and (4) Officer Gregory of the Haymarket Police Department. *Appellate Exhibit V.c. at 2-3.* As of the date of this filing, the defense has yet to receive this requested contact information from the Government, and the defense requests that the Court now order discovery.

10. Discovery relating to witness bias and credibility.

The defense requested the Government discover: (1) The contents of any prior inconsistent statement or statement that tends to show bias or motive to fabricate made by any potential witness in this case known by the government or agents thereof, including closely aligned civilian authorities or entities; (2) any evidence that a potential witness consumed alcohol or drugs prior to witnessing the events that give rise to his or her testimony; (3) any evidence tending to show that any potential witness's ability to perceive, remember, communicate, or tell the truth is impaired; (4) any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser; and (5) any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of the complaining witness. *Appellate Exhibit V.a. at 5.* With respect to items (1) through (3) above, the Government told the defense it had provided all evidence within its possession. With respect to item (4), the Government indicated it was not aware of such evidence, and additionally denied the request as "overly broad and not relevant to Defense preparation." With respect to item (5), the Government indicated it was not aware of any such evidence. *Appellate Exhibit V.b. at 3.*

This case involves concurrent investigations by civilian and military law enforcement authorities, and the defense has received no assurances that the Government has yet asked PWCPD or the Haymarket Police Department for responsive discovery.

11. Unredacted copies of evidence.

The defense requested the Government provide: (1) a complete unredacted copy of CT's Battlefield High School attendance records; and (2) a complete unredacted copy of PWCPD and Haymarket Police reports. *Appellate Exhibit V.a. at 7.* After initially denying this request, the Government later agreed to provide hard copies of these requested items to the Defense. *Appellate Exhibit V.c. at 2-3.* The defense is yet to receive this requested discovery, and now requests that the Court compel the Government to provide discovery.

12. Evidence in possession of PWCPD.

The defense requested the Government provide (1) access to all items of evidence seized by the Prince William County Police Department in the execution of a search warrant at Sycamore

Park Drive in Haymarket, Virginia on 28 June 2019; (2) a complete copy of all photographs and/or videos generated by Prince William County Police Department during the execution of their search warrant on the Tejeda residence on 28 June 2019; and (3) a complete copy of any documents generated during the execution of the search warrant on the Tejeda residence on 28 June 2019. *Appellate Exhibit V.a. at 7-8.* The Government agreed to make a timely request to the Commonwealth of Virginia for these items of discovery. *Appellate Exhibit V.b. at 5.* As of the date of this filing, the defense has yet to receive any of these requested items of discovery, and now requests that the Court compel the Government to provide discovery.

RELIEF REQUESTED

The defense respectfully requests that this Court compel the government to (1) provide the evidence listed in the above argument to the defense in a timely manner; (2) indicate to the Court when and what actions the government has taken on each defense discovery request; (3) indicate to the Court why the government has failed to act on specific discovery requests, in those instances where it has failed to do so; and (4) confirm to the defense the existence or non-existence of requested items of discovery on which the government has equivocated.

EVIDENCE

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

Appellate Exhibit V.a.	-	Discovery Request of 16 Oct 20
Appellate Exhibit V.b.	-	Discovery Response of 23 Oct 20
Appellate Exhibit V.c.	-	Emails between trial and defense counsel
Appellate Exhibit V.d.	-	Second Discovery Request of 9 Nov 20
Appellate Exhibit V.e.	-	Excerpt from Prince William County PD investigative narrative
Appellate Exhibit V.f.	-	Excerpt from Prince William County PD investigative narrative

Respectfully submitted,

[redacted]

D. J. PHIPPS
LT, JAGC, USN
Defense Counsel

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REQUESTS

THERE ARE NO REQUESTS

NOTICES

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

UNITED STATES	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
JOSE TEJEDA	)	[redacted]
CS1/E-6, USN	)	

1. I, LCDR Matthew Cardellino, JAGC, USN, Navy Victims' Legal Counsel Program, Naval Station Norfolk, Virginia, admitted to practice law and currently in good standing in the State of New Jersey and, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of [redacted], a named victim in the charges.

2. I have entered into an attorney-client relationship with [redacted] I have not acted in any manner which might disqualify me in the above captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice.

4. [redacted] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615.

5. To permit a meaningful exercise of [redacted] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed with the Court that implicate Military Rules of Evidence 412, 513, 514, and 615 and/or in which [redacted]'s rights and privileges are addressed. I also respectfully request a copy of any case management order and to be notified of all proceedings throughout the duration of this court-martial.

6. [redacted] has limited standing in this court-martial and reserves the right to make factual statements and legal arguments herself or through counsel when permitted by law.

7. [redacted] by and through counsel, formally asserts all her rights and privileges as a victim under the UCMJ, Military Rules of Evidence, and other applicable law.

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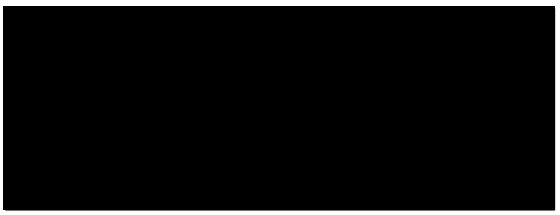
8. My current contact information is as follows:



Respectfully submitted this 13th day of October 2020.

M.J. CARDELLINO

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on 13 October 2020.

M.J. CARDELLINO

APPELLATE EXHIBIT III
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COURT RULINGS & ORDERS

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

UNITED STATES v. Jose TEJEDA CS1/E-6 USN	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY 28 December 2020

1. Procedural Posture, Nature of the Motion, and Ruling.

On 10 November 2020, the Defense filed a Motion to Compel Discovery; on 17 November 2020, the Government responded. Based on subsequent resolution by the parties, it is the court's understanding that only Item 10 on the Defense motion remained contested and require the Court to rule:

Item 10: Discovery relating to witness bias and credibility, by which the Defense argued during the Article 39(a) session that they specifically sought information pertaining to whether the alleged victim, [redacted], had ever sought mental health treatment.

Following an Article 39(a) session, the Defense asserted to the court that they had exhausted all efforts to learn this information by means available to them.

2. Statement of the Law.

Article 46, U.C.M.J. provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." Appellate courts have recognized that "[m]ilitary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."[1]

Rule for Courts-Martial 701(a)(2)(A) states: "After the service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects . . . or copies of portions of these items, if the

[1] *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987) (citation omitted).

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item is within the possession, custody, or control of military authorities and . . . the item is relevant to defense preparation."

The purpose of R.C.M. 701 is to "ensure the prompt, efficient, and fair administration of military justice by encouraging early and broad disclosure of information of the parties."[2] It is intended to "eliminate pretrial gamesmanship" and "reduce the potential for surprise and delay at trial."[3] A "trial counsel's 'obligation under Article 46,' UCMJ, includes removing 'obstacles to defense access to information.'"[4] This includes the duty to provide a clear and understandable response to specific Defense requests. A trial counsel may not remain willfully blind to non-privileged facts the Defense requested, which could be easily discovered.[5]

Rule for Courts-Martial 703 permits the defense to request production of evidence "which is relevant and necessary." In this context, relevance has the same meaning as in Military Rule of Evidence 401, and "[r]elevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive on a matter in issue."[6]

A military judge may regulate the time, place, and manner of discovery, including by ordering in camera review of disputed discovery matters.[7]

"A patient has a privilege to refuse to disclose . . . a confidential communication made between the patient and a psychotherapist . . . in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[8] There is "no privilege" under M.R.E. 513 "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse."[9]

In *H.V. v. Kitchen*[10] and *United States v. Rodriguez,*[11] the Coast Guard and the Army Courts of Criminal Appeals analyzed the term "confidential communication" as used in

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[2] Rule for Courts-Martial (R.C.M.) 701(a)(1), *Discussion,* Manual for Courts-Martial, United States (2019 ed.).

[3] *Id.*

[4] *United States v. Stellato,* 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting *United States v. Williams,* 50 M.J. 436, 442 (C.A.A.F. 1999)).

[5] *See Stellato,* 74 M.J. at 482 (in which the C.A.A.F. agreed that the "Government violated the accused's discovery rights when it did not investigate the existence of [the alleged victim's] mental health records following the accused's discovery request" by failing to ask the alleged victim, to whom the Government had access, *whether* she had received mental health treatment).

[6] R.C.M. 703(e)(1) *Discussion.*

[7] R.C.M. 701(g).

[8] M.R.E. 513(a).

[9] M.R.E. 513(d)(2). It is the court's understanding that [redacted]

[10] 75 M.J. 717 (C.G. Ct. Crim. App. 2016).

[11] 2019 CCA LEXIS 387 (No. 20180138) (A. Ct. Crim. App. 1 Oct. 2019) (unpublished op.).

M.R.E. 513. Although both service courts reached different conclusions about whether certain information was within the scope of M.R.E. 513's privilege, such as diagnosis, course of treatment, and prescriptions, both service courts agreed that the following classes of information were excluded from the privilege: identity of the mental health treatment provider, dates of treatment, and "time taken on each date."[12]

3. Issue Presented.

Should the Court order the Government to provide the Defense with limited, non-privileged details relating to whether [redacted] *has had mental health treatment?*

4. Findings of Fact, Conclusions of Law, and Order.

During the Article 39(a) hearing, the court ascertained that the Defense had not yet asked permission to interview [redacted] Having not exhausted their avenues of possible self-help, the court stated it would not take action to compel any response.

During oral argument, the Government confirmed that, in spite of the Defense request, they had not asked [redacted] whether she had sought mental health treatment. The Government stated they are unaware whether any records existed or whether they might be in the control of military authorities or civilian authorities.

