[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Williams	Travonte	D	[redacted]	PFC
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

MACS-2, MACG-28, 2d MAW	USMC	MCAS Cherry Point, NC
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commanding General

(Title of Convening Authority)

2d Marine Aircraft Wing

(Unit/Command of Convening Authority)

Tried at

MCAS Cherry Point, NC On 6 Mar, 30 Apr, 22 Sept, 1 Oct, 5 Nov, 30 Nov, 1 - 3 Dec, 7 - 10 Dec 2020

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

Companion and other cases

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

[redacted]

CONVENING ORDER

UNITED STATES MARINE CORPS
2D MARINE AIRCRAFT WING
II MARINE EXPEDITIONARY FORCE
POSTAL SERVICE BOX 8050
CHERRY POINT, NC 28533-8050

IN REPLY REFER TO:
5813
GCMCO#1-19

AUG 19 2019

GENERAL COURT MARTIAL CONVENING ORDER #1-19

Pursuant to the authority contained in Article 22 of the Uniform Code of Military Justice and paragraph 0120a(1) of the Manual of the Judge Advocate General, a general court-martial is hereby convened. This court-martial, unless specifically modified, will hear any and all general courts-martial brought by 2d Marine Aircraft Wing. The court-martial will be constituted as follows:

Members

Lieutenant Colonel [redacted], U.S. Marine Corps, President;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
First Lieutenant [redacted], U.S. Marine Corps;
Warrant Officer [redacted], U.S. Marine Corps

[redacted]
K. B. Heckl
Major General
U.S. Marine Corps
Commanding

UNITED STATES MARINE CORPS
2D MARINE AIRCRAFT WING
II MARINE EXPEDITIONARY FORCE
POSTAL SERVICE CENTER BOX 8050
CHERRY POINT, NC 28533-0050

IN REPLY REFER TO:
5813
GCMCO 1b-19

OCT 23 2020

GENERAL COURT MARTIAL CONVENING ORDER #1b-19

General Court-Martial Convening Order 1-19 of 19 August 2019 is hereby modified for the case of United States v. Private First Class Travonte D. Williams, U.S. Marine Corps.

DELETE:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted] U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
First Lieutenant [redacted], U.S. Marine Corps; and
Warrant Officer [redacted], U.S. Marine Corps

ADD:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted] U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted] U.S. Marine Corps;
Second Lieutenant [redacted], U.S. Marine Corps;
Master Gunnery Sergeant [redacted], U.S. Marine Corps;
Master Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted] U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps; and
Corporal [redacted] U.S. Marine Corps

The general court-martial, as now established, is constituted as follows:

One alternate is authorized if excess members remain upon completion of the voir dire process.

[redacted]

M. S. CEDERHOLM
Major General
U.S. Marine Corps
Commanding General

GENERAL COURT MARTIAL CONVENING ORDER #1b-19

MEMBERS:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Second Lieutenant [redacted], U.S. Marine Corps;
Master Gunnery Sergeant [redacted], U.S. Marine Corps;
Master Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps; and
Corporal [redacted], U.S. Marine Corps

One alternate is authorized if excess members remain upon completion of the voir dire process.

[redacted]

M. S. CEDERHOLM
Major General
U.S. Marine Corps
Commanding General

UNITED STATES MARINE CORPS
2D MARINE AIRCRAFT WING
II MARINE EXPEDITIONARY FORCE
POSTAL SERVICE CENTER BOX 8050
CHERRY POINT, NC 28533-0050

IN REPLY REFER TO:
5813
GCMCO 1c-19

OCT 30 2020

GENERAL COURT MARTIAL CONVENING ORDER #1c-19

General Court-Martial Convening Order 1b-19 of 23 October 2020 is hereby modified for the case of United States v. Private First Class Travonte D. Williams, U.S. Marine Corps.

DELETE:

Master Sergeant [redacted], U.S. Marine Corps; and
Gunnery Sergeant [redacted], U.S. Marine Corps;

The general court-martial, as now established, is constituted as follows:

MEMBERS:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Second Lieutenant [redacted], U.S. Marine Corps;
Master Gunnery Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps; and
Corporal [redacted], U.S. Marine Corps

One alternate is authorized if excess members remain upon completion of the voir dire process.

[redacted]

M. S. CEDERHOLM
Major General
U.S. Marine Corps
Commanding General

UNITED STATES MARINE CORPS
2D MARINE AIRCRAFT WING
II MARINE EXPEDITIONARY FORCE
FLEET MARINE FORCES
POSTAL SERVICES CENTER BOX 8050
CHERRY POINT, NC 28533-0050

IN REPLY REFER TO:
5813
GCMCO 1e-19

NOV 19 2020

GENERAL COURT MARTIAL CONVENING ORDER #1e-19

General Court-Martial Convening Order 1c-19 of 30 October 2020 is hereby modified for the case of United States v. Private First Class Travonte D. Williams, U.S. Marine Corps.

DELETE:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Second Lieutenant [redacted], U.S. Marine Corps; and
Master Gunnery Sergeant [redacted], U.S. Marine Corps.

ADD:

Second Lieutenant [redacted], U.S. Marine Corps;
Chief Warrant Officer 2 [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Sergeant [redacted], U.S. Marine Corps; and
Corporal [redacted], U.S. Marine Corps.

The general court-martial, as now established, is constituted as follows:

MEMBERS:

Lieutenant Colonel [redacted], U.S. Marine Corps;
Lieutenant Colonel [redacted], U.S. Marine Corps,
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Major [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Captain [redacted], U.S. Marine Corps;
Second Lieutenant [redacted], U.S. Marine Corps;
Chief Warrant Officer 2 [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Gunnery Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Staff Sergeant [redacted], U.S. Marine Corps;
Sergeant [redacted], U.S. Marine Corps
Corporal [redacted], U.S. Marine Corps and
Corporal [redacted], U.S. Marine Corps;

One alternate is authorized if excess members remain upon completion of the voir dire process.

[redacted]

M. S. CEDERHOLM
Major General
U.S. Marine Corps
Commanding General

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

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

5. UNIT OR ORGANIZATION		6. CURRENT SERVICE	
		a. INITIAL DATE	b. TERM
Marine Air Control Squadron 2, Marine Air Control Group 28, 2d Marine Aircraft Wing	DOB: 12 Mar 2000 EAS: 28 May 2022	29 May 2018	4 Yrs.

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1884.00	N/A	$1884.00	Pretrial Confinement	29 Nov 2019 – Present

II. CHARGES AND SPECIFICATIONS

10.

CHARGE I: Violation of the UCMJ, Article 80 (Attempt)

Specification: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near Greensboro, North Carolina, on or about 24 November 2019, attempt to commit a sexual act upon [redacted] by causing contact between [redacted] mouth and his penis, by using unlawful force.

CHARGE II: Violation of the UCMJ, Article 120 (Sexual Assault)

Specification 1: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, on or about 20 January 2019, commit a sexual act upon Private First Class [redacted], U.S. Marine Corps, by penetrating Private First Class [redacted]' vulva with his penis, without the consent of Private First Class [redacted].

Specification 2: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 16 July 2019, commit a sexual act upon [redacted] by penetrating [redacted]' vulva with his penis, without the consent of [redacted]

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-5	HQHQRON, MCAS Cherry Point, NC

d. SIG [redacted] e. DATE 20191210

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 10 day of December, 20 19, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

[redacted]
Typed Name of Officer
Captain, U.S. Marine Corps

[redacted]
Signature

HQHQRON, MCAS Cherry Point, NC
Organization of Officer
Judge Advocate
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

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

ORIGINAL

AE XIX
Pg 7 of 13

12. On 13 January 20 20, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a))* *(See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

HACS 2 / HACG 28 / 2d MAW
Organization of Immediate Commander

First Lieutenant, U.S. Marine Corps
Grade or Rank of Immediate Commander

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1030 hours, 13 January 20 20 at HACS-2
Designation of Command or

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

FOR THE[1] Commanding Officer

[redacted]
Typed Name of Officer

Official Capacity of Officer Signing

First Lieutenant, U.S. Marine Corps
Grade or Rank of Officer

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
2d Marine Aircraft Wing	MCAS Cherry Point, NC	FEB 03 2020

Referred for trial to the General court-martial convened by courts-martial convening order # 1-19

dated 19 August 2019, subject to the following instructions.[2] None.

By XXXXXXXXXXXXXXX of
Command or Order

K. S. HECKL
Typed Name of Officer

COMMANDING GENERAL
Official Capacity of Officer Signing

Major General, U.S. Marine Corps
Grade or Rank of Officer

[redacted]
Signature

15. On 14 FEBRUARY 20 20, I (caused to be) served a copy hereof on (each of) the above named accused.

G. SWEENEY
Typed Name of Trial Counsel

Captain, U.S Marine Corps
Grade or Rank of Trial Counsel

[redacted]
Signature

FOOTNOTES

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

DD Form 458 Reverse

ORIGINAL

AE XIX

CHARGE III: Violation of the UCMJ, Article 120 (Abusive Sexual Contact)

Specification 1: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, on divers occasions between on or about 15 January 2019 and on or about 15 February 2019, touch the buttocks of Lance Corporal [redacted], U.S. Marine Corps, with his hand with an intent to arouse his sexual desire without the consent of Lance Corporal [redacted]

Specification 2: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, between on or about 1 February 2019 to on or about 28 February 2019, touch the buttocks of Lance Corporal [redacted] U.S. Marine Corps, with his hand with an intent to arouse his sexual desire without the consent of Lance Corporal [redacted]

CHARGE IV: Violation of the UCMJ, Article 128 (Assault Consummated by a Battery)

Specification 1: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, on divers occasions between on or about 15 January 2019 and on or about 15 February 2019, unlawfully touch Lance Corporal [redacted], U.S. Marine Corps, on the lower back with his hand.

Specification 2: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, on or about 20 January 2019, unlawfully kiss Private First Class [redacted] U.S. Marine Corps, on her neck with his mouth.

Specification 3: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, unlawfully pick up [redacted] and put her in his car.

Specification 4: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, unlawfully place his hand over [redacted] mouth.

Specification 5: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near Greensboro, North Carolina, on or about 24 November 2019, unlawfully strike [redacted] in the head with his hand.

Specification 6: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near Greensboro, North Carolina, on or about 24 November 2019, unlawfully wrap his hands around [redacted] throat.

CHARGE V: Violation of the UCMJ, Article 128 (Simple Assault)

Specification: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, assault [redacted] by holding a knife to her face and neck.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. EDIPI	3. GRADE OR RANK	4. PAY GRADE
WILLIAMS, Travonte D.	[redacted]	PFC	E-2

5. UNIT OR ORGANIZATION	6. EAS	6b. CURRENT SERVICE	
		a. INITIAL DATE	b. TERM
MACS-2, MACG-28, 2d MAW	28 May 2022	29 May 2018	4 Yrs

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,884.10	$0	$1,884.10	Pretrial Confinement	29 Nov 2019 - Present

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE I: Violation of the UCMJ, Article 90

Specification (Failure to Obey Lawful General Order or Regulation): In that Private First Class Travonte Williams, U.S. Marine Corps, having received a lawful order from Chief Warrant Officer 4 [redacted] his superior commissioned officer, to not have contraband in Private First Class Williams's possession in the brig, did, on board Camp Lejeune, North Carolina, on or about 21 January 2020, willfully disobey the same.

ADDITIONAL CHARGE II: Violation of the UCMJ, Article 115

Specification 1 (Communicating Threats): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, wrongfully communicate to Sgt [redacted] and Lance Corporal [redacted] brig guards at the Marine Corps Installations East Regional Brig, a threat, to wit: that he was going to "fuck us both up", or words to that effect.

Specification 2 (Communicating Threats): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 22 August 2020, wrongfully communicate to Private First Class [redacted], a brig guard at the Marine Corps Installations East Regional Brig, a threat, to wit: "I'm gonna beat the fuck out of you bro", or words to that effect.

See Supplemental Page

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-4	HQHQRON, MCAS Cherry Point

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20201109

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 9th day of November, 2020, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

M. S. Bosakowski
Typed Name of Officer

HQHQRON, MCAS Cherry Point
Organization of Officer

Captain, U. S. Marine Corps
Grade

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

BOSAKOWSKI.MATTHEW.SEAN[redacted]
Digitally signed by BOSAKOWSKI.MATTHEW.SEAN[redacted]
Date: 2020.11.09 17:01:02 -05'00'
Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

ADDITIONAL CHARGE III: Violation of the UCMJ, Article 124a

Specification (Bribery): In that Private First Class Travonte D. Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 15 Aug 2020, wrongfully offer and give to Lance Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, the sum of $150, with the intent to influence the actions of said Lance Corporal [redacted] as compensation for providing Private First Class Williams an unauthorized cellular phone for use while in confinement.

ADDITIONAL CHARGE IV: Violation of the UCMJ, Article 128

Specification 1 (Aggravated Assault Inflicting Substantial Bodily Harm): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 3 January 2020, commit an assault upon Private [redacted] by striking him on the head with PFC Willliams's fist and did thereby inflict substantial bodily upon Private [redacted] to wit: a fractured orbital socket and severe bruising of the face.

Specification 2 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, unlawfully strike Sergeant [redacted], U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking, grabbing and spitting on Sergeant [redacted] body.

Specification 3 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking, grabbing and spitting on Corporal [redacted] body.

Specification 4 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking, grabbing and spitting on Corporal [redacted] body.

Specification 5 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking, grabbing and spitting on Corporal [redacted] body.

Specification 6 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 19 January 2020, unlawfully strike Lance Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking, grabbing and spitting on Lance Corporal [redacted] body.

Specification 7 (Simple Assault): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 22 February 2020, assault Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by aggressively lunging towards him.

Specification 8 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 11 May 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by punching him with his fist on his body.

Specification 9 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 11 May 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by punching him with his fist on his body.

Specification 10 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 11 May 2020, unlawfully strike Sergeant [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking him on his body.

Specification 11 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 11 May 2020, unlawfully strike Corporal [redacted] U.S. Marine Corps, a brig guard at the Marine Corps Installations East Regional Brig, by kicking him on his body.

Specification 12 (Assault Consummated by Battery): In that Private First Class Travonte Williams, U.S. Marine Corps, did, on board Camp Lejeune, North Carolina, on or about 9 July 2020, unlawfully strike Private First Class [redacted] by throwing a handful of scrambled eggs at his chest.

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES

v.

TRAVONTE WILLIAMS
Private First Class (E-2)
U.S. Marine Corps

DEFENSE MOTION TO COMPEL DISCOVERY

15 April 2020

MOTION

Pursuant to R.C.M. 701, 703(f), 703(g), 906(b)(7), and 914, the Defense moves this Court to order production of the evidence requested by the Defense and itemized below. This evidence is relevant, necessary, and material to the preparation of the Defense of Private First Class Williams.

FACTS

The Defense incorporates the facts as set forth in its motion for ruling of admissibility of evidence pursuant to M.R.E. 412 filed on 15 April 2020. The Defense also provides the following:

On 18 March 2020, the Defense submitted a request for discovery. Enclosure (1). On 24 March 2020, the Government responded, granting some and denying some. Enclosure (2). The Government has yet to provide the Defense with all responsive materials.

BURDEN

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

LAW

"In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846 (2019); *see also* R.C.M. 703(a). "Each party is entitled to the production of evidence which is *relevant and necessary*." R.C.M. 703(e) (emphasis

added). "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(e), Discussion.

The Defense is also entitled to certain discovery. R.C.M. 701; *see also United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "An accused's right to discovery is not limited to evidence that would be known to be admissible at trial; it includes materials that *would assist the defense in formulating a defense strategy*." *United States v. Luke*, 69 M.J. 309, 320 (C.A.A.F. 2011) (emphasis added). It also includes evidence that is favorable to the defense. R.C.M. 701(a)(6). "Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012).

"Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial 'gamesmanship,' reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citing MCM, United States (2002 ed.), Analysis of the Military Rules of Evidence A21–32). The Court of Appeals for the Armed Forces has held that trial counsel's obligation under Article 46, UCMJ, includes removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence. *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999). "If the Government fails to disclose discoverable evidence, the error is tested on appeal for prejudice, which is assessed in light of the evidence in the entire record." *Id.* at 334 (citing *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)).

"If information is withheld impermissibly, the test for prejudicial error is whether there is a reasonable probability of a different result had the suppressed evidence been disclosed to the defense." *Williams*, 50 M.J. at 440 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Coleman*, 72 M.J. 184, 185 (C.A.A.F. 2013) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

DISCUSSION

The following table is provided to summarize the status of requested discovery in this case:

Defense Request	Government Response
All investigator notes taken by NCIS, civilian law enforcement, command investigators, preliminary investigators, or any command representative regarding this case.	To the extent it exists, granted and previously provided.
All email and text communications between civilian law enforcement and NCIS, CID, command investigators, and command representatives as it pertains to this case.	Denied as overly broad and requesting material that is not relevant and necessary.
The "case assessment memo," or any similar document submitted by the trial counsel to the convening authority or staff judge advocate which discusses the strengths or weaknesses of the case.	Denied.
Transcript of all statements made by the Accused.	Granted.

The items listed above have not been discovered/produced to the Defense despite the Government's assertions otherwise. For the reasons detailed below, the requested items are relevant and necessary for the preparation of the Defense's case.

a. Non-responsive Explanations

Failure to adequately respond to Defense's discovery requests is a violation of the Supreme Court's holding in *Brady* and the Rules for Courts-Martial, and thus results in an unfair trial. "To the extent it exists, granted and previously provided" does not adequately inform the Defense. The Government has either not provided the requested items in totality, or has failed to affirmatively state whether what it has provided is everything within its possession. Furthermore, if the Government has or will continue to disclose the requested material, the Defense seeks a response as to whether or not the requested material exists and an affirmative response that the Government has or has not provided it in totality.

b. Investigatory Materials

The Defense requested any notes made by NCIS Agents, TC, TSO clerks, RTIs, or any other military personnel pertaining to this case. Although the Government asserts that "to the extent it exists, granted and previously provided," the Defense has not received such notes. These notes are relevant to the

Defense preparation. In order to effectively cross-examine government witnesses, it is necessary to know what each witness has said previously about this case. Whether inconsistent with prior statements or not, the Defense still needs to anticipate as much as possible what each government witness will assert during live testimony. As such, any notes are relevant and necessary to the preparation of the Defense's case. If the Government would claim some privilege over certain notes, then it should have asserted that privilege in response to the Defense's discovery request. Notes of witness interviews are highly relevant and should be disclosed.

c Correspondence Pertaining to Disposition

The Defense requested all documents considered by the CA prior to referral. R.C.M. 701(a)(1)(A) requires disclosure of "All papers that accompanied the charges when they were referred to the court-martial." The Government denied the request. It is clear under the rules that any documents accompanying the charge sheet should be disclosed. Email correspondence, memos, notes, and any allied paperwork documenting disposition of the case fits under this rule. The Defense has not received such documentation despite its relevance to the case. Accordingly, the Government should be compelled to disclose it.

CONCLUSION

To ensure the efficient processing of this case and to protect the rights of PFC Williams, the Defense moves for discovery/production of the above requested items. The Supreme Court made clear in *Brady* that society benefits when trials are fair. Importantly, *Brady* highlighted that the government cannot benefit from negligent or intentional omissions of evidence. To ensure equal access to evidence and witnesses under Article 46, the Defense seeks the information detailed above. These items are relevant and necessary for the preparation of the Defense's case. Failure to adequately respond to Defense's discovery requests is a violation of the Supreme Court's holding in *Brady* and the Rules for Courts-Martial, and thus results in a fundamentally unfair trial.

EVIDENCE

The following documents are enclosed:

Enclosure (1): Def. First Request for Discovery of 18 Mar 20

Enclosure (2): Gov. Response to Def. First Request for Discovery of 24 Mar 20

RELIEF REQUESTED

The Defense requests that this Court compel the discovery/production of the items identified herein. The Defense requests an Article 39(a), UCMJ, hearing if opposed.

[redacted]
J. K. MCGRATH
First Lieutenant, U.S. Marine Corps
Defense Counsel

****

Certificate of Service

I certify that I have served a true copy (via e-mail) of the above on the Navy-Marine Corps Trial Judiciary, Eastern Judicial Circuit, and opposing counsel on 15 April 2020.

[redacted]
J. K. MCGRATH
First Lieutenant, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY** Date: 22 April 2020

1. **Nature of Motion**. This is the Government's response to the defense motion to compel discovery dated 15 April 2020. For the reasons below, the Government respectfully requests that this court deny the defense motion.

2. **Burden of Proof**. Pursuant to RCM 905(c)(1) the burden of proof is by a preponderance of the evidence.

3. **Burden of Persuasion**. Pursuant to RCM 905(c)(2) the burden of persuasion is on the defense as the moving party.

4. **Summary of Facts**

a. The Government adopts the facts set forth in the defense discovery motion and other motions referenced therein.

5. **Statement of the Law**

The foundation for military discovery practice is Article 46, UCMJ, in which Congress mandated that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). R.C.M. 701 identifies specific discovery and disclosure responsibilities that implement the mandate set forth

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in Article 46, UCMJ. Id. Specifically, R.C.M. 701(a)(6) sets forth specific requirements with respect to "evidence favorable to the defense," providing that trial counsel shall disclose to the defense evidence known to the trial counsel which reasonably tends to

> (A) negate the guilt of the accused of an offense charged;
> (B) reduce the degree of guilt of the accused of an offense charged;
> (C) reduce the punishment; or
> (D) adversely affect the credibility of any prosecution witness or evidence

The broad discovery obligations mandated by Article 46, UCMJ, are also implemented by R.C.M. 703, which governs the production of witnesses and evidence. R.C.M. 703(f) states "[e]ach party is entitled to the production of evidence which is relevant and necessary," and requires that any request for the production of evidence shall list each piece of evidence and a description of each item "sufficient to show its relevance and necessity." Although these rules are intended to put into effect the broad discovery mandate set forth in Article 46, UCMJ, they are themselves grounded on the fundamental concept of relevance. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010)(quoting 1 John Henry Wigmore, Evidence in Trials at Common Law 655 (Peter Tillers rev. 1983)("[n]one but facts having rational probative value are admissible.") The defense is not entitled to a "fishing expedition", as the evidence sough must ultimately be "material to the preparation of the defense." *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

If discovery of documentary evidence is sought, it must appear that the documents are relevant to the subject matter of the inquiry and the request is reasonable. *United States v. Franchia*, 13 U.S.C.M.A. 315 (1962)("the availability of the machinery for extensive discovery

and production of evidence does not entitle the accused to use the machinery for improper purposes.") Article 46, UCMJ does not obviate an accused's requirement to demonstrate the necessity of evidence or assistance beyond what is already at hand. See *United States v. Hutchins*, 2018 CCA LEXIS 31 (N-M Ct. Crim. App. Jan 29, 2018). Military courts have rejected the notion that the mere prospect of finding relevant and necessary evidence satisfies the requirement for showing relevance and necessity. *Id.* See also *Franchia*, 13 U.S.C.M.A. at 320. R.C.M. 701(f) references the attorney work-product privilege, stating: "Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." As explained by our superior court: [t]he theory behind the work-product rule is that, after an attorney has spent time preparing the case, assembling and sorting the facts, deriving a theory and theme for the case, and planning the strategy to be employed, the opponent, without some overriding interests, may not needlessly interfere with the thought processes used in creating the documents. *United States v. Bowser*, 73 M.J. 889, 897, 2014 CCA LEXIS 764.

6. **Discussion**

The defense's discovery motion fails to articulate how production of email communications between NCIS, CID and the command as well as a case analysis memorandum is relevant and necessary to defense preparation. Accordingly, these defense's requests should be denied. Regarding all investigator notes from NCIS and civilian law enforcement, these documents have been previously provided to defense on 17 April 2020.

a. Communication between law enforcement and command. The request for all email and text message communication between NCIS, civilian law enforcement and the command is overly broad and is not necessary or relevant for defense in its

preparation for trial. The defense has presented no information to suggest the existence of relevant and necessary evidence within this broad category of documents. This type of request amounts to a mere fishing expedition.

b. Case Analysis Memorandum (CAM). Any analysis produced by trial counsel in preparation for its case is protected by attorney client privilege and work product doctrine and is not subject to disclosure. Additionally, due to the nature of this case no case analysis memorandum (CAM) was drafted.

7. **Evidence**

Enclosure 1. Fourteenth Additional Discovery Log

8. **Relief Requested**. The government requests that the court **DENY** the defense motion to compel the production of the above requested discovery.

8. **Argument**. The government requests oral argument.

[redacted]
G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 22 April 2020.

[redacted]
G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION TO COMPEL PRODUCTION OF AN EXPERT CONSULTANT (Clinical Forensic Psychologist -Dr. [redacted] Date: 15 April 2020

1. Statement of Good Cause. The Defense requests that Dr. [redacted] replace Dr. [redacted] as their desired Expert Consultant. Due to the recent COVID-19 outbreak in the United States, Dr. [redacted] is no longer accepting new clients or patients. *See* Encl 5.

2. Nature of Motion. Pursuant to Rule for Court-martial (R.C.M.) 703, defense respectfully moves this court to compel the production of the following expert witness: Dr. [redacted], or assignment of a forensic psychologist with qualifications equal to those of Dr. [redacted]

3. Summary of Facts.

The Defense incorporates the facts as set forth in its motion for ruling of admissibility of evidence pursuant to M.R.E. 412 filed on 15 April 2020. The Defense also provides the following:

a. During PFC Williams conversation to [redacted] in August 2019 he [redacted]

4. Discussion.

A fundamental pillar of American jurisprudence is an accused's right to be represented by counsel who is reasonably effective in investigating, preparing and presenting a defense. U.S. Const. Amend. VI. The Supreme Court has recognized that the *Sixth Amendment* right to counsel mandates the provision of adequate resources, to include experts, in order to present an effective defense. When necessary, service members are entitled to expert assistance for an adequate defense, without regard to indigency. *See*, U.S. Const. Amend. VI. ; see also *United States v.*

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Kelly, 39 M.J. 235, 237 (CMA 1994); *United States v. Burnette,* 29 M.J. 473 (CMA 1990); *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. Denied*, 479 U.S. 985 (1986); *see also* Art. 46, UCMJ, *10 U.S.C. § 846* (establishing "equal opportunity to obtain witnesses and other evidence" for the defense); Rules for Courts-Martial. 703(d), Manual for Courts-Martial, United States (2016 ed.). The right to supplement the defense team with expert assistance and witnesses is based on *Article 46, UCMJ*, Military Rule of Evidence 706, and R.C.M. 703(d). Courts uphold this right by placing the resources of the Federal Government at an accused's disposal to pay for expert assistance and guarantee an effective defense team. The right to expert assistance attaches when the defense demonstrates that such assistance is necessary. *United States v. Ndanyi,* 45 M.J. 315, 319 (CAAF 1996); *United States v. Gonzalez* 39 M.J. 459, 461 (CAAF 1994). In order to receive expert assistance, however, an accused must demonstrate that such a necessity exists. *Id.*

Dr. [redacted] Assistance is Necessary to Provide PFC Williams With a Proper Defense

As mentioned above, an accused is entitled to expert assistance provided by the Government if he can demonstrate necessity. *Garries*, 22 M.J. at 291. The Court of Appeals for the Armed Forces adopted a three- pronged test for determining necessity: (1) Why is the expert needed? (2) What would the expert accomplish for the defense? and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop? *United States v. Lee*, 64 M.J. 213, 217 (2006) (citing *United States v. Bresnahan*, 62 M.J. 137, 143(2005)). Appellate authorities use the "abuse of discretion" standard to review a military judge's decision regarding this three-pronged test. *United States v. Short*, 50 M.J. 370, 373 (1999), *cert. denied*, 528 U.S. 1105, 145 L. Ed. 2d 712, 120 S. Ct. 843 (2000). Each of the three prongs shall be addressed separately.

(1)Why the Defense Needs Dr. [redacted]

Dr. [redacted] has been practicing as clinical psychologist for over 27 years. He has Ph.D. in Clinical Psychology from the University of Georgia and a Master's Degree in Clinical Psychology from the University of Louisiana at Monroe. For nearly 30 years, he has provided evaluations and psychological assessment in criminal and civil cases. Dr. [redacted] has authored six books that have been published in his field, as well as, numerous papers, book reviews, and scholarly articles.

Currently, Dr. [redacted] is the owner of a clinical and forensic psychological service provider in Charlotte, North Carolina. In that capacity, he provides clinical and forensic psychological services to local resident, public agencies and court ordered evaluations/assessments for alleged sex offenders. Additionally, he provides evaluations for the likelihood of recidivism, as well as general psychological assessment and recommendations. In short, Dr. [redacted] unique background in the field of psychology is necessary to conduct an adequate pretrial investigation and to uncover evidence relevant for sentencing.

In *Strickland v. Washington*, the Supreme Court held that defense counsel has a duty to bring to bear such skill and knowledge that renders the trial a reliable adversarial testing process. 466 U.S. 668, 688 (1984). With respect to pretrial investigations the Court held that, "counsel have a duty to make reasonable investigations." *Id.* The Court relied on the "...prevailing norms of practice as reflected in American Bar Association's standards .... [as] guides to determining what is reasonable," *Id.* at 688-689.

The ABA's "Criminal Justice Standards for the Defense Function," state that,

> " Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties...Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of

inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise."

Part IV; Standard 4-4(c) "Duty to Investigate and Engage Investigators." Here, Dr. [redacted] evaluations of the prosecution's case enables the defense to make reasonable pretrial investigations into the content of the behaviors and conversations that PFC Williams had with his accusers and attack the material contained in the NCIS reports. Therefore, Dr. [redacted] allows the defense to employ an adequate pretrial investigation and follow the norms set by the ABA.

Moreover, military appellate courts have relied on *Strickland* in overturning a capital sentence based on the denial of a mitigation investigation specialist for the defense and defense counsel's ineffective assistance of counsel in conducting an adequate mitigation investigation. *United States v. Kreutzer*, 59 M.J. 773, 776 (A. Ct. Crim. App. 2004) aff'd, 61 M.J. 293 (C.A.A.F. 2005). PFC Williams does not face capital punishment, but he does face significant confinement and registration on the Sex Offender Registry if convicted. Regardless of PFC Williams's consequences, a sentencing judge is required to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, and sometimes magnify the crime and the punishment. *Pepper v. United States*, 131 S. Ct. 1229 at 1239-40 (U.S. 2011). Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime. *Id.* Specifically, military judges utilize five principles to determine the sentence of servicemembers that are convicted at courts-martial. These principles are: 1) rehabilitation of the wrongdoer; 2) punishment of the wrongdoer; 3) protection of society from the wrongdoer; 4) preservation of good order and discipline in the military; and 5) deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. Military Judges' Benchbook Ch 2, §VI, para 2-6-9. Here, the sentencing judge would be presented a 20 year old Marine with no prior criminal

record, or previous sexual misconduct. It is anticipated that Dr. [redacted] will be able to offer expert testimony relating to two of those five factors. In particular, he would testify about the rehabilitative potential of the accused and the protection of society by an actuarial assessment of PFC Williams's risk to recidivate. Therefore, Dr. [redacted] assistance is needed in order for the defense to effectively present sentencing evidence for the accused. R.C.M. 1001(g).

(2) What Dr. [redacted] Would Accomplish For the Defense

In examining the second prong, military courts look to how the requested expert assistant would aid the defense in preparing its case. *Ndanyi* at 319. In the present case, Dr. [redacted] would provide a thorough psychological evaluation of PFC Williams.

A psychological evaluation of a sexual offender requires a review of all materials relevant to the offenses. This evaluation includes statements to the police, previous psychological evaluations, witness accounts of his behavior, and past criminal records. Dr. [redacted] would be able to use his education and experience to conduct a series of forensic psychological assessments of PFC Williams. These assessments include the Millon Clinical Multiaxial Inventory, 3rd edition (MCMI-III), the Multiphasic Sex Inventory, 2nd edition (MSI-II), the STATIC-99R actuarial assessment instrument and the Structured Risk Assessment—Forensic Version (SRA-FVL).

The MCMI-III uses a computer-generated scoring system that describes the personality functioning of others who respond in the same manner as the individual assessed. Scores will be automatically modified by the computer scoring system to compensate for the individual's test-taking approach. In doing so, the scoring system provides valid and interpretable results even if the individual has a tendency to exaggerate or downplay aspects of his personality.

The MSI-II is a theory-based, nationally standardized self-report questionnaire designed to assess a wide range of psychosexual characteristics of the sexual offender, or a person accused of having committed sexual offenses. It is designed to identify an individual's attempt to exaggerate or to deny psychopathology. The MSI-II incorporates twelve separate measures that can test for an individual's carelessness, malingering, inconsistency, evasiveness, defensiveness, and deception. The MSI-II measurement scales have been specifically designed and constructed to assess an individual's sexual behaviors based on recommended diagnostic criteria from the Diagnostic and Statistical Manual 5, Paraphilias criteria. One of the scales is the Rapist Comparison (RC) Scale, an empirically based measure using demographically comparable but distinctly different samples of admitting adult male sex offenders. The results can show commonality or lack of commonality in thinking and behavior between the individual assessed and the reference group of adult male sex offenders.

The STATIC-99R is an actuarial scale with moderate predictive accuracy in ranking offenders according to their relative risk for sexual offense recidivism. Variables used on the STATIC-99R include the number of prior sex offenses, number of prior sentencing dates, convictions for non-contact sex offenses, the presence of non-sexual violence during the index offense, age at release, victim gender, the offender's marital history, and his relationship to the victim. The STATIC-99R has been revised in order to fully incorporate the relationship between age at release and sexual recidivism. An individual's score on the STATIC-99R can range from -3 to 12, with higher scores indicating a higher risk of reoffending. At the lower end of this spectrum, Dr. [redacted] could hypothetically determine that the probability of PFC Williams re-offending are identical to that of a member of the general public.

The Structured Risk Assessment—Forensic Version (SRA-FVL), is an instrument designed to assist professionals in identifying criminogenic needs relevant to adult sex offending. It is intended to assess long-term vulnerabilities (LTV's) that are relatively static (i.e., unchanging) that can then be used to form the focus of the offender's treatment plan. Progress in treatment can then be judged in terms of how well the offender learns to manage their LTV's. Scores on this assessment change when the patient exhibits healthy functioning in the community that has been sustained long enough to signal changes in the underlying LTV's.

Dr. [redacted] is capable of performing all of the tests noted above. Additionally, he would conduct an extensive in person interview with PFC Williams. Dr. [redacted] would also review reports, transcripts, and other documents provided by the defense. Based on these and other assessments, Dr. [redacted] could draft a psychological report describing not only the results of the assessments, but also findings, opinions, and recommendations. Dr. [redacted] could then discuss with counsel how to best present his findings, opinions, and recommendations, and could potentially testify as a sentencing witness. Therefore, Dr. [redacted] psychological evaluations would allow the defense counsel to undercut the Government's case concerning the specific mental states needed to commit the charged offenses, and present vital sentencing evidence if the court convicts PFC Williams.

(3) Dr. [redacted] Evaluations Cannot be Supplemented or Duplicated by Defense Counsel.

Dr. [redacted] received a Bachelor of Arts in Psychology in 1980 from Harding College and received his Master's degree from University of Louisiana at Monroe, as well as, his Ph.D in Clinical Psychology from the University of Georgia. As a private practitioner, Dr. [redacted] has evaluated and assessed alleged sex offenders, and their risk of re-offense for nearly 30 years. Dr. [redacted] curriculum vitae makes it readily apparent that competence in the field of forensic

psychology and sex offender evaluation analysis can only be achieved after years of study and dedicated research in the field.

Neither defense counsel in this case have a Ph.D. nor are recognized experts in the field of forensic psychology. The defense is unable to gather and present evidence in this area because the defense does not possess the acumen and experience that Dr. [redacted] possesses. He will educate the defense on the issues associated with forensic psychology and how the human mind works. Most significantly, neither defense counsel can testify nor are experts in this field, so Dr. [redacted] could rise to the level of an expert witness and provide testimony during this trial. No amount of research or self-education between now and trial will adequately prepare defense counsel in understanding the science of sex offender evaluation, whether on the merits or sentencing, which is required to effectively provide assistance of counsel for PFC Williams. Therefore, Defense Counsel does not have the expertise to effectively represent PFC Williams without the assistance of an expert consultant in the field of forensic psychology.

(4) Fundamental Fairness Justifies Necessity:

According to *Robinson*, in order to satisfy the necessity test an accused must do two things. First, he must show the military judge that there exists a reasonable probability an expert would be of assistance as the defense has shown above. *Robinson,* at 88-99. Second, *Robinson* includes a fairness prong. *Id.* It is therefore appropriate to consider how denial of this request will result in a fundamentally unfair trial. The government has witnesses, along with his accusers that will testify that they have knowledge of PFC Williams's propensity to commit these types of offenses. It would be fundamentally unfair to deny the defense an expert in the field of forensic psychology in order to rebut this type of testimony put forth by the government. Failure to produce Dr. [redacted] would effectively deprive PFC Williams of his ability to

present an adequate defense in this case and would deny him "[m]eaningful access to justice" in a case in which confinement is a possible outcome. *Okla.*, 470 U.S. at 77.

It is long held that expert testimony concerning recidivism and an accused's potential for rehabilitation of sexual offenders is proper sentencing evidence. *United States v. Scott*, 51 MJ 326 (CAAF 1999). Case law and the Military Judges' Benchbook both recognize that members are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial. *United States v. Frey*, 73 M.J. 245, 251 (CAAF 2014) (citing *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998)); *United States v. Hargrove*, 25 M.J. 68, 71 (C.M.A. 1987); However, the *Frey* court stated:

> "Whether or not a person convicted of a particular offense is more or less likely to offend again or become a serial recidivist is a question requiring expert testimony, empirical research, and scientific and psychological method, inquiry, and evidence. Recidivism is not a matter resolved through appeal to common sense or a member's knowledge of "the ways of the world." Moreover, where sexual offenses are concerned, especially those against children, such appeal is likely to invoke an emotional and stereotypical response, not necessarily an empirical one."

Frey, 55 M.J. at 250. The Court elaborated that a members' "common sense" is not adequate to evaluate the recidivism rates of a convicted sex offender. *Id.* Dr. [redacted] is qualified to provide expert testimony on recidivism rates, explain empirical research, and speak on the scientific methods used to determine an accused's risk to reoffend. As dictated by the appellate courts the members need expert testimony to determine an appropriate sentence. Precluding the Defense from employing Dr. [redacted] would result in an inadequate sentencing

case for PFC Williams and prevent the member's from determining an appropriate sentence. Therefore, Dr. [redacted] is necessary to provide PFC Williams a fundamentally fair trial.

5. Evidence and Burden of Proof. The Defense has the burden of proof by a preponderance of the evidence. The following attachments are offered in support of this motion:

Attachment (1): Defense Request for Expert Consultant
Attachment (2): Government's Response
Attachment (3): Dr. [redacted] C.V.
Attachment (4): Dr. [redacted] Fee Schedule
Attachment (5): Dr. [redacted] Unavailability
Attachment (6): Dr. [redacted] Affidavit
Attachment (7): Scholarly Articles Submitted by Dr. [redacted]

6. Relief Requested. The defense respectfully requests this court to compel the production of Dr. [redacted] as an expert consultant, which will likely ripen into an expert witness for the court-martial.

7. Argument. The Defense desires oral argument.

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

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the court and opposing counsel on 15 April 2020.

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

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	GOVERNMENT RESPONSE TO MOTION TO COMPEL: **CLINICAL FORENSIC PSYCHOLOGIST** 22 April 2020

1. **Nature of the Motion.** The defense requested that this court compel the production of an expert consultant in the field of clinical forensic psychology, Dr. [redacted]. The government opposes the motion.

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

3. **Proposed Findings of Facts**

   a. The accused is a twenty year old male, Private First Class who is currently charged with multiple violations of the UCMJ including several sexual offenses.

   b. Multiple female Marines reported that while assigned to Camp Johnson onboard Camp Lejeune, North Carolina in the beginning months of 2019, the accused engaged in unwanted sexual advances.

   c. Private First Class [redacted] reported that the accused sexually assaulted her in her barracks room on or about 20 January 2019.

   d. Lance Corporal [redacted] and Lance Corporal [redacted] reported that between January 2019 and February 2019 the accused engaged in conduct that constituted abusive sexual contact.

e. A civilian female, Ms. [redacted] reported that in July 2019 the accused sexually assaulted her at her residence.

f. Ms. [redacted] also reported that in August 2019 the accused assaulted her and threatened her with a knife.

g. In November 2019, a civilian female, Ms. [redacted], reported that the accused assaulted her and attempted to rape her.

h. The accused was placed in pretrial confinement on 29 November 2019 and remains in confinement at the present.

4. Discussion of the Law

An accused is entitled to an expert consultant "to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001) (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986)). On a motion to compel expert assistance, "the service member bears the burden of demonstrating the necessity for the expert assistance he requests." *United States v. Allen*, 31 M.J. 572, 624 (N.M.C.M.R. 1990). R.C.M. 703(d) provides for the employment of an expert assistant for the accused when it is relevant and necessary.

In order to determine necessity, courts apply a two pronged test: "[t]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006). This first prong of the *Freeman* test was previously defined in the three-pronged test below:

A. Why is the expert assistance needed?

B. What would the expert assistance accomplish for the accused?

C. Why is defense counsel unable to gather and present the evidence that the expert assistant would be able to develop?

United States v. Gonzalez, 39 M.J 459, 461 (1994).

In particular, the defense must show what it expects to find; how and why the defense counsel and staff cannot do it; how cross-examination will be less effective without the services of the expert; how the alleged information would affect the Government's ability to prove guilt; what the nature of the prosecution's case is; including the nature of the crime and the evidence linking him to the crime; and how the requested expert would otherwise be useful. *Allen*, 31 M.J. at 623–24 (internal citations omitted).

In the process of applying this three-part test, military courts have held that to demonstrate necessity, an accused "must demonstrate something more than a mere possibility of assistance from the requested expert . . . ." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994))(The *Robinson* court determined that there was no error in denying an expert and additional testing in a drug use case even though it was established that the test might have assisted the defense.). The defense "must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id.* Additionally, the Robinson court determined that

One factor courts use to determine if a trial would be fundamentally unfair to the accused is whether the content of the government's expert knowledge is central to the government's case. When scientific analysis is the "linchpin" of the government's case, a denial of expert assistance may be an abuse of discretion. *United States v. McCallister*, 55 M.J. 270, 276 (C.A.A.F. 2001). However, reviewing courts have readily distinguished *McCallister* in cases where the subject matter of the requested expert assistance is not central to the government's case. *See, e.g., United*

States v. Lloyd, 69 M.J. 95, 100 (C.A.A.F. 2010). Additionally, although an accused may be entitled to expert assistance upon the proper showing of necessity, he is not necessarily entitled to an expert of his own choosing. *United States v. Short*, 50 M.J 370, 372–73 (C.A.A.F. 1999) (citing *United States v. Burnette*, 29 M.J 473, 475 (C.M.A. 1990)). If an expert is necessary, all that is required is that competent assistance be available, which may be in the form of an adequate government substitute. *Id.* "In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986).

Case law has rejected a plenary argument for the necessity of recidivism testimony in sexual assault cases. In *United States v. Arthurton*, a per curiam opinion the Navy and Marine Corps Court of Appeals (NMCCA) determined that the defense did not meet their burden to compel the production of an expert consultant in the field of forensic psychology. *United States v. Arthurton*, 2017 CCA LEXIS 115 (N.M.C.C.A 2017). In *Arthurton*, the accused had corresponded online with two undercover law enforcement officers posing as underage girls. The accused ultimately traveled to meet an individual he thought was a fifteen year old girl and was apprehended by law enforcement. The defense counsel in *Arthurton* requested an expert to "rebut claims by the government, on both the merits and at sentencing, that the appellant 'is predisposed to commit sexual misconduct with children…that he is a pedophile, some sort of sexual predator, [and] has an interest in children as sexual objects.'" *Id.* at 3. The court determined that this only established a "mere possibility" of mitigation that was insufficient to compel the production of such an expert. *Id.* at 5.

Furthermore, the seriousness of the alleged offense alone does not trigger a requirement for expert assistance in mitigation. *See United States v. Kreutzer*, 59 M.J. 773, 776 (Army Ct. Crim. App. 2004) ("A capital referral alone does not mean an accused requires or is entitled to expert

assistance."). Rather, in the usual case, the "[p]resentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses." *United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994). To overcome this presumption, the Defense must demonstrate how the accused's exceptional psycho-social history requires expert assistance for counsel to understand and develop. *Kruetzer*, 59 M.J. at 777-78.

In *United States v. Frey*, the Court of Appeals for the Armed Forces determined that the trial counsel's inflammatory statements during his sentencing argument of a child sexual assault case crossed the line from "hard blows" to "foul blows." *United States v. Frey*, 73 M.J. 245, 246 (C.A.A.F. 2014)(internal citations omitted). The trial counsel, in attempting to counter the defense argument that the appellant had never committed a similar offense in the past, argued that the members should "...think what we know, common sense, ways of the world, about child molesters." *Id.* at 247. The court determined that this argument was improper but affirmed the sentence because of the sufficiency of the evidence supporting the sentence. *Id.* at 251. The court discussed that it was improper for the trial counsel and the military judge to direct the members to use their common sense or understanding of the ways of the world in determining an appropriate sentence. While it is established that member should use these traits to evaluate multiple other aspects of courts-martial proceedings (i.e. lay testimony, defenses, credibility, etc...) it is an improper standard to use for calculating recidivism; *Id.* at 250. Thus the reason that the argument was impermissible. *Id.* The court reiterated that "members are supposed to adjudicate a sentence based on the evidence presented and the military judge's instructions, which define, among other things, the potential confinement exposure of the defendant and relevant sentencing factors and philosophies." *Id.* The court follows this reminder with the guidance that

> "whether or not a person convicted of a particular offense is more or less likely to offend again or become a serial recidivist is a question requiring expert testimony, empirical research, and scientific and psychological method, inquiry, and evidence.

> Recidivism is not a matter resolved through appeal to common sense or a member's knowledge of 'the ways of the world.'" *Id.*

Therefore if the government or defense is to offer specific recidivism evidence it should be done through an expert but there is no requirement to do so in every case.

The United States Supreme Court established in *Strickland v. Washington*, a requirement for the defense to conduct "reasonable investigations." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This case examined the level of assistance required from a defense counsel at trial to avoid the label of "ineffective." *Id.* at 671. The Court described that the trial level defense counsel "cut his efforts [to assist his client] short" because of the client's confession to additional crimes. *Id.* In examining the level of assistance required to be deemed effective, the Court tied the definition of "reasonable investigations" to American Bar Association (ABA) criteria for the conduct of a defense counsel. *Id.* The Court also concluded that there were strategic and economies of force reasons not to conduct investigations into every potential avenue of a defense and stated, "[i]f counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective." *Id.* at 681. Nowhere does the Court require the use of experts in certain cases nor does it mandate recidivism experts in any category of cases. The Court acknowledges that there is a tendency from those who have been convicted to second guess the decisions made by their defense counsel and the "court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

As cited above, "a military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion." *United States v. Lloyd,* 69 M.J. 95, 99 (C.A.A.F. 2010). An abuse of discretion occurs when the findings of fact are clearly erroneous or the court's decision is the result of an erroneous view of the law. *Id.* "The abuse of discretion standard is a strict one, calling for

more than a mere difference of opinion." *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F. 2000) (citation omitted). "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (internal quotations omitted).

5. Applicability of the Law to this Case

In order to compel Dr. [redacted] assistance, the Defense must demonstrate by a preponderance of the evidence (1) that an expert is needed, (2) that his assistance will develop relevant and necessary evidence, and (3) that defense counsel is unable to gather and present such evidence without such expert assistance. *Gonzalez*, 39 M.J. at 459. The Defense must further demonstrate by a preponderance of the evidence that the denial of such expert assistance would result in a fundamentally unfair trial. The Defense motion to compel Dr. [redacted] assistance should be denied because it fails to meet any of these thresholds.

a. The Defense has Failed to Establish why an Expert is Needed.

To justify the necessity of an expert, the defense assumes that the accused will be convicted as currently charged. The defense further presumes that the government will make arguments that mischaracterize the accused's misconduct in seeking a higher than appropriate sentence. While it is possible that the accused could be convicted as he is currently charged this is far from decided at this point. The requirement for this consultant and potential witness is not yet ripe. The defense relies on *Strickland* to argue that an expert consultant is required to avoid potential claims of ineffective assistance of counsel. The Court in *Strickland* established a much more deferential standard as to what constitutes ineffective assistance of counsel than the defense suggests. Additionally, the standard is tied to the steps that the defense counsel took in their representation and investigation of the facts of the case not whether or not the assistance of an expert was obtained.

The defense restated the five sentencing principles in the Military Judge's Benchbook and

indicated that "it is anticipated that Dr. [redacted] will be able to offer expert testimony relating to two of those five factors." Defense Motion at 5. This argument admits "a mere possibility" of assistance by Dr. [redacted] A finding of necessity here would essentially amount to a determination that this type of expert assistance is necessary in every sexual assault case.

As detailed above the Navy and Marine Corps Court of Appeals has rejected the notion that recidivism testimony from an expert witness is required in every cases involving a sexual assault and a significant potential sentence. At this time it is unknown what Dr. [redacted] would discover in an evaluation of the accused and it is possible that it would not be favorable to the defense. The defense has already identified two favorable arguments that require no further investigation. The accused is twenty years old and has no prior criminal history.

Furthermore, the seriousness of the alleged offense alone does not trigger a requirement for expert assistance in mitigation. *See United States v. Kreutzer*, 59 M.J. 773, 776 (Army Ct. Crim. App. 2004) ("A capital referral alone does not mean an accused requires or is entitled to expert assistance."). As cited above in the typical case it is the defense counsel not the experts that present the case in extenuation and mitigation. *United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994). The Defense has failed to demonstrate how the accused in this case has an exceptional psycho-social history that requires expert assistance for them to understand and develop a case. The Defense has failed to offer any evidence that would call into question the accused's mental health at the time of the alleged offenses.

b. The Defense has Failed to Adequately Articulate what the Expert would Accomplish.

The Defense asserts that the requested expert will provided the following assistance: 1) assess the accused and then assist the defense in crafting a presentencing case, 2) potentially testify at presentencing. These two benefits of Dr. [redacted] assistance are really two sides of the same coin and only one pertains to his status as a defense consultant. Assisting in preparation of a

defense presentencing argument is the only benefit that Dr. [redacted] would be able to accomplish before being established as a defense witness. These assertions fail to satisfy the defense burden because they establish no more than the mere possibility of expert assistance. Again, it is currently unknown what Dr. [redacted] assessment of the accused would reveal. Thus any mitigation of a potential sentence is speculative.

c. The Defense has Failed to Demonstrate that they are unable to Develop and Present Evidence without Expert Assistance.

The Defense argues that an expert in forensic psychology, specifically to complete multiple psychological evaluations to predict his sexual recidivism, are necessary in order to prepare for their presentencing argument. The defense argues that no member of the defense team is trained or educated in the field of forensic psychology. This argument is also overbroad because it fails to identify any specific facts about this case that require psychological expertise to understand and assess. The argument at presentencing to suggest a low likelihood of recidivism is made by the circumstances of this case alone. The accused is a twenty (20) year old Marine with no prior criminal history. "[T]he duty of counsel, whether of prosecuting or defending, is to educate themselves concerning any issues involved in their case. Sole reliance on the advice of experts is no substitute for the hard work required to obtain the knowledge necessary to prepare a client's case for trial." *Allen*, 31 M.J. at 628 (quoting *United States v. True*, 28 M.J. 1057, 1062 (C.M.A. 1989)) (internal quotations omitted). In this case, the defense has heretofore failed to demonstrate due diligence, such as demonstrating while they could not make a sufficient argument from the circumstances of this case as to why the chance of recidivism is low.

d. Denial of Expert Assistance will not Result in a Fundamentally Unfair Trial.

Only in cases where scientific analysis is the "linchpin" of the Government's case may denial of expert assistance violate the Accused's Constitutional rights. This case falls at the other

end of the spectrum. The government has not consulted with a recidivism expert in this case and has no plans to do so. The defense points to *Robinson* as an indicator that the lack of an expert in this field would result in a fundamentally unfair trial. This reliance is misplaced as the *Robinson* court determined that even if the expert could have helped the defense, a denial did not result in a fundamentally unfair trial. As such, denial of the defense's motion will not result in a fundamentally unfair trial.

The defense has failed to meet its burden to show why expert assistance is necessary, what the expert would accomplish for the accused, why detailed counsel are unable to sufficiently investigate potential evidence in mitigation and extenuation, and why they would be unable to present this presentencing evidence without the requested consultant's assistance. Denial of the requested expert will not result in an unfair trial.

6. **Relief Requested**. The Government requests that the Court deny the defense motion to compel the requested expert consultant.

7. **Evidence**. N/A.

8. **Argument**. The Government requests oral argument.

[redacted]
W. P. PENDLEY
Lieutenant Colonel, U.S. Marine Corps
Government Trial Counsel

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the court and opposing counsel via electronic mail on 22 April 2020.

[redacted]
W. P. PENDLEY
Lieutenant Colonel, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance Request) Date: 16 June 2020

1. **Nature of Motion.** Pursuant to Rule For Courts-Martial 906(b)(l), the Defense and Trial Counsel move the court to continue the Article 39(a) session scheduled for Tuesday, 23 June 2020 and trial scheduled for 22-26 June 2020.

2. **Summary of Facts.**

a. The Court issued a Trial Management Order on 6 March 2020 and scheduled a trial in the case of U.S. v. PFC Travonte Williams for 22-26 June 2020.

b. The Court issued a subsequent order on 3 June 2020 postponing a previously scheduled Article 39(a). The hearing was moved to Tuesday, 23 June 2020 and was to serve as a Sentencing Hearing given the fact the parties were conducting pre-trial negotiations.

c. On 27 May 2020, Mr. Richard McNeil was retained by the Accused and filed his Notice of Appearance.

d. After consulting with Mr. McNeil, the Accused has elected to exercise his constitutional right to a trial, despite prior negotiations to enter into a plea agreement.

e. As a result, the parties request that the Court postpone the Article 39(a), and trial. Accordingly, the parties request that the Court adopt the Updated Trial Management Order. See Enclosure 1.

f. Neither party opposes this motion and are currently adjusting personnel assigned to

this case.

3. **Evidence and Burden of Proof.** The Defense has the burden of proof by a preponderance of the evidence.

4. **Relief Requested.** Pursuant to Rule For Courts-Martial 906(b)(l), the Defense respectfully requests the Court for a continuance of the subject case.

5. **Argument.** The Defense requests oral argument on 23 June 2020.

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

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the Court and opposing counsel on 16 June 2020.

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

Trial Counsel Response

The Government does not oppose the Motion for Continuance.

[redacted]
William P. Pendley
Lieutenant Colonel, U.S. Marine Corps
Trial Counsel

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Court Ruling

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

39a will be held on _____ and/or

Trial will commence on _____ OR

This motion will be litigated at a 39a on _____.

_____ _____ _____ _____ _____ _____ _____ _____ _____

DATE MILITARY JUDGE SIGNATURE

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

UNITED STATES V. **TRAVONTE WILLIAMS** **Private First Class (E-2)** **U.S. Marine Corps**	**DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES** **14 May 2020**

MOTION

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial 703, 905(b)(4), 906(b)(7), 1001(e), the Sixth Amendment to the United States Constitution, and other applicable authority, the Defense moves this Court to order production of the witnesses listed below.

FACTS

The Defense incorporates the facts as set forth in its motion for ruling of admissibility of evidence pursuant to M.R.E. 412, filed on 15 April 2020. The Defense also provides the following:

The Defense submitted to Trial Counsel a witness request in accordance with the trial milestones on 25 March 2020. Enclosure (1). The Defense requested twenty-seven witnesses. The Government responded on 3 April 2020, granting fifteen and denying twelve. Enclosure (2). The Defense submitted to Trial Counsel a supplemental witness request on 15 April 2020, requesting two additional witnesses. Enclosure (3). The Government responded on 20 April 2020, denying both as not relevant or necessary due to lack of temporal context. Enclosure (4).

BURDEN

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

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LAW

There are several rules and statutes that control the production of witnesses before a court-martial. Both Article 46, UCMJ, and the Rules for Court-Martial implementing the statute set forth how witness will be produced for the court-martial. "The prosecution and defense . . . shall have equal opportunity to obtain witnesses and evidence, including the benefits of compulsory process." R.C.M. 703(a); Article 46, UCMJ. Upon timely submission by the defense of a request for witnesses, the Manual requires the trial counsel to arrange for the presence of requested witnesses unless the trial counsel contends that witnesses' presence is not required under R.C.M. 703. R.C.M. 703(c)(2)(D). Upon such a contention, the defense may submit the matter to the military judge for decision. *Id.* While there is not specific provision in the Constitution that provides for the defense to have a right to obtain evidence, a right of compulsory process has been read into the Sixth Amendment right to present a defense and confront witnesses. *See Washington v. Texas*, 388 U.S. 14 (1967).

Materiality has been defined by the Court of Military Appeals as embracing the "'reasonable likelihood' that the evidence could have affected the judgment of the military judge or court members." *United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979). Materiality of a witness turns on whether the witness' testimony "either negates the Government's evidence or supports the defense." *United States v. Allen*, 31 M.J. 572, 610 (N.M.C.R. 1990), *aff'd*, 33 M.J. 209 (CMA 1991), *cert. denied*, 112 S.Ct 1473 (1992). If so, then the witness is material.

A witness is "necessary" when the testimony "would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Breeding*, 44 M.J. 345, 350 (1996). The factors the military judge should consider in determining whether the personal appearance of a witness should be compelled are set forth in *Allen*. The factors considered in determining materiality are as follows:

> (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by nonamenability

> to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service.

Allen, 361 M.J. at 610-11 (citations omitted). Other considerations such as cost, distance or inconvenience will not deem their testimony irrelevant.

The Sixth Amendment to the Constitution affords the Accused in a criminal trial the absolute right to "confront the witnesses" against him. More than a mere right to cross-examining opposing witnesses, this Constitutional guarantee ensures the Accused has the right to present witnesses who will contradict, refute, or impeach the complaining witnesses. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. It is incumbent upon the Defense to present such evidence to the trier of fact so that they may consider it along with that provided by the prosecution in deciding where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington*, 388 U.S. at 19.

DISCUSSION

Each of the witnesses requested herein are relevant and necessary to the Defense's case. The relevance and necessity of each witness is discussed in Enclosure (1) and detailed below. In denying the Defense's requested witnesses, the Government variously cited relevance, necessity, and cumulative.

Relevance is the lowest legal hurdle to overcome. All that is required is that the evidence offered make a fact at issue more or less likely. The testimony of the requested witnesses each makes important facts for the Defense more likely to be true or show that alleged facts that the Government will be presenting at trial are likely not true.

Necessity only requires that the Defense show that the requested witness would contribute to a party's presentation of the case in some positive way on a matter in issue. Moreover, the witnesses

requested by the Defense are not cumulative. In addition to that, however, the Court should deny witnesses based on cumulativeness rarely and only where the cumulativeness is clear. Otherwise, the constitutionally guaranteed right to present a complete defense will be impaired.

In support of this motion, the following is provided with respect to certain witnesses that were denied by the Government:

Officer [redacted] Greensboro Police Department. Officer [redacted] responded to the call pertaining to the alleged assault against [redacted] Enclosure (5). [redacted] reported directly to Officer [redacted] her interactions with PFC Williams and the events that occurred earlier that same evening. Following this conversation with [redacted] Officer [redacted] drove [redacted] home and made contact with her mother. Officer [redacted] is relevant and necessary to the Defense's case in light of his interactions with [redacted] in the hours following the alleged assault, as well as his interactions with her mother when she first learned of the circumstances surrounding the allegations. The government asserts that Officer [redacted] is cumulative of Officers [redacted] because they were also present at the scene; however, they were not present when Officer [redacted] drove [redacted] home and interacted with her mother. Officer [redacted] will testify to his observations of [redacted] and her mother during this timeframe and the substance of his conversations with both. He will also be able to corroborate and/or contradict [redacted] and her version of the events.

Officer [redacted] Greensboro Police Department. Officer [redacted] conducted a follow-up investigation pertaining to the alleged assault against [redacted] the day after the alleged assault occurred. Enclosure (6). Officer [redacted] made contact with [redacted] at her residence, discussed the circumstances of the night prior between [redacted] and PFC Williams, and transported [redacted] in an effort to locate and identify PFC Williams and also locate her phone, which was lost the night prior. Officer [redacted] is relevant and necessary to the Defense's case in light of his one-on-one interactions with Williams the day following the alleged misconduct. The government asserts that Officer [redacted] is cumulative of Officers [redacted] because they were present at the scene the night prior; however, they were not present the following day, when Officer [redacted] made contact with [redacted] Officer [redacted] will testify to his interactions with and observations of [redacted] during a critical timeframe following the alleged

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misconduct. Officer [redacted] is the only investigator who can testify to this effect, as he was the only investigator to have interacted with [redacted] during this timeframe.

Officer [redacted], New Hanover County Sheriff's Office. Officer [redacted] was the first officer to respond to [redacted] allegations against PFC Williams. Enclosure (7). He can testify to his interactions with and observations of [redacted]. The government asserts that Officer [redacted] is cumulative of Detective [redacted] because Detective [redacted] was also at the scene. However, Officer [redacted] was on scene before Detective [redacted] arrived, and Officer [redacted] had to brief Detective [redacted] the information he gathered from [redacted] prior to Detective [redacted] arrival. Officer Gueiss is not cumulative of Detective [redacted] secondhand account of [redacted] initial interactions with law enforcement as it relates to her allegations against PFC Williams. Officer [redacted] will testify to his interactions with and observations of [redacted] during a critical timeframe following the alleged misconduct.

Lance Corporal [redacted] U.S. Marine Corps. In the moments preceding the alleged misconduct, LCpl [redacted] and [redacted] communicated via text message about PFC Williams. Enclosure (8). LCpl [redacted] was the first person to see and speak with [redacted] after the alleged misconduct, and subsequently informed another Marine of the allegations. LCpl [redacted] is relevant because he interacted with [redacted] about PFC Williams in the moments leading up to and the moments immediately following the alleged misconduct. LCpl [redacted] testimony is necessary in that he was the first person [redacted] reported the misconduct to. He's not cumulative because no other person had similar interactions with [redacted] (i.e., contemporaneous with the alleged misconduct and first to learn of the alleged misconduct). LCpl [redacted] will testify to his interactions with and observations of [redacted] during a critical timeframe following the alleged misconduct.

Sergeant [redacted] U.S. Marine Corps. Sgt [redacted] was a Logistics Operations School instructor during the charged timeframe. Enclosure (9). Sgt [redacted] had direct conversations with the female Marines regarding PFC Williams and his conduct towards them. He asked the complaining witnesses, as well as other Marines in the class, whether PFC Williams exhibited any inappropriate conduct that should be reported. His direct communication with the complaining witnesses, and their

denial of any reportable conduct, is relevant. He will testify to his interactions and conversations with the complaining witnesses and his observations of the interactions between PFC Williams and the complaining witnesses. His testimony is necessary to attack the credibility of the complaining witnesses.

Lance Corporal [redacted] U.S. Marine Corps. LCpl [redacted] attended Logistics Operations School with PFC Williams and [redacted] Enclosure (10). LCpl [redacted] will testify to his observations of [redacted] interactions with PFC Williams throughout the course of the period of instruction at Logistics Operations School.

Lance Corporal [redacted] U.S. Marine Corps. LCpl [redacted] attended Logistics Operations School with PFC Williams and the complaining witnesses, [redacted] and [redacted] Enclosure (11). LCpl [redacted] will testify to his observations of [redacted] s and [redacted] interactions with PFC Williams throughout the course of the period of instruction at Logistics Operations School.

EVIDENCE

The following documents are enclosed:

Enclosure (1): Def. Witness Request, dtd 25 Mar 20
Enclosure (2): Gov. Response to Def. Witness Request, dtd 3 Apr 20
Enclosure (3): Def. Supp. Witness Request, dtd 15 Apr 20
Enclosure (4): Gov. Response to Def. Supp. Witness Request, dtd 20 Apr 20
Enclosure (5): [redacted] Reporting Officer Narrative, dtd 24 Nov 19
Enclosure (6): [redacted] Case Supplement Report, dtd 24 Nov 19
Enclosure (7): [redacted] Reporting Officer Narrative, dtd 15 Aug 19
Enclosure (8): NCIS Summary of Interview of [redacted] dtd 12 Feb 19
Enclosure (9): NCIS Summary of Interview of [redacted] dtd 15 Aug 19
Enclosure (10): DC email correspondence with [redacted] dtd 13 May 20
Enclosure (11): DC email correspondence with [redacted] dtd 27 Mar 20

The Defense reserves the right to present further evidence on the record at an Article 39(a) session.

RELIEF REQUESTED

The Defense respectfully requests that this Court compel the production of all requested witnesses pursuant to R.C.M. 703, 905(b)(4), and 906(b)(7). The Defense requests an Article 39(a), UCMJ, hearing.

[redacted]
J. K. MCGRATH
First Lieutenant, U.S. Marine Corps
Defense Counsel

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Certificate of Service

I certify that I have served a true copy (via e-mail) of the above on the Navy-Marine Corps Trial Judiciary, Eastern Judicial Circuit, and Trial Counsel on 14 May 2020.

[redacted]
J. K. MCGRATH
First Lieutenant, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES** Date: 21 May 2020

1. **Nature of Motion**. This Government response is to the Defense motion to compel production of witnesses. Denial of the Defenses motion is warranted because they have not met the requisite burden. For the reasons below, the Government respectfully requests that this court deny the defense motion.

2. **Burden of Persuasion**. Pursuant to RCM 905(c)(2) the burden of persuasion is on the defense as the moving party.

3. **Summary of Facts**

The Government adopts the facts set forth in the defense discovery motion and other motions referenced therein.

4. **Statement of the Law**

M.R.E. 401

Military Rule of Evidence M.R.E. 401 states that relevant evidence means "evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to the discussion provided within R.C.M. 703 (referencing M.R.E. 401), "relevant testimony is deemed

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necessary when it is not cumulative, and when it would contribute to a party's presentation of the case in some positive way."

M.R.E. 403

M.R.E. 403 limits the presentation of evidence, including witness testimony. "As with all evidence at trial, the military judge must apply the M.R.E. 403 balancing test."[1] M.R.E. 403 requires the military judge to consider whether the probative value of the evidence to be offered is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?".[2]

Generally, parties are entitled to production of witnesses where their anticipated testimony would be both relevant and necessary to a matter in issue on the merits.[3] Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.[4] The defense does not have the right "to compel the attendance of witnesses whose testimony would be merely cumulative with testimony already available to the defense."[5]

"Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives

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[1] *United States v. Glover*, 53 M.J. 366 (2000).
[2] *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).
[3] R.C.M. 703(b)(1).
[4] R.C.M. 703(b)(1).
[5] *U.S. v Allen*, 31 M.J. 572, 610 (N.M.C.M.R. 1990).

to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony."[6]

For a military judge to determine whether the material witnesses are "merely cumulative," she must resolve at least three questions: (1) Is the credibility and demeanor of the requested witness greater than that of the attending witness? (2) Is the testimony of the requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of attending witnesses? (3) Will any benefit accrue to the accused from an additional witness saying the same thing that other witnesses have already said?[7]

In the case of opinion evidence, a proper foundation must show "the character witness personally knows the witness and is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness' character."[8]

Additionally the formation of opinion regarding testimonial honesty is "established by reputation evidence at the time of trial and during periods not remote thereto."[9]

5. **Discussion**

Responding to each individual witness requested by the Defense:

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[6] *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000) citing *United States v. Tangpuz*, 5 M.J. 426, 429 (CMA 1978).
[7] *United States v. Jouan*, 3 M.J. 136 (C.M.A. 1977); *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977); *United States v. Scott*, 3 M.J. 1111 (NMCMR 1977), rev'd in part on other grounds, 5 M.J. 431 {C.M.A. 1978); *United States v. Jones*, 20 M.J. 919, 927 (N.M.C.M.R. 1985).
[8] *United States v. Breeding*, 44 M.J. 345, 350 (C.A.A.F. 1996) (citing *United States v. Toro*, 37 M.J. 313, 317 (C.M.A. 1993)).
[9] *United States v. Midkiff*, 15 M.J. 1043, 1047 (fn 7) (N.M.C.M.R. 1983).

a. Officer [redacted] Greensboro Police Department

The Government denied Officer [redacted] because the purported witness is cumulative and therefore not relevant. The government granted Officers [redacted] who will testify about their observations of the scene and of [redacted] Officer [redacted] will not provide any meaningful testimony that is different or additional compared to Officers [redacted]

b. Officer [redacted] Greensboro Police Department – GRANTED

The government does not oppose this requested witness.

c. Officer [redacted] New Hanover County Sheriff's Office

The Government denies Officer [redacted] because Officer [redacted] is cumulative and therefore not relevant. The government granted Officer [redacted] who will testify about his observations of the scene and of [redacted] Officer [redacted] would not testify to anything different or additional to Officer [redacted] Given that Officer [redacted] is granted, Officer [redacted] is cumulative and therefore not relevant.

d. Lance Corporal [redacted] U.S. Marine Corps

Lance Corporal [redacted] is not relevant because the conversations preceding the sexual assault of [redacted] have no relevance to the reported misconduct itself. The conversations after the charged sexual assault did not specifically address the assault and therefore do not make the charged events more or less probable. Lance Corporal [redacted] was not present during the sexual assault and would not provide any material testimony. His testimony is therefore not necessary.

e. Sergeant [redacted] U.S. Marine Corps

Sergeant [redacted] is not relevant or necessary. Statements of the alleged victims to him about how he should handle the accused or if he should talk to the accused are not relevant to the

charged misconduct. A lack of evidence is not evidence. The fact that the victims did not report the specific misconduct to him at that time does not make the charged misconduct more or less probable. Sergeant [redacted] was not present during any of the sexual assaults or incidents where the accused committed sexually abusive contact on the named victims. Even if admissible, his testimony would not assist the factfinder in making a determination as to guilt or innocence.

f. Lance Corporal [redacted] U.S. Marine Corps

Lance Corporal [redacted] is not relevant or necessary. The proffered testimony of his observed interactions between the accused and [redacted] have no relation to the charged misconduct and defense has not shown how brief observations will provide any meaningful testimony that is relevant to the factual circumstances. Most importantly the defense has provided no evidence to determine the timeframe of these observed interactions between [redacted] and the accused. Amiable interactions between them prior to the charged misconduct are not relevant. Lance Corporal [redacted] was not present during the reported sexually abusive contact. Therefore his testimony would not be necessary or relevant.

g. Lance Corporal [redacted] U.S. Marine Corps

Lance Corporal [redacted] is not necessary or relevant. The proffered testimony of his observed interactions between the accused and [redacted] and [redacted] have no relation to the charged misconduct and defense has not shown how brief observations will provide any meaningful testimony that is relevant to the factual circumstances. Most importantly the defense has provided no evidence to determine the timeframe of these observed interactions between [redacted] and [redacted] and the accused. Amiable interactions between them prior to the charged misconduct are

not relevant. Lance Corporal [redacted] was not present during any of the reported misconduct. Therefore his testimony would not be necessary or relevant.

6. **Evidence**

The government relies on the evidence submitted in defense's motion.

7. **Relief Requested**. The government requests that the court **DENY** in part the defense motion to compel the production of the above requested witnesses.

8. **Argument**. The government requests oral argument.

[redacted]
G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 21 May 2020.

[redacted]

G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION TO RECONSIDER PRODUCTION OF AN EXPERT CONSULTANT (Clinical Forensic Psychologist -Dr. [redacted]) Date: 19 August 2020

1. Nature of Motion. Pursuant to Rule for Court-martial (R.C.M.) 703, 905(b)(4), and 906(b)(7) the Defense respectfully moves this court to compel the production of the following expert witness: Dr. [redacted], or assignment of a forensic psychologist with qualifications equal to those of Dr. [redacted]

3. Summary of Facts.

The Defense incorporates the facts as set forth in its motion for ruling of admissibility of evidence pursuant to M.R.E. 412 filed on 15 April 2020. The Defense also provides the following:

a. On 18 April 2018, PFC Travonte Williams enlisted in the USMC at the Military Entrance Processing Station (MEPS) in Montgomery, Alabama. See Enclosure (1).

b. PFC Williams listed his home of record as [redacted] on his enlistment contract. See id.

c. The address that was listed on PFC Williams enlistment paperwork is the address to [redacted] which is a group home in Alabama. See Enclosure 2.

d. On 23 July 2019, [redacted] verified his admittance into their facility and disclosed PFC Williams' discharge summary. See id.

e. The discharge summary evidences that PFC Williams was admitted into [redacted] on 11 March 2016 and discharge on 6 January 2017. Id.

f. PFC Williams was readmitted to [redacted] on 24 July 2017 and stayed until he left for bootcamp on 28 May 2017. Id.

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g. PFC Williams was referred to the [redacted] for Houston County, Alabama. The discharge summary explained that PFC Williams, [redacted] Id.

h. The discharge summary dictates that PFC Williams was diagnosed with a history of [redacted] and [redacted] with [redacted] Id.

i. Due to some of PFC Williams diagnoses, [redacted] See Enclosure 3.

j. The summary further details that PFC Williams, [redacted] The report continues to dictate that PFC Williams [redacted] Id.

k. During PFC Williams conversation to [redacted] in August 2019 he [redacted] See Enclosure 4.

l. PFC Williams also conveyed to his schoolhouse instructor, Sgt [redacted] that he grew up in a group home. See Enclosure 5.