After the Article 39(a) hearing, the Defense corresponded with Victims' Legal Counsel [V.L.C.] for [redacted], who stated that [redacted] declined to provide the requested information but left open the possibility that the Defense might seek interrogatories. The V.L.C. stated he was waiting for the Defense to decide whether they would seek interrogatories. The Defense filed an additional brief stating their belief that they had exhausted all avenues of self-help.

Neither *Kitchen* nor *Rodriguez* is binding on the Navy-Marine Corps Trial Judiciary. However, to the extent both cases constitute persuasive authority, even the more expansive view taken by the Coast Guard Court of Criminal Appeals *explicitly excluded* from M.R.E. 513's reach the information the Defense seeks in this case. The court's own reading of the rule leads to the same conclusion—that the identity of a mental health treatment provider and the dates of treatment are not confidential communications that are privileged under M.R.E. 513.

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[12] *Kitchen*, 75 M.J. at 719 ("However, release of dates of treatment and the identity of the provider and time taken on each date are not privileged."); *Rodriguez*, 2019 CCA LEXIS at *7 (adopting a "plain language approach" to interpreting the term "confidential communication" and strictly limiting the term to communications "made for the purpose of facilitating diagnosis or treatment not *including* diagnosis and treatment.")

The Government has put itself in the position of ignorance by failing to ask [redacted] to confirm or deny whether she has had any mental health treatment. This was one of several missteps the Court of Appeals for the Armed Forces discussed in *United States v. Stellato* when it affirmed the military judge's drastic remedy of dismissal of charges with prejudice. The military judge in that case wrote that the "Government 'systematically ignored' its obligations under R.C.M. 701 by leaving disclosure to the whims of interested parties . . . and failing to respond to basic discovery requests to preserve evidence or determine if mental health records existed."[13] The Army Court of Criminal Appeals affirmed the military judge's ruling on that point, and the C.A.A.F. accepted it. Accordingly, there is authority to require the Government to make affirmative efforts to learn of the existence of the type of non-privileged information the Defense seeks.[14]

Without *limited* assistance from the Government, the Defense are powerless to even attempt to formulate a request under R.C.M. 703, if such records are not in the control of military authorities, because they will not be able to state with specificity where the documents sought may be found. The court will not be receptive to any motion relating to the records, even if they are in the control of military authorities and subject to R.C.M. 701 and M.R.E. 513, if the Defense cannot even state a good faith basis that such records exist.

Accordingly, the Government is ordered to disclose: (1) the identity of any mental health treatment provider who has treated [redacted] since June 2018; (2) the start and end date of treatment and an *estimation* of the frequency of meetings *or* the date of each meeting with a specific named mental health treatment provider; and (3) whether any records documenting this treatment are maintained within a military treatment facility or are maintained by a civilian provider.

As directed above, the Defense motion for appropriate relief is **GRANTED IN PART.**

So ordered this 28th day of December 2020.

[redacted]
A. J. TANG
CDR, JAGC, USN
Military Judge

[13] *Stellato*, 74 M.J. at 482.
[14] Disclosing the *existence* of such information in no way diminishes the arguments the parties will be able to make with regard to further attempts to discover privileged or non-privileged substance. It merely removes an obstacle that will disallow the Defense from making any argument at all.

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

UNITED STATES v. Jose TEJEDA CS1/E-6 USN	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF (UNREASONABLE MULTIPLICATION OF CHARGES) 28 December 2020

1. Procedural Posture, Nature of the Motion, and Ruling.

On 10 November 2020, the Defense moved the court to rule that, if guilty findings are returned on both Charge I, Specifications 1 and 3, those specifications would be merged for sentencing. The Defense further moved the court to rule that if convictions result for Charge I, Specifications 2 and 4 or Charge IV, Specifications 1 and 2, that those sets of specifications would likewise be merged for sentencing. The Government opposed the motion.

During oral argument, the court identified, and the parties agreed that certain other specifications were charged for contingencies of proof and that the Government would agree to conditionally dismiss certain specifications depending on what findings are returned. The Defense reserved the right to raise further motions relating to unreasonable multiplication after findings.

As further described below, the court **DENIES** the Defense motion as it relates to the Specifications under Charge I, and it **DEFERS** decision on the Defense motion as it relates to the Specifications under Charge IV until after findings are returned.

2. Statement of the Law.

Rule for Courts-Martial 307 is entitled "How to allege offenses." Section (c)(4) of the rule states, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges is a different concept, "not to be confused with multiplicity" which relates to double jeopardy.[1] The doctrine of unreasonable multiplication of charges, by contrast, "addresses

[1] Rule for Courts-Martial 307(c)(4), *Discussion*, Manual for Courts-Martial, United States (2019 ed.).

APPELLATE EXHIBIT XVIII
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those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."[2]

In *United States v. Campbell*, the Court of Appeals for the Armed Forces (CAAF) clarified the doctrines of multiplicity and unreasonable multiplication of charges.[3] The CAAF reaffirmed the test outlined in *United States v. Quiroz*,[4] for evaluating an unreasonable multiplication of charges.

The *Quiroz* factors are:[5]

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?[6]
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

The *Quiroz* factors are a non-exclusive list of factors a military judge should consider. No single factor is a prerequisite to finding an unreasonable multiplication, but a military judge could find one or more factors sufficiently compelling to justify granting relief.[7]

There may be an unreasonable multiplication of charges for sentencing but not for findings. For findings, the analysis turns on whether "[c]harges arise from substantially the same transaction."[8] "Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on punishment than on findings, he or she may find that there is an unreasonable multiplication as applied to sentence" and may accordingly find that the maximum punishment for both offenses shall be the highest maximum allowed punishment available for either.[9]

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[2] *United States v. Quiroz*. 55 M.J. 334, 337 (C.A.A.F. 2001).
[3] 71 M.J. 19 (2012).
[4] 55 M.J. 334 (C.A.A.F. 2001).
[5] *Campbell*, 71 M.J. at 24 (citing *Quiroz*, 55 M.J. at 338) (listing *Quiroz* factor 1 in footnote 10).
[6] Although in devising this test the Navy-Marine Corps Court of Criminal Appeals initially used the term "unfairly," a term of equity, the Court of Appeals for the Armed Forces rejected this term in favor of the "traditional legal standard" of reasonableness. *Quiroz*, 55 M.J. at 338-39.
[7] *See Campbell*, 71 M.J. at 23.
[8] R.C.M. 907(b)(12)(A).
[9] R.C.M. 907(b)(12)(B).

When determining whether offenses are separate, a court must look to "Congressional intention as to the unit of prosecution."[10] If there is no legislative history as to Congress' intent, a court must then look to the statutory language.[11] Even though "unit of prosecution" analysis relates to whether arguably single acts are separately punishable—a question of multiplicity and double jeopardy—the analysis is also pertinent to determining whether this court should find there is an unreasonable multiplication of charges for sentencing.[12] Indeed, *Quiroz* factor 2 is a question of multiplicity. A court may determine the unit of prosecution by gauging "the duration of the specific intent required for commission of the offense" or, for general intent crimes, the determination may "turn on intent as seen through the *actus reus*."[13] The C.A.A.F. has held that indecent acts and indecent liberties with a child is a single unit of prosecution offense, and the Army Court of Criminal Appeals has made the same finding with regard to sexual assault.[14] Nevertheless, it may be proper to merge multiple acts of the same type, taking place close in time, for sentencing.[15]

In *United States v. Schupp*, the Army Court of Criminal Appeals reviewed an appellant's claim of unreasonable multiplication of charges that was necessitated by a change in the law to Articles 120 and 134, UCMJ.[16] The court held the appellant waived the issue by entering an unconditional guilty plea, and it also found that the government could have charged each penetrative offense separately and that even if the court were to apply the *Quiroz* test, the challenge would fail.

In *United States v. Forrester*,[17] the C.A.A.F. rejected an appellant's claim that his charges were unreasonably multiplied for sentencing purposes. The court held that the child pornography offense enumerated in what was then-Paragraph 68b of Part IV of the Manual for Courts-Martial (2012 ed.) punished possession of "'material that contains' illicit visual

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[10] *United States v. Collins*, 16 U.S.C.M.A. 167, 168-69 (C.M.A. 1966) (holding the unit of prosecution for damage to property was based on the discrete incident, not the unit of property, even when the property has different owners).

[11] *See id.*

[12] *See United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) ("But the 'unit of prosecution' question is relevant to—and in this case, dispositive on—the issue of unreasonable multiplication of charges.")

[13] *United States v. Bradley*, 2018 CCA LEXIS 56 at *10-*11 (No. 20150752) (A. Ct. Crim. App. 29 Jan. 2018) (unpublished op.) (quoting *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989).

[14] *United States v. Neblock*, 45 M.J. 191 (C.A.A.F. 1996) (writing "We are not persuaded . . . that this offense is so continuous as a matter of law as to include all indecent acts or liberties with a single victim, without regard to their character, their interrupted nature, or the different times of their occurrence," and citing several cases from other jurisdictions that held that separate acts of penetrative sexual assault were individually punishable.); *United States v. Schupp*, 2017 CCA LEXIS 466 (No. 20160079) (A. Ct. Crim. App. 12 Jul. 2017) (unpublished op.) (holding the government could have individually charged each penetrative act because the "unit of prosecution for sexual assault is each assault.")

[15] *See United States v. Ramirez*, 2020 CCA LEXIS 433 (No. 20190367) (A. Ct. Crim. App. 30 Nov. 2020) (unpublished. op.).

[16] 2017 CCA LEXIS 466.