4. Discussion.

A fundamental pillar of American jurisprudence is an accused's right to be represented by counsel who is reasonably effective in investigating, preparing and presenting a defense. U.S. Const. Amend. VI. The Supreme Court has recognized that the *Sixth Amendment* right to counsel mandates the provision of adequate resources, to include experts, in order to present an effective defense. When necessary, service members are entitled to expert assistance for an adequate defense, without regard to indigency. *See*, U.S. Const. Amend. VI. ; see also *United States v. Kelly*, 39 M.J. 235, 237 (CMA 1994); *United States v. Burnette,* 29 M.J. 473 (CMA 1990); *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986); *see also* Art. 46, UCMJ, *10 U.S.C. § 846* (establishing "equal opportunity to obtain witnesses and other evidence" for the defense); Rules for Courts-Martial. 703(d), Manual for Courts-Martial, United States (2016 ed.). The right to supplement the defense team with expert assistance and witnesses is based on *Article 46, UCMJ*, M.R.E. 706, and R.C.M. 703(d). Courts uphold this right by placing the resources of the Federal Government at an accused's disposal to pay for expert assistance and

guarantee an effective defense team. The right to expert assistance attaches when the defense demonstrates that such assistance is necessary. *United States v. Ndanyi,* 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez* 39 M.J. 459, 461 (C.A.A.F. 1994). In order to receive expert assistance, however, an accused must demonstrate that such a necessity exists. *Id.*

Dr. [redacted] Assistance is Necessary to Provide PFC Williams With a Proper Defense

As mentioned above, an accused is entitled to expert assistance provided by the Government if he can demonstrate necessity. *Garries*, 22 M.J. at 291. The Court of Appeals for the Armed Forces adopted a three- pronged test for determining necessity: (1) Why is the expert needed? (2) What would the expert accomplish for the defense? and (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop? *United States v. Lee*, 64 M.J. 213, 217 (2006) (citing *United States v. Bresnahan*, 62 M.J. 137, 143(2005)). Appellate authorities use the "abuse of discretion" standard to review a military judge's decision regarding this three-pronged test. *United States v. Short*, 50 M.J. 370, 373 (1999), *cert. denied*, 528 U.S. 1105, (2000). Each of the three prongs shall be addressed separately.

(1)Why the Defense Needs Dr. [redacted]

Appellate authorities have accepted various reasons why expert assistance may be needed by the defense. In *Ford*, the Court agreed that the defense needed an expert merely to contradict the testimony of the Government's witness. *United States v. Ford*, 51 M.J. 445, 456 (1999).

In this case, PFC Williams is charged with sexually assaulting or attempting to sexually assault (5) five different women. Therefore it is reasonable to assume that the Government will present evidence to argue that PFC Williams is a habitual sex-offender with a high likelihood to reoffend. As a result, the Government will likely recommend and argue that the sentence adjudged should protect others from future crimes committed by the accused, and result in

decades of confinement. RCM 1002(f). In this case, PFC Williams faces confinement for the rest of his life. If PFC Williams is released from confinement, he still would spend the remainder of his life on the sex-offender registry. With the potential arguments, and sentences at hand, counsel must be afforded the ability to combat the Government's case a put on a formidable defense during sentencing.

Therefore the Defense requests an expert consultant in the field of forensic psychology. The requested expert consultant will perform evaluations that will provide the Defense with the necessary data concerning the accused's likelihood of committing sexual misconduct in the future. This information is relevant and necessary for the defense to put on a meaningful sentencing case, and effectively demonstrate the history and characteristics of the accused. R.C.M. 1002(f). The quantitative data that can be derived from Dr. [redacted] evaluations will provide the Defense the ability to meet any arguments by the Government with objective science. *Ford* at 456. Dr. [redacted] has been qualified as an expert in both federal and state courts. In doing so, he has testified as an expert witness in forensic psychology. Based on Dr. [redacted] experience in his field, and the court-room, he will be able to advise counsel on effective methods to present their sentencing case, and combat the Government's evidence.

(2) What Dr. [redacted] Would Accomplish For the Defense

In examining the second prong, military courts look to how the requested expert assistant would aid the defense in preparing its case. *United States v. Ndanyi,* 45 M.J. 315, 319 (C.A.A.F. 1996). In other words, how would "...the requested expert evidence would help the defense undermine..." the prosecution's case in chief? *Ndanyi* at 319. Here, Dr. [redacted] would provide a thorough psychological evaluation of PFC Williams. This evidence would help

undercut the Government's case and rebut any argument requesting for more punishment than is necessary to rehabilitate the accused, and protect society.

Dr. [redacted] has been practicing as clinical psychologist for over 27 years. He has Ph.D. in Clinical Psychology from the University of Georgia and a Master's Degree in Clinical Psychology from the University of Louisiana at Monroe. He has provided evaluations and psychological assessment in both criminal and civil cases. Dr. [redacted] has authored six books that have been published in his field, as well as, numerous papers, book reviews, and scholarly articles. Currently, Dr. [redacted] is the owner of a clinical and forensic psychological service provider in Charlotte, North Carolina. In that capacity, he provides clinical and forensic psychological services to local residents, public agencies and court ordered evaluations / assessments for alleged sex offenders. Specifically, he provides evaluations for the likelihood of recidivism, as well as general psychological assessments and recommendations.

Dr. [redacted] psychological evaluation includes a review of all materials relevant to the offenses alleged. This evaluation includes statements to the police, previous psychological evaluations, witness accounts of his behavior, and past criminal records. Additionally, Dr. [redacted] would be able to use his education and experience to conduct a series of forensic psychological assessments of PFC Williams. These assessments include the Millon Clinical Multiaxial Inventory, 3rd edition (MCMI-III), the Multiphasic Sex Inventory, 2nd edition (MSI-II), the STATIC-99R actuarial assessment instrument and the Structured Risk Assessment—Forensic Version (SRA-FVL).

The MCMI-III uses a computer-generated scoring system that describes the personality functioning of others who respond in the same manner as the individual assessed. Scores will be automatically modified by the computer scoring system to compensate for the individual's test-

taking approach. In doing so, the scoring system provides valid and interpretable results even if the individual has a tendency to exaggerate or downplay aspects of his personality.

The MSI-II is a theory-based, nationally standardized self-report questionnaire designed to assess a wide range of psychosexual characteristics of the sexual offender, or a person accused of having committed sexual offenses. It is designed to identify an individual's attempt to exaggerate or to deny psychopathology. The MSI-II incorporates twelve separate measures that can test for an individual's carelessness, malingering, inconsistency, evasiveness, defensiveness, and deception. The MSI-II measurement scales have been specifically designed and constructed to assess an individual's sexual behaviors based on recommended diagnostic criteria from the Diagnostic and Statistical Manual 5, Paraphilias criteria. One of the scales is the Rapist Comparison (RC) Scale, an empirically based measure using demographically comparable but distinctly different samples of admitting adult male sex offenders. The results can show commonality or lack of commonality in thinking and behavior between the individual assessed and the reference group of adult male sex offenders.

The STATIC-99R is an actuarial scale with moderate predictive accuracy in ranking offenders according to their relative risk for sexual offense recidivism. Variables used on the STATIC-99R include the number of prior sex offenses, number of prior sentencing dates, convictions for non-contact sex offenses, the presence of non-sexual violence during the index offense, age at release, victim gender, the offender's marital history, and his relationship to the victim. The STATIC-99R has been revised in order to fully incorporate the relationship between age at release and sexual recidivism. An individual's score on the STATIC-99R can range from -3 to 12, with higher scores indicating a higher risk of reoffending. At the lower end of this

spectrum, Dr. [redacted] could hypothetically determine that the probability of PFC Williams re-offending are identical to that of a member of the general public.

The Structured Risk Assessment—Forensic Version (SRA-FVL), is an instrument designed to assist professionals in identifying criminogenic needs relevant to adult sex offending. It is intended to assess long-term vulnerabilities (LTV's) that are relatively static (i.e., unchanging) that can then be used to form the focus of the offender's treatment plan. Progress in treatment can then be judged in terms of how well the offender learns to manage their LTV's. Scores on this assessment change when the patient exhibits healthy functioning in the community that has been sustained long enough to signal changes in the underlying LTV's.

Based on these and other assessments, Dr. [redacted] could draft a psychological report describing not only the results of the assessments, but also findings, opinions, and recommendations. Dr. [redacted] could then discuss with counsel how to best present his findings, opinions, and recommendations, and could potentially testify as a sentencing witness. An expert in this area will assist the Defense in ensuring that any gaps in the Government's sentencing argument are properly exploited and highlighted during the presentation of each parties' case. PFC Williams is on trial and he has the right to present a defense under Amendment VI of the Constitution. Our request for Dr. [redacted] a main part of the defense's strategy for countering the expected evidence that will likely be presented by the government.

(3) Dr. [redacted] Evaluations Cannot be Supplemented or Duplicated by Defense Counsel.

Defense counsel are not trained in the area of forensic psychology. We therefore submit assignment of Dr. [redacted] is the only way to ensure our client's Sixth Amendment rights are fully and completely exercised before this court. Neither defense counsel in this case have a

Ph.D. nor are recognized experts in the field of forensic psychology. The defense is unable to gather and present evidence in this area because the defense does not possess the acumen and experience that Dr. [redacted] possesses. Dr. [redacted] will educate the defense on the issues associated with forensic psychology and how the human mind works. Most significantly, neither defense counsel can testify nor are experts in this field, so Dr. [redacted] could rise to the level of an expert witness and provide testimony during this trial. Therefore, Defense Counsel does not have the expertise to effectively represent PFC Williams without the assistance of an expert consultant in the field of forensic psychology.

(4) Fundamental Fairness Justifies Necessity:

According to *Robinson*, in order to satisfy the necessity test an accused must do two things. First, he must show the military judge that there exists a reasonable probability an expert would be of assistance as the defense has shown above. *United States v. Robinson,* 39 M.J. 88, 88-89 (CMA 1994). Second, *Robinson* includes a fairness prong. *Id.* It is therefore appropriate to consider how denial of this request will result in a fundamentally unfair trial. The government has witnesses, along with his accusers that will testify that they have knowledge of PFC Williams's propensity to commit these types of offenses. It would be fundamentally unfair to deny the defense an expert in the field of forensic psychology in order to rebut this type of testimony put forth by the government. Failure to produce Dr. [redacted] would effectively deprive PFC Williams of his ability to present an adequate defense in this case and would deny him "[m]eaningful access to justice" in a case in which confinement is a possible outcome. *Ake v. Okla.*, 470 U.S. 68, 77 (1985).

It is long held that expert testimony concerning recidivism and an accused's potential for rehabilitation of sexual offenders is proper sentencing evidence. *United States v. Scott*, 51 MJ

326 (CAAF 1999). Case law and the Military Judges' Benchbook both recognize that members are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial. *United States v. Frey*, 73 M.J. 245, 251 (CAAF 2014) (citing *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998)); *United States v. Hargrove*, 25 M.J. 68, 71 (C.M.A. 1987); However, the *Frey* Court stated:

> "Whether or not a person convicted of a particular offense is more or less likely to offend again or become a serial recidivist is a question requiring expert testimony, empirical research, and scientific and psychological method, inquiry, and evidence. Recidivism is not a matter resolved through appeal to common sense or a member's knowledge of "the ways of the world." Moreover, where sexual offenses are concerned, especially those against children, such appeal is likely to invoke an emotional and stereotypical response, not necessarily an empirical one."

Frey, 55 M.J. at 250. The Court elaborated that a members' "common sense" is not adequate to evaluate the recidivism rates of a convicted sex offender. *Id.* Here, Dr. [redacted] is qualified to provide expert testimony on recidivism rates, explain empirical research, and speak on the scientific methods used to determine an accused's risk to reoffend. As dictated by appellate courts the members need expert testimony to determine an appropriate sentence. Precluding the Defense from employing Dr. [redacted] would result in an inadequate sentencing case for PFC Williams and prevent the member's from determining an appropriate sentence. Therefore, Dr. [redacted] is necessary to provide PFC Williams a fundamentally fair trial.

5. <u>Evidence and Burden of Proof</u>. The Defense has the burden of proof by a preponderance of the evidence. The following attachments are offered in support of this motion:

Enclosure (1): PFC Travonte Williams' Enlistment Contract dtd 2018 April 18
Enclosure (2): [redacted] Program Summary and Contact Information
Enclosure (3): [redacted] ICO Travonte Williams
Enclosure (4): New Hanover County Sheriff's Office Case Supplemental Report dtd 9 Sep 2019

Enclosure (5): NCIS Results of Interview of Sgt [redacted] dtd 15 Aug 2019
Enclosure (6): Dr. [redacted] C.V.
Enclosure (7): Dr. [redacted] Fee Schedule
Enclosure (8): Dr. [redacted] Affidavit

6. **Relief Requested.** The defense respectfully requests this court to compel the production of Dr. [redacted] as an expert consultant, which will likely ripen into an expert witness for the court-martial.

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

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

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the court and opposing counsel on 19 August 2020.

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

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	GOVERNMENT RESPONSE TO MOTION TO COMPEL: **CLINICAL FORENSIC PSYCHOLOGIST** 26 August 2020

1. **Nature of the Motion**. This is the consolidated Government response to the defense motion to reconsider this court's previous denial of an expert consultant in the field of clinical forensic psychology.

2. **Burden**. As the moving party, the defense bears the burden of persuasion, which it must meet by a preponderance of the evidence. Rules for Courts-Martial (RCM) 905(c).

3. **Proposed Findings of Facts**

a. The government incorporates its proposed findings of facts from its 22 April 2020 response to the defense's motion to compel an expert consultant in the field of forensic psychology.

h. On 25 March 2020, the defense requested an expert consultant in the field of forensic psychology.

c. On 31 March 2020, the convening authority denied the defense's expert consultant request.

d. On 15 April 2020, the defense filed a motion to compel an expert consultant in the field of clinical forensic psychology.

e. On 22 April 2020, the government opposed the defense's motion.

f. On 30 April 2020, the motions were litigated at an Article 39(a) hearing.

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g. The military judge ruled in favor of the government and denied the defense's motion to compel an expert consultant in the field of forensic psychology.

h. On 19 August 2020, the defense filed a motion to reconsider the court's denial of an expert consultant in the field of forensic psychology.

4. Discussion of the Law

"On request of any party or *sua sponte*, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge." RCM 905(f). A motion to reconsider must be based on the following: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros,* 176 F.3d 669, 677 (3d Cir. 1999); see also Rule 10.8, Navy-Marine Corps Trial Judiciary Rules of Practice.

5. Applicability of the Law to this Case

The defense has failed to meet its burden for the court to reconsider the motion to compel an expert consultant in forensic psychology. In this case, the defense appears to rely solely upon prong two (new evidence) as the basis for its argument. In its motion, the defense supplied enclosure (3), the accused's discharge summary from [redacted] However, the defense failed to discuss the enclosure or its relevance in the defense motion to reconsider. In fact, aside from providing different enclosures from its original motion, the defense motion to reconsider is nearly identical to the one it filed on 15 April 2020.

Even if reconsideration was appropriate in this case, the defense's argument has not materially changed since its original filing. For example, in its original filing, the defense argued its expert would "testify about the rehabilitative potential of the accused and the protection of

society..."[1] On page five of its motion to reconsider, the defense argued its expert would help "undercut the Government's case and rebut any argument requesting for more punishment than is necessary to rehabilitate the accused and protect society." Thus, the defense's motion still establishes no "more than the mere possibility of expert assistance." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)).

Moreover, rehabilitation and protection of society, two *sentencing* principles that could involve the accused's potential recidivism likelihood, are not at all central to the government's case. See *United States v.* McCallister, 55 M.J. 270 (C.A.A.F. 2001). As such, the defense has not met its burden to prove that the expert would indeed be of assistance and that denial of such assistance would result in a fundamentally unfair trial. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006).

6. **Relief Requested**. The Government requests that the court deny the defense motion to reconsider.

7. **Evidence**. N/A.

8. **Argument**. None requested.

[redacted]
M. S. SAVARESE
Major, U.S. Marine Corps
Government Trial Counsel

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the court and opposing counsel via electronic mail on 28 August 2020.

[redacted]
M. S. SAVARESE
Major, U.S. Marine Corps
Government Trial Counsel

[1] 15 April 2020 Defense Motion to Compel Expert Consultant in the Field of Forensic Psychology, p. 5.

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

UNITED STATES **v.** **TRAVONTE WILLIAMS** **Private First Class (E-2)** **U.S. Marine Corps**	DEFENSE MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF (Unreasonably Multiplied Charges) 19 August 2020

MOTION

Pursuant to 906(b)(12), the Defense respectfully moves this Court to dismiss Specification 4 of Charge IV and the Sole Specification of Charge V; or, in the alternative, merge Specifications 3 and 4 of Charge IV and the Sole Specification of Charge V. The Defense further moves this Court to dismiss Specification 6 of Charge IV; or, in the alternative, merge Specifications 5 and 6 of Charge IV.

BURDEN

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

FACTS

On 10 December 2019, the Government preferred against PFC Williams 12 specifications alleging violations of Articles 80, 120, and 128 of the Uniform Code of Military Justice. Charges were referred to the General Court Martial now pending on 3 February 2020. Enclosure (1).

The alleged basis for the following charges and specifications involving [redacted] are set forth in Enclosure (2).

> Charge IV: Art. 128 (assault consummated by a battery) Specification 3: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, unlawfully pick up [redacted] and put her in his car.
>
> Charge IV: Art. 128 (assault consummated by a battery) Specification 4: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, unlawfully place his hand over [redacted] mouth.

Charge V: Art. 128 (simple assault) Specification: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near New Hanover County, North Carolina, on or about 15 August 2019, assault [redacted] by holding a knife to her face and neck.

The alleged basis for the following charge and specifications involving [redacted] are set forth in Enclosure (3).

Charge IV: Art. 128 (assault consummated by a battery) Specification 5: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near Greensboro, North Carolina, on or about 24 November 2019, unlawfully strike [redacted] in the head with his hand.

Charge IV: Art. 128 (assault consummated by a battery) Specification 6: In that Private First Class Travonte D. Williams, U.S. Marine Corps, on active duty, did, at or near Greensboro, North Carolina, on or about 24 November 2019, unlawfully wrap his hands around [redacted] throat.

LAW

"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 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:

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

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

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

(4) 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); *see also Campbell*, 71 M.J. at 23 (noting that "one or more [*Quiroz*] factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges[.]").

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

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 them 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 convictions, mindful that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation." *United States v. Doss*, 15 M.J. 409, 412 (C.M.A. 1983) (citing *O'Clair v. United States*, 470 F.2d 1199, 1203 (9th Cir. 1972), *cert. denied*, 412 U.S. 921 (1973)).

ARGUMENT

I. [redacted]: Specification 3 of Charge IV, Specification 4 of Charge IV, and the Sole Specification of Charge V Constitute Unreasonable Multiplication of Charges.

Relief from these unreasonably multiplied charges is warranted because the *Quiroz* factors favor the Defense. Principally, each specification is aimed at a single course of conduct. That course of conduct is confined to a very brief period of time during the early morning hours of 15 August 2019 and alleges the same victim, [redacted].[1] In *United States v. Clarke*, the Army Court of Criminal Appeals addressed

[1] Enclosure (2).

unreasonable multiplication of charges of an alleged assault. 74 M.J. 627 (A.C.C.A. 2015). In the opinion dismissing and merging assault specifications the accused was separately convicted on, the court stated: "Congress intended assault, as prescribed in Article 128, UCMJ . . . to be a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty." *Id.* at 628 (citing *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981)). Such is the case here, as alleged. That is, each specification alleges separate acts from what is actually a single ongoing, uninterrupted course of conduct, united in time, circumstance, and impulse. Furthermore, the three specifications exaggerate the criminality alleged against [redacted] The aggregation of these acts constitute a single course of conduct and therefore a single offense.

Finally, the exaggeration of criminality arising from this single course of conduct unfairly increases PFC Williams's punitive exposure. PFC Williams faces a maximum punishment of six months confinement for Specification 3 of Charge IV. The maximum confinement for Specification 4 of Charge IV is six months, and the maximum confinement for the Sole Specification of Charge V is three months. MCM, Part IV, ¶¶ 77.d.(2)(a), 77.d.(1)(a). The 150% increase in punitive exposure is unreasonable. *Cf. United States v. Johnston*, 75 M.J. 563, 572 (N-M.C.C.A. 2016) (describing a 32% increase in potential confinement as "a substantial escalation" and "unreasonable"). The alleged facts in each specification demonstrate that this charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*. Therefore, relief is appropriate.

II. [redacted] Specification 5 and Specification 6 of Charge IV Constitute Unreasonable Multiplication of Charges.

Relief from these unreasonably multiplied charges is warranted because the *Quiroz* factors favor the Defense. First, both specifications are aimed at a single course of conduct that is alleged to have occurred in the early hours of 24 November 2019, against the same victim, [redacted] Both specifications alleged separate acts from what is actually a single ongoing, uninterrupted course of conduct, united in time, circumstance, and impulse. *See, e.g.*, *Clarke*, 74 M.J. at 628 (distinguishing that, in an alleged

[2] Enclosure (3).

assault, it is the "number of overall beatings the victim endured rather than the number of individual blows suffered.").

Finally, the exaggeration of criminality arising from this single course of conduct unfairly increases PFC Williams's punitive exposure. PFC Williams faces a maximum punishment of six months confinement for Specification 5 of Charge IV. The addition of Specification 6 of Charge IV unreasonably doubles the punitive exposure. *See* MCM, Part IV, ¶ 77.d.(2)(a). The alleged facts in each specification demonstrate that this charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*. Therefore, relief is appropriate.

III. <u>Dismissal is the appropriate remedy.</u>

Dismissal is the appropriate remedy with respect to both [redacted] and [redacted] charges and specifications. This Court may remedy unreasonably multiplied charges at the findings stage by dismissing the lesser offenses or merging all offenses into one. R.C.M. 906(b)(12); *Roderick*., 62 M.J. at 433. Although either remedy works the same effect here, dismissal is the cleanest approach. Dismissal will enforce the unreasonable multiplication doctrine, as well as eliminate the confusion and redundancy at trial caused by unreasonable multiplication.

EVIDENCE

The following documents are enclosed:

Enclosure (1): Referred Charge Sheet ICO U.S. v. PFC Travonte Williams
Enclosure (2): Incident/Investigation Report (excerpt) of Officer [redacted], dtd 15 Aug 19
Enclosure (3): Incident/Investigation Report (excerpt) of Officer [redacted] dtd 24 Nov 19

RELIEF REQUESTED

The Defense respectfully moves this Court to dismiss Specification 4 of Charge IV and the Sole Specification of Charge V; or, in the alternative, merge Specifications 3 and 4 of Charge IV and the Sole Specification of Charge V. The Defense further moves this Court to dismiss Specification 6 of Charge IV; or, in the alternative, merge Specifications 5 and 6 of Charge IV.

The Defense requests oral argument if the Court deems necessary to rule on this motion.

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Respectfully submitted,

[redacted]

J. K. McGrath
First Lieutenant, U.S. Marine Corps
Detailed Defense Counsel

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Certificate of Service

I certify that I have served a true copy (via e-mail) of the above on the Navy-Marine Corps Trial Judiciary, Eastern Judicial Circuit, and Trial Counsel on 19 August 2020.

[redacted]

J. K. McGrath

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

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (UMC)** **27 August 2020**

SUMMARY

This is the Government response to the defense motion to dismiss certain specifications on the grounds of unreasonable multiplication of charges. The government respectfully requests this Court to **DEFER** ruling on this matter until after the entry of findings.

BURDEN

As the moving party, the defense bears the burden of persuasion, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

PROPOSED FINDINGS OF FACT

1. Specifications 3 and 4 of Charge IV and the sole Specification of Charge V all stem from the accused's alleged physical assault upon [redacted] in her driveway in Wilmington, NC, on 15 August 2019. Enclosure (1).
2. Specifically, the government has alleged that the accused committed the following offenses upon [redacted]
    a. Simple assault by holding a knife to [redacted] face and neck (Charge V)
    b. Assault consummated by a battery by picking [redacted] up and putting her in his car (Specification 3, Charge IV)

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c. Assault consummated by a battery by placing his hand over [redacted] mouth (Specification 4 of Charge IV)

3. Specifications 5 and 6 of Charge IV both stem from the accused alleged physical assault of [redacted] in Greensboro, NC, on or about 24 November 2019. Enclosure (2).

4. Specifically, the government has alleged that the accused committed the following offenses upon [redacted]

a. Assault consummated by a battery by hitting her in the head with his hand

b. Assault consummated by a battery by unlawfully wrapping his hands around [redacted] throat

DISCUSSION

"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). Contrary to the related concept of multiplicity, the prohibition against unreasonable multiplication of charges (UMC) is not rooted in the Constitutional protection against Double Jeopardy, but instead "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). In *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), the court adopted a list of non-exhaustive factors, originally set forth in *Quiroz*, that should be considered when determining whether two or more offenses are unreasonably multiplied, to include:

(1) Whether the specifications are aimed at distinctly separate criminal acts;

(2) whether the number of charges misrepresent or exaggerate the accused's criminality;

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(3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure; and

(4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges;

Campbell, 71 M.J. at 24.[1]

Even where charges are not multiplicious as a matter of law, the Rules for Court-Martial afford the military judge discretion to ensure the government adheres to a legal standard of reasonableness in charging. *Quiroz*, 55 M.J. at 338. When there has been an unreasonable multiplication of charges, the military judge may fashion a remedy as applied to findings or sentencing. R.C.M. 906(b)(12). In this context, "the military judge generally has wide discretion to dismiss offenses, merge offenses, or merge offenses only for the purposes of sentencing." *United States v. Thomas*, 74 M.J. 563, 568 (N.M.C.C.A. 2014). It is only incumbent upon the military judge to either consolidate or dismiss charges for findings when guilty findings are returned for multiple specifications obviously charged to account for contingencies of proof. *Id.* Ordinarily, a ruling on any UMC motion should be deferred until after the entry of findings. R.C.M. 906(b)(12), Discussion.

Unreasonable multiplication of charges claims are not uncommon in cases involving charges of assault. Congress intended assault under Article 128, UCMJ, to be a continuous course-of-conduct-type offense; each blow in a single altercation should not be the basis for a separate guilty finding. *United States v. Clarke*, 74 M.J. 627, 628 (A.C.C.A. 2015). Therefore, the appropriate unit of prosecution is determined by "the number of overall beatings the victim endured rather than the number of individual blows suffered." *Id.* (finding that the accused

should not be separately convicted for two immediately consecutive blows to his wife with a metal stool). A single unit of prosecution is reasonable when multiple batteries "united in time, circumstance, and impulse" occurred amidst a single uninterrupted attack." *Id.* The analysis remains the same even if the repeated touching was more intimate in nature, rather than repeated violent blows in an altercation. *United States v. Hernandez*, 78 M.J. 643, 647 (C.C.G.C.A. 2018) (UMC analysis in context of an uninterrupted sequence of abusive sexual contact plead down to multiple Article 128 specifications).

Nevertheless, separately charging multiple blows in a single altercation does not, *ipso facto*, amount to an unreasonable multiplication of charges. "Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). Further, multiple batteries occurring in close proximity and time constitute distinctly criminal acts unless successive parts of an uninterrupted sequence. *United States v. Boykin*, 2017 CCA LEXIS 400 (A.C.C.A. 2017) (finding no UMC when accused was charged with separate specifications for strangling his spouse, banging her head on the ground, shaking her, striking her in the face, and dragging her by the hair during the same altercation).

From this body of case law it is readily apparent why the drafters of the Rules for Court-Martial advise trial courts to defer ruling on this issue until after entry of findings. R.C.M. 906(b)(12), Discussion. The allegations forming the basis of the challenged specifications are contained in the respective complaints [redacted] and [redacted] filed with police. Enclosures (2) and (3). Based on these reports alone, each of the alleged assaults against both [redacted] and [redacted] may very well constitute distinctly separate acts. At a minimum, the reports support the reasonableness of

the government's charging decision and belie any assertion of prosecutorial overreach. For example, the three specifications arising from the driveway altercation with [redacted] stem from assaults that are apparently separated by at least some space and time and intervening responses by [redacted] Without question, this Court will only be equipped to rule on this issue after all of the evidence is received and findings are reached. As such, the government respectfully requests the Court defer ruling on this motion until after entry of findings.

EVIDENCE

Enclosures:

(1) – [redacted] statement to New Hanover County Sheriff's Office dated 15 Aug 19
(2) – [redacted] statement to Greensboro Police Department dated 24 Nov 19

[redacted]
N. C. THOMAS
Major, U.S. Marine Corps
Government Trial Counsel

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I certify that I served a true copy via e-mail of the above on the Court and Defense Counsel on 27 August 2020.

[redacted]
N. C. THOMAS
Major, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. TRAVONTE WILLIAMS **PRIVATE FIRST CLASS** U.S. Marine Corps	GENERAL COURT MARTIAL DEFENSE MOTION TO EXCLUDE EVIDENCE UNDER M.R.E. 403 AND 404 15 April 2020

MOTION

Pursuant to Rule for Court-Martial (R.C.M.) 906(b) (13) and Military Rules of Evidence (M.R.E.) 403 and 404(a) and (b), the Defense respectfully moves this Court to exclude any improper use of character evidence, crimes, wrongs, or other acts.

ISSUE

The Government provided notice that they seek to introduce allegations made by LCpl [redacted] LCpl [redacted], and LCpl [redacted]. These allegations were made in interviews conducted by NCIS and are listed below:

1. LCpl [redacted] alleged that on more than one occasion PFC Williams grabbed her hips to move her out of the way and that LCpl [redacted] did not consent to PFC Williams touching her. (BS-074 - BS-075)
2. LCpl [redacted] alleged that while she was studying in the Camp Johnson library PFC Williams wrapped his arm around her waist and lower back to pull her closer to him. (BS-079 – BS-080)
3. LCpl [redacted] alleged that PFC Williams touched her in an unwanted manner and would comment on her buttocks, stating, "You fine," or words to that effect. (BS-052)

Are the allegations listed above admissible?

FACTS

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a. PFC Williams is charged with one specification of violating Article 80 of the UCMJ (Attempted Sexual Assault), two specifications of violating Article 120 (Sexual Assault), two specifications of Article 120 (Abusive Sexual Contact), six specifications of Article 128 (Assault Consummated by a Battery), and one specification of Article 128 (Simple Assault). *See* Encl 1.

b. On 3 April 2020, the Government provided 404(b) Notice to the Defense of its intent to use allegations made by LCpl [redacted], LCpl [redacted], and LCpl [redacted] *See* Encl 2.

c. On 2 April 2019, NCIS interviewed LCpl [redacted] and she recounted that PFC Williams had placed his hand on her lower back. She also claimed that PFC Williams stated, "ok, with your fine ass," to her on another occasion.

d. During an interview conducted by NCIS on 17 June 2019, LCpl [redacted] stated that she was enrolled in Logistics Embarkation School (hereinafter "LES") with PFC Williams.

e. While at LES, LCpl [redacted] stated that PFC Williams was placed in a supervisory role as the class "Guide." At LES, the students were required to stand against the wall in hallways in order to provide others space to walk by.

f. In the interview, LCpl [redacted] stated that PFC Williams grabbed her hips on two separate occasions to move her closer to the wall.

g. During an interview conducted by NCIS on 21 June 2019, LCpl [redacted] stated that PFC Williams on one occasion, placed his left hand on her hip and attempted to pull her closer to him. LCpl [redacted] claimed that this event occurred in a computer lab around January 2019.

i. After recounting this event, LCpl [redacted] stated that, "she did not feel as though she was physically or sexually assaulted by [PFC] Williams and attributed the incident to her being too friendly toward him."

j. On 15 August 2019, Sgt [redacted] was interviewed by NCIS. Sgt [redacted] was an instructor at LES during the alleged time frame.

k. During the interview, Sgt [redacted] relayed that he was approached by 12-13 female Marines after a class concluded, approximately 7-10 days into the period of instruction.

l. At the meeting, the 12-13 female Marines expressed concerns about PFC Williams behavior. Specifically, Sgt [redacted] recalled that PFC Williams made the female Marines feel uncomfortable because he asked them to go out on dates.

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m. On several occasions during the meeting, and again at the close of the meeting, Sgt [redacted] asked the female Marines if PFC Williams did anything beyond asking them on dates. The 12-13 female Marines replied negatively on every occasion.

BURDEN

Pursuant to R.C.M. 905(c), the burden of proof is a preponderance of the evidence standard on the Defense as the moving party. As the proponent of any such evidence at trial however, the government would hold the burden to show any evidence is admissible.

LAW

I. M.R.E. 403 excludes evidence outweighed by danger of unfair prejudice.

The military rules of evidence allows for exclusion of evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time or needlessly presenting cumulative evidence."

II. M.R.E. 404(a) prohibits use of evidence of a person's character or character trait.

Use of "a person's character or character trait is not admissible to prove that on a particular occasion a person acted in accordance with the character or trait." The Government wishes to paint PFC Williams as a "handsy" junior Marine in an attempt to show his propensity to touch his other accusers in an inappropriate manner. Mil. R. Evid. 404(b)(1). If the evidence is not "offered for a purpose other than to show an accused's predisposition to commit an offense," then it must be excluded. *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. Sept. 25, 2000).

A. The *Reynolds* three-part governs admissibility of uncharged acts.

To admit evidence of uncharged misconduct, each element of the three-prong test provided in *United States v. Reynolds* must be met:

(1) Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts?
(2) What "fact . . . of consequence" is made more or less probable by the existence of this evidence?
(3) Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). If the evidence fails any of these prongs, it is inadmissible. *Id.*

The first prong requires that "the factfinder could reasonably find by a preponderance of the evidence that the misconduct occurred." *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. Sept. 30, 2005). The court only has to determine a reasonable person could find the act actually occurred. *United States v. Mirandes-Gonzalez*, 26 M.J. 411, 414 (C.M.A. 1988).

The second prong is described by the Supreme Court as: "the threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004) (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). The evidence in question must be probative to proving an element of the current offense. *Id.*

The third prong requires that "the evidence is legally, as well as logically, relevant." *United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004). This incorporates M.R.E. 403: "the evidence must satisfy the balancing required by Mil. R. Evid. 403, i.e., its probative value must not be 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *United States v. Tennyson*, 53 M.J. 465, 469 (C.A.A.F. 2000) (quoting *United States v. Reynolds*, at 109 (C.M.A. 1989)).

In *United States v. Berry*, C.A.A.F. articulated factors to consider in the 403 balancing test: (1) the strength of the proof of the prior act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the prior conduct; (6) the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. 61 M.J. 91, 95 (C.A.A.F. 2005). C.A.A.F. specifically noted failure to properly administer the factors and articulate the reasoning on the record would result in more scrutiny from the appellate courts. *Id.* at 96.

B. The Government must provide a valid, specific purpose other than propensity for admitting evidence of uncharged offenses

The Government must explicitly state a non-propensity purpose of evidence implicating M.R.E. 404(b). *United States v. Ferguson*, 28 M.J. 104, 108-109 (C.M.A. 1989). The

Government's proposal must include: "exactly what issue it is trying to prove in order to see whether the evidence is probative, how probative it is, and whether it should be admitted in light of other evidence in the case and the ever present danger of prejudice. *Id.* In *United States v. Brannan*, the court disapproved of "broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)." 18 M.J. 181, 185 (C.M.A. 1984). The alternative purpose should be a cogent theory and not merely a subterfuge for showing propensity.

ARGUMENT

In *United States v. Thompson*, an Airman Basic was charged and convicted of possession, use, and distribution of marijuana. 63 M.J. 228, 229 (C.A.A.F. 2006). At trial, the government introduced statements regarding specific instances of prior drug usage that was not charged. *Id.* The defense appealed, arguing this evidence "painted him as a habitual drug user." *Id.* The Court held the military judge abused his discretion by admitting this evidence. *Id* at 231. Here, the Government is seeking to admit evidence that PFC Williams had inappropriate contact and verbal exchanges with LCpl [redacted], LCpl [redacted], and LCpl [redacted]. Any allegation of inappropriate verbal exchanges would be a violation of MCO 5354.1E (hereinafter "PAC Order") and result in an additional Article 92 charge. Likewise, any allegation of inappropriate touching would be a violation of Article 128, or Article 120 and result in additional specifications to the charged misconduct. The Government has only charged PFC Williams with violating Article 128, and Article 120 in regards to the named complainants in the charge sheet. None of which are the accusers mentioned in the Government's 404(b) notice. Therefore, any other allegations concerning additional Article 92, Article 120, or Article 128 violations constitutes uncharged misconduct and should be viewed in the same light as the prosecutor's evidence in *Thompson*. *Id.* at 229.

I. <u>There is no evidence that reasonably supports a finding by the trier of fact that PFC Williams committed prior crimes, wrongs or acts</u>

Lance Corporal [redacted]

The Government contends PFC Williams improperly placed his hand on LCpl [redacted] lower back and stated, "You fine," or words to that effect. *See* Encl 3; BS-052.