[17] *Forrester*, 76 M.J. 389 (C.A.A.F. 2017).

depictions of child pornography, not the quantity or variety of visual depictions."[18] Possession of different media (materials), each containing multiple images, could be separately charged based on each individual item of media (material) possessed. The court held it was not error for the military judge to deny the defense motion asking to combine all of the separate possession offenses for purposes of sentencing.

Also in *United States v. Forrester,* the military judge confronted an issue involving a change in the Manual. The accused was initially charged with a single specification alleging possession of child pornography on a particular item of media, alleging a date range that began before and ended after a date when a new offense became effective. Before 12 January 2012, there was no presidentially-enumerated offense punishing possession of child pornography, although it had been an accepted practice to allege child pornography offenses as novel (non-enumerated) offenses under Article 134, Clause 1 and/or 2. To avoid "ambiguity in the findings," the military judge severed the specifications into separate offenses, each alleging only pre- or post-2012 revision period of time. After findings, the military judge re-merged the specifications that had been separated only to account for the change in the Manual. The court also noted that the presidentially-enumerated Article 134 child pornography offense was modelled after 18 U.S.C. § 2252A, the federal child pornography statute.[19]

Several federal courts of appeals have "held that the proper unit of prosecution under [18 U.S.C. § 2251, the federal statute prohibiting use of a child to engage in sexually explicit conduct for the purpose of producing child pornography] was each image or video depicting the child, not each 'use' of the child."[20] Although the presidentially-enumerated child pornography offense under Article 134 was modelled after 18 U.S.C. § 2252A, that federal statute does not cover production of child pornography under circumstances not intended for distribution; that offense is prohibited under 18 U.S.C. 2251. Therefore case law interpreting the unit of prosecution under that statute will be persuasive in interpreting the enumerated Article 134 offense.

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[18] *Id.* at 391 (quoting the 2102 edition of the Manual for Courts-Martial, Part IV, para 68b.c.(1)).

[19] *Forrester,* 76 M.J. at 397. Indeed, for double jeopardy purposes, the Article 134, UCMJ offense is viewed as the same act as one charged under 18 U.S.C. 2252A, notwithstanding the fact that the federal statute involves a jurisdictional element and the Article 134 offense involves a Clause 1 or 2 terminal element. *See United States v. Rice,* 80 M.J. 36 (C.A.A.F. 2020).

[20] *United States v. Smith,* 919 F.3d 1 (1st Cir. 2019) (holding that under the facts presented, the "proper unit of prosecution under Section 2251(a) is each video depicting the victim" and affirming an appellant's conviction for six separate offenses when the appellant made six different videos of the same victim engaging in discrete sexual acts on the same day between 12:43 p.m. and 1:49 p.m. all at the same place.) *See also United States v. Esch,* 832 F.2d 531 (10th Cir. 1987) (affirming propriety of separate convictions under 18 U.S.C. 2251(a) for each pornographic photograph produced in a single photographing session as not multiplicious, and noting "the key element of the offense is the use of a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction of such conduct."); *United States v. Fee,* 491 Fed. Appx. 151 (11th Cir. 2012) ("The text of section 2251(a) makes clear that Congress proscribed each discreet [sic] visual depiction of a minor as a separate offense.").

3. Issue Presented.

Is there an unreasonable multiplication of charges for sentencing when the government: (1) charged two separate specifications on divers occasions to account for a change in the law to Article 120, UCMJ; and (2) in the case of Charge IV, charged two specifications of divers occasions to account for a change in the Manual for Courts-Martial?

4. Findings of Fact.

a. The effective date of the revised punitive offenses of the Military Justice Act of 2016 was 1 January 2019, applying to offenses committed on or after that date.

b. The accused is charged with conduct that pre- and post-dates the 1 January 2019 implementation date of MJA 16.

c. The accused is charged with four specifications alleging a violation of Article 120, UCMJ, and 2 specifications alleging a violation of Article 134, UCMJ. Three sets of specifications (6 total) are charged to separately cover the alleged offenses that pre-date the effective date of MJA 16, and three specifications cover the alleged offenses that post-date the effective date of MJA 16.

d. The only reason the Government charged two separate "divers occasions" specifications for each of the two challenged sets of specifications charged under Article 120, UCMJ, was to account for the change in the law (Charge I, Specifications 1 and 3 and Charge I, Specifications 2 and 4). The Government was required to charge two separate specifications.

e. As for the Article 134, UMCJ offenses alleging the accused produced child pornography, there was no substantive change in the law requiring the offenses be split to account for MJA 16.[21] Although the President issued a 2019 edition of the Manual for Courts-Martial, the presidentially-outlined elements and definitions relating to this offense were unchanged from the 2016 to the 2019 Manual. The Paragraph number changed from 68 to 93 in Part IV.

f. Except for the date range alleged, Charge IV, Specifications 1 and 2 are identical.

[21] The Article 134, UCMJ presidentially-enumerated offense relating to child pornography was first effective on 12 January 2012. *See United States v. Forrester*, 76 M.J. 389, 391 (C.A.A.F. 2017). The Military Justice Act of 2016 effected only a minor change to Article 134, UCMJ, adding the clause, "As used in the preceding sentence" to specify the definition of "crimes and offenses not capital" that followed the clause referred to the term as earlier used.

5. Conclusions of Law.

a. Analysis as relates to the Article 120, UCMJ, offenses in Charge I.

The *Quiroz* factors, as applied to these sets of specifications:

(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?

YES.

(2) Is each charge and specification aimed at distinctly separate criminal acts?

YES. Each specification relates to two or more (divers) alleged sexual acts that took place within the time frame of the specification. The unit of prosecution for sexual act permits separate prosecutions for each sexual act.

(3) Does the number of charges and specifications misrepresent or exaggerate the accused's alleged criminality?

NO, given the fact that the Government could properly have charged each individual sexual act as a separate offense. The Government alleges the accused repeatedly sexually assaulted [redacted] on divers occasions during each of the charged time periods. Given the total possible punitive exposure that would result if the Government had charged each act separately, charging two specifications on divers occasions does not misrepresent or exaggerate the accused's criminality. To the extent the Defense are concerned the members will be shocked by the number of specifications on the charge sheet, the court can instruct the members that several charges are alleged as contingencies of proof and that some charges had to be split into two specifications based on a change in the law. The members will repeatedly be admonished to presume the accused is not guilty and to hold the Government to its burden of proof on each and every specification without *improperly* allowing one offense to spillover into another.[22]

(4) Does the number of charges and specifications *unreasonably* increase the accused's punitive exposure?

NO, given the fact that the Government could have permissibly charged each sexual act as a separate specification, and the Government was required to allege at least two different specifications to account for the change in the law. The Government's charging structure already demonstrates restraint.

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

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[22] There is a motion under M.R.E.s 404, 413, and 414 that may allow *permissible* spillover, but the court has not ruled on the admissibility of this proffered evidence.

NO, and the Defense agreed.

Based on the *Quiroz* factors, the court finds that Charge I, Specifications 1 and 3 and Charge I, Specifications 2 and 4 do not constitute an unreasonable multiplication of charges for sentencing.

b. Analysis as relates to the Article 134, UCMJ, offenses in Charge IV.

The *Quiroz* factors, as applied to these sets of specifications:

(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?

YES.

(2) Is each charge and specification aimed at distinctly separate criminal acts?

YES. The unit of prosecution for the analogous federal statute is each discrete image or video of child pornography, notwithstanding the fact that an accused could have produced many such depictions of the same child on the same day. Article 134's enumerated child pornography offense was based on its federal analogue, 18 U.S.C. § 2252A and ostensibly 18 U.S.C. § 2251, the federal statute that covers production of child pornography without the intent to distribute. Case law interpreting that statute has consistently affirmed separate charges for each image. Although the federal cases interpreting 18 U.S.C. § 2251 are not binding on this court, the court finds them persuasive and consistent with a plain reading of what is now Paragraph 95.b.(4) in Part IV of the 2019 Manual for Courts-Martial, which requires proof that the accused "knowingly and wrongfully produced child pornography." The actus reus of "producing" suggests that an accused can be held separately liable for each discrete act of "production."

(3) Does the number of charges and specifications misrepresent or exaggerate the accused's alleged criminality?

NO. Although the Government could have separately charged a production offense for each distinct video, the Government charged the accused with two separate offenses alleging misconduct on divers occasions. As described above, the court can instruct the members that several of the specifications are charged as contingencies of proof.

(4) Does the number of charges and specifications unreasonably increase the accused's punitive exposure?

POSSIBLY, but the court's analysis of this factor will depend on the findings to the Specifications under Charge I. The court acknowledges that the Government could have properly charged a separate production offense for each video. However, just because the Government *can* elect to pursue a draconian charging regime does not mean that the

Government *should* do so, nor does it mean the court should condone such action when the *Quiroz* test embodies a standard of reasonableness.[23]

The court's analysis for this Charge is different from the court's analysis above with regard to the Article 120 offenses. There was no substantive change in the law *requiring* the Government to bifurcate the Article 134 alleged offense into two separate specifications. In *United States v. Forrester*, the C.A.A.F. noted that the military judge initially bifurcated the child pornography offense for the purposes of clarity and to account for a substantive change to the Manual for Courts-Martial, then merged the offenses for sentencing after findings were returned. In this case, there was no substantive change to Article 134, UMCJ, or to the Manual, meaning there was no necessity to charge two separate offenses.

The court evaluates the accused's total punitive exposure in light of the fact that the Government was required to charge 4 total specifications instead of 2 for Charge I. The court also evaluates the accused's total punitive exposure in light of the fact that the court has found the specifications under Charge I do not constitute an unreasonable multiplication of charges for sentencing—exposing the accused to 120 years' confinement for Charge I alone where the exposure would otherwise have been 60 years. Therefore, the court's ultimate determination of this *Quiroz* factor will depend on the findings returned for Charge I. If the accused is in no way penalized by the change in the law under Article 120, then the court will not likely find that this charging scheme unreasonably exaggerates the accused's punitive exposure.