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There is no credible evidence that reasonably supports that PFC Williams touched LCpl [redacted] or made any inappropriate comments to her. First, in the NCIS interview LCpl [redacted] could not provide any information as to *when* the alleged misconduct occurred. Likewise, the Government failed to provide in their notice further specificity on when the interaction between the two Marines occurred. This absence of information leaves the Defense, fact-finder, and the Court with over a two (2) month window of when this interaction could have taken place. Additionally, LCpl [redacted] never states *where* the interaction occurred, or provide any context to the NCIS investigator as to what activity she was doing with PFC Williams. For the sake of argument, LCpl [redacted] does not convey that the comment or alleged touching was not welcomed. Since PFC Williams arraignment, nearly 1000 pages of discovery have been turned over including command inquiries, NCIS investigations, and class surveys. No other documentation has been provided that substantiates LCpl [redacted] claim, or lends any credence to her allegation. Contrarily, Sgt [redacted] had a meeting with all of the females of the LES class and repeatedly asked the group if PFC Williams committed any misconduct outside of asking the female Marines on dates. Every time Sgt [redacted] asked the group, they responded negatively. This was also verified by another NCO present, Sgt [redacted] In sum, there is no credible evidence that reasonably supports that PFC Williams committed any misconduct alleged by LCpl [redacted]

Lance Corporal [redacted]

The Government alleges that PFC Williams pulled his chair very close to LCpl [redacted] and wrapped his arm around her waist and back. *See* Encl 3; BS-079 – BS- 080. Again, there is no evidence that any misconduct occurred. At the beginning of the NCIS interview, LCpl [redacted] denies ever being sexually assaulted by PFC Williams. Throughout the duration of the interview, she also makes no mention of any sexual harassment that would constitute a PAC order violation, or any Article 92 violation. Akin to LCpl [redacted] allegations, she is unable to provide basic information regarding this interaction. LCpl [redacted] fails to state when this allegation occurred, and which computer lab onboard MCI-East it occurred in. LCpl [redacted] does state that there was a possible witness [redacted] to this interaction because she recalls receiving a text message from her. However, the text message was never produced and a follow-up interview with PFC [redacted] was never conducted to verify this interaction. Contrarily, Sgt [redacted] had a meeting

with all of the females of the LES class and repeatedly asked the group if PFC Williams committed any misconduct outside of asking the female Marines on dates. Every time Sgt [redacted] asked the group, they responded negatively. At the end of the interview with NCIS, LCpl [redacted] stated, "she did not feel as though she was physically or sexually assaulted by [PFC] Williams and attributed the incident to her being too friendly toward him." Therefore, there is no evidence that reasonably supports LCpl [redacted] claim, or that PFC Williams acted in any manner that could be viewed as inappropriate or a violation of the UCMJ.

Lance Corporal [redacted]

The Government alleges that PFC Williams grabbed the hips of LCpl [redacted] to move her out of the way while he served as the class "Guide." Encl 3; BS-074 - BS-075. Unfortunately, there is no credible evidence that reasonably supports that PFC Williams ever touched LCpl [redacted] First, in the NCIS interview LCpl [redacted] could not provide any information as to when either of the alleged misconduct occurred. Likewise, the Government failed to provide in their notice further specificity on when the interaction between the two Marines occurred. This absence of information leaves the Defense, fact-finder, and the Court with over a two (2) month window of when this interaction could have taken place. Additionally, LCpl [redacted] never states what hallway these instances occurred in, or who was present. Presumably the remainder of the class was present, however, no other Marine has come forth to substantiate her claim. In fact, no evidenced has been produced to support her claim despite having a command and NCIS investigation conducted. Contrarily, Sgt [redacted] had a meeting with all of the females of the LES class and repeatedly asked the group if PFC Williams committed any misconduct outside of asking the female Marines on dates. Every time Sgt [redacted] asked the group, they responded negatively. This was also verified by another NCO present, Sgt [redacted] Therefore, there is no evidence that reasonably supports LCpl [redacted] claim, or that PFC Williams acted in any manner that could be viewed as inappropriate or a violation of the UCMJ.

Lack of Judicial & Administrative Action

PFC Williams never received a Non-judicial punishment, 6105, or a NPLOC substantiating the allegations made by these Marines. After reviewing the Command and

NCIS investigation conducted the LES leadership elected to not take any action regarding these allegations; only those allegations depicted in the charge sheet. With that said, there is no credible evidence that reasonable supports that PFC Williams committed any misconduct.

II. The misconduct at issue fails the second prong of the *Reynold*'s test because it has no probative value.

C.A.A.F. found the second prong of the *Reynolds* test was not met in *Thompson*. *Id.* at III. Specifically the *Thompson* court stated, "evidence of prior drug use is not admissible per se at court-martial." *Id.* at 231 (quoting *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001)). Likewise, presumptive use of unsubstantiated allegations that PFC Williams had inappropriate conversations or interactions with other female Marines is not admissible *per se* either.

The evidence in question must be probative to proving an element of the current offense. *McDonald*, 59 M.J. at 429. As stated previously, courts have disapproved of "broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)." *United States v. Brannan,* 18 M.J. 181, 185 (C.M.A. 1984). The alternative purpose should be a cogent theory and not merely a subterfuge for showing propensity. Here, the Government has done just that. The Government has proffered that the evidence will be used to show PFC Williams' opportunity, motive, intent, plan, and absence of mistake. *See* Encl 2. However, the Government has not tied their intended uses to a cogent theory, and the proffered 404(b) evidence is not probative. The Government offers this evidence solely as subterfuge for showing propensity. Therefore, this evidence should be excluded.

II. The probative value is substantially outweighed by the danger of unfair prejudice.

When looking at the analysis above, there is no probative value to the Government's proposed use of the above referenced evidence. There is no credible evidence to show that PFC Williams committed any of the misconduct alleged. Even if PFC Williams conduct concerning the three Marines took place there is no evidence conveying PFC Williams' motive behind the allegations, and its connection to this case. Similarly, there no evidence relevant to this case that sheds light on his intent in committing those acts, his lack of mistake, or his plan.

The Government's desire to submit such "evidence" causes a high danger of unfair prejudice. Presenting these allegations as evidence during the Government's case-in-chief will have a detrimental effect on PFC Williams receiving a fair and unprejudiced trial.

This issue also raises serious concerns of distracting the fact-finder. This case, at its core, is about whether each of the named accusers' claims holds water; claims that jeopardize not only PFC Williams career but his livelihood and freedom. This case is not about the validity of uncharged allegations. Introducing these irrelevant issues into a trial only leads to confuse the fact-finder and distract from the relevant facts of the case.

III. Conclusion

The Government's proposed intent to introduce the uncharged misconduct discussed above fails to reasonably support that the misconduct occurred, show a fact of consequence is more or less probable, and has nearly no probative value to this case. Under the law, this evidence should not be admitted.

ENCLOSURES

Enclosure 1: Charge Sheet dtd 7 January 2020
Enclosure 2: Government's 404(b) Notice
Enclosure 3: Excerpts from the NCIS Investigation Regarding the Proposed 404(b) allegations

RELIEF REQUESTED

Defense requests the court exclude the Government's proposed use of such evidence.

[redacted]
M. J. THOMAS
Captain, USMC
Detailed Defense Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on Trial Counsel and the Court on 15 April 2020.

[redacted]
M. J. THOMAS
Captain, USMC
Detailed Defense Counsel

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

UNITED STATES v. WILLIAMS, Travonte Private First Class U. S. Marine Corps	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE EVIDENCE UNDER MIL.R.EVID. 403 AND 404** 21 May 2020

1. **Nature of the Motion.** This is the Government response to the defense motion to exclude evidence under Mil.R.Evid. 403 and 404 - a preliminary ruling of admissibility on Government's intended evidence.

2. **Burden.** As the proponent of the evidence, trial counsel has the burden to demonstrate that the evidence is admissible. The standard of proof is by a preponderance of the evidence.[1]

3. **Proposed Findings of Fact**. The Government adopts the findings of fact proposed in defense's motions and adds the following facts.

Lance Corporal [redacted]

a. The accused would place his hand on Lance Corporal [redacted] lower back. Encl. 1.

b. The accused would make statements to Lance Corporal [redacted] including, "ok, with your fine ass." Encl. 1.

Lance Corporal [redacted]

a. The accused made unwanted contact with Lance Corporal [redacted] while she was studying in the computer lab around January 2019. Encl. 2.

b. Lance Corporal [redacted] was in the computer lab completing coursework when the accused pulled up a chair and sat next to her. Encl. 2.

[1] R.C.M. 905(c).

c. Lance Corporal [redacted] gave the accused a hug, and then sat down to continue her schoolwork. Encl. 2.

d. After hugging her, the accused left his hand on Lance Corporal [redacted] hip for about five minutes. Encl. 2.

e. Lance Corporal [redacted] pushed the accused's hand away and off her hip twice, as the accused would place his hand back on her hip after she pushed it away. Encl. 2.

f. Lance Corporal [redacted] slid her chair away from the accused on three separate occasions to move away from him. Encl. 2.

g. The accused would continue to place his hand on Lance Corporal [redacted] hip even after she would move away. Encl. 2.

h. After some time passed, Lance Corporal [redacted] got up out of her chair, walked away from the accused, and left the computer lab. Encl. 2.

Lance Corporal [redacted]

a. While at Logistics Embark School, the accused grabbed and held both of Lance Corporal [redacted] hands in his own hands for about ten minutes. Encl. 3

b. The accused asked Lance Corporal [redacted] on a date after flirting with her. Lance Corporal [redacted] did not accept the offer and walked away. Encl. 3.

c. While filling the billet as class Guide, in an effort to move Lance Corporal [redacted] out of the way, the accused grabbed her by the hips on at least two occasion. Encl. 3.

[redacted]

a. [redacted] and the accused were in a prior intimate relationship. Encl. 4.

b. That relationship ended in the beginning weeks of January 2019. Encl. 4.

c. On 20 January 2019, the accused went to [redacted] room to hangout with her. Encl. 4.

d. The accused was told by her that no sexual intercourse was going to take place that night.

e. After coming over, the accused stripped down to his boxers, and proceeded to get in the bed with [redacted] Encl. 4.

f. [redacted] told the accused multiple times that she did not want to have sexual intercourse with him. Encl. 4.

g. The accused proceeded to sexual assault [redacted] Encl. 4.

[redacted]

a. [redacted] met the accused on the dating application, Meetme. Encl. 5.

b. After about three weeks of talking back and forth over the dating application, the two of them agreed to meet. Encl. 5.

c. The accused picked up [redacted] in his vehicle and the two of them began to drive around aimlessly. Encl. 5.

d. After driving around for an extended period of time, the accused parked his vehicle and attempted to rape [redacted] Encl. 5.

[redacted]

a. The accused met [redacted] over a social media application called "Monkey." Encl. 6.

b. After about two weeks of talking over the application, [redacted] invited the accused over to her house. Encl. 6.

c. The two of them began to watch television together in [redacted] bedroom. Encl. 6.

d. The accused began to fondle and get "touchy" with [redacted] and began kissing her. [redacted] told the accused that she did not want to have sexual intercourse with the accused. Encl. 6.

e. Shortly after, [redacted] stated to the accused that her back was hurting due to a recent car accident she was in. Encl. 6.

f. The accused then offered to give [redacted] a back massage. Encl. 6.

g. The accused then started to give [redacted] a massage, and then proceeded to sexually assault her. Encl. 6.

4. **Discussion.** Under Mil.R.Evid. 403, the military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.[2]

The primary factors for the military judge's consideration when performing the balancing test is whether the evidence will contribute to the members arriving at a verdict on an improper basis, the potential for the prior acts evidence to cause the members to be distracted from the charged offenses; and, how time consuming it will be to prove the prior acts.[3] When conducting a Rule 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.[4] The probative value of the evidence, as with relevancy, should be determined by assessing the similarities between the prior acts and the charged offenses as well as the clarity of the witness' recall of the prior acts.[5] If the witness' recall is clear and firm, and the impact of the alleged prior acts on the witness is still apparent, the greater will be the probative value.[6] In *Dewrell*, the court properly admitted

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[2] Mil. R. Evid. 403.
[3] *United States v. Dewrell*, 52 M.J. 601, 609-610, 1999 CCA LEXIS 296
[4] *United States v. Berry*, 61 M.J. 91 (2005).
[5] *Dewrell* at 609.
[6] *See United States v. Larson*, 112 F.3d 600, 605, 1997 U.S. App. LEXIS 9319.

evidence after it assessed the relevancy of the evidence by analyzing the similarities between appellant's prior acts and the charged offenses.[7] Further, the court provided a clear limiting instruction to the members on how they were to use the evidence.[8] Striking a balance between probative value and prejudicial effect "should be struck in the favor of admission."[9]

Mil.R.Evid. 404 prohibits the use of character evidence to prove "that on a particular occasion the person acted in accordance with the character or trait."[10] However, Mil.R.Evid. 404(b) allows evidence of "crimes, wrongs, or acts" is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," rather than for proof of character.[11] "Accordingly, the sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged..."[12] In order to be admissible, evidence must: (1) reasonably support a finding that an accused committed wrongs or acts; (2) make a fact of consequence more or less probable; and, (3) possess probative value that is not substantially outweighed by its danger for unfair prejudice.[13] It is also important to note that it is not necessary that relevant evidence fit snugly into a pigeon hole provided by Mil. R. Evid. 404(b).[14]

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[7] *Dewrell* at 610.
[8] *Id.*
[9] *United States v. Henry*, 1998 CCA LEXIS 616, *5.
[10] Mil.R.Evid. 404(a)(1)
[11] Mil.R.Evid. 404(b)
[12] *United States v. Castillo*, 29 M.J. 145, 150 (CMA 1989).
[13] *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).
[14] *Castillo*, 29 M.J. at 150.

a. Evidence Reasonably Supports a finding by the Factfinder that the Accused Committed the Prior Acts

The evidence reasonably supports a finding that the accused committed the prior acts, satisfying the first prong of the *Reynolds test*. With Lance Corporal [redacted] Lance Corporal [redacted] and Lance Corporal [redacted] the accused began to groom each one of them by unwanted touching and verbal statements that were sexual in nature.

Lance Corporal [redacted] gave no indicator that she was interested in the accused when he would place his hand on her lower back or make sexually derogatory comments towards her.

As with Lance Corporal [redacted] the accused would make small gestures towards her, to get an idea if she would resist his advances and his acts of grooming her, in an effort to isolate her. The accused started with seemingly innocent gestures like holding Lance Corporal [redacted] hands for a prolonged period of time. The accused would also attempt to flirt with her, in which Lance Corporal [redacted] responded by distancing herself from the accused by walking away.

As to Lance Corporal [redacted] the accused demonstrated acts of grooming her by sitting next to her in the computer lab during their time together onboard Camp Johnson, and the accused appeared to be offering to assist Lance Corporal [redacted] with her schoolwork. After Lance Corporal [redacted] gave the accused a hug, the accused kept his hand on Lance Corporal [redacted] hip for an extended period of time. In response, Lance Corporal [redacted] moved the accused's hand away and slid her chair away from him multiple times. However, the accused was persistent in his sexual gestures and would place his hand back on her hips. In response Lance Corporal [redacted] got up and left the computer lab. All three of these female Marines stood their ground and prevented the accused from continuing his sexually natured acts.

Further, contrary to what defense states in their motion, the events occurred on or near Camp Johnson, North Carolina. And the events occurred during the time period in which the

accused and the above-named females were in school there. The timing and location of the prior bad acts are known and stated within the NCIS interviews. The *exact* time and *exact* location are not necessary to establish that there is sufficient evidence to support the findings of the prior bad acts. The lack of any judicial and or administrative action does not negate the existence of evidence that the prior bad acts occurred.

There is sufficient evidence to support the findings that the accused committed these prior bad acts, thereby satisfying the first prong of the *Reynolds* test.

b. The Prior Acts Are Probative in Nature

The evidence of the prior acts satisfies the second prong of the *Reynolds* test because the evidence is probative to establish the intent of the accused, absence of mistake, plan and opportunity.

Intent and Absence of Mistake

A showing of intent can be used pursuant to Mil.R.Evid. 404(b) to prove circumstantially that the accused possessed the criminal intent required for the charged offenses of aggravated assault, rape, and wrongful communication of a threat.[15] When considering whether uncharged misconduct constitutes admissible evidence of intent under Rule 404(b), a military judge should consider "whether … [the accused's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses."[16] The relevancy of the other crime is derived from the

[15] *United States v. Watkins*, 21 M.J. 224 (1986). *See also See United States v. Hays*, 62 M.J. 158 (2005), (The CAAF affirmed a military judge's decision to admit the appellant's uncharged acts as evidence of intent. The appellant was charged with solicitation to commit the rape of a minor, and the government introduced numerous items of child pornography and explicit e-mails from the appellant's computer to demonstrate intent to commit the offense).
[16] *United States v. McDonald*, 59 M.J. 426, 430 (2004).

accused's possession of the same state of mind in the commission of both offenses.[17] The *McDonald* court examined whether the presentation of evidence that the accused made his stepdaughter watch pornographic videos with him was permissible during his trial for sexually assaulting the same stepdaughter.[18] No videos were found in the home, but magazines containing video order forms were found and introduced at trial under Rule 404(b).[19] CAAF affirmed holding that this evidence was relevant to show intent and that the accused may have groomed his victim.[20]

Intent is in issue in this case, despite the defense's posture that it is not relevant, because the accused, consistent with the accused in *Henry*, demonstrated as intent to groom females and target them for the possibility of further sexual acts in the future. As with [redacted] the accused approached her by coming to her room, by entering, and by laying down next to her. The accused knew that she was a target to his actions and so the accused persisted. In regards to [redacted] the accused texted [redacted] for a couple weeks in order to make her trust him, went over to her house, isolated her, and after fondling her, he escalated when he noticed he could overpower her. Likewise with [redacted] he sent text messages to her, then he proceeded to isolate her when he picked her up in his vehicle, and then despite her denials continued with his sexual advances toward her. With all three of these names victims, the accused would groom the females until he was able to isolate them and he would overpower them and commit the sexual assaults on them.

The accused demonstrated an intent to seek out targets for his sexual advances, and he would do so through these seemingly minor gestures and acts. These minor gestures, as also

[17] *Id.*
[18] *United States v. Henry*, 53 M.J. 108 (2000).
[19] *Id.*
[20] *Id.*

demonstrated with the named victims in this case, were evidence of the intent to groom these females and the intent to further commit more egregious unwanted sexual acts upon these females if they did not stand up to the accused. Further, the accused was gathering information on whether or not the females would stand up to him. The accused then knew how far he could persist and to what end.

It is reasonable that the accused would have continued his escalation with Lance Corporal [redacted] Lance Corporal [redacted] and Lance Corporal [redacted] if these three females did not get up and remove themselves from the accused or deliberately and continuously demonstrate they were not interested in anymore unwanted sexual advances. The evidence shows that the accused would cease and desist his acts towards the females when in public who appeared to stand up to him, who stood their ground, and who would deliberately put a stop to the accused's sexual advances. The accused then carried on with his intent to locate other females who may not have been as strong and appeared to him to be vulnerable to his unwanted acts. The accused makes an effort to deliberately be isolated with females in a private setting, where it is just him and the female, which makes it easier to manipulate and control the situation to his advantage and where he can carry out his unwanted sexual advances.

The evolution of the accused's acts demonstrate absence of mistake as he purposely sought out locations where he knew he could and would overpower the females, and he did so by finding ways to bring the named victims into a setting where others could not intervene or where the female could not seek comfort from other people around them. The accused did this hy getting the named victims in a location where it was just him and the female. In contrast, as with Lancc Corporal [redacted] Lance Corporal [redacted] and Lance Corporal [redacted] the accused knew to stop his unwanted sexual advances because these instances took place in a public

setting. With the named victims, the accused understood that he *should* have stopped his advances, but chose not to because he was in an isolated and private setting with these named victims.

Common Scheme or Plan and Opportunity

A plan is a commonality of purpose that links otherwise disparate criminal acts as stages in the execution of a singular scheme.[21] In order for these "other crimes, wrongs, or acts" of the accused to be relevant for the above purpose, they must be shown to be more than just similar to the charged offenses.[22] For example, they must possess a concurrence of common features so as to naturally suggest that all these acts were results of the same plan.[23] Some decisions have been quite liberal in admitting uncharged misconduct evidence under the rubric of plan.[24]

Here, the accused demonstrated a plan to target females, to ascertain whether or not the females would reject his sexual advances. If the accused determined that if one of the females would not stand their ground, he would continue to target them and escalate his aggressive and unwanted sexual advances. The accused, through his acts appeared to plan to groom them and remove these females to an isolated setting, where he would slowly edge closer to the female, as he did with [redacted], [redacted], and [redacted].

The three females, Lance Corporal [redacted] Lance Corporal [redacted], and Lance Corporal [redacted] all avoided being isolated by the accused and thereby disrupted the accused's

[21] *United States v. Jenkins*, 48 M.J. 594 (U.S.A.C.C.A 1998).
[22] *United States v. Brannan*, 18 M.J. 181, 183 (CMA 1984).
[23] *Id.*
[24] *See, United States v. Munoz*, 32 M.J. 359 (C.M.A.), cert. denied, 502 U.S. 967 (1991) (where the "age of the victim, the situs of the offense, the circumstances surrounding their commission, and the fondling nature of the misconduct" were similar to sexual misconduct of the accused 12 years earlier, the evidence was admissible to show a plan to sexually abuse his children).

plans to escalate his aggressive sexual conduct. Lance Corporal [redacted] did this by standing up to the accused, pushing his hands away, moving away from the accused and informing the accused that she was not willing to entertain his actions. Lance Corporal [redacted] disrupted the accused's plan to target her by walking away from him and declining his invitation to go on a date with him. Lance Corporal [redacted] did not make any indications that she was interested in the accused.

Overtime, the accused began to modify and enhance his plans. It appears that the accused, in furtherance of his plans, began to target more vulnerable females. He did so by targeting females outside of the military setting, and going to females homes where they were alone and isolated, as he did with [redacted] and [redacted] [redacted] and [redacted] did not have the support network that the females in the Marine Corps had, which allowed the accused to execute his plan of perpetrating unwanted sexual acts on these females. The accused modified his plans to seek out females, namely [redacted] and [redacted] who were isolated and the accused believed would be more willing to acquiesce because the accused had already isolated them in their home or in his vehicle. This evidence of the accused actions with female Marines in public and their rejection of his sexual advances is probative towards the steps he made to isolate and assault [redacted] and [redacted]

The evidence of the prior bad acts satisfies the second prong of the *Reynolds* test because the evidence is probative to establish the intent, absence of mistake, plan, and opportunity of the accused.

c. The Probative Nature of the Prior Acts are not Substantially Outweighed by Unfair Prejudice

The probative nature of the accused's prior bad acts outweigh the danger of any unfair prejudice. Regarding the third prong of the *Reynolds* test (403 prong), an appellate court should not overturn a military judge's decision to admit such evidence under Mil.R.Evid. 403 absent a

clear abuse of discretion.[25] To reverse for an abuse of discretion involves far more than a difference in opinion…the challenged action must…be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal."[26]

Pursuant to Mil.R.Evid. 404(b), and as demonstrated above, the probative value of the "other crimes, wrongs, or acts" evidence in this case is extremely high on the issues of intent, absence of mistake, plan, and opportunity. In addition, any danger of "unfair prejudice" to the accused is diminished by the fact that the accused's prior "crimes, wrongs, or acts" occurred in generally similar circumstances to the charged offenses. The prior bad acts committed by the accused were done so within the same year as the charged misconduct. Being close in temporal proximity suggests that the evidence will be probative in nature of the accused's intent, absence of mistake, plan, and opportunity.[27] The probative value of the prior bad acts outweigh any possible unfair prejudice.

5. **Evidence Offered**

1. NCIS Interview with Lance Corporal [redacted]
2. NCIS Interivew with Lance Corporal [redacted]
3. NCIS Interview with Lance Corporal [redacted]
4. NCIS Interview with [redacted]
5. Investigative Report involving [redacted]
6. Investigative Report involving [redacted]

[25] *United States v. Miller*, 46 M.J. 63 (1997).
[26] *Id.*
[27] *But see United States v. McDonald*, 59 M.J. 426, 430 (2004) (holding that a military judge abused his discretion in admitting 20-year-old acts of uncharged misconduct committed when the appellant was 13 years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter).

6. **Relief Requested**. The Government respectfully requests that the court deny the defense's motion to exclude evidence under MIL.R.EVID. 403 and 404.

7. **Oral Argument**. The Government requests oral argument on this matter.

[redacted]
G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the court and opposing counsel via electronic mail on 21 May 2020.

[redacted]
G. J. SWEENEY
Captain, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance Request) Date: 1 Oct 2020

1. Nature of Motion. Pursuant to Rule For Courts-Martial 906(b)(l), the Defense moves the court to continue this court martial to 11-15 January 2021.

2. Summary of Facts.

a. With consent of the Accused, on 29 Sept 2020, 1stLt Joseph McGrath was relieved from his duties as detailed defense counsel in United States v. PFC Travonte Williams. See Enclosure (1).

b. Recently, on 1 October 2020, 1stLt Blake Dunham was detailed by the Regional Defense Counsel to serve as PFC Williams' defense counsel. See Enclosure (2).

c. Additionally, [redacted] records system has been inoperable the week of 28 Sept 2020. As a result, [redacted] has been unable to deliver PFC Williams [redacted]

d. These records are essential for Dr. [redacted] to provide an adequate evaluation in PFC Williams' case. See Enclosure (3).

e. In order to allow 1stLt Dunham adequate time to review the discovery, that exceeds 1000 pages and 10 DVD enclosures, and [redacted] to successfully deliver PFC Williams medical/mental health records the Defense requests that this court-martial be moved to 11-15 January 2021.

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3. **Evidence and Burden of Proof.** The Defense has the burden of proof by a preponderance of the evidence.

4. **Relief Requested.** Pursuant to Rule For Courts-Martial 906(b)(l), the Defense respectfully requests the Court for a continuance of the subject case.

5. **Argument.** The Defense requests to be heard on this issue.

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

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served in person on the Court and opposing counsel on 1 Oct 2020.

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

****

Court Ruling

[redacted]

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

~~39a will be held on _____ and/or~~

Trial will commence on 2-6 Nov 2020 OR

~~This motion will be litigated at a 39a on _____~~

[redacted]

1 Oct 2020
DATE

MILITARY JUDGE SIGNATURE

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION TO DISMISS Date: 29 October 2020

1. Nature of Motion. Pursuant to Rule For Courts-Martial 701(g)(3)(D), the Defense moves the court to dismiss with prejudice all charges involving [redacted] and [redacted]

2. Summary of Facts.

a. Counsel is less than three (3) business days away from the court-martial in the above mentioned case, which is scheduled to start trial on 2 November 2020.

b. Substantial additional discovery has been tendered on Defense Counsel within the past two weeks.

c. On Tuesday, 27 October 2020 Defense Counsel received the 27th Additional Discovery including:

a. [redacted]701 Disclosure Memorandum (BS 1361-1362); and
b. [redacted]GPD Interview Audio Recording (BS 1363)

d. On Monday, 26 October 2020 Defense Counsel received the 26th Additional Discovery including:

a. Receipt of Emergency Phone Call Recordings (BS 1356)
b. Incident Report Dated 15 August 20 (BS 1357-1358)
c. Audio File of [redacted]Interview (BS 1359); and
d. [redacted]911 Call dated 15 August 20 (BS 1360)

e. This past Friday, 23 October 2020 Defense counsel received the 25th Additional Discovery including:

a. Images of Building M450 PM 229 (BS1295-1315); and
b. NCIS ROI dated 16 October 2020 (BS1316-1355) which contains additional

allegations of UCMJ violations pertaining to PFC Williams.

f. This past Friday, 23 October 2020 Defense Counsel received the 24th Additional Discovery including:

a. New Hanover Case Supplemental Report (BS 1290);
b. New Hanover Case Supplemental Report (BS 1291-1292);
c. Case Supplemental Report (BS 1293), and
d. [redacted] Arm Injury Photograph (BS 1294).

g. [redacted] Arm Injury Photograph is either from the July 2019 incident, or the August 2019 incident. However, that information is unknown to Defense Counsel.

h. On Thursday, 22 October 2020 Defense Counsel received the 23rd Additional Discovery including:

a. LCpl [redacted] Interview Summary (BS 1283-1288) and
b. Video of New Hanover Interrogation of Accused dtd 23 August 2019.

i. The interrogation took place over a year ago, and Defense Counsel was only provided an interview summary of said interrogation until last Thursday.

j. On Friday, 23 October 2020, the Government submitted its Final Pretrial Matters and expressed their intent to use the video in their case-in-chief. This video was discovered on Defense Counsel five (50 business days prior to trial and without a transcript.

k. On Wednesday, 22 October 2020 Defense Counsel received the 22nd Additional discovery including:

a. Military Protective Order signed 13 Nov 19 (BS 1269 - 1270)
b. Revocation Letter dated 5 Dec 19 (BS 1271 - 1273)
c. Military Protective Order signed 4 Oct 19 (BS 1274 - 1275)
d. Military Protective Order signed 13 Nov 19 (BS 1276 - 1277); and
e. MPO issued Protective Order dated 24 Jun 20 (BS 1278 - 1282)

l. On Tuesday, 20 October 2020, Defense Counsel received the 21st Additional Discovery including:

a. Full Incident Report (BS 1225-1268)

m. Aside from the additional investigative steps Greensboro Police Department took

that were unknown to Defense Counsel, the 21st Additional discovery included photographs of [redacted] and reports of DNA extractions of her fingernails that were taken hours after her report.

n. On Wednesday, 14 October 2020 the Defense received the 20th Additional Discovery an Affidavit from NCIS that Special Agent [redacted] received a 3-day suspension for unprofessional behavior due to unauthorized purchasing on a GTCC while not on Official Travel Duty.

3. Discussion

Law

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with the "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. Article 46, UCMJ, 10 U.S.C. § 846 (2012). "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). This Court has held that trial counsel's "obligation under Article 46," UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

The Rules for Courts-Martial further define a trial counsel's obligations under Article 46, UCMJ. *See United States v. Pomarleau*, 57 M.J. 351, 359 & n.9 (C.A.A.F. 2002). Three provisions are of particular relevance to this case. First, "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). Second, "trial counsel

shall, as soon as practicable, disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." R.C.M. 701(a)(6);7 see *United States v. Garlick,* 61 M.J. 346, 349-50 (C.A.A.F. 2005). Third, the Government must permit the defense to inspect "[a]ny books, papers, documents, photographs, tangible objects, . . . or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." R.C.M. 701(a)(2)(A). These discovery rules "ensure compliance with the equal-access-to evidence mandate in Article 46." *Williams, 50 M.J. at 440.* In doing so, the rules "aid the preparation of the defense and enhance the orderly administration of military justice." *Roberts, 59 M.J. at 325.* We further note that "**[t]**he parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate."

R.C.M. 701(a)(6) "implements the Supreme Court's decision in *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)." Williams, 50 M.J. at 440.* Under Brady, "the Government violates an accused's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.'" *United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (*quoting *Smith v. Cain,* 565 U.S. 73, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571, (2012)).

"[M]ilitary courts possess the . . . authority to impose sanctions for noncompliance with discovery requirements . . . ." *Pomarleau, 57 M.J. at 360.* "In the military justice system, RCM 701(g)(3) governs the sanctioning of [Rule 701] discovery **[**41]** violations" and "provides the military judge with a number of options to remedy such violations." *Id. at 361-62; United States v. Murphy, 33 M.J. 323, 328 (C.M.A. 1991).* These sanctions are: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the

circumstances. R.C.M. 701(g)(3). "Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated." *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993).*

Dismissal with prejudice may also be an appropriate remedy for a discovery violation under R.C.M. 701(g)(3)(D). *United States v. Stellato*, 73 M.J. 473, 489 (C.A.A.F. 2015). Dismissal of charges may be appropriate if a military judge determines that the effects of the Government's discovery violations have prejudiced the accused and no lesser sanction will remedy this prejudice. *Id.* In order to determine if prejudice exists in cases involving discovery violations, Article III courts have held that the proper inquiry is whether there was "injury to [an accused's] right to a fair trial." *Stellato,* 73 M.J. at 490.

Application

When the government's multiple and repeated discovery violations compromised the accused's ability to mount a defense dismissal with prejudice was appropriate given the "nature, magnitude, and consistency of the discovery violations." *U.S. v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). In PFC Williams case, the Government has disclosed mere days before trial:

i. Additional interrogation of the Accused,
ii. photographs of injuries,
iii. victim's audio interviews,
iv. 911 recordings/transcripts, and
v. police reports.

The list noted above is not exhaustive. Since 20 October 2020, the Government has tendered (8) iterations of additional discovery amounting to over 100 pages of additional reports, and hours of audio recording including statements made by the Accused. All of the discovery has been accessible to the Government and was requested by the Defense in March of 2020. All of the discovery has been available to the Government for nearly a year. Given the nature, magnitude,

and consistency of the discovery violations the Defense asks for all charges and specifications involving [redacted] and [redacted] be dismissed with prejudice.

4. Evidence and Burden of Proof. The Defense has the burden of proof by a preponderance of the evidence and have attached the following Enclosures:

1. 27th Additional Discovery dtd 27 Oct 2020
2. 26th Additional Discovery dtd 26 Oct 2020
3. 25th Additional Discovery dtd 23 Oct 2020
4. 24th Additional Discovery dtd 23 Oct 2020
5. 23rd Additional Discovery dtd 22 Oct 2020
6. 22nd Additional Discovery dtd 22 Oct 2020
7. 21st Additional Discovery dtd 20 Oct 2020
8. 20th Additional Discovery dtd 14 Oct 2020

5. Relief Requested. Pursuant to Rule For Courts-Martial 701(g)(3)(D), the Defense respectfully requests the Court to dismiss all charges concerning [redacted] and [redacted] with prejudice. Alternatively, the Defense requests the court to sever the charges and specifications involving [redacted] and [redacted] and proceed forward on all charges concerning PFC [redacted]

6. Argument. The Defense requests oral argument

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

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the Court and opposing counsel on 29 October 2020.

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

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NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. TRAVONTE D. WILLIAMS Private First Class U. S. Marine Corps	**GENERAL COURT MARTIAL** **GOVERNMENT MOTION IN LIMINE** (Preclude Victims' Prefcrences and Prosecutorial Discretion of Other Agencies) Date: 27 October 2020

1. Nature of Motion.

The Government moves for the court preclude the Defense from presenting or eliciting evidence before the members regarding any victims' prcference not totestify at trial.. Such evidence is irrelevant under Mil. R. Evid. 401, and any probative valuc would be substantially outweighed by a danger of (1) unfair prejudice, (2) confusing the issues, or (3) misleading the members. *See* Mil. R. Evid. 403. For the above reasons, the Government also asks the court to preclude Defense from presenting or eliciting evidence regarding the decisions of civilian prosecution offices not to prosecute alleged sexual offenses by the accuscd against named victims [redacted] and [redacted] in this case

2. Burden.

Pursuant to R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Pursuant to R.C.M. 905(c)(2)(A), the burden of persuasion is on the Government as the moving party.

3. Summary of Facts.

a. The Accused is currently pending trial for alleged violations of Article 80 (Attempted rape), Article 120 (Abusive sexual contact) and Article 128 (Assault) of the Uniform Code of Military Justice (UCMJ).

b. Three named victims ([redacted]) may have initially expressed a varying level of desire notto testify at trial. .

c. The Defense wishes to cross-examine these victims on the issue of not initially wanting to participate.

d. The defense further wishes to cross-examine witnesses on the issue of the District Attorney's Office in Wilmington (relating the offense against [redacted]) and the District Attorney's Office in Greensboro (relating to the offense against [redacted]) election not to pursue charges.

4. Statement of the Law.

Under M.R.E. 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining thc action." Additionally, under M.R.E. 403, "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the members[.]" Evidence of a Victim's preference not to participate is not relevant, because such evidence would not make any relevant facts more or less probable. Moreover, such evidence—even if otherwise relevant—should not be admitted, because such evidence would unfairly prejudice the government and would likely confuse thc issues or mislead the members by eclipsing the available evidence actually presented at trial.

5. Analysis.

a. Victim Participation Preference Evidence

The Court should preclude evidence of the Victim's initial preference not to participate, because it does not tend to show any element of the alleged sexual assault or attempted sexual assault is more or less likely to have occurred. The Rules for Courts-Martial and service

regulations afford victims of sex-related offenses the right to express their preferences to disposition authorities. Victims may prefer to not participate in the prosecution of a case for any number of reasons that have no bearing on the actual facts of the case or their credibility. In this case, the three alleged victims listed above participated in the investigation of this case but subsequently notified trial counsel of their individual preference not to testify at trial. Nevertheless the Government anticipates at present that all persons on its witness list will be present for trial.

Finally, even if victim preferences possessed some modicum of probative value, such evidence would be likely to overshadow the evidence actually presented at trial that tends to show that such acts did occur. Accordingly, such evidence should be precluded under M.R.E. 401 and M.R.E. 403.

b. District Attorney's Office Decisions

The court should deny entry of evidence relating to any decision of Wilmington or Greensboro District Attorney's Office to deny prosecution of the present case because such evidence is not relevant under Mil. R. Evid. 401 and the danger of unfair prejudice, confusing the issues and misleading members substantially outweighs any probative value under Mil. R. Evid. 403. While these offices could have relied upon a myriad of possible reasons (related to or wholly unrelated to evidentiary merit) when making their decision to decline prosecution, none of these reasons are relevant evidence to present to members on the merits. Finally, allowing members to consider a civilian's agency's declination to prosecute as evidence would invade the province of the factfinder.

6. Evidence.

The Government submits the following enclosures in support of this motion:

A. Portion of Greensboro Police Department Report
B. Portion of New Hanover County Sherriff Office's Report
C. Victims' R.C.M. 701 Disclosures

7. Relief Requested.

The Government requests that the Court preclude evidence of the victims' initial participation preference or the decisions of civilian district attorney offices.

8. Argument.

The Government requests oral argument.

[redacted]
J. S. HIGH
Captain, U.S. Marine Corps
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing was served on the court and opposing counsel electronically on 27 October 2020.

[redacted]
J. S. HIGH
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION IN LIMINE TO SUPPRESS UNDER RULE FOR COURTS-MARTIAL 304 Date: 27 October 2020

1. **Nature of Motion:**

This is a defense motion to suppress the video of PFC Travonte Williams' interrogation on 22 August 2020 conducted by Detective [redacted] (New Hanover Sheriff's Office). The video of the interrogation was discovered on the Defense in violation of Military Rule of Evidence 304.

2. **Summary of the Facts:**

a. PFC Travonte Williams was interrogated by New Hanover Sheriff's Office Detective [redacted] on 22 August 2020.

b. A summary of the interrogation was dictated by Detective [redacted] in his investigative report.

c. Detective [redacted] did not notate that the interrogation was recorded on video and that NCIS had a copy of the interrogation.

d. PFC Williams was arraigned on 6 March 2020.

e. Defense Counsel submitted their initial discovery request on 18 March 2020.

f. Per the initial TMO, Trial Counsel was to turn over requested discovery on 24 March 2020.

g. Trial is scheduled to commence on 2 November 2020.

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h. On Thursday, 22 October 2020 Defense Counsel received the 23rd Additional Discovery (Enclosure 1) including:

   a. LCpl [redacted] Interview Summary (BS 1283-1288); and
   b. Video of New Hanover Interrogation of Accused dtd 23 August 2019.

i. On Friday, 23 October 2020, the Government submitted its Final Pretrial Matters and expressed their intent to use the video in their case-in-chief.

j. This video was discovered on Defense Counsel 5 business days prior to trial.

3. **Discussion**

Law

Mil. R. Evid. 304(d) states:

> Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused.

Furthermore, Rules for Courts-Martial 701(a)(2)(B) requires the trial counsel to provide the defense upon request with, inter alia, all reports, papers and documents within control of military authorities. R.C.M. 701 does not solely apply to evidence within the immediate custody of the prosecution, but also requires the review of evidence in the possession, control, or custody of other Government authorities, which would include NCIS. *United States v. Williams*, 50 M.J. 436, 441 (CAAF 1999). This prosecutorial requirement of due diligence extends to files, as designated in a defense discovery request, that involve a specified type of information within a specified entity. *Id.* Additionally, within the Government's standard of due diligence on complying with lawful discovery requests, Trial Counsel must also ensure that all answers to discovery requests are correct. *See United States v. Green,* 37 M.J. 88 (CMA 1993).

Application

The Defense moves to suppress the video of PFC Travonte Williams's interrogation conducted on 22 August 2020 by Detective [redacted] (New Hanover Sheriff's Office). The Government's disclosure of PFC Williams' statement is untimely and violates Mil. R. Evid. 304. PFC Williams was arrainged on 6 March 2020, and the Government's discovery was due on 24 March 2020. Defense Counsel submitted their initial discovery request on 18 march 2020. Consequently, Defense Counsel received the video of PFC Williams' interrogation on Thursday, 22 October 2020. The interrgoation was conducted 22 August 2019. Therefore, the video was discovered on the Defense 1 year and 2 months after the interrogation was taken, and just 6 business days prior to trial. The Government provided the Court notice of their intent to use the video during their case in chief the day following the Defense Counsel's reciept of the video. Given the untimeliness of the discovery, the video should be precluded from being admitted into evidence. The Defense reserves the right to file subsequent motions concerning the substantive issues with this evidence, as well as, object at trial to those substantive issues.

4. **Relief Requested.**

The Defense requests that all statements made during PFC Williams' interrogation conducted on 22 August 2020 by New Hanover Sheriff's Office be suppressed.

5. **Burden.**

a. Pursuant to M.R.E. 304the burden is on the government to establish by a preponderance of the evidence that the accused's statements are admissable.

6. **Evidence.**

a. Evidence in support of this motion will include:

1. Defense's Initial Discovery Request dtd 18 March 2020

2. Twenty Third Additional Discovery ICO U.S. v. PFC Travonte D. Williams, USMC dtd 22 October 2020
3. New Hanover County Police Report dtd 9 Sept 2019

7. **Argument**: The Defense requests oral argument on this issue.

[redacted]
M. J. THOMAS
Captain, USMC
Detailed Defense Counsel

****

CERTIFICATE OF SERVICE

I certify that I served a true and accurate copy of this motion on Government counsel on date 27 October 2020.

[redacted]
M. J. THOMAS
Captain, USMC
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. PFC TRAVONTE WILLIAMS Private First Class U. S. Marine Corps	**GENERAL COURT MARTIAL** **GOVERNMENT RESPONSE** (DEFENSE MOTION IN LIMINE TO SUPRESS) Date: 30 October 2020

1. Nature of Motion.

The motion is in response to the defense's motion to suppress Detective [redacted] 22 August 2020 interrogation of PFC Travonte Williams. Because the subject matter of the interrogation was discovered to defense prior to arraignment, the Government did not violate Mil. R. Evid. 304(d). Further, because any failure to comply with Rule for Court-Martial (R.C.M.) 701(a)(2)(A) did not prejudice the Accused, sanction under R.C.M. 701(g)(3) is improper.

Burden.

Pursuant to R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Pursuant to R.C.M. 905(c)(2)(A), the burden of persuasion is on the defense as the moving party.

2. Summary of Facts.

a. The Accused is currently pending trial for alleged violations of Article 80 (Attempted rape), Article 120 (Abusive sexual contact) and Article 128 (Assault) of the Uniform Code of Military Justice (UCMJ).

b. Detective [redacted] of New Hanover County Sheriff's Office (NHCSO) interrogated PFC Williams on 22 August 2019 for 50 minutes (including dead time).

c. Because the New Hanover County Sherriff's Office report contained a detailed summary of the interrogation, the defense has been on notice of the contents of the interrogation since it was discovered 13 December 2019.[1]

d. NCIS Investigative Action (IA) "Results of Receipt and Review of Additional Documents from the New Hanover County Sherriff's Office" dated 1 Oct 2019 provided further notice of the interrogation's existence to defense.[2]

e. The government became aware of the video's existence on 22 October 2020 during pretrial interviews with NHCSO and NCIS.

f. While the Government only recently became aware of the fact that the interrogation was recorded, the Government took prompt action to obtain the recording, tender to the defense on 22 October 2020, and provide notice to the defense and court via pretrial matters that it intended to offer the statement into evidence.

3. Statement of the Law

The prosecution has a duty to disclose the contents of the Accused's statements under Mil. R. Evid. 304(d) before arraignment. However, Mil. R. Evid. 304(f)(2) contemplates admittance of a defendant's statement disclosed after arraignment. R.C.M. 701(a)(2)(A) further requires trial counsel to permit the defense to inspect items: "(i) relevant to defense preparation; (ii) the government intends to use in its case-in-chief; (iii) the government anticipates using in rebuttal; or (iv) items obtained from or belonging to the accused."

Military courts possess the authority to impose sanctions for noncompliance with discovery requirements. R.C.M. 701(g)(3) provides the military judge with a number of options to remedy noncompliance, including: "(A) ordering the party to permit discovery; (B) grant a

[1] Enclosure (1), Bate Stamp 354-356.
[2] Enclosure (1), Bates Stamp 334-335.

continuance; (C) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) enter such other order as is just under the circumstances." R.C.M. 701(g)(3) *Discussion* advises that factors to be considered determining whether to grant an exception to exclusion under R.C.M. 701(g)(3)(C) include: "the extent of the disadvantage that resulted from a failure to disclose, the reason for the failure to disclose, the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors."

In *United States v. Stillato*, 74 M.J. 473 (C.A.A.F) 2015, the court held that in cases involving potential discovery violations, the "proper inquiry is whether there was "injury to [an accused's] right to fair trial." In making this determine, the court examined: "(1) whether the delayed disclosure hampered or foreclosed a strategic option; (2) whether the belated disclosure hampered the ability to prepare a defense; (3) whether the delay substantially influenced the fact-finder; and (4) whether the nondisclosure would have allowed the defense to rebut evidence more effectively.[3]

4. <u>Analysis.</u>

The accused's videotaped interrogation should not be prohibited because the government did not violate its duty under Mil. R. Evid. 304(d) or R.C.M 701(a)(2)(A). Alternatively, any failure to comply with these rules resulted in *de minimis* prejudice to the defense thus making the sanction of suppression improper. Under Mil. R. Evid. 304(d), the government only has a duty to disclose the *contents* of the Accused's statement before arraignment. Because a detailed summary of Detective [redacted] interrogation was provided to the defense 13 December 2019 prior to the Accused's 6 March 2020 arraignment, this rule was not violated. While inspection of this

[3] *Stillato*, 74 M.J. at 490.

video is required under R.C.M. 701(a)(2)(A), the government in the absence of bad faith only recently became aware of the fact that the interrogation was recorded. Once aware of its existence, the government took prompt action to obtain the recording, tender it to the defense, and provide notice to the defense and the court that it intended to offer the statement into evidence. This is the sort of scenario contemplated by Mil. R. Evid. 304(f)(2).

A detailed summary of the 22 August 2019 interview has been in defense possession since 13 December 2019, making any prejudice to the Accused *de minimis* and suppression of the video improper under a R.C.M. 701(g)(3) and *Stillato*.[4] Although the video was not discovered until 23 October 2020, this fact alone makes the severe sanction of suppression inequitable. As the moving party, the defense has failed to articulate the extent of disadvantage, if any, it suffered as a result of the delayed disclosure.[5] Under a *Stillato* analysis, an inquiry into whether there was "injury to the accused's right a fair trial" similarly reveals none under any of the four factors. The delayed disclosure did not hamper strategic options or preparation because the defense already knew the substantive details of the interrogation.[6] Further, the defense received a copy of the video in time to sufficiently prepare for trial.

5. Evidence.

The government submits the following enclosures in support of its motion:

1. Excerpts from Fourth Additional Discover dated 13 December 2019

6. Relief Requested.

The government requests that the defense's motion to suppress the 22 Aug 2019 video of the Accused's interrogation be denied.

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[4] *See* Enclosure (1), Bate Stamp 354-356.
[5] *See* R.C.M. 701(g)(3) *Discussion.*
[6] *See Stillato,* 75 M.J. at 490. Factors (3) and (4) are only applicable at trial. *See Id.*

7. **Argument**.

The Government requests oral argument.

[redacted]
J. S. HIGH
Captain, U.S. Marine Corps
Trial Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing was served on the court and opposing counsel electronically on 30 October 2020.

[redacted]
J. S. HIGH
Captain, U.S. Marine Corps
Trial Counsel

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE MOTION TO DISMISS Date: 29 October 2020

1. **Nature of Motion.** Pursuant to Rule For Courts-Martial 701(g)(3)(D), the Defense moves the court to dismiss with prejudice all charges involving [redacted] and [redacted]

2. **Summary of Facts.**

a. Counsel is less than three (3) business days away from the court-martial in the above mentioned case, which is scheduled to start trial on 2 November 2020.

b. Substantial additional discovery has been tendered on Defense Counsel within the past two weeks.

c. On Tuesday, 27 October 2020 Defense Counsel received the 27th Additional Discovery including:

a. V/ Williams 701 Disclosure Memorandum (BS 1361-1362); and
b. V/ [redacted] GPD Interview Audio Recording (BS 1363)

d. On Monday, 26 October 2020 Defense Counsel received the 26th Additional Discovery including:

a. Receipt of Emergency Phone Call Recordings (BS 1356)
b. Incident Report Dated 15 August 20 (BS 1357-1358)
c. Audio File of [redacted] Interview (BS 1359); and
d. [redacted] 911 Call dated 15 August 20 (BS 1360)

e. This past Friday, 23 October 2020 Defense counsel received the 25th Additional Discovery including:

a. Images of Building M450 PM 229 (BS1295-1315); and
b. NCIS ROI dated 16 October 2020 (BS1316-1355) which contains additional

allegations of UCMJ violations pertaining to PFC Williams.

f. This past Friday, 23 October 2020 Defense Counsel received the 24th Additional Discovery including:

a. New Hanover Case Supplemental Report (BS 1290);
b. New Hanover Case Supplemental Report (BS 1291-1292);
c. Case Supplemental Report (BS 1293), and
d. [redacted] Arm Injury Photograph (BS 1294).

g. [redacted] Arm Injury Photograph is either from the July 2019 incident, or the August 2019 incident. However, that information is unknown to Defense Counsel.

h. On Thursday, 22 October 2020 Defense Counsel received the 23rd Additional Discovery including:

a. LCpl [redacted] Interview Summary (BS 1283-1288) and
b. Video of New Hanover Interrogation of Accused dtd 23 August 2019.

i. The interrogation took place over a year ago, and Defense Counsel was only provided an interview summary of said interrogation until last Thursday.

j. On Friday, 23 October 2020, the Government submitted its Final Pretrial Matters and expressed their intent to use the video in their case-in-chief. This video was discovered on Defense Counsel five (50 business days prior to trial and without a transcript.

k. On Wednesday, 22 October 2020 Defense Counsel received the 22nd Additional discovery including:

a. Military Protective Order signed 13 Nov 19 (BS 1269 - 1270)
b. Revocation Letter dated 5 Dec 19 (BS 1271 - 1273)
c. Military Protective Order signed 4 Oct 19 (BS 1274 - 1275)
d. Military Protective Order signed 13 Nov 19 (BS 1276 - 1277); and
e. MPO issued Protective Order dated 24 Jun 20 (BS 1278 - 1282)

l. On Tuesday, 20 October 2020, Defense Counsel received the 21st Additional Discovery including:

a. Full Incident Report (BS 1225-1268)

m. Aside from the additional investigative steps Greensboro Police Department took

that were unknown to Defense Counsel, the 21st Additional discovery included photographs of [redacted] and reports of DNA extractions of her fingernails that were taken hours after her report.

n. On Wednesday, 14 October 2020 the Defense received the 20th Additional Discovery an Affidavit from NCIS that Special Agent Wiesler received a 3-day suspension for unprofessional behavior due to unauthorized purchasing on a GTCC while not on Official Travel Duty.

3. Discussion

Law

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with the "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. Article 46, UCMJ, 10 U.S.C. § 846 (2012). "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). This Court has held that trial counsel's "obligation under Article 46," UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

The Rules for Courts-Martial further define a trial counsel's obligations under Article 46, UCMJ. *See United States v. Pomarleau*, 57 M.J. 351, 359 & n.9 (C.A.A.F. 2002). Three provisions are of particular relevance to this case. First, "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). Second, "trial counsel

shall, as soon as practicable, disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." R.C.M. 701(a)(6);7 see *United States v. Garlick*, 61 M.J. 346, 349-50 (C.A.A.F. 2005). Third, the Government must permit the defense to inspect "[a]ny books, papers, documents, photographs, tangible objects, . . . or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." R.C.M. 701(a)(2)(A). These discovery rules "ensure compliance with the equal-access-to evidence mandate in Article 46." *Williams, 50 M.J. at 440*. In doing so, the rules "aid the preparation of the defense and enhance the orderly administration of military justice." *Roberts, 59 M.J. at 325*. We further note that "[t]hc parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate."

R.C.M. 701(a)(6) "implements the Supreme Court's decision in *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*." *Williams, 50 M.J. at 440*. Under Brady, "the Government violates an accused's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.'" *United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012)* (quoting *Smith v. Cain*, 565 U.S. 73, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571, (2012)).

"[M]ilitary courts possess the . . . authority to impose sanctions for noncompliance with discovery requirements . . . ." *Pomarleau, 57 M.J. at 360*. "In the military justice system, RCM 701(g)(3) governs the sanctioning of [Rule 701] discovery [**41] violations" and "provides the military judge with a number of options to remedy such violations." *Id. at 361-62*; *United States v. Murphy, 33 M.J. 323, 328 (C.M.A. 1991)*. These sanctions are: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the

and consistency of the discovery violations the Defense asks for all charges and specifications involving [redacted] and [redacted] be dismissed with prejudice.

4. Evidence and Burden of Proof. The Defense has the burden of proof by a preponderance of the evidence and have attached the following Enclosures:

1. 27th Additional Discovery dtd 27 Oct 2020
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6. 22nd Additional Discovery dtd 22 Oct 2020
7. 21st Additional Discovery dtd 20 Oct 2020
8. 20th Additional Discovery dtd 14 Oct 2020

5. Relief Requested. Pursuant to Rule For Courts-Martial 701(g)(3)(D), the Defense respectfully requests the Court to dismiss all charges concerning [redacted] and [redacted] with prejudice. Alternatively, the Defense requests the court to sever the charges and specifications involving [redacted] and [redacted] and proceed forward on all charges concerning PFC [redacted]

6. Argument. The Defense requests oral argument

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

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the Court and opposing counsel on 29 October 2020.

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

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

UNITED STATES v. TRAVONTE WILLIAMS PRIVATE FIRST CLASS USMC	GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS OR SEVER CHARGES (DISCOVERY) 2 NOVEMBER 2020

SUMMARY

This is the Government response to the defense motion to dismiss charges pertaining to the named victims [redacted] and [redacted] or, in the alternative to sever those charges from the current court-martial. The motion should be **DENIED** in fully because no discovery violation has occurred, and the defense has failed to establish any grounds for the requested relief.

BURDEN

As the moving party, the defense bears the burden of persuasion, which it must meet by a preponderance of the evidence. R.C.M. 905(c).

PROPOSED FINDINGS OF FACT

1. Since the inception of this court-martial, the Government has to date tendered to defense an initial discovery package in December 2019 and twenty-nine separate batches of additional discovery.
2. Excerpts from both the pertinent Greensboro Police Department (GPD) and New Hanover County Sheriff's Office (NHCSO) reports in this case were included in the initial discovery package. Enclosure (5)

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3. The defense submitted an initial discovery request on 18 March 2020. To date, the defense has not submitted any additional discovery requests, motions to compel discovery, or any requests for witness interviews.

4. During its investigation of this case, NCIS submitted two written requests to the NHCSO for departmental records pertaining to this case, both of which NHCSO complied with. Enclosure (6). NCIS later submitted a written request for the complete GPD report pertaining to this case. Enclosure (7). All reports obtained by NCIS were tendered to defense on or before 29 January 2020.

5. At an Article 39(a) session on 1 October 2020, the defense requested a continuance of approximately sixty days from the previous trial dates of 2-6 November 2020 in order to prepare for trial.

6. Additional batches of discovery 20-29 were tendered to defense between 14-30 October 2020.

7. On 30 October 2020, the parties agreed to, and the Court ordered, a thirty-day in order to provide the defense with adequate time to prepare for trial. The Government joined in the continuance motion.

8. 29th Additional Discovery.

    a. Tendered to defense on 30 October 2020.

    b. Consists primarily of brig disciplinary records that are unrelated to the charges currently before this court-martial.

9. 28th Additional Discovery.

    a. Tendered to defense on 29 October 2020.

b. Contains two disclosure memos from trial counsel following pretrial witness interviews.

c. Contains excerpts from the NHCSO Report that the department did not originally provide to NCIS during the investigation of this case.

d. Also contains GPD dash cam and body cam footage which the trial counsel first learned of on 29 October 2020. Enclosure (4).

10. 27th Additional Discovery.

a. Tendered to defense on 27 October 2020.

b. Contains an audio recording of [redacted] by the GPD which corresponds to the detailed summary of interview contained at BS 1235-1239 (see Enclosure 1), which was tendered to defense on 22 October 2020 (see below). The Government first learned that the audio recording existed during an interview with GPD on 26 October 2020. The Government thereafter took prompt steps to obtain a copy of the recording and disclose it to the defense.

11. 26th Additional Discovery.

a. Tendered to defense on 26 October 2020.

b. [redacted] 9-1-1 call log and recording. The Government obtained this evidence from New Hanover County on 23 October 2020 and tendered it to defense on 26 October.

c. NHCSO recording of [redacted] interview. This recording corresponds to the detailed summary of interview found at BS 338-343 (see Enclosure 2), which was tendered to defense on 24 January 2020. The trial counsel first learned on that the interview had been recorded during an interview with a NHCSO Detective on 22

October 2020. Trial Counsel took diligent steps to secure a copy of the recording and provide timely disclosure to the defense.

12. 25th Additional Discovery.

a. Tendered to defense on 23 October 2020.

b. The NCIS Report of Investigation contained in this discovery consists of recent allegations of misconduct by the accused that are unrelated to this court-martial.

c. Contains photographs of the Camp Johnson barracks room of PFC [redacted] which is the situs of the sexual assault alleged in Specification 1 of Charge II.

13. 24th Additional Discovery.

a. Tendered to defense on 23 October 2020.

b. The photograph purporting to show an injury to the arm of [redacted] stems from the August 2019 incident with the Accused. The photograph was first provided to the Government by a NHCSO Detective on 22 October 2020.

14. 23rd Additional Discovery.

a. Tendered to defense on 22 October 2020.

b. Contains the recorded interrogation of the Accused by the New Hanover County Sheriff's Office – Addressed via separate motion response.

15. 22nd Additional Discovery.

a. Tendered to defense on 22 October 2020.

b. Consists of Military Protective Orders that were previously furnished to the Accused.

16. 21st Additional Discovery.

a. Tendered to defense on 20 October 2020.

b. Consists of the complete GPD report pertaining to allegations against the Accused by [redacted] NCIS obtained what was believed to be the complete report from GPD on 28 November 2019, which is contained at BS 430 – 436 (see Enclosure 3) and tendered to defense on 29 January 2020. During pretrial preparation, the Government learned on 19 October 2020 that additional written supplements to the GPD report had not been obtained by NCIS. The Government took prompt steps to obtain a complete paper copy of the report and tendered to defense on 20 Oct 2020.

17. 20th Additional Discovery.

a. This affidavit is the result of a standard pre-trial records check request submitted to NCIS by the trial counsel. SA [redacted] is not on the witness list for either party.

STATEMENT OF THE LAW

Grounded in the Due Process guarantees of the Fifth Amendment and Article 46 of the UCMJ, discovery in the military justice system is designed to eliminate pretrial gamesmanship, promote equal access to evidence, and enhance the fair and orderly administration of military justice. *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015). "Trial counsel shall, as soon as practicable, disclose to the defense the existence of [exculpatory] evidence known to the trial counsel," R.C.M. 701(a)(6), and must permit defense inspection of documents or other physical evidence that is within control of military authorities and relevant to defense preparation. R.C.M. 701(a)(2)(A). All parties have a continuing duty to disclose evidence subject to discovery throughout the course of a court-martial. R.C.M. 701(d).

R.C.M. 701(g)(3) affords military courts broad discretion to remedy discovery violations, to include granting a continuance or entering other orders as justice requires. Dismissal with

prejudice may also be an appropriate remedy for discovery violations stemming from willful prosecutorial misconduct or systematic disregard of discovery obligations. *Stellato*, 74 M.J. at 488-91. However, the military judge must "craft the least drastic remedy to obtain the desired results," *Id.* at 490 (internal quotation marks omitted), and dismissal is warranted only when flagrant and excessive discovery violations actually prejudice the accused's ability to mount a defense. *Id.*

ARGUMENT

Absent from this case is any of the sort of flagrant, continuance discovery violations that merited dismissal with prejudice in *Stellato*, the case relied upon the defense almost exclusively in its request for relief. The Government has not engaged in any willful misconduct or deliberate disregard of its discovery obligations. Indeed, contrary to defense assertions, no discovery violation has occurred in this case. The great majority of the "new" evidence tendered to defense between 14-30 October 2020 falls into two categories: (1) evidence not directly related to the facts of this court-martial, such as brig disciplinary records; or (2) recordings of witness interviews conducted by either GPD or NHCSO.

NCIS took steps during its investigation of this case to obtain complete copies of all civilian law enforcement reports pertinent to this case. All of the witness interviews conducted by either GPD or NHCSO are referenced in those reports, however notably absent from any of these reports is any annotation that any witness interviews were recorded. In the case of the GPD report, there is also no reference to the dash cam or body cam footage referenced at Enclosure (4). NCIS and trial counsel, not being regularly acquainted with the reporting practices of state law enforcement, reasonably assumed no audio/video evidence was attached to the any of the civilian law enforcement reports in this case. Only during the course of recent

pretrial interviews with representatives of the GPD and NHCSO did it become apparent that some witness interviews had been recorded and that dash cam/body cam footage existed. The trial counsel thereafter took diligent steps to secure all pertinent electronic media in possession of GPD or NHCSO and disclose it to the defense.

Even had some discovery violation occurred in this case, the defense has failed to make any showing of prejudice not already remedied by the continuance previously granted by this Court. Notably, in the days and weeks since the defense received the discovery at issue it has not generated any request for additional discovery, witness interviews, or witness production.

Finally, the defense has requested the alternative relief of severance of charges involving the allegations by [redacted] and [redacted] The military judge has the discretion to sever unrelated charges, but only to prevent "manifest injustice" that cannot be mitigated by less drastic action such as limiting instructions. R.C.M. 906(b)(10); *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999). Severance of charges is not a recognized remedy under R.C.M. 701(g)(3) or any other legal authority, nor has the defense articulated how the accused will not receive a fair trial upon the charges as currently referred before this court-martial.

CONCLUSION

The motion should be **DENIED** in full because no discovery violation has occurred in this case, and even if it had the defense has failed to establish any actual prejudice.

EVIDENCE

Enclosures

(1) – Summary of GPD interview with [redacted]
(2) – Summary of NHCSO interview with [redacted]
(3) – Initial GPD Incident Report
(4) – R.C.M. 701 Disclosure pertaining to dash cam/body cam footage
(5) – Initial discovery containing NHCSO and GPD reports
(6) – NCIS requests for complete NHCSO reports

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(7) – NCIS request for complete GPD report

[redacted]
N. C. THOMAS
Major, U.S. Marine Corps
Government Trial Counsel

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I certify that I served a true copy via e-mail of the above on the Court and Defense Counsel on 2 October 2020.

[redacted]
N. C. THOMAS
Major, U.S. Marine Corps
Government Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	GENERAL COURT-MARTIAL **CONTINUANCE MOTION** 30 October 2020

1. **Nature of Motion**. The Government respectfully moves the Court to order an Article 39(a) session aboard Camp Lejeune on 5 November 2020 and docket trial aboard Cherry Point from 30 November – 4 December 2020.

2. **Justification**. Trial is currently scheduled to begin on 2 November 2020. The requested continuance is in the best interest of justice, and all parties are available for trial on the dates requested above.

[redacted]
N. C. THOMAS
Major, U. S. Marine Corps
Government Trial Counsel

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Defense Counsel does not oppose the motion and agrees to the proposed Article 39(a) and trial dates.

30 October, 2020
Date

[redacted]
Defense Counsel

****

Court Ruling

The motion is **granted**. The parties shall appear before the Court on 5 November 2020 for an Article 39(a) session. Trial will be docketed for the week of 30 November - 4 December 2020.

30 October, 2020
Date

[redacted]
Kyle G. Phillips
Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	DEFENSE RESPONSE TO GOVERNMENT'S MOTION IN LIMINE TO ADMIT DNA EVIDENCE Date: 12 November 2020

1. Nature of Motion. Pursuant to Rule for Courts-Martial 701, the Defense responds to Government's Motion in Limine to admit DNA Evidence.

2. Summary of Facts.

a. Counsel is less than three (3) weeks away from the court-martial in the above mentioned case, which is scheduled to start trial on 30 November 2020.

b. On Tuesday, 20 October 2020, Defense Counsel received the 21st Additional discovery including:

a. Greensboro Police Department Full Incident Report (BS 1225-1268).

c. Aside from the additional investigative steps Greensboro Police Department took that were unknown to Defense Counsel, the 21st Additional discovery included photographs of [redacted] and reports of DNA extractions of her fingernails that were taken hours after her report.

d. On Wednesday, 4 November 2020 Trial Counsel notified the Defense of the Government's intent to have the DNA extractions from [redacted] fingernails tested by USACIL.

e. On Thursday, 5 November 2020, PFC Travonte Williams provided NCIS a sample of his DNA after being served a CASS minutes before the Article 39(a) hearing.

f. NCIS had already obtained a sample over a year prior to the CASS executed on 5

November 2020. In October of 2019, NCIS took PFC Williams mugshot, DNA, and fingerprints at the Cherry Point NCIS office.

g. At the Article 39(a) hearing held on 5 November 2020, the Court precluded the Government from introducing any evidence of DNA evidence seized after 2 November 2020.

3. Discussion

Law

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with the "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. Article 46, UCMJ, 10 U.S.C. § 846 (2012). "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). This Court has held that trial counsel's "obligation under Article 46," UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

The Rules for Courts-Martial further define a trial counsel's obligations under Article 46, UCMJ. *See United States v. Pomarleau*, 57 M.J. 351, 359 & n.9 (C.A.A.F. 2002). Three provisions are of particular relevance to this case. First, "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). Second, "trial counsel shall, as soon as practicable, disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." R.C.M. 701(a)(6);7 see *United States v. Garlick*, 61 M.J. 346, 349-50 (C.A.A.F. 2005). Third, the Government must permit the defense to inspect "[a]ny

books, papers, documents, photographs, tangible objects, . . . or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." R.C.M. 701(a)(2)(A). These discovery rules "ensure compliance with the equal-access-to evidence mandate in Article 46." *Williams, 50 M.J. at 440.* In doing so, the rules "aid the preparation of the defense and enhance the orderly administration of military justice." *Roberts, 59 M.J. at 325.* We further note that "[t]he parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate."

R.C.M. 701(a)(6) "implements the Supreme Court's decision in *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*." *Williams, 50 M.J. at 440.* Under Brady, "the Government violates an accused's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.'" *United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (*quoting *Smith v. Cain,* 565 U.S. 73, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571, (2012)).

"[M]ilitary courts possess the . . . authority to impose sanctions for noncompliance with discovery requirements . . . ." *Pomarleau, 57 M.J. at 360.* "In the military justice system, RCM 701(g)(3) governs the sanctioning of [Rule 701] discovery **[**41]** violations" and "provides the military judge with a number of options to remedy such violations." *Id. at 361-62*; *United States v. Murphy, 33 M.J. 323, 328 (C.M.A. 1991).* These sanctions are: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances. R.C.M. 701(g)(3). "Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated." *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993).*

Dismissal with prejudice may also be an appropriate remedy for a discovery violation under R.C.M. 701(g)(3)(D). *United States v. Stellato*, 73 M.J. 473, 489 (C.A.A.F. 2015). Dismissal of charges may be appropriate if a military judge determines that the effects of the Government's discovery violations have prejudiced the accused and no lesser sanction will remedy this prejudice. *Id.* In order to determine if prejudice exists in cases involving discovery violations, Article III courts have held that the proper inquiry is whether there was "injury to [an accused's] right to a fair trial." *Stellato,* 73 M.J. at 490.

Application

First and foremost, the Government's issue is not ripe for litigation. As of 12 November 2020, USACIL has not tested, nor generated a lab report concerning the results of the DNA at issue. This matter cannot be before the Court because the evidence pertinent to the Government's motion does not exist at this time.

R.C.M. 701(g)(3) provides the military judge with numerous options to remedy noncompliance, including: "(A) ordering the party to permit discovery; (B) grant a continuance; (C) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) enter such other order as is just under the circumstances." R.C.M. 701(g)(3) *Discussion* advises that factors to be considered determining whether to grant an exception to exclusion under R.C.M. 701(g)(3)(C) include: "the extent of the disadvantage that resulted from a failure to disclose, the reason for the failure to disclose, the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors."

PFC Williams is at an extreme disadvantage that resulted from the Government's repeated mishandling of evidence and repeated discovery violations. Every single piece of evidence causing this litigation has been available to the Government prior to March 2020, when

PFC Williams was arraigned. The Government had over 365 days to obtain a new CASS for PFC Williams' DNA, and gather DNA evidence from the Greensboro Police Department. The Government's negligence and inability to have meaningful discussions with NCIS and local law enforcement caused the delay in obtaining [redacted] DNA samples. The Government's failure to discuss USACIL's procedures and standards for proper DNA sample collection required them to obtain another CASS and put the Court, as well as, PFC Williams in compromising positions. The Government should have taken the steps necessary to contact NCIS about PFC Williams' DNA a year ago, but they did not. This issue was avoidable and has caused unnecessary additional litigation.

The disadvantage to PFC Williams cannot be overstated. At best the Defense will receive the USACIL report the week - if not days - before trial. Defense counsel will yet again be tendered another piece of critical evidence on the eve of trial. In the Government's motion they have indicated that they have a DNA forensic examiner assigned to the case and who will likely be required for trial in order to have the evidence admitted. The Defense will be unable to hire, or submit a motion to the Court to produce an expert consultant regarding the results. Consequently, PFC Williams will be denied the opportunity to have his own expert review the report and testing procedures. Putting aside PFC Williams inability to obtain an expert, his own counsel will be denied a meaningful opportunity to determine how to utilize, or weaponize the report in order to properly defend him.

The Government points to the continuance granted on 30 October 2020 as a remedy, but that continuance cannot cure this issue. Again, USACIL has not tested, nor has USACIL generated results concerning the evidence at this time. The results are unknown to the Defense, and regardless of the test's outcome the Defense will be put on their heels forced to defend PFC

Williams without adequate time to prepare. This will result in the necessity for another trial continuance in order for counsel to properly and adequately represent PFC Williams. No events can mitigate the disadvantage caused by the Government's repeated failure to abide by the Court's orders, and the UCMJ.

4. Evidence and Burden of Proof. The Defense has the burden of proof by a preponderance of the evidence and have attached the following Enclosures:

1. 21st Additional Discovery Disclosure
2. Email from Trial Counsel concerning CASS dtd 4 November 2020
3. Command Authorization of Search & Seizure ICO US v. PFC Williams
4. NCIS ROI dtd 22 Aug 2019

5. Relief Requested. Pursuant to Rule For Courts-Martial 701 the Defense requests the Court DENY the Government's motion.

6. Argument. The Defense requests oral argument

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

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served electronically on the Court and opposing counsel on 12 November 2020.

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

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

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE TO SUPPRESS DNA EVIDENCE** 12 November 2020

1. **Nature of the Motion.** This is the Government's response to the Defense's motion to suppress DNA evidence. The motion should be **DENIED** because sanctioning the Government by excluding this evidence is not an appropriate remedy under the facts and circumstances of this case.

2. **Burden.** As the proponent of the evidence, trial counsel has the burden to demonstrate that the evidence is admissible. The standard of proof is by a preponderance of the evidence. R.C.M. 905(c).

3. **Proposed Findings of Facts**

a. The Accused is currently pending trial for alleged violations of Article 80 (Attempted Rape), Article 120 (Abusive Sexual Contact) and Article 128 (Assault) of the Uniform Code of Military Justice (UCMJ).

b. On 27 November 2019, the Greensboro Police Department (GPD) notified the Naval Criminal Investigative Service (NCIS) of an attempted sexual assault by the Accused on or about 24 November 2019.

c. On 28 November 2019, NCIS received a copy of GPD's investigation pursuant to a written request (Enclosure 1).

d. The GPD Report (Enclosure 1) made no reference to any DNA seizure.

e. On approximately 19 December 2019, NCIS Special Agent [redacted] requested all GPD

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investigative materials associated with the case from GPD Detective [redacted] after Detective [redacted] informed NCIS that the cognizant District Attorney declined to prosecute the case (Enclosure 4).

f. GPD did not provide any additional materials pursuant to the 19 December 2019 request (Enclosure 4).

g. GPD did not conduct any additional investigation in this case after 19 December 2019.

h. At no point did the defense request an opportunity to inspect the GPD physical files in this case.

i. The Accused was ordered into pretrial confinement on 29 November 2019, and charges were preferred on 10 December 2019.

j. After two joint continuances joined by the Defense, trial was scheduled to commence on 2 November 2020.

k. On 19 October 2020, the Government first learned that GPD officers had seized DNA samples from under the victim's (A.M.) fingernails shortly after she reported scratching her attacker during the attempted rape.

l. The Government received the full GPD report, involving supplemental reports, which contained references to the DNA seized from the victim's (A.M.) fingernails (Enclosure 3).

m. On 20 October 2020, the Government promptly disclosed this information to the defense.

n. At no point prior to 19 October 2020 was the Government in possession of this information.

o. The Government did not request a continuance in order to facilitate DNA analysis prior to the previously scheduled trial dates.

p. On 29 October 2020, the Defense filed a motion to dismiss all charges with prejudice based on the disclosure of this evidence and other discovery tendered to Defense prior to trial.

q. On 30 October 2020, during an R.C.M. 802 conference between the parties and Military Judge, the Defense informed the Court that in addition to its request for dismissal of charges, it would be seeking the alternative relief of a continuance at the next scheduled Article 39(a) session on 2 November 2020.

r. Following the R.C.M. 802 conference, the Government inquired as to the defense position regarding an approximately 1-day continuance in order to permit additional time to prepare while completing the trial as schedule on or about 6 November 2020. The defense indicated it would object to commencement of trial before 30 November 2020.

s. Subsequently, the parties joined in a request to continue the trial until 30 November 2020, which the Court granted.

t. On 5 November 2020, pursuant to a command authorized search and seizure (CASS)(Enclosure 2), the Government seized a sample of the Accused's DNA for the purpose of comparing it to the samples collected from the victim, [redacted] in November 2019.

u. Subsequently, at an Article 39(a) session on 5 November 2020, defense counsel made an oral motion to suppress any evidence stemming from analysis of DNA samples collected in this case. The Government opposed that motion.

v. In an oral ruling, the Military Judge precluded the Government from introducing any evidence of DNA seized after 2 November 2020. This oral ruling gives rise to the instant motion.

w. The Government has coordinated with the U.S. Army Criminal Investigative Laboratory (USACIL) in order to arrange for completion of DNA analysis prior to the new trial dates.

x. USACIL received the DNA evidence in this case on 10 November 2020. A forensic DNA examiner has been assigned to the case, and USACIL will provide the trial counsel with a progress update no later than 17 November 2020.

y. While the Government is in possession of a DNA sample of the Accused taken prior to 5 November 2020, the CASS-obtained sample is the only standard available to the prosecution for DNA testing in this case.

z. The Government does not intend to request a continuance of the current trial dates.