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

NO, and the Defense agreed.

Balancing the *Quiroz* factors, with special emphasis on factor 4, there may be an unreasonable multiplication of charges for sentencing if the Government can seek up to 60 years' confinement for the specifications under Charge IV when it may already be entitled to seek 120 years' confinement for the specifications under Charge I.

Therefore, ***if*** the Government achieves convictions on both Charge I, Specifications 1 and 3 ***or*** Charge I, Specifications 2 and 4 (resulting in two convictions for two separate time periods solely because of the change in the law), the court will likely find that Charge IV, Specifications 1 and 2 constitute an unreasonable multiplication of charges for the purposes of sentencing. If the accused does not suffer a 30- or 60-year increase in his punitive exposure

[23] In *United States v. Smith*, 919 F.3d 1, the appellant contested the propriety of his 55-year sentence and argued that the maximum sentence should have been the 30-year maximum for only one of the six offenses. Permitting the six offenses, committed within an hour of one another, to stand as separate escalated the maximum punishment from 30 years to 180. Even though this regime was permissible in the federal system, and would not be multiplicious for findings under the UCMJ, the Court of Appeals was evaluating the offenses in terms of multiplicity only, not in terms of the uniquely military concept of unreasonable multiplication of charges.

as a result of the findings on Charge I, then the court will evaluate *Quiroz* factor 4 differently. Therefore, the court cannot fully resolve this matter until findings are returned.

6. Order.

For the reasons stated above, the Defense motion for appropriate relief is **DENIED** as it relates to the Specifications under Charge I. The court **DEFERS** decision on the Defense motion as it relates to the Specifications under Charge IV until after findings are returned.

So ordered this 28th day of December 2020.

[redacted]
A. J. TANG
CDR, JAGC, USN
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
TEJEDA, Jose	Navy	E-6	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
MESS MANAGEMENT SPECIALIST WASH D	General	Judge Alone - MIA16	Feb 24, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	36 Years	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
N/A	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
525	0	525 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

Punitive discharge: Mandatory Dishonorable Discharge adjudged. Confinement: Thirty five years minimum and forty five years maximum. Forfeiture: None may be adjudged; automatic forfeitures deferred and waived subject to establishment of dependents' allotment. Fine: May not adjudge. Reduction: Defer, suspend and remit any adjudged; suspend and remit automatic. Other lawful punishments: May be adjudged.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ◉ No ○
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ○ No ◉
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ◉ No ○

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Tang, Angela, J.	Navy	O-5	Feb 24, 2021	TANG.ANGELA.J.[redacted] Digitally signed by TANG.ANGELA.J.[redacted] Date: 2021.02.24 11:44:40 -05'00'

37. NOTES

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I	120	Specification 1:	Not Guilty	W/D			120-BE
		Offense description	Sexual Assault, asleep 2018				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
		Specification 2:	Not Guilty	W/D			120-BB
		Offense description	Sexual Assault, bodily harm 2018				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
		Specification 3:	Guilty	Guilty			120-2E
		Offense description	Sexual Assault, asleep 2019				
		Specification 4:	Not Guilty	W/D			120-2D
		Offense description	Sexual Assault, without consent 2019				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
Charge II	120b	Specification 1:	Guilty by E&S	Guilty by E&S			120-BA4
		Offense description	Rape of a child 2018				
		Exceptions and Substitutions	Except the words "Zolpidem Tartrate (Ambien)" and substituting the words "Advil PM." Excepted words dismissed without prejudice to ripen into prejudice upon completion of appellate review.				
		Specification 2:	Not Guilty	W/D			120-BB1
		Offense description	Sexual Assault of a child 2018				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
Charge III	120c	Specification:	Not Guilty	W/D			120-C1B
		Offense description	Indecent Recording				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
Charge IV	134	Specification 1:	Not Guilty	W/D			134-R6D
		Offense description	Production of Child Pornography 2018				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				
		Specification 2:	Not Guilty	W/D			134-CD
		Offense description	Production of Child Pornography 2019				
		Withdrawn and Dismissed	Dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the F/S have been upheld.				

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Additional Charge I	120	Specification	Guilty	Guilty			120-BE
		Offense description	Sexual Assault, asleep 2018				
	134	Specification	Guilty	Guilty			134-R6D
Additional Charge II		Offense description	Production of Child Pornography				

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I	Specification 1:	N/A			
	Specification 2:	N/A			
	Specification 3:	30 years	Charge II; Additional Charge I; Additional Charge II		
	Specification 4:	N/A			
Charge II	Specification 1:	36 years	Charge I; Additional Charge I; Additional Charge II		
	Specification 2:	N/A			
Charge III	Specification:	N/A			
Charge IV	Specification 1:	N/A			
	Specification 2:	N/A			
Additional Charge I	Specification:	30 years	Charge I; Charge II; Additional Charge II		
Additional Charge II	Specification:	30 years	Charge I; Charge II; Additional Charge I		

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
TEJEDA, JOSE	E6	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
MESS MANAGEMENT SPECIALIST WASHINGTON DC	1 Jun 2018	4 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Naval District Washington	General	Judge Alone	24 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.

The accused requests that the convening authority add language to block 28 of the Convening Authority's Action recommending that the Navy-Marine Corps Court of Criminal Appeals exercise its authority under Article 66, UCMJ, to reduce the confinement portion of the accused's sentence.

On 8 June 2021 the Staff Judge Advocate verbally advised the convening authority.

24. Convening Authority Name/Title	25. SJA Name
RDML Carl A. Lahti, USN	LCDR [redacted] JAGC, USN

26. SJA signature	27. Date
[redacted]	Jun 16, 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.]

1. Sentence - On 24 February 2021, the accused was sentenced to thirty-six years confinement and a dishonorable discharge.
2. Action - In the case of First Class Culinary Specialist Jose Tejeda, USN, the sentence is approved and will be executed in accordance with the UCMJ, MCM, applicable regulations, and the terms of the pretrial agreement.
3. Pretrial Confinement Credit - 525 days.
4. Place of Confinement - United States Disciplinary Barracks, Fort Leavenworth, Kansas, is designated as the place of confinement.
5. Companion Cases - N/A
6. Statutory Reporting Requirements - Sex offender registration is required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07. DNA collection and submission is required per DoDI 5505.14 and 10 U.S.C. §1565. As this matter involves a crime punishable by imprisonment for a term exceeding one year, the firearm possession prohibition in 18 U.S.C. §922 applies.
7. Deferment/Waiver - In accordance with the pre-trial agreement and Article 58b, UCMJ, the Convening Authority deferred to the Entry of Judgment and waived for six months thereafter the automatic forfeitures of all pay and allowances due to the member. In accordance with the pre-trial agreement and Article 58b, UCMJ, the Convening Authority suspended the accused's automatic reduction in rank to E-1 until six-months following the entry of judgment.
8. Matters Considered - Prior to taking action, I considered the pre-trial agreement, statement of trial results, the recommendation of my Staff Judge Advocate, and the accused's request for clemency.
9. Post-Trial review - Pursuant to Section 0158b of the JAGMAN, the record of trial shall be sent directly to the Navy-Marine Corps Appellate Review Activity (Code 40), 1254 Charles Morris Street SE, Suite B01, Washington Navy Yard, DC 20374-5124 for review under Article 66, UCMJ.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:

N/A

30. Convening Authority's signature	31. Date
[redacted]	Jun 16, 2021

32. Date convening authority action was forwarded to PTPD or Review Shop.

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

33. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

Charge I: Violation of UCMJ, Article 120 (10 U.S.C. §920) - Rape and Sexual Assault generally
Plea: Guilty Finding: Guilty

Spec. 1: Sexual Assault on divers occasions in 2018.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Spec. 2: Sexual Assault on divers occasions in 2018.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Spec. 3: Sexual Assault on divers occasions between about 4 February 2019 and about 17 May 2019.
Plea: Guilty Finding: Guilty

Spec. 4: Sexual Assault on divers occasions in 2019.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Charge II: Violation of UCMJ, Article 120b (10 U.S.C. §920b) - Rape and sexual assault of a child
Plea: Guilty Finding: Guilty

Spec. 1: Rape of a child on or about 21 June 2018.
Plea: Guilty by E & S Finding: Guilty by E & S

Spec. 2: Sexual Assault of a child on or about 21 June 2018.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Charge III: Violation of UCMJ, Article 120c (10 U.S.C. §920c) - Other sexual misconduct
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Spec: Indecent Recording on or about 2 January 2019.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Charge IV: Violation of UCMJ, Article 134 (10 U.S.C. §934)- General article
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Spec. 1: Production of Child Pornography on divers occasions in 2018.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Spec. 2: Production of Child Pornography on divers occasions in 2019.
Plea: Not Guilty Finding: Withdrawn and Dismissed.

Additional Charge I: Violation of UCMJ, Article 120 (10 U.S.C. §920) - Rape and sexual assault generally
Plea: Guilty Finding: Guilty

Spec: Sexual Assault on divers occasions between about 2 August 2018 and about 3 December 2018.
Plea: Guilty Finding: Guilty

(See Continuation Page)

34. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

Sentence by Military Judge:

Dishonorable discharge
Total sentence to confinement: 36 years as a result of the following segmented sentence:

Charge I, Specification 3: 30 years
Charge II, Specification 1: 36 years
Additional Charge I, Specification: 30 years
Additional Charge II, Specification: 30 years.