4. <u>Discussion of the Law</u>

Military courts possess the authority to impose sanctions for noncompliance with discovery requirements. R.C.M. 701(g)(3) provides the military judge with numerous options to remedy

noncompliance, including: "(A) ordering the party to permit discovery; (B) grant a continuance; (C) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) enter such other order as is just under the circumstances." R.C.M. 701(g)(3) *Discussion* advises that factors to be considered determining whether to grant an exception to exclusion under R.C.M. 701(g)(3)(C) include: "the extent of the disadvantage that resulted from a failure to disclose, the reason for the failure to disclose, the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors."

In United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015), the court held that in cases involving potential discovery violations, the "proper inquiry is whether there was "injury to [an accused's] right to fair trial." In making this determination, the court examined: "(1) whether the delayed disclosure hampered or foreclosed a strategic option; (2) whether the belated disclosure hampered the ability to prepare a defense; (3) whether the delay substantially influenced the fact-finder; and (4) whether the nondisclosure would have allowed the defense to rebut evidence more effectively. Stellato, 74 M.J. at 490.

Further, there are very limited circumstances where evidence held by state law enforcement agencies should be considered to be in the possession of the military for purposes of discovery obligations:

> Generally speaking, we agree with the proposition that an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities. See United States v. Poulin, 592 F. Supp. 2d 137, 142-43 (D.Me.2008) (citing cases in declaring that "local law enforcement offices" are not included in "government" for purposes of the federal civilian criminal discovery rule, Fed.R.Crim. P. 16). However, a trial counsel cannot avoid R.C.M. 701(a)(2)(A) through "'the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.'" United States v. Marshall, 132 F.3d 63, 69, 328 U.S. App. D.C. 8 (D.C. Cir. 1998) (quoting United States v. Brazel, 102 F.3d 1120, 1150 (11th Cir. 1997)). Article III courts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement.

Stellato, 74 M.J. at 484-485. In enumerating the "joint investigation" exception, C.A.A.F. relied on the 9th Circuit Court of Appeals' decision in United States v. Bryan, 868 F.2d 1032 (9th Circuit 1989), discussing Fed.R.Crim.P. 16(a)(1)(C). In Bryan, the 9th Circuit held that "information in the possession of the government may sometimes include out-of-district documents of which the prosecutor has knowledge and access to." Id. At 1036. However, the court also cautioned that "the scope of the government's obligation ... should turn on the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each case." Id. In enumerating the fourth exception, where the prosecution inherits a case, C.A.A.F. relied on United States v. Poulin, 592 F.Supp.2d 137. In Poulin, the Government was aware of and in control of the evidence in question, but merely kept the evidence in the physical possession of a local sheriff's office. Therefore, it is clear that every court in every case has ultimately required knowledge by the Prosecution of the existence of evidence prior to finding any discovery violation, and discovery violations should ordinarily only be found in limited, enumerated circumstances.

5. Applicability of the Law to this Case

The Court's ruling precludes the Government from introducing evidence that has potentially high probative value, both in terms of proving the suspect's identity and corroborating the victim's testimony. Conversely, the results of the DNA analysis may be favorable to the defense. While the Military Judge did not expressly bar the Government from offering DNA evidence in any form, the Government does not have access to the Accused's DNA through any other source than the sample collected on 5 November 2020[1]. Therefore, the prohibition of any DNA evidence seized after 2 November 2020 practically deprives the Government of the right to use any DNA evidence, as meaningful forensic DNA analysis is not possible without comparing the Accused's known DNA standard to the samples of unknown DNA taken from the victim's fingernails.

[1] The Accused's DNA was previously seized for the routine purpose of entry into the Combined DNA Index System (CODIS). However, this cannot be utilized for analysis specific to this case.

The DNA evidence should not be prohibited because the Government did not violate its duty under R.C.M. 701(a). While discovery of the DNA evidence is required under R.C.M. 701(a), the Government in the absence of bad faith only recently became aware of the fact that the victim's DNA was seized by GPD. As noted above, the Government was first apprised of the evidence's existence on 19 October 2020. In preparation for trial, the prosecution sought to confirm with the GPD that no additional reports existed in this case beyond those previously provided to NCIS. The trial counsel did not do this in response to a specific defense discovery request, nor did the Government have any reason to suspect GPD was in possession of previously undisclosed physical evidence. Rather, the prosecution was acting in an abundance of caution.

While in hindsight it is easy to criticize the trial counsel for not discovering the evidence sooner, the belated nature of the discovery would only be relevant to a Government continuance request, which is not before the Court. Instead, the relevant legal analysis centers on whether a discovery violation actually occurred, and it has not. First, the Government did not withhold favorable evidence from the defense. Second, the trial counsel had absolutely no reason to believe any DNA evidence was ever obtained by the GPD. The Government acknowledges that because NCIS inherited this case from GPD, the GPD files fall within the scope of the trial counsel's due diligence requirement to look "beyond its own files." However, NCIS did this in November and December 2019 by requesting a copy of GPD's complete investigative file. Finally, the record is devoid of any clues that would lead a reasonable prosecutor to suspect DNA samples had been taken from the victim. This conclusion is supported by the fact that the defense did not submit any specific discovery requests beyond the general multi-page request of March 2019, and no motions to compel production of discovery have been litigated to date.

Once aware of the DNA, the Government took prompt action to procure the evidence and obtain analysis by USACIL. Crucially, the Government promptly notified the Defense both of the newly discovered existence of this evidence and its intent to use the evidence at trial. The Government has, at

every step, communicated clearly with Defense in good faith, and will promptly tender the results of the DNA testing as soon as they are obtained from USACIL. The Government has complied with all discovery requirements and has not violated its duty.

Further, the R.C.M. 701(g)(3) and Stellato analysis clearly contemplates circumstances where a discovery violation occurred and resulted in "injury to [the Accused's] right to fair trial." As discussed above, no discovery violations have occurred. The Government notified the Defense of the newly discovered DNA evidence promptly upon discovery and has discovered all evidence as it comes within the possession, custody, or control of military authorities. Similarly, the fact that the CASS was issued and USACIL analysis was requested so recently – in fact, after the two originally scheduled trial dates – clearly proves that this is not a situation where trial counsel allowed "relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." Rather, the prosecution did not seek a continuance to enable the DNA evidence to be tested, and, once notified of the defense's intent to seek a continuance, initially proposed a one-day continuance in order to enable defense preparation while maintaining the current trial dates. Additionally, the Defense's argument about "joint investigations" triggering an enumerated exception under Stellato does not apply. This was not the kind of nationwide, multi-agency "joint investigation" outlined in Bryan, upon which C.A.A.F. relied in Stellato; rather, the only cooperation between GPD and NCIS was GPD's transfer of what turned out to be ultimately incomplete files that did not mention the DNA evidence.

Assuming *arguendo* that the delayed disclosure constitutes a discovery violation, the instant circumstances fall short under the Stellato prejudice analysis. First, this disclosure has not hampered or foreclosed any strategic option; Defense counsel was effectively put on notice approximately one month prior to trial about the Government's intent to use the newly discovered DNA evidence. The Defense has failed to articulate how this amount of time is insufficient to hamper or foreclose any strategic options (Defense argument involving USACIL delay discussed *infra*). For the same reasons, the 'delayed disclosure' has neither hampered the ability to prepare a defense nor inhibited the

Defense's ability to rebut evidence more effectively. Finally, the delay could not have substantially influenced the fact-finder when the fact-finder has yet to be seated.

During oral argument at the R.C.M. 39(a) session on 5 November 2020, the Defense asserted they would have insufficient time to prepare for trial, despite having been granted almost a month's continuance, due to delay in receiving the reports from USACIL. However, this argument is entirely without merit. First, as the Defense acknowledged during the R.C.M. 39(a) session, there are only two possible results: the Accused's DNA either matches that found under [redacted] fingernails, or it does not. The Defense has not alleged any reason why they are unable to prepare for trial under either contingency. Finally, even if this court determines that extra preparation time for the Defense is necessary, the Defense has not articulated any reason why an additional continuance should not be granted. To the contrary, this evidence has extremely high probative value into fundamental questions in this case and is necessary to ensuring a fair trial. This probative value substantially and materially outweighs any considerations of slight delay the Defense may raise, particularly in light of the numerous continuances joined by the Defense and the Defense's previous request to delay the start of trial until January 2021.

6. Relief Requested. The Government requests that the court deny the Defense's motion in limine and allow the Government to introduce DNA evidence. Given the stage of litigation in which the Government discovered the DNA, it would have been well within the Court's discretion to deny a Government continuance request to test the evidence. However, the Government anticipates completing DNA analysis prior to the current trial dates. As such, suppressing this evidence amounts to a substantial sanction upon the Government for a discovery violation that has not occurred. This is antithetical to the truth-seeking function of the court-martial.

7. Evidence. The Government submits the following enclosures in support of its motion:

a. Enclosure 1: Initial NCIS Request and Incident Report Provided by GPD

b. Enclosure 2: Command Authorized Search and Seizure (CASS), dtd 4 November 2020

c. Enclosure 3: Complete GPD Incident Report

d. Enclosure 4: Affidavit of NCIS Special Agent Darrell Smith

8. Argument. None requested.

BOSAKOWSKI.MATTHEW.SEAN.[redacted] Digitally signed by BOSAKOWSKI.MATTHEW.SEAN.[redacted] Date: 2020.11.12 15:15:47 -05'00'

M. S. BOSAKOWSKI
Captain, U.S. Marine Corps
Government Trial Counsel

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the court and opposing counsel via electronic mail on 12 Novemnber 2020.

BOSAKOWSKI.MATTHEW.5EAN.[redacted] Digitally signed by BOSAKOWSKI.MATTHEW.SEAN.[redacted] Date: 2020.11.12 15:18:44 -05'00'

M. S. BOSAKOWSKI
Captain, U.S. Marine Corps
Government Trial Counsel

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

UNITED STATES v. TRAVONTE D. WILLIAMS PRIVATE FIRST CLASS U.S. Marine Corps	DEFENSE MOTION TO SUPPRESS STATEMENTS OF THE ACCUSED **COURT'S ESSENTIAL FINDINGS, CONCLUSIONS OF LAW, AND RULING**

1. **Nature of Motion**. The Defense moved this Court pursuant to Military Rule of Evidence (M.R.E.) 304 to suppress the video recorded statement made by the accused to Detective [redacted] of the New Hanover County Sheriff's Office.[1] The Government opposed the motion.[2] The motion was litigated during an Article 39(a) session on 5 November 2020. After considering the briefs, supporting evidence, argument from counsel, and applicable law, this Court **DENIED** the Defense motion as detailed below.[3]

2. **Findings of Fact**:

a. PFC Williams is charged with one specification of violating Article 80 of the UCMJ (Attempted Sexual Assault), two specifications of violating Article 120 (Sexual Assault), two specifications of Article 120 (Abusive Sexual Contact), six specifications of Article 128 (Assault Consummated by a Battery), and one specification of Article 128 (Simple Assault).

b. The accused was in pre-trial confinement continuously from 29 November 2019 through trial.

[1] The Defense Motion in Limine to Suppress the video recorded interview is filed as Appellate Exhibit (AE) – XXXII.
[2] The Government Response to the Defense motion is filed as AE-XXXIII.
[3] This supplements the ruling provided to the parties via email on 9 November 2020 included in the record as AE-LXXXIX.

c. Charges were preferred on 10 December 2019.

d. Charges were referred on 3 February 2020.

e. The accused was arraigned on the Charges on 6 March 2020 with a trial scheduled for 22 June 2020 through 26 June 2020.

f. The Defense submitted their initial discovery request on 18 March 2020 in accordance with the Trial Management Order AE - I.

g. On 28 May 2020, the Defense and Government submitted a joint motion for a continuance due to Mr. [redacted] being recently retained as civilian defense counsel. The continuance request was approved by the Court, scheduling the Article 39(a) for 11 June 2020. Due to the large amount of discovery, the Defense and Government again jointly moved the Court to continue the Article 39(a) session to 23 June 2020 which the Court approved on 3 June 2020.

h. On 17 June 2020 the parties again moved the Court for a continuance that was approved, scheduling an Article 39(a) session for 1 September 2020 and trial for 1 – 9 October 2020.

i. On 24 August 2020, the Court approved a fourth continuance request scheduling an Article 39(a) session for 22 September 2020 and trial for 2 – 6 November 2020.

j. On 1 October 2020, an Article 39(a) session was conducted in order to advise the accused of his counsel rights upon request for the release of detailed defense counsel 1stLt McGrath.

k. The Defense requested an additional continuance due to the release of 1stLt McGrath and the detailing of an additional defense counsel. Captain Thomas has been the detailed defense counsel representing the accused from arraignment and Mr. [redacted] remained as civilian defense counsel since he was retained. The Court denied the defense request for continuance with the trial set to begin on 2 November 2020.

l. On 22 October 2020, the Defense received significant additional discovery including the video recorded interview of the accused byDetective [redacted]

m. Due to the additional discovery provided, a continuance request was granted by the Court, moving the trial dates from 2-6 November 2020 to 30 November to 4 December 2020. An Article 39(a) session was scheduled for 5 November 2020. (Included as AE-XXXVI).

n. The video recorded interview between Detective [redacted] and the accused was conducted on 22 August 2019 at NCIS Field Office, Marine Corps Air Station Cherry Point, North Carolina.

o. A three page written report was completed by Detective [redacted] on 9 September 2019.

p. The three page written report provided a detailed account of the interview between the accused and Detective [redacted].

q. The Government provided the written report, and detective [redacted] contact information to the Defense in discovery prior to the video recorded statement that was provided on 22 October 2020.

r. The three page written report substantially includes all the relevant information that is included in the video recorded statement.

s. The Government was in possession of the video recorded statement prior to arraignment of the accused.

t. Additional facts necessary to resolve the presented issues are discussed below.

3. **Conclusions of Law**.

a. Statement of the Law.

(1) "Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused." M.R.E. 304(d).

(2) "If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice

to the military judge and defense counsel. The defense may object at that time, and the military judge may make such orders as are required in the interests of justice." M.R.E. 304(f)(2).

(3) "[Military Rule of Evidence] 304(d) requires the prosecution to disclose to the defense, prior to arraignment, all of the accused's statements which are (1) relevant to the case, (2) known to the prosecution, and (3) within the control of the armed forces, and all evidence derived from such statements. This requirement is not hinged on the prosecutor's intended use and contains no sanction for failing to comply. In addressing a similar disclosure provision in Rule 12 of the Federal Rules of Criminal Procedure, the Advisory Committee in its Notes on the 1974 Amendments to the Rules stated that excluding evidence for failure to notify would be too burdensome considering other broad discovery rights. That rationale is equally applicable in military practice. Untimely disclosure should support a continuance, however. This would be consistent with (f)(2) which recognizes that disclosure may occur after arraignment and further provides that the military judge may take whatever action is appropriate." 1 Military Rules of Evidence Manual § 304.02 (2020).

b. Analysis.

(1) The Defense motion to suppress the statement of the accused is premised solely upon the basis of untimely disclosure under M.R.E. 304(d).

(2) Disclosure.

(a) The Government, in this case the NCIS Field Office, was in possession of the evidence prior to arraignment. It is uncontroverted that the Government did not turn over the statement in accordance with M.R.E. 304(d). The Government first produced the discovery and turned over the recording to the Defense with notice of their intent to utilize the video recorded statement on 22 October 2020. The Government provided the additional discovery and notice to the Defense upon the Trial Counsel becoming aware of its existence within the NCIS

investigative file. Although the recorded statement was not "known to trial counsel," it was within control of the Government before 22 October 2020. M.R.E. 304(d). Regardless, late disclosure, even on the eve of trial, does not automatically merit suppression of the statement. *See United States v. Callara*, 21 M.J. 259, 263 (C.M.A. 1986) ("[M.R.E. 304(f)(2) does not specifically prescribe suppression of an individual statement by an accused. Instead, it grants authority to the military judge to 'make such orders as are required in the interests of justice' -- orders which may include but certainly are not limited to suppression of the pretrial statement as evidence."). "The purpose of MIL. R. EVID. 304(d) is to establish a procedure to assist the defense in formulating its challenges to statements of the accused offered by the Government, not to provide for the defense a new, separate substantive basis for challenging such statements." *United States v. Callara*, 1984 CMR LEXIS 4398, *3 (N.M.C.M.R. 9 May 1984); *see also United States v. Blackshire*, 1986 CMR LEXIS 2781, *14 (N.M.C.M.R. 20 Feb. 1986) ("The rule exists in order to assist the defense in formulating its challenges to the admissibility of an accused's statements by giving it notice of statements to which it may want to object." (citations omitted)). This purpose was achieved here, despite the late disclosure: The Defense received notice and did not oppose a Government request for a continuance. The Defense was provided an opportunity from the date of the initial discovery of the video statement on 22 October 2020 to the start of the trial on 30 November 2020 to compare the video recorded statement to the written report completed by Detective [redacted]. The Defense was informed of the Court's ruling on 9 November 2020. The Defense made no additional objections to the admissibility of the video recorded statement.

(b) "[E]xcept in extreme cases where appellant is prejudiced by the lack of notice or where the failure to give notice is deliberate and done in order to attain an unfair advantage over the accused, suppression is not an appropriate remedy for a violation of the notice requirements

of Rule 304. *Callara*, 1984 CMR LEXIS 4398, at *4–5 (internal citation and quotation marks omitted). This is not an extreme case; the accused has not been prejudiced by the timing of the disclosure, and there was no deliberate failure by the Government to provide notice in order to attain an unfair advantage over the accused.

(4) Voluntariness. The Defense did not object to the statement or move the court to suppress the statement due to a lack of voluntariness. The basis of the Defense motion was untimely discovery and notice under M.R.E. 304(d). The court specifically addressed the voluntariness of the statement during the 5 November 2020 Article 39(a) session:

MJ: "Okay. So you're not objecting to voluntariness of this statement at this point."

DC: "Not at this point. We need time to sort through those issues."

MJ: "Okay. Alright. So this strictly is under 304(f)(2)?"

DC: "Yes, sir."

(a) The Court *sua sponte,* ordered certain redactions to the video recorded statement under M.R.E. 707(a). The Court ordered references to the offer of a polygraph be redacted from the video recorded statement. (AE-LXXXIX). The matter of the video recorded statement was again addressed with Defense counsel during an Article 39(a) session on 1 December 2020.

TC: "Sir, just one matter to also bring to the Court's attention. It's relative testimony to Detective [redacted] The government created a redacted version of the interrogation video and we've prepared that for introduction to evidence and we've asked defense if they would have any issues that we would address that or if they need help viewing the redacted video or we can do a copy,

but we haven't been able to confirm that everything's good to go and I don't want to waste time in the middle of trial if possible."

MJ: "Okay."

CDC: "We have no objection. I can look at that right now."

MJ: "Okay."

CDC: "We've finally had the opportunity to see it and we have no problem with the redaction."

(b) The sole basis of the Defense's objection to the video recorded statement remained the untimely disclosure under M.R.E. 304(d). Remedial measures in addition to the previously granted continuance in AE-XXXVI were not necessary.

4. **Ruling.** The Defense motion to suppress the video recorded statement of the accused to Detective [redacted] is **DENIED**.

So ordered this 15th day of March, 2021.

[redacted]
R.G. PHILLIPS
Colonel, U.S. Marine Corps
Military Judge

REQUESTS

UNITED STATES v. TRAVONTE WILLIAMS Private First Class U.S. Marine Corps	**GOVERNMENT REQUEST FOR FINDINGS INSTRUCTIONS**

The government respectfully requests that the following findings instructions be provided to the members. All paragraph citations refer to the Military Judges' Benchbook (DA PAM 27-9).

Instruction	**Paragraph**
Circumstantial Evidence	7-3
Judicial Notice	7-6
Credibility of Witnesses	7–7–1
Prior Consistent Statement	7-11-2

NOTICES

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

UNITED STATES **v.** **TRAVONTE D. WILLIAMS** **Private First Class (E-2)** **U.S. Marine Corps**	**GENERAL COURT-MARTIAL** **VICTIMS' LEGAL COUNSEL NOTICE OF APPEARANCE** **Date: 6 March 2020**

1. Pursuant to Rule 36.1 of the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary, I, Captain [redacted], USMC, hereby provide notice to the Court of my appearance on behalf of LCpl [redacted] My office address, phone number, and e-mail address are: [redacted]

2. I have been detailed as the Victims' Legal Counsel for the above named victim in this case by the Regional Victims' Legal Counsel, Legal Services Support Section East. I am qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice. I have not acted in any disqualifying manner.

3. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

4. I have reviewed and am familiar with the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary and the Eastern Judicial Circuit Rules of Practice.

5. My client has limited standing as a named victim in this court-martial, and she reserves the right to exercise those rights through counsel as needed.

[redacted]
W. NGAN
Captain, U.S. Marine Corps
Victims' Legal Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel via email on 6 March 2020.

[redacted]
W. NGAN
Captain, U.S. Marine Corps
Victims' Legal Counsel

GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. TRAVONTE WILLIAMS PRIVATE FIRST CLASS U.S. Marine Corps	M.R.E 404(b), 413 NOTICE 3 April 2020

1. Pursuant to M.R.E. 404(b) the government hereby provides notice of its intent to use the following evidence of other crimes, wrongs, or acts during the case-in-chief as substantive evidence of the Accused's **opportunity, motive, intent, plan, absence of mistake**:

a. That the Accused grabbed the hips of Lance Corporal [redacted] on more than one occasion in order to move her out of the way. This physical contact was not required and it was done without the permission of Lance Corporal [redacted]

b. That the Accused approached Lance Corporal [redacted] while she was studying in the library aboard Camp Johnson. The accused moved his chair very close to Lance Corporal [redacted] and wrapped his arm around her waist and lower back to pull her closer to himself.

c. That the Accused touched Lance Corporal [redacted] in an unwanted manner. Additionally, the Accused would comment on Lance Corporal [redacted] buttocks, stating, "You fine," or words to that effect.

2. The government is also providing this notice pursuant to M.R.E. 413 to the extent that the above instances of conduct are considered a previous sexual offense.

[redacted]

G. SWEENEY
Captain, USMC
Trial Counsel

AE XXI
Pg 13 of 24

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Travonte D. Williams Private First Class U.S. Marine Corps	GENERAL COURT-MARTIAL CIVILIAN DEFENSE COUNSEL NOTICE OF APPEARANCE Date: 27 May 2020

1. Pursuant to Rule 5.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and Rule 5.1a of the Eastern Judicial Circuit Rules of Practice (Circuit Rules), I, Richard T. McNeil, hereby provide notice to the Circuit Military Judge of my appearance on behalf of Private First Class Travonte D. Williams. [redacted] I am an active member in good standing licensed to practice in the following jurisdictions: North Carolina.

2. I understand that practice in the Eastern Judicial Circuit requires me to be familiar with the Uniform and Circuit rules. Additionally, I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1 series. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

[redacted]
Richard T. McNeil
Attorney At Law

Appellate Exhibit XXIII
Page 1 of 2

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Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel personally and/or electronically on 27 May, 2020.

[redacted]

Richard T. McNeil

AE XXIII

Pg 2 of 2

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT

UNITED STATES v. TRAVONTE WILLIAMS PRIVATE FIRST CLASS U.S. Marine Corps	GENERAL COURT-MARTIAL VICTIMS' LEGAL COUNSEL NOTICE OF APPEARANCE Date: 22 September 2020

1. Pursuant to Rule 36.1 of the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary, I, Captain Brentt McGee , USMC, hereby provide notice to the Court of my appearance on behalf of Lance Corporal [redacted] My office address, phone number, [redacted]

2. I have been detailed as the Victims' Legal Counsel for the above named victim in this case by the Regional Victims' Legal Counsel, Legal Services Support Section East. I am qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice. I have not acted in any disqualifying manner.

3. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

4. I have reviewed and am familiar with the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary and the Eastern Judicial Circuit Rules of Practice.

Appellate Exhibit XXIV
Page 1 of 2

5. My client has limited standing as a named victim in this court-martial, and she reserves the right to exercise those rights through counsel as needed.

[redacted]
B. L. MCGEE
Captain, U.S. Marine Corps
Victims' Legal Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel via email on 22 September 2020.

[redacted]
B. L. MCGEE
Captain, U.S. Marine Corps
Victims' Legal Counsel

AE XXIV
Pg 2 of 2

COURT RULINGS & ORDERS

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

UNITED STATES v. **Travonte D. Williams** **Private First Class** **U.S. Marine Corps**	**COURT RULING** MOTION IN LIMINE TO SUPPRESS DNA EVIDENCE

1. **Nature of Ruling**. On 5 November 2020 an Article 39(a) session was held to litigate a number of outstanding matters. The Defense moved this court to suppress certain evidence and dismiss, or in the alternative, sever, certain specifications for discovery violations.[1] The court previously approved a continuance request on 30 October 2020 as a remedy for the additional discovery provided by the Government to the Defense. On the morning of 5 November 2020 during the Article 39(a) session, the Defense informed the court that the Government executed a Command Authorized Search and Seizure (CASS) for a buccal swab of the accused for purposes of testing the accused Deoxyribonucleic Acid (DNA). The Government sought to have the DNA sample obtained through the CASS to be analyzed against samples taken from victim [redacted] pertaining to the specification of Charge I and specifications 5 and 6 of Charge II. The defense moved the Court to preclude the Government from introducing the evidence by oral motion on 5 November 2020. The Court **GRANTED** the Defense request, however, the Court invited the parties to provide supplemental briefs if the Government requested reconsideration of the Court's

[1] The Defense motion to suppress pursuant to late discovery is Appellate Exhibit (AE) XXXII. The Government response is AE-XXXIII. The Defense also submitted a motion to dismiss or sever specifications in AE-XXXIV. The Government response to the motion to dismiss or sever for late discovery is included in AE-XXXV. The Court ruled on the record, denying the Defense request to suppress the New Hanover County Sheriff Office interrogation video and denying the motion to dismiss or sever. The Court considered the previously granted continuance of 30 October 2020 as an appropriate remedy for the late discovery in accordance with R.C.M. 701(g)(3).

ruling. Both parties submitted their supplemental briefs in accordance with the Court's order on 12 November 2020. On 18 November 2020 the Government informed the Court and the Defense of the results of the DNA analysis. Upon consideration of the Defense motion on 5 November 2020, the Defense and Government supplemental briefs filed with the Court on 12 November 2020, the evidence, and argument presented by the parties, the Court **GRANTS** the Defense motion in limine to preclude the admissibility of the DNA evidence obtained from the accused on 5 November 2020 and makes the following findings of fact and conclusions of law.

2. **Findings of Fact**.

a. PFC Williams is charged with one specification of violating Article 80 of the UCMJ (Attempted Sexual Assault), two specifications of violating Article 120 (Sexual Assault), two specifications of Article 120 (Abusive Sexual Contact), six specifications of Article 128 (Assault Consummated by a Battery), and one specification of Article 128 (Simple Assault)..

b. The accused has been in pre-trial confinement continuously since 29 November 2019 to the present.

c. Charges were preferred on 10 December 2019.

d. Charges were referred on 3 February 2020.

e. The accused was arraigned on the Charges on 6 March 2020 with a trial scheduled for 22 June 2020 through 26 June 2020.

f. The Defense submitted their initial discovery request on 18 March 2020 in accordance with the Trial Management Order Appellate Exhibit (AE) - I.

g. On 28 May 2020, the Defense and Government submitted a joint motion for a continuance due to Mr. McNeil being recently retained as civilian defense counsel. The continuance request was approved by the Court, scheduling the Article 39(a) for 11 June 2020. Due to the large

amount of discovery, the Defense and Government again jointly moved the Court to continue the Article 39(a) session to 23 June 2020 which the Court approved on 3 June 2020.

h. On 17 June 2020 the parties again moved the Court for a continuance that was approved, scheduling an Article 39(a) session for 1 September 2020 and trial for 1 – 9 October 2020.

i. On 24 August 2020, the Court approved a fourth continuance request scheduling an Article 39(a) session for 22 September 2020 and trial for 2 – 6 November 2020.

j. On 1 October 2020, an Article 39(a) session was conducted in order to advise the accused of his counsel rights upon request for the release of detailed defense counsel 1stLt McGrath.

k. The Defense requested an additional continuance due to the release of 1stLt McGrath and the detailing of an additional defense counsel. Captain Thomas has been the detailed defense counsel representing the accused from arraignment nd Mr. McNeil remained as civilian defense counsel since he was retained. The Court denied the defense request for continuance with the trial set to begin on 2 November 2020.

l. On 20 October 2020, the Defense received significant additional discovery from the Government. Included was Greensboro Police Department Full incident report (Bates Stamp 1225-1268). The Defense also received discovery that was the basis for the motion to suppress in AE-XXXII and motion to dismiss or sever in AE-XXXIV.

m. Due to the additional discovery provided, a continuance request was granted by the Court, moving the trial dates from 2-6 November 2020 to 30 November to 4 December 2020. An Article 39(a) session was scheduled for 5 November 2020. The sole basis for the continuance request was to allow Defense the opportunity to review the additional discovery.

n. On 4 November 2020, the Government notified Defense of their intent to execute the CASS to obtain DNA samples from the accused.

o. On 5 November 2020, prior to the start of the Article 39(a) session, the samples were taken from the accused.

p. On 18 November 2020, the Government provided the results of the DNA analysis to the Court and the Defense.

q. Additional facts are contained below.

3. **Discussion**.

A. *Applicable law*.

Article 46 of the UCMJ is the root source for much of the military's discovery and production rules. "The counsel for the Government, the counsel for the accused, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46(a), UCMJ.

"Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e).

For production, "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." R.C.M. 703(a).

"Each party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(e).

"Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." *United States v. Walker*, 66 M.J. 721, 742, (N.M.C.C.A. 2008) (Citing *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). "An accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy." *United States v. Webb*,

66 M.J. 89, 92 (C.A.A.F. 2008)

The C.A.A.F. has held that the prosecution "must exercise due diligence" in reviewing the files of other government entities to determine whether such files contain discoverable information. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). "The scope of the due-diligence requirement with respect to governmental files beyond the prosecutor's own files generally is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity 'closely aligned with the' prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *Id.* (Citations omitted).

The remedies available to the military judge for failure of a party to comply with the discovery rules include: (1) ordering the party to permit discovery; (2) grant a continuance (a common remedy); (3) prohibit the party from introducing the evidence or calling a witness; or, (4) enter such other order as is just under the circumstances. R.C.M. 701(g)(3).

B. *Analysis and Conclusions of Law.*

The accused has been in pretrial confinement since 29 November 2019. The investigation involving [redacted] was initiated by the Greensboro Police Department on or about 24 November 2019. The affidavit that formed the basis of the probable cause determination to seize the buccal swab of the accused stated that Greensboro Police Department obtained DNA evidence from [redacted] at 0216 on 24 November 2019. The evidence of the accused DNA was not seized until 5 November 2020, almost a full year after the seizure of the DNA evidence from [redacted]

The Defense is entitled to equal access to evidence, and the equal access to obtain witnesses. The production of the results of the DNA analysis was completed on 18 November

2020, twelve days prior to the start of the trial. The DNA evidence in issue is distinguished from the statements of the accused contained in the video recording that was the subject of the motion to suppress in AE-XXXII. The video recording that was the subject of the motion in AE-XXXII was fairly summarized in the discovery previously provided to the Defense. The DNA evidence produced on 18 November 2020 is entirely new evidence. The complacency of the Government in obtaining the evidence from the Greensboro Police Department and pursuing the DNA analysis pertaining to the specification of Charge I and specifications 5 and 6 of Charge II effectively prevent the Defense from meaningful access to the evidence or the opportunity to obtain an expert consultant or an expert witness for trial on 30 November 2020.

The court considered all remedies available under R.C.M. 701(g)(3). While the common remedy for discovery issues raised prior to the commencement of trial is a continuance, the Court finds such a remedy in this specific instance inadequate. The Court takes specific notice of the fact that the accused will have been in pre-trial confinement for over one year at the commencement of the anticipated start of the trial on 30 November 2020. The Court previously granted a continuance due to the late discovery of evidence, to include the statements of the accused, as an appropriate remedy under the circumstances. The discovery of the DNA analysis on 18 November 2020 was only made possible by the fact that the Court granted a continuance on 30 October 2020. The continuance that was predicated on the Government's late discovery. The Government's complacency then allowed for time for the buccal swab CASS on 5 November 2020, the results of which were only provided to the Defense on 18 November 2020. The specific facts and sequence of events in this case requires prohibition of the introduction of the evidence by the Government.

However, the Defense may not use the shield of the discovery remedy as a sword in this case. The Defense risks opening the door to the possible admissibility of the DNA evidence.

Through opening statements, closing arguments, cross examination of Government witnesses, or through the presentation of witnesses for the Defense, if the Defense brings the absence of DNA evidence in the case of [redacted] in issue, the Court would invite reconsideration of this ruling or fashioning an appropriate remedy.

4. **Ruling**. The defense motion to preclude evidence of the DNA analysis obtained from the buccal swab seized from the accused on 5 November 2020 is **GRANTED** consistent with this ruling.

So ordered this 20th day of November 2020.

[redacted]
K. G. PHILLIPS
COLONEL, USMC
MILITARY JUDGE

AE XLIII
Pg 7 of 7

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

UNITED STATES **v.** **Travonte D. Williams** **Private First Class** **U.S. Marine Corps**	**COURT RULING** FUNDING OF EXPERT CONSULTANT: (Clinical Forensic Psychologist – Dr. [redacted])

1. **Nature of Ruling**. The defense moved the Court to compel the production of an expert consultant in the field of Clinical Forensic Psychology.[1] The motion was litigated at an Article 39(a) session on 22 September 2020. The Government opposed the motion. Upon consideration of the defense motion, the government response, and the evidence, witnesses and argument presented by the parties, the Court **GRANTS** the defense motion **in part** and makes the following findings of fact and conclusions of law.

2. **Findings of Fact**.

a. PFC Williams is charged with one specification of violating Article 80 of the UCMJ (Attempted Sexual Assault), two specifications of violating Article 120 (Sexual Assault), two specifications of Article 120 (Abusive Sexual Contact), six specifications of Article 128 (Assault Consummated by a Battery), and one specification of Article 128 (Simple Assault)..

b. On 18 April 2018, PFC Travonte Williams enlisted in the USMC at the Military Entrance Processing Station (MEPS) in Montgomery, Alabama.

c. PFC Williams listed his home of record as [redacted]

[1]The defense motion to compel production of expert consultant, specifically for the services of Dr. [redacted] as a Clinical Forensic Psychologist, was first filed with the court on 15 April 2020. In a previous session of court, the Military Judge denied the defense motion. The defense filed pleadings to reconsider the defense motion for expert consultation on 19 August 2020.

[redacted]

d. The address that was listed on PFC Williams enlistment paperwork is the address to [redacted] which is a group home in Alabama.

e. On 23 July 2019, [redacted] verified his admittance into their facility and disclosed PFC Williams' discharge summary.

f. The discharge summary states that PFC Williams was admitted into [redacted] on 11 March 2016 and discharge on 6 January 2017.

g. PFC Williams was readmitted to [redacted] on 24 July 2017 and stayed until he left for bootcamp on 28 May 2017.

h. PFC Williams was referred to the [redacted] for Houston County, Alabama. The discharge summary explained that PFC Williams, "has been in [redacted] custody for several years. [redacted]

i. The discharge summary dictates that PFC Williams was [redacted]

j. The summary further details that PFC Williams, [redacted] The report continues to dictate that PFC Williams [redacted] consists of, [redacted]

k. During PFC Williams conversation to [redacted] in August 2019 he conveyed that he had been [redacted]

l. Additional facts are contained below.

3. **Discussion**.

A. *Applicable law*.

An accused has a right to the assistance of an expert upon a showing of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). In order to determine necessity, courts apply a two pronged test: "[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006). The first prong of that test is demonstrated by satisfying three conditions: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994) (citations omitted).

The defense has the burden to show that there is more than the "mere possibility of assistance from a requested expert." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010), *citing United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citation and quotation marks omitted). The defense must show a "reasonable probability" the expert would assist the defense and that denial of the expert would result in an unfair trial. *Id.* With regard to the production of expert witnesses, Rule for Court-Martial (R.C.M.) 703 states, "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits . . . would be relevant and necessary." R.C.M. 703(b)(1). The discussion section of Rule 703(b) further states that "relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." This standard for production applies equally to expert witnesses.