All sentences to confinement run concurrently with the sentences adjudged for the other specifications for a total sentence to confinement of 36 years.

The accused is to be credited with 525 days' pretrial confinement credit.

Consistent with the plea agreement, the convening authority suspended the accused's automatic reduction to paygrade E-1 for six months after Entry of Judgment. Automatic forfeitures of all pay and allowances were deferred until Entry of Judgment and waived for six months thereafter.

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

In accordance with the plea agreement, the convening authority deferred automatic forfeitures from the day they would have become effective until date of Entry of Judgment and further waived automatic forfeitures for six months from the date of Entry of Judgment.

36. Action convening authority took on any suspension recommendation from the military judge:

N/A.

37. Judge's signature:	38. Date judgment entered:
[redacted]	Jun 21, 2021

39. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

33. Findings (Continued)

Additional Charge II: Violation of UCMJ, Article 134 (10 U.S.C. §934) - General article
Plea: Guilty Finding: Guilty

Spec: Production of Child Pornography on divers occasions between about 17 March 2016 and about 17 May 2019.
Plea: Guilty Finding: Guilty

All charges and specifications that were dismissed, and the excepted language in Specification 1 of Charge II, were dismissed without prejudice to ripen into dismissal with prejudice upon completion of appellate review in which the findings and sentences are upheld.

APPELLATE INFORMATION

IN THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Jose TEJEDA** Culinary Specialist First Class (E-6) U.S. Navy *Appellant*	NMCCA Case No. 202100176 **APPELLANT'S MOTION FOR FIRST ENLARGEMENT OF TIME** Tried at Washington Navy Yard, District of Columbia, on 13 October 2020, 24 November 2020, 17, 19, 23, and 24 February 2021, before a General Court-Martial convened by, Commandant, Naval District Washington, Commander Angela Tang, Military Judge, 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 is August 30, 2021. The number of days requested is thirty. The requested due date is September 30, 2021.

Status of the case:

1. The Record of Trial was docketed on 01 July 2021.

2. The Moreno date is 01 January 2023.

3. CS1 Tejeda is currently confined. His release date is in 2054.

4. The record consists of 771 transcribed pages and 1,328 total pages.

5. Counsel has reviewed the record.

Good cause is required in this case because counsel requires further time to consult with his client, obtain supporting evidence for his claims, adequately review the file for error, and draft a brief. Appellant has been consulted and concurs with the enlargement request.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a 30-day enlargement of time to file his brief.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on August 26, 2021, that a copy was uploaded into the Court's case management system on August 26, 2021, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] n August 26, 2021.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D 1st Enl (Dempsey)
Signed By: [redacted]

RECEIVED
Aug 26 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

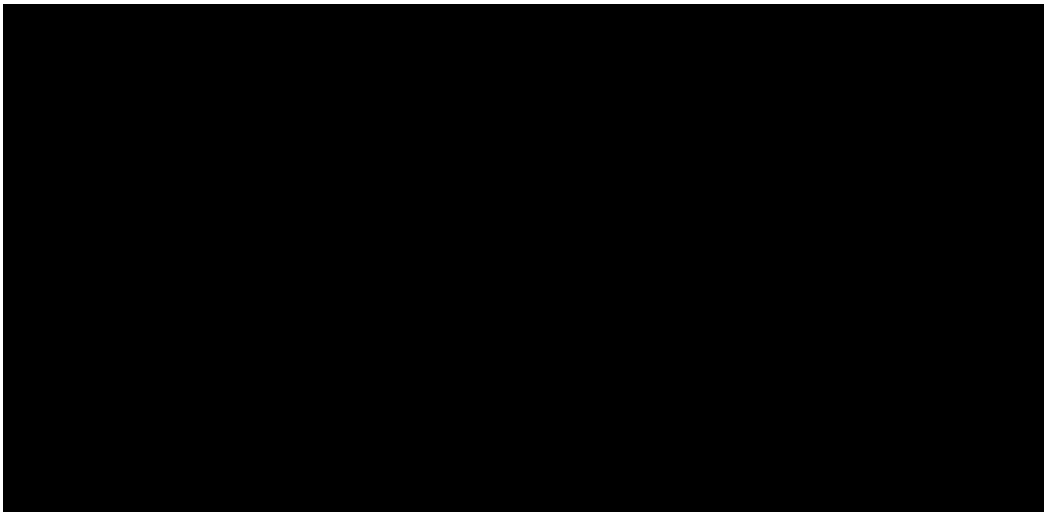
Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D 1st Enl (Dempsey)

Good Afternoon Clerk of Court,

Please see attached motion in the case of US v. CS1 Tejeda. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]



[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D 1st Enl (Dempsey)
Signed By: [redacted]

MOTION GRANTED
Aug 26 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D 1st Enl (Dempsey)

Good Afternoon Clerk of Court,

Please see attached motion in the case of US v. CS1 Tejeda. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]

[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Jose TEJEDA** Culinary Specialist First Class (E-6) U.S. Navy *Appellant*	NMCCA No. 202100176 **APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS IN THE RECORD OF TRIAL** Tried at Washington Navy Yard, District of Columbia, on 13 October 2020, 24 November 2020, 17 February 2021, before a General Court-Martial convened by, Commandant, Naval District Washington, Commander Angela Tang, Military Judge, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW the undersigned and respectfully moves, pursuant to Rule 6.2(c) of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure to examine sealed exhibits in the record of trial.

1. Specifically, counsel requests to examine the following:

   a. Prosecution Exhibit 6, Digital media card.

   b. Appellate Exhibit VI.d, Redacted law enforcement investigation.

2. With regard to sealed exhibits:

a. Prosecution Exhibit 6

(1) was released to trial and trial defense counsel.

(2) was reviewed by the military judge in camera.

(3) is subject to the following colorable claim of privilege: None.

(4) Access to the sealed exhibit by appellate defense counsel is necessary for the following reasons:

(a) To ensure issues are properly raised with the court on behalf of my client.

(b) To ensure the sealed exhibit meets the legal definition of child pornography.

(5) Undersigned counsel does not seek to copy the sealed exhibit.

b. Appellate Exhibit VI.d

(1) was released to trial and trial defense counsel.

(2) was reviewed by the military judge in camera.

(3) is subject to the following colorable claim of privilege: None.

(4) Access to the sealed exhibit by appellate defense counsel is necessary for the following reasons:

(a) To ensure issues are properly raised with the court on behalf of my client.

(5) Undersigned counsel does not seek to copy the sealed exhibit.

3. 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.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on August 10, 2021, that a copy was uploaded into the Court's case management system on August 10, 2021, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] on August 10, 2021.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D Mtn to Examine Sealed (Dempsey)

Signed By: [redacted]

RECEIVED
Aug 10 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

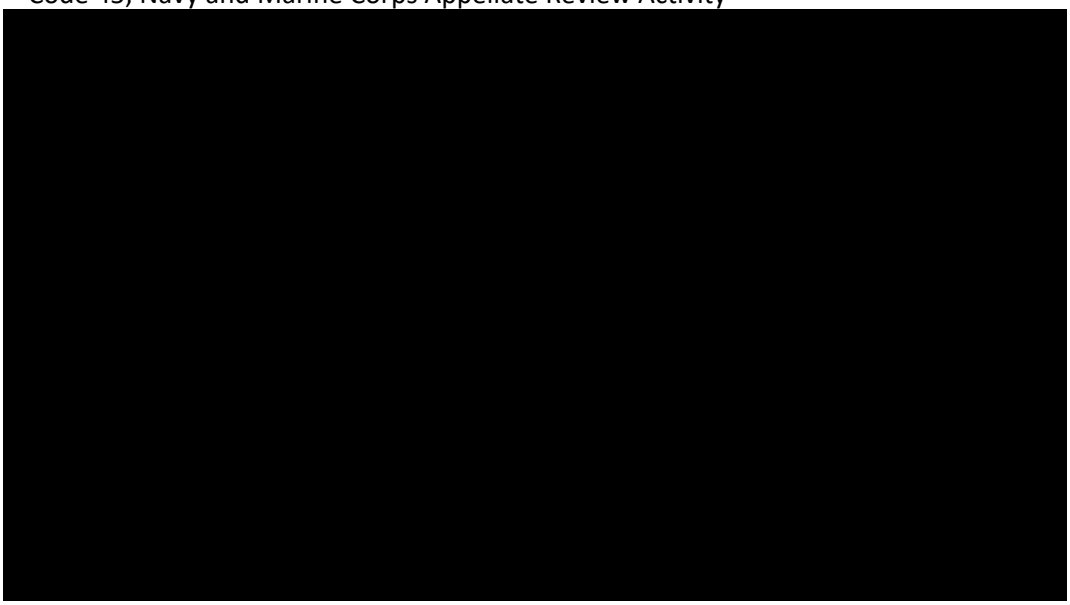
Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D Mtn to Examine Sealed (Dempsey)

Good Afternoon Clerk of Court,

Please see attached motion in the case of US v. CS1 Tejeda. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity



[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D Mtn to Examine Sealed (Dempsey)

Signed By: [redacted]

MOTION GRANTED
August 11 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - D Mtn to Examine Sealed (Dempsey)

Good Afternoon Clerk of Court,

Please see attached motion in the case of US v. CS1 Tejeda. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Jose TEJEDA** Culinary Specialist First Class (E-6) U.S. Navy *Appellant*	NMCCA No. 202100176 **APPELLANT'S MOTION TO COMPEL PRODUCTION OF SEARCH WARRANT** Tried at Washington Navy Yard, District of Columbia, on 13 October 2020, 24 November 2020, 17 February 2021, before a General Court-Martial convened by, Commandant, Naval District Washington, Commander Angela Tang, Military Judge, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Appellant, through undersigned Counsel, pursuant to Rule 23 of this Court's Rules of Appellate Procedure, moves for production of a search warrant and application that was not included in the record of trial. This warrant and application are required for undersigned counsel's effective review of the record.

A search warrant was applied for, approved, and executed to conduct a search of the Appellant's iCloud data while he was under investigation. For the undersigned counsel to properly review any claims for ineffective assistance of

counsel or violations of the Fourth Amendment, counsel must review this warrant and related application. Motions were filed by both the Trial Defense and Government counsel (Appellate Exhibits XX and XXI) referencing this warrant and application as Appellate Exhibit V.m. However, Appellate Exhibit V.m is a prior warrant for physical objects and does not relate to the iCloud account that was the subject of a second warrant and the motions filed by counsel.

Accordingly, this Court should order the government produce the missing items.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court on September 16, 2021, that a copy was uploaded into the Court's case management system on September 16, 2021, *and* that a copy of the foregoing was by electronic means with the consent of the government to Appellate Government Division [redacted] on September 16, 2021.

[redacted]

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - Motion to Compel
Signed By: [redacted]

RECEIVED
Sep 16 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - Motion to Compel

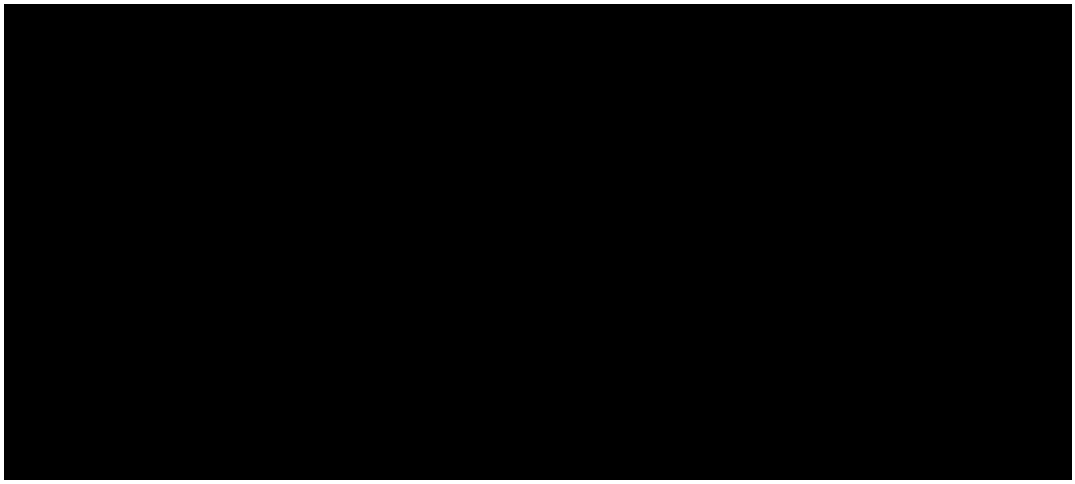
Good Afternoon Clerk of Court,

Please see attached motion in the case of US v. CS1 Tejeda. Thank you.

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]

[redacted]



[redacted]

Subject: RULING - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - Motion to Compel
Signed By: [redacted]

MOTION GRANTED
13 Oct 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 - Motion to Compel

Good Afternoon Clerk of Court,

[redacted]

Very Respectfully,

Christopher B. Dempsey
LT, JAGC, USN
Appellate Defense Counsel
Washington Navy Yard
Code 45, Navy and Marine Corps Appellate Review Activity
[redacted]

[redacted]

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	APPELLEE'S ORDER RESPONSE
v.	)	Case No. 202100176
Jose TEJEDA, Culinary Specialist First Class (E-6) U.S. Navy Appellant	)	Tried at Washington Navy Yard, District of Columbia, on October 13, November 24, and February 17, 19, and 23–24, 2021, before a general court-martial convened by Commandant, Naval District Washington, Commander A. Tang, JAGC, U.S. Navy, presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

In response to this Court's Order of October 15, 2021, the United States respectfully produces Appellate Exhibit V.m, the Search Warrant and accompanying Affidavit for Appellant's Apple iCloud Account, marked as Appendix A.

R. Blake Royall Digitally signed by R. Blake Royall

R. BLAKE ROYALL
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Appendix

A. Appellate Exhibit V.m – Apple iCloud Search Warrant and Affidavit

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. Dempsey, JAGC, U.S. Navy, on October 28, 2021.

R. Blake Royall Digitally signed by R. Blake Royall

R. BLAKE ROYALL
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted]

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 -G-Order Response (Royall)

Signed By: [redacted]

RECEIVED
Oct 28 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

Subject: FILING - Panel 2 - U.S. v. Tejeda - NMCCA 202100176 -G-Order Response (Royall)

To this Honorable Court:

Please find attached the Appellee's Order Response in United States v. Tejeda, NMCCA No. 202100176.

Very respectfully,

R. Blake Royall
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel | Code 46
1254 Charles Morris St. SE | Bldg 58, Suite B01
Washington Navy Yard, DC 20374-5124
[redacted]

[redacted]

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Case No. 202100176
Jose TEJEDA, Culinary Specialist First Class (E-6) U.S. Navy Appellant	)	Tried at Washington Navy Yard, Washington, District of Columbia, on October 13 and November 24, 2020, and February 17, 19, and 23–24, 2021, by a general court-martial convened by Commandant, Naval District Washington, Commander A. J. Tang, JAGC, U.S. Navy, presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Error Assigned

DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO PRESENT EVIDENCE IN MITIGATION OF APPELLANT'S HARSH PRETRIAL CONFINEMENT CONDITIONS?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of dishonorable discharge and confinement for two years or more. This Court has jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2016).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of sexual assault, rape of a child, and producing child pornography, in violation of Articles 120, 120b, and 134, UCMJ, 10 U.S.C. §§ 920, 920b, 934 (2016). The Military Judge sentenced Appellant to thirty-six years of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged. Under a Plea Agreement, the Convening Authority deferred and waived automatic forfeiture of pay and allowances, suspended automatic reduction to pay grade E-1 for six months, and, except for the punitive discharge, ordered the sentence executed. The Military Judge entered judgment.

Statement of Facts

A. The United States charged Appellant with eleven specifications.

The United States charged Appellant with five specifications of sexual assault, one specification of rape of a child, one specification of sexual abuse of a child, one specification of indecent recording, and three specifications of

producing child pornography. (Charge Sheet, Sep. 22, 2020; Additional Charge Sheet, Feb. 9, 2021.)

B. Appellant entered into a Plea Agreement and a Stipulation of Fact.

Appellant agreed to plead guilty to two specifications of sexual assault, one specification of rape of a child, and one specification of producing child pornography. (Appellate Ex. XXVI at 2–7.) The minimum confinement allowed under the Plea Agreement was thirty-five years, and the maximum was forty-five years. (R. 304; Appellate Ex. XXVI at 11.)

Before trial, Appellant and the United States agreed to a Stipulation of Fact detailing Appellant's misconduct. (Prosecution (Pros.) Ex. 1.)

C. Appellant pled guilty to four sexual offenses, and admitted facts consistent with the Stipulation of Fact.

At trial, Appellant pled guilty in accordance with the Plea Agreement. (R. 231.) He admitted the facts underlying his guilty pleas. (R. 235–74.)

1. Appellant sexually assaulted his teenage daughter by having anal sex with her while she slept.

Appellant worked at an admiral's residence onboard Washington Navy Yard. (R. 244.) Sometimes he brought his [redacted] to work with him, and she would fall asleep in one of the beds. (R. 246.) On multiple occasions, Appellant penetrated his [redacted] anus with his penis while she slept in the admiral's residence. (R. 243–44.) On other occasions, Appellant

penetrated his [redacted] anus with his penis while she slept in the family's own home. (R. 258–59.)

2. Appellant anally raped his [redacted] by administering a drug to make her sleep.

On at least one occasion, when his [redacted] Appellant gave his [redacted] Advil PM to make her fall asleep so he could have anal sex with her. (R. 250–51.) This took place in the living room of the admiral's residence where Appellant was working. (R. 251.)

3. Appellant produced child pornography by videorecording his sexual abuse of his [redacted]

On twenty or more occasions over a period of three years, Appellant videorecorded numerous acts of sexual abuse of his [redacted] (R. 267; Pros. Ex. 1 at 4.) The recordings included a "progression" of abuse, from Appellant touching her genitalia or buttocks, to videos of her exposed genitalia, to oral copulation, and finally, anal intercourse while she slept. (R. 267–70.)

After hearing Appellant's admissions, the Military Judge accepted Appellant's pleas and found him guilty. (R. 321.)

D. Appellant denied experiencing unlawful pretrial punishment.

The Military Judge asked if Appellant had been punished in any way that would constitute illegal pretrial punishment. (R. 323.) Trial Defense Counsel said,

"No, Your Honor." (*Id.*) The Military Judge asked Appellant if he agreed with Trial Defense Counsel's answer, and Appellant replied, "Yes, Your Honor." (*Id.*)

E. The United States and Trial Defense Counsel presented evidence during presentencing.

1. The United States presented evidence in aggravation.

The United States presented police reports from the Prince William County Police Department, the Haymarket Police Department, and the Naval Criminal Investigative Service detailing law enforcement investigations of Appellant's sexual offenses against his teenage daughter. (R. 341, 531, 536; Pros. Exs. 2–5.) The United States offered a video of the police interview of the teenage victim. (R. 339; Pros. Ex. 7.)