B. *Analysis and Conclusions of Law.*

The defense argues that the assistance of a Clinical Forensic Psychologist, specifically, Dr. [redacted] or a similarly credentialed expert, is necessary to aid the defense in preparing a case in extenuation and mitigation, should the accused be convicted of any of the offenses alleged. To that end, the defense called Dr. [redacted] who testified that he would conduct various tests and evaluations of the accused to include: (1) Minnesota Multiphasic Personality Inventory – 2 (MMPI-2); (2) Sex Offender Risk Appraisal Guide (SORAG); (3) Hare – Psychopathy Checklist – Revised: 2nd Ed. (PCL-R), and; (4) Psychopathy Personality Inventory-Revised (PPI-R). The defense argues that a clinical forensic psychologist would be able to review the results and explain the testing results and provide information for the defense to provide during presentencing, if necessary. The defense has presented some evidence that such information would be of assistance to the defense. The defense motion and evidence, to include the documentation from [redacted] and the testimony of Dr. [redacted] meet the burden of proof by a preponderance of the evidence for the requested consultation. Government counsel indicated that an adequate substitute would not be available.

The defense motion and argument on the motion requests the court to compel the production of an expert consultant for 12 hours of services at a rate of $200 per hour plus 8 hours of travel at a rate of $150 per hour. Dr. [redacted] testified that video teleconferencing or remote means could be used. Although the defense indicates that Dr. [redacted] will likely ripen into an expert witness, the defense has not met its burden to produce any expert as a witness. The ruling is specifically limited to only the twelve (12) hours of consultation and travel to conduct tests, review materials, and review the results with defense counsel.

4. **Ruling**. The defense motion to compel expert assistance is **GRANTED in part.** The defense has made an adequate showing of why the expert assistance is needed, what the expert assistance would do and why the defense cannot obtain the information without the appointment of an expert consultant. **IT IS HEREBY ORDERED THAT**: Dr. [redacted] be contracted by the U.S. Government as an expert defense consultant. Dr. [redacted] may provide consultant services for up to twelve (12) hours and is authorized travel costs for up to eight (8) hours. The court notes the fee schedule in the defense motion and **hereby orders NOT MORE THAN $3,600 in furtherance of consultation for the conduct and review of the test results**. At no time will the expert or the defense exceed this authorization without the prior approval of the U.S. government or this court. Neither this court nor the United States will be liable, for paying any amount, without a written approval signed by a Contracting Official of the U.S. **The Court authorizes no more than $3,600.** Under this contract, Dr. [redacted] is designated as part of the accused's defense team and is covered by the rules of confidentiality and attorney client privilege. Additional requests for expert assistance, to appear as an expert witness, or additional services to be performed by Dr. [redacted] must be approved by the court.

So ordered this 22nd day of September 2020.

[redacted]
K. G. PHILLIPS
COLONEL, USMC
MILITARY JUDGE

EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. Travonte Williams Private First Class U.S. Marine Corps	)	GENERAL COURT-MARTIAL **COURT ORDER TO DISCLOSE MEDICAL, RECORDS PURSUANT TO 42 U.S.C. §1320d *et seq*, (HIPAA) and 45 C.F.R. §164.512(e)** 23 September 2020

1. **Nature of Requested Order.** Pursuant to Rules for Courts-Martial 703(f)(4)(B), 801(c), and 906(b)(7), the defense moved this court to compel discovery of medical and mental health records in the custody of [redacted] and the custodian of records at that facility, a "covered entity" as that term is defined in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §1320, *et seq*. The prosecutor in the above captioned case, has joined in that motion, conceding the entitlement of the defense to the requested records described below.

2. **Findings of Fact.**

a. On 22 September 2020 the Court compelled the production of Dr. [redacted] as an expert clinical forensic psychologist. The medical and mental health records are necessary in order for Dr. [redacted] to conduct an appropriate evaluation of PFC Travonte Williams.

b. All medical and mental health records pertaining to the treatment of PFC Travonte Williams are legally relevant to this case and their release to defense counsel is required by the Rules for Courts-Martial and the Constitution.

3. **Records Covered by Order.** All medical treatment records, including documents relating to any medical or mental health diagnosis of Travonte Williams, [redacted] U.S. Marine Corps relating to medical treatment provided to Travonte Williams and as further described in the attached subpoena.

4. **Order of Court.** The attached subpoena is ordered implemented in accordance with the provisions in 45 C.F.R. §164.512(e). This order is therefore directed to the [redacted] and the custodian of records at that facility as named in the attached subpoena. The requested medical records shall be produced and the attached subpoena shall be treated as a subpoena of this Court. The custodian of all records described in paragraph 3 shall deliver them to the custody of the prosecutor representing the United States in the subject case - as identified in the attached subpoena, and in the manner described therein - no later than 2359, 29 September 2020. The parties are further ordered that no disclosure of the produced records is authorized except in the course of necessary duty in connection with the instant litigation.

So ordered this 23rd day of September 2020.

[redacted]
Kyle Phillips
Colonel, U.S. Marine Corps
Military Judge

Attachment (1): United States Subpoena dated 23 September 2020

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
Williams, Travonte D.	Marine Corps	E-2	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
2d Marine Aircraft Wing	General	Members	Dec 10, 2020

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	11 years	Total Forf pay and allowances	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
377		377 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

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

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

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

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

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

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Phillips, Kyle G.	Marine Corps	O-6	Dec 10, 2020	PHILLIPS.KYLE.GENARO.[redacted] Digitally signed by PHILLIPS.KYLE.GENARO[redacted] Date: 2020.12.10 17:32:16 -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 Plea: Not Guilty Finding: Not Guilty	80	Specification:	Not Guilty	Not Guilty			90Z
		Offense description	Attempts - other than murder and voluntary manslaughter				
Charge: II Plea: Not Guilty Finding: Guilty	120	Specification 1:	Not Guilty	Not Guilty			120AA2
		Offense description	Sexual Assault without consent of the other person				
		Specification 2:	Not Guilty	Guilty			E120AA2
		Offense description	Sexual Assault without consent of the other person				
		Specification 3:	Not Guilty	Withdrawn			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
		Withdrawn and Dismissed	Specification 3 of Charge II has been withdrawn and dismissed without prejudice.				
		Specification 4:	Not Guilty	Guilty			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
Charge: III Plea: Not Guilty Finding: Guilty	128	Specification 1:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 2:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 3:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 4:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 5:	Not Guilty	Guilty			128-B-
		Offense description	Battery				
		Specification 6:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 7:	Not Guilty	Guilty			128-A-
		Offense description	Simple assault				

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 Plea: Not Guilty Finding: Not Guilty	80	Specification:	Not Guilty	Not Guilty			90Z
		Offense description	Attempts - other than murder and voluntary manslaughter				
Charge: II Plea: Not Guilty Finding: Guilty	120	Specification 1:	Not Guilty	Not Guilty			120AA2
		Offense description	Sexual Assault without consent of the other person				
		Specification 2:	Not Guilty	Guilty			E120AA2
		Offense description	Sexual Assault without consent of the other person				
		Specification 3:	Not Guilty	Withdrawn			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
		Withdrawn and Dismissed	Specification 3 of Charge II has been withdrawn and dismissed without prejudice.				
		Specification 4:	Not Guilty	Guilty			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
Charge: III Plea: Not Guilty Finding: Guilty	128	Specification 1:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 2:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 3:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 4:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 5:	Not Guilty	Guilty			128-B-
		Offense description	Battery				
		Specification 6:	Not Guilty	Not Guilty			128-B-
		Offense description	Battery				
		Specification 7:	Not Guilty	Guilty			128-A-
		Offense description	Simple assault				

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
Williams, Travonte D.	E2	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
MACS-2, MACG-28, 2d MAW	29 May 2018	4 yrs.

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
2d MAW	General	Members	10 December 2020

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	○ Yes	◉ No
12. Has the accused made a request for deferment of confinement?	○ Yes	◉ No
13. Has the accused made a request for deferment of adjudged forfeitures?	○ Yes	◉ No
14. Has the accused made a request for deferment of automatic forfeitures?	○ Yes	◉ No
15. Has the accused made a request for waiver of automatic forfeitures?	○ Yes	◉ No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	○ Yes	◉ No
17. Has the accused submitted matters for convening authority's review?	◉ Yes	○ No
18. Has the victim(s) submitted matters for convening authority's review?	○ Yes	◉ No
19. Has the accused submitted any rebuttal matters?	○ Yes	◉ No
20. Has the military judge made a suspension or clemency recommendation?	○ Yes	◉ No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	○ Yes	◉ No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	○ Yes	◉ No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

On 18 December 2020, detailed defense counsel submitted matters for your consideration, specifically requesting you grant any clemency available. You are required to consider these matters in determining the action you take on the findings of guilty or on the sentence.

I have advised the Convening Authority of clemency authority based on the earliest findings of guilty for an offense committed on or after 1 January 2019 pursuant to R.C.M. 1109, MCM (2019 Ed.)

24. Convening Authority Name/Title	25. SJA Name
M. S. CEDERHOLM / Commanding General	[redacted]
26. SJA signature	27. Date
[redacted]	Feb 12, 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.]

General Court-Martial Order No. W21-06

Action.
In the General Court-Martial case of United States v. Private First Class Travonte D. Williams, U.S. Marine Corps, the sentence is approved and, except for the part of the sentence extending to a Dishonorable Discharge, will be executed. The Marine Corps Installations East Regional Brig, Camp Lejeune, North Carolina, is designated as the initial place of confinement.

Confinement Credit.
The accused will be credited with having served 377 days of confinement.

Disposition.
Pursuant to Article 66, Uniform Code of Military Justice, the record of trial will be forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374 for appellate review.

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
CEDERHOLM.MICHAEL.S. [redacted] Digitally signed by CEDERHOLM.MICHAEL.S. [redacted] Date: 2021.02.24 19:57:47 -05'00'	24 FEB 2021

32. Date convening authority action was forwarded to PTPD or Review Shop. Feb 25, 2021

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
Williams, Travonte D.	E2	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
MACS-2, MACG-28, 2d MAW	29 May 2018	4 yrs.

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
2d MAW	General	Members	10 December 2020

SECTION B - ENTRY OF JUDGMENT

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

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

Charge I: Violation of Article 80, UCMJ.
Plea: Not Guilty. Finding: Not Guilty.

Specification: Did, on or about 24 November 2019, attempt to rape [redacted] by using unlawful force. Plea: Not Guilty. Finding: Not Guilty.

Charge II: Violation of Article 120, UCMJ.
Plea: Not Guilty. Finding: Guilty.

Specification 1: Did, on or about 20 January 2019, commit a sexual act upon PFC C. Ross, USMC, by penetrating PFC [redacted] vulva with his penis, without the consent of PFC [redacted] Plea: Not Guilty. Finding: Not Guilty.

Specification 2: Did, on or about 16 July 2019, commit a sexual act upon [redacted] by penetrating [redacted] vulva with his penis, without the consent of [redacted] Plea: Not Guilty. Finding: Guilty.

Specification 3: Did, on divers occasions, between on or about 15 January 2019 and on or about 15 February 2019, touch the buttocks of LCpl [redacted] USMC, with his hand, with the intent to arouse his sexual desire without the consent of LCpl [redacted] Plea: Not Guilty. Finding: Withdrawn and dismissed without prejudice by the Convening Authority on 23 November 2020.

Specification 4: Did, between on or about 1 February 2019 to on or about 28 February 2019, touch the buttocks of LCpl [redacted] USMC, with his hand, with an intent to arouse his sexual desire without the consent of LCpl [redacted] Plea: Not Guilty. Finding: Guilty.

Charge III: Violation of Article 128, UCMJ.
Plea: Not Guilty. Finding: Guilty.

Specification 1: Did, on divers occasions, between on or about 15 January 2019 and on or about 15 February 2019, unlawfully touch LCpl [redacted] USMC, on the lower back with his hand. Plea: Not Guilty. Finding: Not Guilty.

Specification 2: Did, on or about 20 January 2019, unlawfully kiss PFC [redacted] USMC, on on her neck with his mouth. Plea: Not Guilty. Finding: Not Guilty.

Specification 3: Did, on or about 15 August 2019, unlawfully pick up [redacted] and put her in his car. Plea: Not Guilty. Finding: Not Guilty.

(See addendum page)

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

Members: Dishonorable Discharge, confinement for a period of 11 years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

The accused is credited with having served 377 days of confinement.

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

N/A.

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

N/A.

15. Judge's signature:	16. Date judgment entered:
PHILLIPS.KYLE.GENARO.[redacted] Digitally signed by PHILLIPS.KYLE.GENARO.[redacted] Date: 2021.03.23 17:02:58 -04'00'	Mar 23, 2021

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

18. Judge's signature:	19. Date judgment entered:

11. Findings (Continued)

Specification 4: Did, on or about 15 August 2019, unlawfully place his hand over [redacted] mouth. Plea: Not Guilty. Finding: Not Guilty.

Specification 5: Did, on or about 24 November 2019, unlawfully strike [redacted] in the head with his hand. Plea: Not Guilty. Finding: Guilty.

Specification 6: Did, on or about 24 November 2019, unlawfully wrap his hands around [redacted] throat. Plea: Not Guilty. Finding: Not Guilty.

Specification 7: Did, on or about 15 August 2019, assault [redacted] by holding a knife to her face and neck. Plea: Not Guilty. Finding: Guilty.

Note: Specification 3 of Charge II was originally labeled as Specification 1 of Charge III. The relabeled Specification 3 of Charge II was referred to trial, but withdrawn and dismissed prior to entry of findings. Specification 4 of Charge II was originally labeled as Specification 2 of Charge III. Charge III was originally labeled as Charge IV. Specification 7 of Charge III was originally labeled as a sole Specification of Charge V. The charges and specifications were renumbered as reflected above.

APPELLATE INFORMATION

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Aviation Electronics Technician Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR FIRST ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 June 6, 2021. The number of days requested is thirty. The requested due date is July 6, 2021.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has not completed her review of the record.

Good cause exists for granting the requested enlargement because counsel additional time to review the record of trial, research identified legal issues, and draft assignments of error for this Court's review. The case is complex. This case involves allegations of sexual assault from multiple witnesses.

6/1/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on Juen 1, 2021, that a copy will be uploaded into the Court's case management system on June 1, 2021, and that a copy of the foregoing was emailed to Director, Appellate Government Division on June 1, 2021.

6/1/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 1 United States v. Williams, Travonte NMCCA No. 202100094 Motion for 1st enlargement of time

Signed By: [redacted]

RECEIVED
June 01 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 1 United States v. Williams, Travonte NMCCA No. 202100094 Motion for 1st enlargement of time

To This Honorable Court:

Attached please find a motion for a first enlargement of time ICO U.S. v. PFC Travonte Williams, NMCCA No. 202100094.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - FILING - Panel 1 United States v. Williams, Travonte NMCCA No. 202100094 Motion for 1st enlargement of time

Signed By: [redacted]

MOTION GRANTED
June 01 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 1 United States v. Williams, Travonte NMCCA No. 202100094 Motion for 1st enlargement of time

To This Honorable Court:

Attached please find a motion for a first enlargement of time ICO U.S. v. PFC Travonte Williams, NMCCA No. 202100094.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES, Appellee v. Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	APPELLEE'S CONDITIONAL CONSENT TO APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on March 6, April 30, September 22, October 1 and 5, November 5 and 30, and December 1–3 and 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions), and Lieutenant Colonel K. G. Phillips, U.S. Marine Corps (arraignment, motions, trial), 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 opposes a thirty-day enlargement but consents to a fourteen-day

enlargement. The United States will consent to a thirty-day enlargement if Appellant files an amended justification complying with the Rules and precedent.

A. This Court's Rules require a detailed explanation of good cause, including the status of review of the record and a discussion of case complexity.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). This includes requiring Counsel to provide the "status of review of the record of trial" and "a discussion of complexity of the case." *Id.*

The justification for appellate delay implicates Appellant's right to speedy appellate process. In *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the court held the Court of Criminal Appeals failed to exercise "institutional vigilance" and attributed that failure to the United States where appellate defense counsel stated the same reason for delay in each enlargement request. *Id.* at 137. The court found recurrent, rote justifications for delay suggested there was no evidence demonstrating "the enlargements were directly attributable to [the appellant]," "the need for additional time arose from other factors such as the complexity of [the appellant]'s case," or "the numerous requests for delay filed by appellate defense counsel benefited [the appellant]." *Id.*

B. Appellant fails to demonstrate good cause with particularity.

1. By stating only that review of the Record is incomplete, Appellant fails to provide the Court and United States the current status of review.

Appellant's Motion asserts Appellate Defense Counsel has not completed review of the Record. This case was docketed over four months ago and the status in the Fourth Enlargement is identical to that in the First Enlargement Motion filed three months ago. (*See* Appellant's Mot. First Enl. at 3, June 1, 2021.) This rote claim that Counsel has not reviewed the Record fails to update the Court—so that the Court can exercise "institutional vigilance"—and fails to convey to the United States information to permit a fully informed response to the Motion. *Diaz v. JAG of the Navy*, 59 M.J. 34, 40 (C.A.A.F. 2003).

For example, if the review of the Record is nearly complete, then the United States litigation position on this Motion might be different than if significant portions of the Record have not yet been reviewed.

2. The Motion does not describe the case's complexity.

As with each of the previous three requests, the current Motion simply states the case "involves allegations of sexual assault from multiple complaining witnesses." (*Compare* Appellant's Mot. Fourth Enl., Sept. 1, 2021, *with* Appellant's Mot. Third Enl., July 30, 2021, Appellant's Mot. Second Enl., July 1, 2020, *and* Appellant's Mot. First Enl., June 1, 2021.) But the type of allegations

alone does not demonstrate the complexity of the case or any potential appellate issues.

This Court's Rules demand otherwise. The recitation here of forum, findings, and number of sealed exhibits should not constitute a description of the case's complexity.

Conclusion

The United States opposes a thirty-day enlargement but consents to a fourteen-day enlargement. The United States will consent to the full requested thirty days if Appellate Defense Counsel files an amended motion within five days describing with particularity (1) the status of the review of the Record, and (2) the complexity of any potential issues in this appeal.

Gregory A. Rustico
Digitally signed by Gregory A. Rustico

GREGORY A. RUSTICO
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 this document was emailed to the Court's filing address, uploaded

to the Court's case management system, and emailed to Appellate Defense Counsel, Major Mary Claire FINNEN, U.S. Marine Corps, on September 2, 2021.

Gregory A. Rustico Digitally signed by Gregory A. Rustico

GREGORY A. RUSTICO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted]

Subject: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Cond Consent 4th Enl (Rustico)

Signed By: [redacted]

RECEIVED
Sep 02 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 1 - U.S. v. Williams - NMCCA 202100094 - Cond Consent 4th Enl (Rustico)

To this Honorable Court:

Please find attached the Appellee's Conditional Consent to Appellee’s Motion for Fourth Enlargement for electronic filing in United States v. Williams, NMCCA No. 202100094.

Thank you.

Very Respectfully,
LT Rustico

LT Greg Rustico
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]

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

Before Panel No. 1

UNITED STATES, Appellee v. Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	APPELLEE'S CONDITIONAL CONSENT TO APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on March 6, April 30, September 22, October 1 and 5, November 5 and 30, and December 1–3 and 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions), and Lieutenant Colonel K. G. Phillips, U.S. Marine Corps (arraignment, motions, trial), 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 opposes a thirty-day enlargement but consents to a fourteen-day

enlargement. The United States will consent to a thirty-day enlargement if Appellant files an amended justification complying with the Rules and precedent.

A. This Court's Rules require a detailed explanation of good cause, including the status of review of the record and a discussion of case complexity.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). This includes requiring Counsel to provide the "status of review of the record of trial" and "a discussion of complexity of the case." *Id.*

The justification for appellate delay implicates Appellant's right to speedy appellate process. In *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the court held the Court of Criminal Appeals failed to exercise "institutional vigilance" and attributed that failure to the United States where appellate defense counsel stated the same reason for delay in each enlargement request. *Id.* at 137. The court found recurrent, rote justifications for delay suggested there was no evidence demonstrating "the enlargements were directly attributable to [the appellant]," "the need for additional time arose from other factors such as the complexity of [the appellant]'s case," or "the numerous requests for delay filed by appellate defense counsel benefited [the appellant]." *Id.*

In *Moreno*, the court held the Court of Criminal Appeals' failure to exercise "institutional vigilance" against the United States because the United States "must

provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *Moreno*, 63 M.J. at 137.

B. The lack of progress in reviewing the Record is cause for concern, and this Court should consider directing the assignment of additional appellate defense counsel.

Appellant's Motion asserts Appellate Defense Counsel has completed review of twenty-five percent of the Record. (Appellant's Mot. Fifth Enl. at 3, Oct. 1, 2021.) This case was docketed six months ago, and in each of her four previous requests for enlargement of time, Appellate Defense Counsel has simply stated that her review of the record was incomplete. (*See* Appellant's Mot. Fourth Enl., Sept. 1, 2021; Appellant's Mot. Third Enl., July 30, 2021; Appellant's Mot. Second Enl., July 1, 2021; Appellant's Mot. First Enl., June 1, 2021.) Counsel provides no specific rationale for why she has reviewed so little of the Record over the course of the previous four enlargements, nor does she detail her expected progress over the requested enlargement. Without such explanations, the Court cannot exercise "institutional vigilance" to ensure Appellant's right to speedy appellate process. *Diaz v. JAG of the Navy*, 59 M.J. 34, 40 (C.A.A.F. 2003).

If Appellate Defense Counsel is unable to facilitate speedy appellate processing of Appellant's case, this Court should decline to grant Appellant's request until additional counsel is detailed.

Conclusion

The United States opposes a thirty-day enlargement but consents to a fourteen-day enlargement. The United States will consent to the full requested thirty days if Appellate Defense Counsel files an amended motion within five days asserting that additional counsel will be detailed to Appellant's case or describing with particularity how the full enlargement will benefit Appellant.

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 this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Major Mary Claire FINNEN, U.S. Marine Corps, on October 6, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

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

[redacted]

Subject: RECEIPT - FILING – Panel #1 – U.S. v. Williams – NMCCA 202100094 – Cond Consent to 4th EOT (Martino)

Signed By: [redacted]

RECEIVED
Oct 06 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 #1 – U.S. v. Williams – NMCCA 202100094 – Cond Consent to 4th EOT (Martino)

To this Honorable Court:

Please find attached Appellee's Conditional Consent to Appellant's Motion for Fourth Enlargement of Time, for electronic filing in United States v. Williams, NMCCA No. 202100094.

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]

[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Aviation Electronics Technician Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR SIXTH ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 sixth enlargement of time to file a brief and assignments of error. The current due date is November 4, 2021. The number of days requested is thirty. The requested due date is December 4, 2021.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has reviewed more than seventy-five percent of the transcript of trial and associated unsealed paper exhibits. Counsel has not reviewed any sealed exhibits. A request to view sealed material was filed on October 22, 2021 (late Friday afternoon, likely after Court closed). Counsel has copies of, but has not yet reviewed, audio and visual exhibits.

Good cause exists for granting the requested enlargement because counsel additional time to review the record of trial, research identified legal issues, and draft assignments of error for this Court's review. The case was contested and is complex. This case involves allegations of sexual assault and assault from multiple complaining witnesses—both civilian and military, across a nearly eleven-month time span. At this point, Counsel expects to draft multiple non-*Grostefon* assignments of error in this case.

Counsel typically works forty or more hours per week, but has worked fewer hours over some weeks in the previous enlargement period. During the previous enlargement period, Counsel's children were exposed to Covid and were quarantined from daycare for seven days, which required the undersigned counsel to stay home to care for them. Counsel's children were also quarantined for fourteen days in September; the cumulative effect of the two quarantines in less than 45 days resulted in significantly reduced work hours during September

and October.

Counsel has five other active cases before this Court of varying complexity. She is currently drafting a brief in another contested general court-martial; that client is also still confined, the case is complex, and that case was docketed before this one. Counsel is alternating between working on that case and working on this one.

Counsel's collateral duties have not taken any time this past enlargement period. Counsel assisted with seven moots in three different cases over the past enlargement period in October. Due to the number of oral arguments in September and October, most (if not all) Code 45 attorneys assisted in multiple moots.

Counsel has been consulted and concurs with this request for an enlargement of time.

10/29/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on October 29, 2021, that a copy will be uploaded into the Court's case management system on October 29, 2021, and that a copy of the foregoing was emailed to Director, Appellate Government Division on October 29, 2021.

10/29/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 6th EOT (Finnen)

Signed By: [redacted]

RECEIVED
Oct 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 6th EOT (Finnen)

To This Honorable Court:

Attached please find a motion for a sixth enlargement of time ICO U.S. v. Travonte Williams, NMCCA No 202100094, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 6th EOT (Finnen)

Signed By: [redacted]

MOTION GRANTED
5 NOV 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 6th EOT (Finnen)

To This Honorable Court:

Attached please find a motion for a sixth enlargement of time ICO U.S. v. Travonte Williams, NMCCA No 202100094, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION TO EXAMINE SEALED MATTERS IN THE RECORD OF TRIAL** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS 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 and make copies of the sealed exhibits and portions of the transcript in the record of trial.

Appellant stands convicted of two specifications of Article 120 (sexual assault and abusive sexual contact), and three specification of Article 128 (assault consummated by a battery).

Specifically, counsel requests to examine and reproduce the following:

1. **Appellate Exhibits III, IV, V, XI, XIII, XIV, XXV, and XXX, and Record at 58-112 and 144-163.**

    a. Were the sealed matters

        i. Presented or reviewed by counsel at trial? **Yes.**

        ii. Reviewed in camera and then released to trial or defense counsel? **No.**

    b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities: **The sealed matters are the defense's motions to admit evidence in accordance with M.R.E. 412, the government's responses, the Court's ruling, (Sealing Order, Mar. 9, 2021) and the transcript of the hearings (on 30 Apr 20 and 22 Sep 20) at which these motions were litigated. Inspection of these records is necessary to fully and accurately review the adequacy of trial defense counsel's assistance of counsel, the factual and legal sufficiency of the evidence, and whether the military judge's rulings were correct.**

    c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: **N/A.**

    d. Is the matter the subject of a colorable claim of privilege? **There is nothing in the unsealed record to indicate the matter is subject to a claim of privilege.**

    e. If so, who may hold such a privilege? **If there is any privilege, it would be held by the alleged victims.**

    f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? **These motions were argued at trial. Without a proper review of this material at the appellate level, Appellant will not receive adequate appellate review of his case.**

g. Are you seeking disclosure of this matter? **The undersigned counsel seeks reproduction of the matter by making a copy of the sealed material for review in her office.**

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed: **The undersigned will be able to conduct a more thorough review in her office and will need to refer back to the material frequently if it is the subject of an assignment of error. The undersigned will destroy the material upon completion of appellate review.**

2. With regard to sealed materials that undersigned counsel seeks to copy, the granting of this motion shall constitute an Order of the Court binding upon Appellant and Appellee, as follows—

a. Counsel shall not make any additional copies of the materials beyond that requested and approved by the Court or divulge any of the sealed materials except as is necessary to prepare and present this appeal.

b. Within 14 days of this Court completing its Article 66, UCMJ, review, appellate defense counsel will provide appellate government counsel with notice as to whether Appellant intends to file a petition for review with the Court of Appeals for the Armed Forces for review under Article 67, UCMJ.

c. Absent further Order from this Court, within 14 days of the earliest of:

(1). Appellate government counsel receiving notice that Appellant has decided not to file a petition for review with the Court of Appeals for the Armed Forces under Article 67, UCMJ;

(2). The expiring of the time within which to file a petition for review with the Court of Appeals for the Armed Forces under Article 67, UCMJ, without the filing of such a petition;

(3). The Court of Appeals for the Armed Forces declining review under Article 67, UCMJ;

(4). The Court of Appeals for the Armed Forces completing review under Article 67, UCMJ;

(5). Appellate government counsel receiving notice that the Appellant has decided not to file a petition for a writ of certiorari with the Supreme Court;

(6). The expiring of the time within which to file a petition with the Supreme Court;

(7). The Supreme Court denying certiorari; or

(8). The Supreme Court finally deciding the Appellant's appeal,

all appellate counsel will destroy by shredding or other secure means all copies of the sealed materials made pursuant to this motion and will each sign and deliver to the Court a declaration certifying both that no other copies of the sealed materials were made except as authorized by the Court, and that all copies of the sealed materials were destroyed.

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.

Respectfully submitted.

10/22/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on October 22, 2021, that a copy will be uploaded into the Court's case management system, and that a copy of the foregoing was emailed to Director, Appellate Government Division on October 22, 2021.

10/22/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion to examine sealed material (Finnen)

Signed By: [redacted]

RECEIVED
Oct 25 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion to examine sealed material (Finnen)

To This Honorable Court:

Attached please find an motion to examine sealed materials ICO U.S. v. Travonte Williams, NMCCA No 202100094, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion to examine sealed material (Finnen)

Signed By: [redacted]

MOTION GRANTED
1 NOV 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion to examine sealed material (Finnen)

To This Honorable Court:

Attached please find an motion to examine sealed materials ICO U.S. v. Travonte Williams, NMCCA No 202100094, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S AMENDED MOTION TO COMPEL PRODUCTION OF ITEMS MISSING FROM THE RECORD OF TRIAL** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, presiding

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

Appellant, through undersigned Counsel, pursuant to Rules 1.4 and 23 of this Court's Rules of Appellate Procedure, moves for production of items (listed below) that are not included in the record of trial that was docketed with this Court on March 5, 2021.

Appellant filed a motion to compel production on November 23, 2021. Appellant included in that filing the actual names of court-martial members and what is presumably the name of an accused in a different case. Counsel is filing

this amended motion to use pseudonyms instead of the actual names in this unsealed filing. Additionally, Appellant corrected that there are only four missing questionnaires, not five.

In accordance with Rule for Courts-Martial 912 and 1112(b), Manual for Courts-Martial (2019), the listed items should have been included in the record of trial.

The following items are missing from the record of trial:

A) Additional portions of Appellate Exhibit XXXVIII. Members questionnaires for:

1. Second Lieutenant S. Echo,
2. Chief Warrant Officer 2 B. Papa,
3. Sergeant S. Charlie,
4. Corporal I. Romeo.

The GCMCO of the court-martial that was assembled was 1e-19 but the exhibit presently contains only questionnaires for the members listed on GCMCO 1c-19. The Court intended Appellate Exhibit XXVIII to contain the members questionnaires of the panel for the court-martial that was actually assembled. The missing items are members questionnaires for the panel members that are listed on GCMCO 1e-19 but not on GCMCO 1c-19.

B) Notice of Pleas and Forum. Appellate Exhibit XXIX is a sworn affidavit from trial defense counsel that the Notice of Pleas and Forum for Corporal D. Whiskey was included in the record of trial, and that trial defense counsel did not object to it being removed. The Notice of Pleas and Forum for PFC Travonte Williams was not added to the record of trial.

Accordingly, this Court should order the government produce the missing items, and order that the due date for the initial brief and assignment of errors be delayed for ten days after the Government has produced the items.

11/29/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on November 29, 2021, that a copy will be uploaded into the Court's case management system on November 29, 2021, and that a copy of the foregoing was emailed to Director, Appellate Government Division on November 29, 2021.

11/29/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094-D- Amended Motion to Compel Production of Missing Items from ROT -29 Nov 21

Signed By: [redacted]

[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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- D- Amended Motion to Compel Production of Missing Items from ROT -29 Nov 21

To This Honorable Court:

Attached please find an amended motion to produce missing items from the record of trial ICO U.S. v. Travonte Williams, NMCCA No 20210094, for electronic filing. This filing uses pseudonyms in place of the actual names used in the earlier filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094-D- Amended Motion to Compel Production of Missing Items from ROT -29 Nov 21

Signed By: [redacted]

MOTION GRANTED
30 NOV 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- D- Amended Motion to Compel Production of Missing Items from ROT -29 Nov 21

To This Honorable Court:

Attached please find an amended motion to produce missing items from the record of trial ICO U.S. v. Travonte Williams, NMCCA No 20210094, for electronic filing. This filing uses pseudonyms in place of the actual names used in the earlier filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES, Appellee v. Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	APPELLEE'S PARTIAL OPPOSITION TO APPELLANT'S AMENDED MOTION TO COMPEL ITEMS MISSING FROM THE RECORD OF TRIAL Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on March 6, April 30, September 22, October 1 and 5, November 5 and 30, and December 1–3 and 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions), and Lieutenant Colonel K. G. Phillips, U.S. Marine Corps (arraignment, motions, trial), presiding.

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

Pursuant to Rule 23.1(b) of this Court's Rules of Appellate Procedure, the United States partially opposes Appellant's Motion to Compel. The United States

opposes the Motion as to the written notice of Appellant's election of pleas and forum but does not oppose the Motion as to the missing Members Questionnaires.

A. This Court's Rules require Appellant to identify with particularity the item that is missing and its relevance to this Court's review.

Appellant may move the Court to compel the Government to produce an item when it is clear that the original record is missing that item. N-M. Ct. Crim. App. R. 23.9. The motion must identify "with particularity the item that is missing, and how it is relevant to the Court's review." *Id.*

B. It is not clear that the written notice of pleas and forum is missing from the Record, and if it is, it is not relevant to this Court's review.

Appellate Exhibit XXIX indicates that at one point, there was a document unrelated to Appellant's case that was erroneously added to the Record. (Appellate Exhibit XXIX.) Appellant makes no connection between this irrelevant document and any written notices that may have existed in Appellant's case. (*See* Appellant's Mot. Compel at 2, Nov. 29, 2021.) Appellant provides no evidence he ever submitted a written notice of pleas and forum, which he now claims is missing from the Record. (*Id.*) Furthermore, Appellant entered his pleas and election of forum on the Record. (R. 214–15.) With his election on the Record, Appellant has not shown how a written notice of pleas and forum is "relevant to the Court's review." N-M. Ct. Crim. App. R. 23.9.

Conclusion

The United States respectfully requests this Court deny Appellant's Motion to Compel as to the written notice of pleas and forum. The United States does not oppose the Motion as to the missing Members Questionnaires.

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 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, Major Mary Claire FINNEN, U.S. Marine Corps, on December 1, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

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

[redacted]

Subject: RECEIPT - FILING – Panel #1 – U.S. v. Williams – NMCCA 202100094 – Partial Oppo Mot to Compel (Martino)

Signed By: [redacted]

RECEIVED
Dec 01 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 #1 – U.S. v. Williams – NMCCA 202100094 – Partial Oppo Mot to Compel (Martino)

To this Honorable Court:

Please find attached Appellee's Partial Opposition to Appellant's Motion to Compel Items Missing from the Record of Trial, for electronic filing in United States v. Williams, NMCCA No. 202100094.

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]

[redacted]

[redacted]

Subject: RULING - FILING – Panel #1 – U.S. v. Williams – NMCCA 202100094 – Partial Oppo Mot to Compel (Martino)

Signed By: [redacted]

MOTION DENIED
2 DEC 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 #1 – U.S. v. Williams – NMCCA 202100094 – Partial Oppo Mot to Compel (Martino)

To this Honorable Court:

Please find attached Appellee's Partial Opposition to Appellant's Motion to Compel Items Missing from the Record of Trial, for electronic filing in United States v. Williams, NMCCA No. 202100094.

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]

[redacted]

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

Before Panel No. 1

UNITED STATES, Appellee	)	APPELLEE'S ORDER RESPONSE
v.	)	Case No. 202100094
Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Cherry Point, North Carolina, on March 6, April 30, September 22, October 1 and 5, November 5 and 30, and December 1–3 and 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions), and Lieutenant Colonel K. G. Phillips, U.S. Marine Corps (arraignment, motions, trial), presiding.

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

In response to this Court's Order of November 30, 2021 granting Appellant's Motion to Compel of November 29, 2021, the United States respectfully produces four missing members' questionnaires.

A. The United States now produces four missing members' questionnaires.

Pursuant to this Court's Order, Counsel has obtained the missing members' questionnaires from Appellant's court-martial. At trial, members' questionnaires were attached as Appellate Exhibit XXXIII. (Appellate Ex. XXXVIII.) However, the questionnaires for four prospective members were missing from Appellate Exhibit XXXVIII. (*See* General Court Martial Convening Order 1e-19; Appellate Ex. LXXXIV.)

B. The United States cannot locate the additional documents Appellant requested.

In his Motion to Compel, Appellant requested the United States produce his written notice of pleas and forum. (See Appellant's Mot. Compel at 2, Nov. 29, 2021.) Appellant provided no evidence he submitted a written notice of pleas and forum, and the United States opposed production for that reason. (Appellee's Partial Opposition to Appellant's Amended Mot to Compel, at 2, Dec. 1, 2021.)

Despite diligent effort, undersigned Counsel was unable to confirm that those documents existed. As such, and because Appellant entered his pleas and election of forum on the Record, (R. 214–15), the United States has produced all available, responsive documents.

Conclusion

The United States respectfully reports substantial compliance with this Court's Order.