The United States offered the expert testimony of a forensic neuropsychologist (R. 380–444.) The expert opined that Appellant had low to moderate rehabilitative potential. (R. 407.) The expert testified that this opinion was based on scientifically validated risk measures and the specific facts of Appellant's misconduct. (R. 407–09.)

The Military Judge viewed some of the child pornography produced by Appellant. (R. 536–43; Pros. Ex. 6; Appellate Ex. XXVII.) Finally, the Victim submitted a victim-impact statement. (R. 552–67; Pros. Ex. 8.)

While the United States presented its case in aggravation, Trial Defense Counsel objected multiple times. (R. 325, 335, 341, 346–47, 352, 361, 392, 412, 481.)

Appellant's Trial Defense Counsel also consulted with an expert, and cross-examined the United States' forensic neuropsychologist witness. (R. 415–32.)

2. Trial Defense Counsel presented evidence in extenuation and mitigation.

Trial Defense Counsel presented the testimony of a retired Chief Petty Officer who supervised Appellant when he worked in then-Vice President Joe Biden's official residence. (R. 446–62.)

Trial Defense Counsel also presented testimony of a retired Senior Chief Petty Officer who worked with Appellant at the Vice President's residence. (R. 462–79.) Both witnesses testified to Appellant's military service and his rehabilitative potential.

Appellant's mother testified about Appellant's family background and difficult upbringing. (R. 502–14.)

Trial Defense Counsel offered the expert testimony of a forensic psychologist. (R. 577–707.) The psychologist testified that, in her clinical opinion, Appellant had moderate to high rehabilitative potential. (R. 613.) She said the reason for her opinion was that despite the nature of Appellant's crimes, there was no evidence of a personality disorder, other criminality, or psychopathy.

(R. 614–15.) She also opined that Appellant seemed ready to engage with sex-offender treatment, and that the treatment offered through the United States Disciplinary Barracks at Fort Leavenworth would be beneficial to Appellant. (R. 620–22.)

Trial Defense Counsel offered into evidence written character statements from a Vice Admiral and Appellant's pastor concerning Appellant's military service and rehabilitative potential. (R. 520; Defense (Def.) Ex. B.)

Trial Defense Counsel also offered documentary evidence of Appellant's military service, including evaluations, awards, and photographs. (R. 520; Def. Exs. A, C–E.)

Finally, Appellant made an unsworn statement, expressing remorse and apologizing to his family, his friends, and the Navy. (R. 713–17.)

Appellant never mentioned or implied mistreatment by other inmates during his time in the Prince William Jail, nor did he claim that the Prince William Jail inadequately resolved any issues with his fellow inmates. (*Id.*) Appellant never mentioned or implied that he received sub-standard health care during his time in pre-trial confinement. (*Id.*) Appellant never mentioned, even generally, dissatisfaction with the conditions of his pre-trial confinement. (*Id.*)

F. The Military Judge sentenced Appellant.

The United States asked the Military Judge to sentence Appellant to forty-five years of confinement. (R. 745.) Appellant asked the Military Judge to sentence Appellant to thirty-five years of confinement, and to recommend suspension of at least five years of confinement. (R. 761–62.)

The Military Judge sentenced Appellant to a dishonorable discharge and thirty-six years of confinement. (R. 770.)

G. Appellant filed a post-trial Declaration.

On appeal, Appellant filed a new Declaration at this Court, claiming:

> I was incarcerated at Prince William County Jail pending trial in Virginia. I was also charged through the military for the same alleged misconduct. While in pretrial confinement in civilian jail, my charges were posted online. As a result, I was physically abused by other prisoners who learned about them. This led to two fights where I had to defend myself. I also had an infected tooth implant through my entire time at the Prince William County Jail that went without treatment until I was transferred to the brig after sentencing in military court. I told my trial defense counsel about these conditions prior to entering my pleas of guilty in military court.

(Appellant's Mot. Attach Sworn Decl., Appendix (App.) A at 1, Oct. 29, 2021.)

H. Trial Defense Counsel provided Affidavits addressing Appellant's claims.

This Court ordered Trial Defense Counsel to provide affidavits or sworn declarations in response to Appellant's assertions. (Order to Produce, Jan. 6, 2022.)

Appellant's Lead Trial Defense Counsel was aware that other prisoners had yelled at Appellant and called him names because of his charges. (Appellee's Order Response, App. A at 1, Feb. 4, 2022.) Appellant did not tell her that the physical altercation he had with another prisoner was related to his charges. (*Id.*)

Appellant never told Assistant Trial Defense Counsel that Appellant had been involved in a physical alteration. (Appellee's Order Response, App. B at 3.)

Appellant told his Lead Trial Defense Counsel that he had tooth pain that had not yet been resolved, despite receiving some treatment while in confinement. (Appellee's Order Response, App. A at 1–2, App. B at 4.) Both Counsel immediately arranged for Appellant to receive medical care at a military facility. (*Id.*)

Appellant told neither Defense Counsel that he had been denied medical care at the detention facility. (*Id.*)

Argument

APPELLANT'S COUNSEL WERE NOT INEFFECTIVE. APPELLANT NEVER TOLD THEM HE WAS MISTREATED IN THE PRINCE WILLIAM JAIL AND THE EVIDENCE HE RAISES ON APPEAL IS NOT MITIGATING.

A. The standard of review is *de novo*.

"'[Q]uestions of deficient performance and prejudice [are reviewed] *de novo*.'" *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330–31 (C.A.A.F. 2008)).

B. Appellant bears the burden of proving deficient performance and prejudice.

To establish ineffective assistance of counsel, "appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Green*, 68 M.J. at 361–32 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To establish the first prong, an appellant must show that counsel's performance was deficient such that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008), *aff'd* 556 U.S. 904 (2009). This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 689). "To overcome this presumption, an appellant must show that

counsel made specific errors that were unreasonable under prevailing professional norms." *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001) (citing *Strickland*, 466 U.S. at 688–90). "Even under *de novo* review, the standard judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Under *Strickland*'s second prong, an appellant must demonstrate "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Datavs*, 71 M.J. at 424 (citations omitted). In other words, in the sentencing context, an appellant must show that the military judge at sentencing would have adjudged a different sentence "if the military judge had considered not only the evidence in extenuation and mitigation that trial defense counsel actually presented at trial, but also the additional evidence that they could have presented." *United States v. Scott*, 81 M.J. 79, 87 (C.A.A.F. 2021).

C. Appellant fails to meet his burden of showing prejudice.

This Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant]" if "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . . ." *Datavs*, 71 M.J. at 424–25 (internal citations and quotations omitted).

Appellant claims he was prejudiced by Trial Defense Counsel's performance because he was sentenced to thirty-six years of confinement instead of the thirty-five year minimum confinement sentence allowed under the Plea Agreement. (Appellant's Br. at 10, Nov. 19, 2021.)

1. Appellant's crimes were heinous.

To determine if the result of sentencing "would have been different" under *Strickland*, appellate courts consider the facts and evidence in aggravation presented at trial. *See United States v. Scott*, 81 M.J. 79, 87 (C.A.A.F. 2021). For an appellant to prevail, the "likelihood of a different result must be substantial, not just conceivable." *See Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

Given the nature of Appellant's crimes and the evidence presented in aggravation, there is no reasonable probability Appellant would have received a lighter sentence.

Appellant started sexually abusing his [redacted] and continued to do so until just before her [redacted] (*See* Pros. Ex. 1 at 3–4.) While she slept, Appellant groped her buttocks, masturbated himself in her presence, digitally penetrated her anus and vulva, put his penis in her mouth, had sexual intercourse with her, and penetrated her anus with his penis. (Pros. Ex. 1 at 3–4.) At least once, he administered a drug to make her sleep so he could rape her. (Pros. Ex. 1 at 2.)

Throughout this long period of abuse, Appellant videorecorded his [redacted] victimization. (Pros. Ex. 1 at 3.)

Multiple instances of abuse occurred in Appellant's workplace, when he brought his [redacted] to an admiral's residence at the Washington Navy Yard, and recorded himself penetrating her anus with his penis while she slept in the admiral's living room or one of the beds. (R. 243–246.)

2. Evidence of Appellant's tooth infection and fights while in confinement present no reasonable possibility of a different sentencing result, like the five character letters in *Scott*.

In *Scott*, the Court determined that character letters from five witnesses with "unequivocally positive descriptions of [the appellant's] bravery and skill would have contributed favorably to the overall picture of the appellant as a soldier and officer. 81 M.J. at 87. Nevertheless, that evidence was "not so transformative that it would have changed the result" of the appellant's sentence for an orders violation and adultery conviction. *Id*.

Unlike the character letters in *Scott*, the evidence Appellant raises on appeal is not, on its face, favorable. First, the fact that Appellant had been involved in multiple fights while in pretrial confinement would not necessarily be seen as mitigating evidence by the Military Judge. Trial Defense Counsel went to great lengths to portray Appellant as a good man who struggled with demons, felt remorse for his actions, and was ready to participate in sex-offender treatment. (R.

753–63.) But had the Military Judge known Appellant was involved in multiple fights while in pretrial confinement, that more likely would have undermined Trial Defense Counsel's strategy of emphasizing Appellant's rehabilitative potential, and resulted in a more severe sentence.

Second, Appellant's infected tooth implant has almost no probative value. Notably, Appellant's affidavit is silent on whether he sought or was denied dental treatment in pre-trial confinement. (*Compare* Appellant's Mot. Attach Sworn Decl., App. A, *with,* Appellant's Brief at 2, Nov 19, 2021.) Appellant told Lead Trial Defense Counsel, however, that he had received treatment for his tooth in confinement. (Appellee's Order Response, App. A at 2–3.) During his transfer from civilian to military confinement, his attorneys facilitated treatment with a new provider because his dental concern was not yet resolved. (Appellee's Order Response, App. A at 2–3, App. B at 4.) It is unclear how an infected tooth implant that Appellant received treatment for was "important evidence" in mitigation after a conviction for sexual assault, rape of a child, and producing child pornography. (*See* Appellant's Brief at 8.)

Given the facts of the case, there is no reasonable probability that the evidence Appellant now raises would have resulted in a more lenient sentence. Appellant's claim of speculative prejudice fails to satisfy *Strickland. See Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

D. Appellant fails to meet his burden of proving his counsel was deficient.

Appellate courts must presume that trial defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *United States v. Akbar*, 74 M.J. 364, 371 (C.A.A.F. 2015) (quoting *Strickland*, 466 U.S. at 689–90.) The burden is on an appellant to rebut this presumption. *Gutierrez*, 66 M.J. at 330–31. Strategic choices made by defense counsel after a thorough investigation of the law and facts relevant to plausible options are "virtually unchallengeable." *Akbar*, 74 M.J. at 371 (quoting *Strickland*, 466 U.S. at 690–91.)

The measure of deficiency is not based on the success of a defense counsel's trial strategy, but instead whether the counsel made an objectively reasonable choice in strategy from the available alternatives. *Akbar*, 74 M.J. at 379.

1. Trial Defense Counsel was not deficient in declining to raise unlawful pretrial punishment.

Appellant now claims Trial Defense Counsel was constitutionally deficient for failing to raise a claim of unlawful pretrial punishment, (Appellant's Br. 7 n.32), but there is nothing in the Record to support a claim of unlawful pretrial punishment. On the Record Appellant conceded he experienced no unlawful pretrial punishment. (R. 323.) In his post-trial declaration, Appellant said he was

held in county jail because he was awaiting trial in state court. (Appellant's Mot. Attach, App. A at 1.)

Thus, Appellant has not shown the conditions of pretrial confinement resulted from an intent to punish Appellant. *See United States v. Howell*, 75 M.J. 386, 393 (C.A.A.F. 2016) (question of unlawful pretrial punishment turns on intent).

Trial Defense Counsel properly chose to not raise a meritless argument.

2. Trial Defense Counsel was not deficient for choosing not to inform the Military Jude of the conditions of Appellant's pretrial confinement.

a. Trial Defense Counsel swore in detailed and credible Affidavits that they were unaware Appellant had been "attacked" because the "jail posted a list of his charges online."

As part of her investigation, Appellant's Lead Trial Defense Counsel learned that the only information available online about Appellant's case was an article written by a local media outlet reporting the initial allegations against Appellant. (*Compare* Appellee's Order Response, App. A at 1–2, *with*, Appellant's Brief at 2 (claiming "the jail posted a list of his charges online.")) While she was aware other prisoners yelled at Appellant and called him names because of the allegations, she was unaware that was the reason for the fights while in confinement. (Appellee's Order Response, App. A at 2.)

Appellant never told his Assistant Defense Counsel about the fight. (Appellee's Order Response, App. B at 3.) Appellant never told his attorneys he was "attacked" in confinement, nor did he characterize his fights in that manner in his post-trial Affidavit. (*Compare* Appellee's Order Response, App. A at 1–2, *and* Appellee's Order Response, App. B at 3, *and* Appellant's Mot. Attach, App. A at 1, *with*, Appellant's Brief at 2.)

b. Trial Defense Counsel made a reasonable professional judgment not to introduce evidence of Appellant's fight in pre-trial confinement and ongoing dental care.

Appellants Trial Defense Counsel made an "objectively reasonable choice in strategy" when they chose not to introduce evidence of his fight and ongoing dental care during pre-sentencing. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). Appellant's Lead Trial Defense Counsel determined that introducing evidence of Appellant's altercation in pre-trial confinement was not beneficial to the sentencing case or the "general character [they] were attempting to convey." (Appellee's Order Response, App. A at 2.)

Given the facts as Counsel knew them, it was reasonable to focus their presentencing presentation on emphasizing Appellant's character, military service, and rehabilitative potential. The testimonial and documentary evidence Trial Defense Counsel presented all directly supported this presentation.

Evidence of Appellant's infected tooth implant and fights would not have supported this. Trial Defense Counsel properly chose not to present evidence of Appellant's infected tooth or altercations during sentencing.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify I emailed this document to the Court's filing address, uploaded it to the Court's case management system, and emailed it to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on February 23, 2022.

Megan E. Martino
Digitally signed by Megan E. Martino
MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted] [redacted]

RECEIPT - FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov Answer (Martino)

[redacted]

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Feb 23 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

[redacted]

Subject: FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov Answer (Martino)

To this Honorable Court:

Please find attached Answer on Behalf of Appellee, for electronic filing in United States v. Tejeda, NMCCA No. 202100176.

Thank you.

Very respectfully,

[redacted]

Megan Martino
LT, JAGC, USN
Appellate Government Counsel, Code 46
Navy and Marine Corps Appellate Review Activity
1254 Charles Morris St. SE | Bldg 58, Suite B01
Washington Navy Yard, D.C. 20374-5124

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Jose TEJEDA, Culinary Specialist First Class (E-6) U.S. Navy Appellant	)	APPELLEE'S ORDER RESPONSE Case No. 202100176 Tried at Washington Navy Yard, Washington, District of Columbia, on October 13 and November 24, 2020, and February 17, 19, and 23–24, 2021, by a general court-martial convened by Commandant, Naval District Washington, Commander A. J. Tang, JAGC, U.S. Navy, presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

In response to this Court's Order of January 6, 2022, the United States respectfully produces Affidavits from Appellant's Trial Defense Counsel, marked as Appendices A–B.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Appendices

A. [redacted] U.S. Navy

B. [redacted] U.S. Navy

Certificate of Filing and Service

I certify I emailed this document to the Court's filing address, uploaded it to the Court's case management system, and emailed it to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on February 4, 2022.

Megan E. Martino
Digitally signed by Megan E. Martino
MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted] [redacted]

RECEIPT - FILING – Panel # 2– U.S. v. Tejeda – NMCCA 202100176 – Order Response (Martino)

[redacted]

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Feb 4 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel # 2– U.S. v. Tejeda – NMCCA 202100176 – Order Response (Martino)

To this Honorable Court:

Please find attached Appellee's Order Response, for electronic filing in United States v. Tejeda, NMCCA No. 202100176.

Thank you.

Very respectfully,

Megan Martino
LT, JAGC, USN
Appellate Government Counsel, Code 46
Navy and Marine Corps Appellate Review Activity
1254 Charles Morris St. SE | Bldg 58, Suite B01
Washington Navy Yard, D.C. 20374-5124

[redacted]

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR THIRD ENLARGEMENT OF TIME
v.	)	Case No. 202100176
Jose TEJEDA, Culinary Specialist First Class (E-6) U.S. Navy Appellant	)	Tried at Washington Navy Yard, Washington, District of Columbia, on October 13 and November 24, 2020, and February 17, 19, and 23–24, 2021, by a general court-martial convened by Commandant, Naval District Washington, Commander A. J. Tang, JAGC, U.S. Navy, presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from February 17, 2022, to March 19, 2022, to answer Appellant's Brief and Assignment of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

(A) This case was docketed with the Court on July 1, 2021;

(B) The *Moreno III* date is January 1, 2023;

(C) Appellant is confined with a release date in 2054;

(D) The Record of Trial consists of 771 transcribed pages and 1328 total pages;

(E) Counsel has completed review of the Record; and

(F) This case is complex. Appellant was found guilty at a general court-martial of sexual assault, rape of a child, and production of child pornography. His sentence includes a dishonorable discharge and confinement for thirty-six years and he now raises ineffective assistance of counsel.

B. Good cause exists given the need for further research, review, and drafting.

Good cause exists for a Third Enlargement. Appellant's Assignment of Error requires in-depth, fact-specific analysis and legal research. Counsel completed drafting the United States' Answer during the last enlargement period, which is currently under review by supervisory counsel. Additional time is required to incorporate necessary changes and finish editing the Answer to ensure it completely and accurately represents the United States' settled position on Appellant's Assignment of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to March 19, 2022.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Christopher B. DEMPSEY, JAGC, U.S. Navy, on February 11, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted] [redacted]

RECEIPT - FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov 3rd EOT (Martino)

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United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

[redacted]

Subject: FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov 3rd EOT (Martino)

To this Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time, for electronic filing in United States v. Tejeda, NMCCA No. 202100176.

Thank you.

Very respectfully,

[redacted]

Megan Martino
LT, JAGC, USN
Appellate Government Counsel, Code 46
Navy and Marine Corps Appellate Review Activity
1254 Charles Morris St. SE | Bldg 58, Suite B01
Washington Navy Yard, D.C. 20374-5124

[redacted] [redacted]

RULING - FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov 3rd EOT (Martino)

[redacted]

MOTION GRANTED
14 FEB 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

[redacted]

Subject: FILING – Panel #2 – U.S. v. Tejeda – NMCCA 202100176 – Gov 3rd EOT (Martino)

To this Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time, for electronic filing in United States v. Tejeda, NMCCA No. 202100176.

Thank you.

Very respectfully,

Megan Martino
LT, JAGC, USN

[redacted]

[redacted]

Appellate Government Counsel, Code 46
Navy and Marine Corps Appellate Review Activity
1254 Charles Morris St. SE | Bldg 58, Suite B01
Washington Navy Yard, D.C. 20374-5124

[redacted]

[redacted]

REMAND

THERE WERE NO REMANDS

SUPPLEMENTAL COURT-MARTIAL ORDER