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 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, Major Mary Claire FINNEN, U.S. Marine Corps, on December 22, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

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

[redacted]

Subject: RECEIPT - FILING – Panel #1 – U.S. v. WIlliams – NMCCA 202100094 – Order Response (Martino)

Signed By: [redacted]

RECEIVED
Dec 21 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel #1 – U.S. v. WIlliams – NMCCA 202100094 – Order Response (Martino)

To this Honorable Court:

Please find attached Appellee's Order Response, for electronic filing in United States v. Williams, NMCCA No. 202100094.

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]

[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR SEVENTH ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 seventh enlargement of time to file a brief and assignments of error. The current due date is January 1, 2021. The number of days requested is thirty. The requested due date is February 1, 2021.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has completed review of the record of trial.

Good cause exists for granting the requested enlargement. Counsel needs additional time to draft assignments of error. The case was contested and is complex. This case involves allegations of sexual assault and assault from multiple complaining witnesses—both civilian and military, across a nearly eleven-month time span. Counsel is drafting multiple non-*Grostefon* assignments of error in this case.

Additionally, the Government has not produced all the documents it was ordered to produce. On November 29, 2021, Appellant filed an amended motion to compel production of items missing from the record of trial and for a due date for Appellant's brief and assignments of error ten days after the Government produced the missing items. Appellant's motioned to produce member's questionnaires and the Appellant's written notice of pleas and forum. (The written notice of pleas and forum of another accused had erroneously been entered into the record and an affidavit, labeled as an appellate exhibit, documented that the other accused's pleas and forum was removed from the record without objection from trial defense counsel.) This Court granted Appellant's motion on November 30, 2021.

On December 1, 2021, the Government filed a motion of partial opposition to Appellant's motion, arguing that Appellant had not produced any evidence that a written notice of pleas and forum for Appellant ever existed. The Court denied the Government's motion in opposition on December 2, 2021.

On December 22, 2021, the Government produced members' questionnaires. The Government again stated that "Appellant provided no evidence he submitted a written notice of pleas and forum, and the United States opposed production for that reason. . . .Despite diligent effort, undersigned Counsel was unable to confirm that those documents existed. . . .As such, the Government has produced all available, responsive documents." (Appellee's Order Response at 2, Dec. 22, 2021). The Government also implied that because Appellant's forum selection was also made orally on the record, there was no written notice of pleas and forum. But there is evidence that the document existed: the three trial management orders in the case all provided due dates for *written* notice of pleas and forum (Appellate Exhibits I, XCIII, and XCIV). There is no evidence in the record—and the Government has not provided any evidence with its Order Response—that trial defense counsel did not comply with the orders. As such, the Government should produce the written notice of pleas and forum and Appellant should be provided additional time to review the material.

Counsel has four other active cases before this Court of varying complexity. Counsel is prioritizing this case above those cases. During the previous enlargement

period, Counsel submitted two briefs. Counsel's collateral duties have not taken any time this past enlargement period. Counsel assisted with moots in different cases over the past enlargement period.

Counsel has been consulted and concurs with this request for an enlargement of time.

12/28/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on December 28, 2021 (after close of business), that a copy will be uploaded into the Court's case management system on December 28, 2021, and that a copy of the foregoing was emailed to Director, Appellate Government Division on December 28, 2021.

12/28/2021

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 7th enlargement of time

Signed By: [redacted]

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

[redacted]

Subject: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 7th enlargement of time

To This Honorable Court:

Attached please find Appellant's motion for a seventh enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 7th enlargement of time

Signed By: [redacted]

MOTION GRANTED
29 DEC 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 7th enlargement of time

To This Honorable Court:

Attached please find Appellant's motion for a seventh enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION EIGHTH ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 an eighth enlargement of time to file a brief and assignments of error. The current due date is February 1, 2021. The number of days requested is thirty. The requested due date is March 2, 2021.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has completed review of the record of trial.

Good cause exists for granting the requested enlargement. Counsel needs additional time to finish drafting assignments of error, review the brief with her client and incorporate additional assignments of error raised in accordance with *United States v. Grostefon*, and send the brief through her chain of command for editing. This case involves allegations of sexual assault and assault from multiple complaining witnesses—both civilian and military, across a nearly eleven-month time span. The case was contested and is complex, with both trial counsel concurring that it was the "most serious" court-martial in the Eastern Region at the time it was tried. R. at 226, 227.

Appellant is confined in the Fort Leavenworth Disciplinary Barracks. Because of their Covid protocols, Appellant has access to legal calls only one day a week. Counsel will be reviewing the assignments of error with the Appellant in the course of two brig calls scheduled over the next two weeks.

Counsel has completed about thirty-five pages of the brief (three issues) and is raising non-*Grostefon* assignments of error that include factual sufficiency and legal sufficiency of the abusive sexual contact and sexual assault convictions, ineffective

assistance of counsel related to failures to object to admission of evidence, and the military judge's abuse of discretion in admitting evidence, including during sentencing.

Counsel's progress during the past month not as much as she expected and was slowed by a week-and-a-half illness.

Since submitting the previous enlargement request, counsel drafted two reply briefs, worked with civilian counsel to submit an initial brief and assignments of error in a separate case, and completed review of a record and submitted a merit review in a fourth case. At this time, counsel is the primary counsel on only one other case, which is on its first enlargement of time.

1/27/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on January 27, 2021 (after close of business), that a copy will be uploaded into the Court's case management system on January 27, 2021, and that a copy of the foregoing was emailed to Director, Appellate Government Division on January 27, 2021.

1/27/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE [redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 8th enlargement of time

[redacted]

RECEIVED
Jan 27 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Mo. on for 8th enlargement of time

To This Honorable Court:

A□ached please find Appellant's motion for an eighth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

[redacted]

[redacted]

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

[redacted]

[redacted]

RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 8th enlargement of time

[redacted]

MOTION GRANTED
31 JAN 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Mo. on for 8th enlargement of time

To This Honorable Court:

A□ached please find Appellant's motion for an eighth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

[redacted]

[redacted]

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

[redacted]

[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR A NINTH ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 ninth enlargement of time to file a brief and assignments of error. The current due date is March 2, 2022. The number of days requested is seven. The requested due date is March 9, 2022.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has completed review of the record of trial.

Good cause exists for granting the requested enlargement. Counsel needs additional time to finish drafting assignments of error, complete substantial edits to reduce length of the brief, and send the brief through her chain of command for editing.

Counsel did not expect to need a ninth enlargement of time, but was informed yesterday (22 February 2022) that one of her children had been exposed to Covid at daycare and would not be allowed back in daycare until 1 March (a ten-day quarantine). Counsel's spouse is required to travel out of the area for work from Thursday morning, 24 February through at least Sunday evening, 27 February, cannot change this work schedule, and thus will not be sharing childcare. Counsel had also intended to work on Monday, 21 February, while her husband watched the kids (daycare was closed for the Federal holiday), but his work trip over last weekend was extended an extra day until Monday evening.

These unexpected schedule adjustments over the past few days have put counsel behind on providing the brief to the acting director, Code 45. The acting director only has limited availability starting Friday, 25 February 2022, due to out-

of-area reserve duties for the week, and has at least three other briefs (at least one of which is also seventy-five pages) to review over the weekend and evenings during this time period.

Counsel has been reviewing the assignments of error with the Appellant, is no longer limited to one call a week to the brig, and has been able to draft her client's Grostefon issues.

Counsel has completed about seventy-five pages of the brief (eight issues) and is raising non-*Grostefon* assignments of error that include factual sufficiency and legal sufficiency of the abusive sexual contact and sexual assault convictions, ineffective assistance of counsel related to failure to motion to suppress a statement given to a civilian law enforcement *and* an NCIS agent after appellant only received *Miranda* warnings, the military judge's abuse of discretion in admitting evidence of brig misconduct during sentencing, and trial counsel's improper argument during closing, rebuttal, and sentencing that misstated a complaining witness's testimony on a critical issue, argued propensity and criminal disposition, and ran afoul in other ways of this and other Court's decisions on what is proper, lawful argument. Appellant is also raising the *Causey/Ramos* unanimous verdict issue.

Since submitting the previous enlargement request, counsel has participated in some moots to assist other counsel but has been primarily working on this brief. Counsel will continue to work on this brief during the evenings while her children are at home, but does not anticipate being able to complete standard workdays until she

has access to daycare again.

Appellant has been consulted and concurs with this motion for an enlargement of time.

2/23/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on February 23, 2022 (corrected version filed after closed of business), that a copy will be uploaded into the Court's case management system on February 23, 2022, and that a copy of the foregoing was emailed to Director, Appellate Government Division on February 23, 2022.

2/23/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 9th enlargement of time (7 days)

[redacted]

RECEIVED
Feb 24 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: RE: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Mo. on for 9th enlargement of time (7 days)

To This Honorable Court:

I apologize-I a□ached an unsigned motion in the previous email. I made two changes to the body of the motion (changing dates from "2021" to "2022"), a change to the date in the certificate of filing, and electronically signed this motion. I made no other changes. A□ached please find the signed, corrected version of the defense's motion for a ninth (7 day) enlargement of time ICO US v. PFC Travonte Williams.

Very Respectfully,

[redacted]

[redacted]

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

[redacted]

Subject: RE: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 9th enlargement of time (7 days)

To This Honorable Court:

A□ached please find Appellant's motion for an ninth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

[redacted]

[redacted]

[redacted]

RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 9th enlargement of time (7 days)

[redacted]

MOTION GRANTED
24 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: RE: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Mo. on for 9th enlargement of time (7 days)

To This Honorable Court:

I apologize-I a□ached an unsigned motion in the previous email. I made two changes to the body of the motion (changing dates from "2021" to "2022"), a change to the date in the certificate of filing, and electronically signed this motion. I made no other changes. A□ached please find the signed, corrected version of the defense's motion for a ninth (7 day) enlargement of time ICO US v. PFC Travonte Williams.

Very Respectfully,

Major Mary Claire Finnen

[redacted]

Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

Subject: RE: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 9th enlargement of time (7 days)

To This Honorable Court:

A□ached please find Appellant's motion for an ninth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR LEAVE TO FILE OUT OF TIME** NMCCA No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, presiding

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

COMES NOW the undersigned and respectfully moves for leave to file appellant's motion for a tenth enlargement of time out of time. Appellant's brief and assignment of errors is due tomorrow, on March 9, 2022. A timely request for an enlargement of time would have been due on Friday, March 4, 2022.

Good cause exists for granting this motion for leave to file out of time because counsel's brief is with the Acting Director, Code 45, for editing. The Acting Director was on out-of-area Reserve duty all of last week and returned over the weekend. During the weekend and into today, March 8, 2022, she has been reviewing a different, long brief. Appellant's brief is lengthy and the Acting Director does not anticipate being able to complete review of the brief before Monday, March 14, 2022 due to CAAF training and additional Reserve duty Friday through Sunday (March 11-13). Tomorrow and Thursday, the Acting Director and counsel both have CAAF training.

Respectfully submitted.

3/8/2022

X Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court via email on March 8, 2022, that a copy was uploaded into the Court's case management system on March 8, 2022, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on March 8, 2022.

3/8/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE [redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for Leave to File out of Time (10th enlargement of time)
Date: Tuesday, March 8, 2022 1:31:59 PM

RECEIVED
Mar 8 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for Leave to File out of Time (10th enlargement of time)

To This Honorable Court:

Attached please find Appellant's motion for leave to file out of time a tenth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for Leave to File out of Time (10th enlargement of time)
Date: Monday, March 14, 2022 11:12:11 AM

MOTION GRANTED
14 MAR 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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for Leave to File out of Time (10th enlargement of time)

To This Honorable Court:

Attached please find Appellant's motion for leave to file out of time a tenth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES, Appellee v. Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	APPELLEE'S CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME Case No. 202100094 Tried at Marine Corps Air Station, Cherry Point, North Carolina, on March 6, April 30, September 22, October 1, November 5 and 30, and December 1–3, 7–10, 2020 by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions) and Colonel K. Phillips, U.S. Marine Corps, (motions and trial) 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 April 15, 2022, to May 15, 2022, to answer Appellant's Brief and Assignments of Error.

The Record of Trial consists of 1349 transcribed pages, and Appellant consents to this Enlargement. No showing of good cause is therefore required. *See* N-M. Ct. Crim. App. R. 23.2(c)(2).

Conclusion

The United States respectfully requests the Court grant this Motion and extend the time to file its Answer to May 15, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
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 I uploaded this document into this Court's case management system and emailed it to this Court's filing address and Appellate Defense Counsel, Major Mary C. FINNEN, U.S. Marine Corps, on April 8, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel

[redacted]

Subject: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 1st Cons Enl (Blair)
Date: Friday, April 8, 2022 3:27:54 PM

RECEIVED
Apr 8 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 1 - U.S. v. Williams - NMCCA 202100094 - Gov 1st Cons Enl (Blair)

To This Honorable Court:

Please find attached Appellee's Consent Motion for First Enlargement of Time for electronic filing in United States v. Williams, NMCCA 202100094.

Thank you

Very Respectfully,
Capt Tyler W. Blair

Tyler W. Blair
Captain, USMC
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]

Subject: RULING - RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 1st Cons Enl (Blair)
Date: Friday, April 8, 2022 3:37:22 PM

MOTION GRANTED
8 APR 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: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 1st Cons Enl (Blair)

RECEIVED
Apr 8 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 1 - U.S. v. Williams - NMCCA 202100094 - Gov 1st Cons Enl (Blair)

To This Honorable Court:

Please find attached Appellee's Consent Motion for First Enlargement of Time for electronic filing in United States v. Williams, NMCCA 202100094.

Thank you

Very Respectfully,
Capt Tyler W. Blair

_____

Tyler W. Blair
Captain, USMC
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 UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES

Appellee

v.

Travonte D. WILLIAMS
Private First Class (E-2)
U.S. Marine Corps

Appellant

APPELLANT'S MOTION FOR LEAVE TO FILE BRIEF AND ASSIGNMENTS OF ERROR UNDER SEAL

NMCCA Case No. 202100094

Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020,
before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, presiding

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

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

COMES NOW Appellant, by and through counsel, and moves the Court pursuant to Rules 17.4 to permit him to file his and his Brief and Assignments of Error under seal.

Some of the arguments in the Brief require counsel to cite sealed matters relating to a complaining witness' romantic relationship with the Appellant. The material cited existed in the record only as an enclosure to a sealed motion. Thus, counsel asks for leave of court to file a brief that redacts those portions from the brief and as well as to file a separate brief under seal with the Court that *does* reference the sealed matters.

WHEREFORE, counsel respectfully requests leave to file under seal unredacted versions of Appellant's Motion to Attach and Brief in addition to a redacted version filed under normal rules of the court.

Respectfully submitted.

3/16/2022

X Mary Claire Finnne

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court via email on March 16, 2022, (after close of business) that a copy was uploaded into the Court's case management system on March 16, 2022, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on March 16, 2022.

3/16/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING- PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def BRIEF
Date: Thursday, March 17, 2022 7:44:44 AM

RECEIVED
Mar 17 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: PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File out of Time

To This Honorable Court:

Attached please find Appellant's redacted brief ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Under Seal
Date: Thursday, March 17, 2022 12:13:01 PM

MOTION GRANTED
17 MAR 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: PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Under Seal

To This Honorable Court:

Attached please find Appellant's motion for leave to file a brief under seal (and redact portions of the brief for unsealed filing) ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR LEAVE TO EXCEED WORD LIMIT FOR OPENING BRIEF** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, presiding

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

Pursuant to Rules 23.11 and 17.3 of this Court's Rules of Appellate Procedure, Appellant, through counsel, respectfully moves for leave to file a principal brief exceeding 15,000 words.

Principal briefs may exceed 15,000 words (exclusive of the case caption, footnotes, indexes, certificates, and appendices) by permission of the Court. N-M. Ct. Crim. App. R. 17.3. Appellant's brief contains 23,716 words.

Good cause exists to allow undersigned to exceed the word count. The court-martial was tried before members and had five complaining witnesses. Appellant has raised nine errors. Two of those errors are raised pursuant to *United States v. Grostefon.* The other seven errors required significant factual detail and analysis. Two issues are factual sufficiency, which required a close, detailed analysis of the facts and were approximately ten pages each. An assignment of error raising ineffective assistance of counsel for failing to move to suppress Appellant's statement took significant explanation and detail, as counsel had to address the merits of the underlying suppression issue and the prejudice to Appellant's case. That error took about twenty-pages to address. The assignment of error addressing trial counsel's improper argument is approximately thirty pages. Counsel broke this assignment of error into multiple sub issues to add clarity because of the different types of error the trial counsel committed, and the different responses (or lack of response) from the military judge and defense counsel to those improper arguments—all of which affects the standard of review and prejudice analysis.

Counsel has edited the brief multiple times to reduce the length. Counsel's supervisor also edited the brief, in part to reduce the length.

Because of the underlying complexity of the case and the issues raised, Appellant's brief currently exceeds the word limit by 8,716 words. Appellant respectfully requests this Court grant this motion for leave to file the brief exceeding the word count.

Respectfully submitted.

3/16/2022

X Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court via email on March 16, 2022, (after close of business) that a copy was uploaded into the Court's case management system on March 16, 2022, and that a copy of the foregoing was transmitted by electronic means with the consent of the counsel being served to the Director, Appellate Government Division, on March 16, 2022.

3/16/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.[redacted]

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RECEIPT - FILING -PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Exceeding Page length
Date: Thursday, March 17, 2022 7:41:11 AM

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

[redacted]

Subject: PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Exceeding Page length

To This Honorable Court:

Attached please find Appellant's motion for leave to file a brief exceeding the word limit ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

[redacted]

Subject: RULING - PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Exceeding Page length
Date: Tuesday, April 12, 2022 10:46:50 AM

MOTION GRANTED
12 APR 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: PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File Brief Exceeding Page length

To This Honorable Court:

Attached please find Appellant's motion for leave to file a brief exceeding the word limit ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[redacted]

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

Before Panel No. 1

UNITED STATES *Appellee* v. **Travonte D. WILLIAMS** Private First Class (E-2) U.S. Marine Corps *Appellant*	**APPELLANT'S MOTION FOR A TENTH ENLARGEMENT OF TIME** NMCCA Case No. 202100094 Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Col Scott Woodard, U.S. Marine Corps, and Col Kyle Phillips, U.S. Marine Corps, 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 tenth enlargement of time to file a brief and assignments of error. The current due date is March 9, 2022. The number of days requested is seven. The requested due date is March 16, 2022.

Status of the case:

1. The Record of Trial was docketed on April 6, 2021.

2. The Moreno III date is October 6, 2022.

3. Private First Class Travonte Williams is confined. His release date is August 31, 2030.

4. The record consists of 1,349 transcribed pages and 2,882 total pages (not including sealed exhibits).

5. Counsel has completed review of the record of trial.

Good cause exists for granting the requested enlargement. Counsel needs additional time to receive and incorporate counsel's supervisor's edits. The Acting Director, Code 45, had out-of-area Reserve duty all of last week. Over the weekend and through today, she has been reviewing and editing a different brief for another counsel. That brief is of substantial length.

The brief in this case is also of substantial length. The Acting Director and counsel are both attending all-day training at CAAF tomorrow and Thursday (March 9-10). The Acting Director is on Reserve duty Friday-Sunday (March 11-13). The Acting Director anticipates completing review on Monday, March 14, 2022. Counsel will use Tuesday, March 15, 2022 to incorporate edits.

Counsel is raising nine issues and is raising non-*Grostefon* assignments of error that include factual sufficiency and legal sufficiency of the abusive sexual contact and sexual assault convictions, ineffective assistance of counsel related to failure to motion to suppress a statement given to a civilian law enforcement *and* an NCIS agent after appellant only received *Miranda* warnings, ineffective assistance of counsel for failing to object during trial counsel's improper argument, the military

judge's abuse of discretion in admitting evidence of brig misconduct during sentencing, and trial counsel's improper argument during closing, rebuttal, and sentencing that misstated a complaining witness's testimony on a critical issue, argued propensity and criminal disposition, and ran afoul in other ways of this and other Court's decisions on what is proper, lawful argument. Appellant is also raising the *Causey/Ramos* unanimous verdict issue.

3/8/2022

X Mary Claire Finnen

Mary Claire Finnen
Mary Claire Finnen
Major, USMC
Signed by: FINNEN.MARY.CLAIRE.[redacted]
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
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CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was emailed to the Court on March 8, 2022 (corrected version filed after closed of business), that a copy will be uploaded into the Court's case management system on March 8, 2022, and that a copy of the foregoing was emailed to Director, Appellate Government Division on March 8, 2022.

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Subject: RECEIPT - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 10th enlargement of time (7 days)
Date: Tuesday, March 8, 2022 1:31:20 PM

RECEIVED
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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: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 10th enlargement of time (7 days)

To This Honorable Court:

Attached please find Appellant's motion for a tenth enlargement of time ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing. The brief is currently due tomorrow, March 9, 2022. Counsel will be filing, by separate email, a motion for leave to file out of time.

Very Respectfully,

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Subject: RULING - ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 10th enlargement of time (7 days)
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MOTION GRANTED
14 MAR 2022
United States Navy-Marine Corps
Court of Criminal Appeals

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Washington Navy Yard, DC 20374

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Subject: ELECTRONIC FILING: PANEL 1- US v. Williams, Travonte, NMCCA 202100094- Def Motion for 10th enlargement of time (7 days)

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

Before Panel No. 1

UNITED STATES,

Appellee

v.

Travonte D. WILLIAMS
Private First Class (E-2)
U.S. Marine Corps,

Appellant

APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR

NMCCA Case No. 201900094

Tried at Marine Corps Air Station Cherry Point, North Carolina, on 6 March, 30 April, 22 September, 1 October, 5 and 30 November, 1-3 and 7-10 December 2020, before a General Court-Martial convened by the Commanding General, 2d Marine Air Wing, Colonel Scott Woodard, U.S. Marine Corps, and Colonel Kyle Phillips, U.S. Marine Corps, presiding

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

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Issues Presented

I. ***Whether PFC Williams's conviction for abusive sexual contact is legally and factually sufficient where PFC Williams touched LCpl Whiskey's butt during an explicitly-consented-to hug after an evening spent together at a skating rink.***

II. ***Whether PFC Williams's conviction for sexual assault is legally and factually sufficient where the complaining witness, Ms. [redacted], testified that PFC Williams inserted his penis in her during the course of a topless massage and stopped intercourse as soon as he realized she was trying to get up.***

III. ***Whether PFC Williams' conviction for assaulting Ms. [redacted] by holding a pocket knife to her is factually sufficient where the doorbell footage that may have shown the alleged encounter was never provided to the government and Ms. [redacted] account was inconsistent with a different video that was provided.***[1]

IV. ***Whether PFC Williams's conviction for assault consummated by a battery is factually sufficient where the complaining witness's, Ms. [redacted] lack of injuries were inconsistent with the incident she described.***[2]

V. ***Whether defense counsels' representation was ineffective when they failed to move to suppress the statement PFC Williams made after law enforcement failed to advise him of any crime of which he was suspected.***

VI. ***Whether PFC Williams right to a fair trial was prejudiced by trial counsel's misconduct in repeatedly misstating Ms. [redacted] testimony on the critical issue of whether she consented, or appeared to consent, to sex; using propensity as a theme after being ordered not to make propensity arguments; and making other errors in closing, rebuttal, and sentencing that this Court and others have excoriated counsel for making.***

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[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

VII. Whether defense counsels' representation was ineffective when they failed to object to portions of trial counsel's closing, rebuttal, and sentencing arguments.

VIII. Whether the military judge abused his discretion in admitting PFC Williams's brig observational and disciplinary reports, especially when some of the misconduct underlying those reports was the subject of a separate pending criminal proceeding.

IX. Whether PFC Williams has a right under the Fifth and Sixth Amendments to a unanimous verdict in a court-martial for the serious charged crimes.

Statement of Statutory Jurisdiction

The Convening Authority (CA) approved a court-martial sentence that included a punitive discharge. Therefore, this Court has jurisdiction under Article 66(b)(3).[3]

Statement of the Case

A panel of officers and enlisted, sitting as a general court-martial, convicted Private First Class (PFC)Williams, contrary to his pleas, of one specification of sexual assault, one specification of abusive sexual contact, one specification of assault consummated by a battery, and one specification of simple assault in violation of Articles 120 and 128, UCMJ.[4] The members acquitted him of

[3] 10 U.S.C. § 866(b)(3).
[4] R. at 1199; Entry of Judgment at 1.

attempted rape, one specification of sexual assault, and four specifications of assault consummated by a battery in violation of Articles 80, 120, and 134.[5]

The members sentenced PFC Williams to a reduction to E-1, forfeiture of all pay and allowances, eleven years' confinement, and a dishonorable discharge.[6]

The CA approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed.[7]

Statement of Facts

A. Private First Class Williams was accused of sexual assault, abusive sexual contact, assault, and attempted rape and was acquitted of most specifications.

At his general court-martial, PFC Williams faced allegations from five women—both civilian and military—that ranged in dates from January to November 2019. The severity of the accusations ranged from battery by PFC Williams touching, through the clothing, the back of one of his logistics school classmates (resulting in an acquittal) to attempted rape (also resulting in acquittal) and sexual assault without consent. He was convicted of four specifications and acquitted of seven specifications.

[5] Entry of judgement at 1, 4.
[6] R. at 1347; Entry of Judgement at 2.
[7] Convening Authority Action.

B. Lance Corporal Whiskey alleged that after she and PFC Williams went to a skating rink together, he asked for a hug and grabbed her butt when he hugged her.

The first alleged incident occurred in early 2019. Lance Corporal Whiskey and PFC Williams were classmates during embarkation school in Camp Johnson, North Carolina.[8] Private First Class Williams was the class guide.[9]

Lance Corporal Whiskey described her interactions with PFC Williams as "We didn't have many. We weren't friends at all. So it was, kind of, touch and go."[10] Despite this characterization, PFC Williams and LCpl Whiskey went to a skating rink on a weekend evening together, just the two of them.[11] Lance Corporal Whiskey attributed this to "no one else wanted to go."[12] Lance Corporal Whiskey admitted that PFC Williams tried to pay for her at the skating rink, but she paid for herself and told him it was not a date.[13] She and PFC Williams ate together, but she could not remember who paid for the meal.[14] She and PFC Williams shared a taxi to and from the skate rink, but she could not remember who paid for the taxis.[15]

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[8] R. at 861-62.
[9] R. at 949.
[10] R. at 855.
[11] R. at 856.
[12] R. at 856-57.
[13] R. at 857.
[14] R. at 866 (LCpl Whiskey first denied he tried to pay for her meal, but then said "I do not remember who paid for lunch.").
[15] R. at 864.

Private First Class Williams escorted LCpl Whiskey back to her barracks room.[16] They said goodbye but he did not try to hug or kiss her.[17] He returned to ask for "tissue"—toilet paper.[18] After LCpl Whiskey provided the toilet paper, PFC Williams asked for a hug and she said yes.[19] While they hugged—what LCpl Whiskey described as a loose, side hug—PFC Williams allegedly "grabbed" her butt.[20] The description of the butt grab—which trial counsel subsequently characterized as a deliberate squeeze—was perfunctory.[21] There was no testimony about how forceful the grab was, where it was on her butt, whether she was still wearing a coat or not, or what PFC Williams' appearance and demeanor was when it occurred. There was little testimony about what happened after the grab, except that LCpl Whiskey was "kind of thrown off" by it.[22] She did not report it until the Naval Criminal Investigative Service (NCIS) interviewed her as part of an investigation into a separate allegation.[23]

The government submitted no evidence corroborating LCpl Whiskey's allegations.

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[16] R. at 859.
[17] R. at 865.
[18] R. at 859.
[19] R.at 859.
[20] R. at 859.
[21] R. at 860.
[22] R. at 860.
[23] R. at 868-69.

After LCpl Whiskey's testimony, a member submitted the following question to her: "Do you feel Travonte Williams touched your buttocks with the intent to arouse his sexual desire?"[24] The military judge sustained the government's objection to the question.[25]

After the close of evidence, trial defense counsel made an R.C.M. 917 motion on this specification.[26] The defense argued there was "insufficient evidence regarding the intent to arouse a sexual desire in that particular specification based upon the testimony of Lance Corporal Whiskey."[27] Trial defense counsel explained that there was no language or comments or any other kind of behavior to imply some sexual intent.[28] The military judge denied the motion, relying on the "facts and circumstances upon which the two of them engaged in their skating outing. The facts and circumstances as testified from Lance Corporal Whiskey as to the…their snack that they had."[29]

Private First Class Williams was convicted of abusive sexual contact.[30]

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[24] R. at 871; App Ex. LXI.
[25] R. at 871.
[26] R. at 1023.
[27] R. at 1023.
[28] R. at 1025.
[29] R. at 1026.
[30] Entry of Judgement.

C. Ms. [redacted] alleged that, while PFC Williams was giving her a back massage, he inserted his penis in her vagina and about a month later held a knife to her and picked her up to put her in his car.

1. PFC Williams met Ms. [redacted] at her home after talking on social media.

Ms. [redacted] met PFC Williams on Monkey, a social media application.[31] She was living in Wilmington, North Carolina while PFC Williams was stationed aboard MCAS Cherry Point.[32] She was twenty-two at the time and PFC Williams was nineteen.[33]

On July 16, 2020, allegedly a couple of weeks after meeting on the Monkey app, Ms. [redacted] gave PFC Williams her address.[34] She couldn't remember whose idea it was to meet in person, but they agreed to meet at her house.[35] Private First Class Williams arrived late in the evening.[36] Ms. [redacted] mother, [redacted], was home.[37] [redacted] and PFC Williams chatted about his plan to make the Marine Corps a career and then PFC Williams and Ms. [redacted] went to her bedroom.[38] They started watching TV.[39]

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[31] R. at 650-51.
[32] R. at 652; *see* Charge Sheet.
[33] R. at 674; *see* Charge Sheet.
[34] R. at 675.
[35] R. at 652.
[36] R. at 652.
[37] R. at 653, 700.
[38] R. at 654, 701.
[39] R. at 654, 701.

The house was a single-story, three-bedroom house.[40] [redacted] testified that the whole time PFC Williams and Ms. [redacted] were in Ms. [redacted] room, [redacted] was in her room, which was adjacent to Ms. [redacted].[41]

2. Ms. [redacted] alleged that, while giving her a back massage, PFC Williams took down her shorts and inserted his penis in her vagina but stopped as soon as he realized she was trying to get up.

The two kissed in the room. Ms. [redacted] didn't "know how it started."[42] After kissing, PFC Williams offered Ms. [redacted] a back massage.[43] Ms. [redacted] lay on her stomach on the bed and PFC Williams straddled her back.[44] Because it was hot in the room, PFC Williams had already removed his pants and was wearing his shirt and a pair of shorts.[45] Ms. [redacted] had a shirt and shorts on but her shirt was up.[46]

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[40] R. at 705. Oddly, [redacted]own testimony and her mother's differed on the layout of the house. [redacted] who did not admit her sister was home at the time, said her sister's room was next to hers and her mother's was across the hall. R. at 676. Her mother, however, testified that [redacted] room was not across from hers but was "angled backwards" with only a closet between them. R. at 705-06.
[41] R. at 701.
[42] R. at 655.
[43] R. at 656.
[44] R. at 657.
[45] R. at 657-58.
[46] R. at 657.

PFC Williams began to massage Ms. [redacted] lower back. He pulled her shorts down as he did so.[47] At this point, Ms. [redacted] alleged that she said "what are you doing" and "why?"[48] PFC Williams said that he was massaging her lower back.[49] There is no indication that Ms. [redacted] tried to pull her shorts up.[50] Then, by Ms. [redacted] account, PFC Williams twice inserted his penis in her vagina while he was holding her wrists next to her head.[51] She was still on her stomach.[52] He was still wearing his boxers when he inserted his penis.[53] Ms. [redacted] did not testify that she said "no" or "stop."[54] Instead, she testified—twice—that he got off her when he saw that she was trying to get up.[55]

Ms. [redacted] got up and "put [her] clothes back up."[56] She said he had to leave.[57] He did not say anything except to repeat what she had just said.[58] Then he

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[47] R. at 658.
[48] R. at 658.
[49] R. at 658.
[50] R. at 658-59.
[51] R. at 659.
[52] R. at 684.
[53] R. at 684.
[54] R. at 659 (explaining that she did not say anything).
[55] R. at 660-61("Trial Counsel: What happened after he initially put his penis in your vagina? [redacted]: I was gritting my teeth and I was trying to raise up, *and I guess once he realized what I was doing, he let go.* And I got off the bed real fast.") (emphasis added); R. at 684 (stating he let go when "he finally realized that I was trying to get up off the bed").
[56] R. at 660.
[57] R. at 660.
[58] R. at 660.

allegedly apologized, hugged her, and "tried to comfort" her.[59] He got dressed and left.[60] He asked her to walk him out and she did.[61] A video from Ms. [redacted] doorbell shows that the two were holding hands when they walked out.[62] When asked whether she kissed him goodbye and asked him to call when he got back to base, she stated "not that I can remember."[63]

3. Ms. [redacted] alleged that on PFC Williams' second visit to her home, he lifted her up to put her in his car and also held a pocket knife up to her face and asked what she would do if he cut her.

Private First Class Williams and Ms. [redacted] continued to chat over the next month.[64] Ms. Williams sent messages that relayed she was often unhappy and did not know what to do with her life.[65] She also asked him for money for Plan B.[66] In August, the two agreed to meet again.[67] This time, the plan was to go running together in a local park and PFC Williams was to pick her up.[68] But he also had news to give her. He thought he might have given her an STD.[69]

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[59] R. at 661.
[60] R. at 661.
[61] R. at 661.
[62] Pros. Ex. 9.
[63] R. at 684.
[64] R. at 678-79.
[65] R. at 685-86.
[66] R. at 678.
[67] R. at 684, 686-87.
[68] Pros. Ex. 4; App. Ex. XXXII at 21.
[69] R. at 672.

Ms. Williams gave PFC Williams her address again.[70] He arrived and went into the house to use the bathroom.[71] Her mother was home but was already in bed.[72] He wanted to talk on the couch, but Ms. [redacted] wanted to go back outside.[73] Outside, he asked her to dance with him.[74] She did, a little, but it was "mostly him dancing."[75] She alleged that, while they were outside, he held a pocket knife to her neck and asked her what she would do if he cut her.[76] Then he showed her how the knife worked and tossed the pocket knife in the backseat of the nearby car.[77] She also alleged that he lifted her up "to the point where [she] kind of, missed [her] step and fell into the back seat of his car."[78] He got in the backseat next to her and tried to keep her in the car—at times he placed his hand on her mouth to keep her from raising her voice.[79] At some point, she told him her uncles would beat him up.[80]

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[70] R. at 687.
[71] R. at 687, 692.
[72] R. at 664.
[73] R. at 687.
[74] R. at 687.
[75] R. at 687.
[76] R. at 668-69 (describing it as a pocket knife or a Swiss knife).
[77] R. at 670.
[78] R. at 670.
[79] R. at 670-72.
[80] R. at 690.

She asked what he was doing and he said he had to tell her something.[81] As she got out of the car, he told her that he may have given her a sexually-transmitted disease.[82] He seemed "kind of confused and worried" when he told her.[83] He shuffled some papers to show her, but she would not look at them.[84] He kept apologizing but she would no longer speak to him.[85] Shortly after, PFC Williams left to drive home.

Sometime later in the morning, Ms. [redacted] called the police.[86] After calling the police, she told her mother that she was sexually assaulted.[87]

4. The government entered PFC Williams's interrogation as evidence of the charges relating to Ms. [redacted].

Ms. [redacted] did not provide her clothes from the alleged first encounter.[88] She said she had initially told her sister that she was sexually assaulted.[89] Her sister was not interviewed by police and did not testify.[90] The government did not call her as a witness even after the defense impeached Ms.

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[81] R. at 672.
[82] R. at 672.
[83] R. at 689.
[84] R. at 673.
[85] R. at 673.
[86] R. at 689.
[87] R. at 702.
[88] R. at 681.
[89] R. at 662, 681.
[90] R. at 999.

[redacted] by implying that she only alleged sexual assault after later learning of possible STD transmission).[91]

At trial, Ring doorbell videos was entered into evidence that showed some, but not all, of PFC Williams' entries and exits from the [redacted] house.[92] The government also introduced a video interrogation of PFC Williams conducted by Detective Lima of the New Hanover County Sheriff's Department in August 2019.[93] This video was turned over to the defense on October 26, 2020, just six days before the court-martial was scheduled to begin.[94] The government did not produce the video for months despite the fact that the interrogation had taken place in the NCIS office aboard Cherry Point, an NCIS agent was present with the detective during the entire interview, and the interview was presumably recorded on NCIS equipment.[95]

The defense moved to suppress the statement on grounds that the disclosure was so late. But the military judge denied the motion and asserted that a previously-granted continuance of less than thirty days was sufficient.[96]

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[91] R. at 999.
[92] Pros. Exs. 3, 9.
[93] Pros. Ex. 4.
[94] App. Ex. XXXV at 3.
[95] App. Ex. XXXII at 1-2, 12, 21; Pros. Ex. 4.
[96] App. Ex. XXXII at 3; App. Ex. XCII at 5-6.

Although the detective neglected to provide PFC Williams his Article 31(b) rights, trial defense counsel did not move to suppress the statement on that ground.[97] In the video, PFC Williams asserted that he did not have sex with Ms. [redacted] but was worried about transmitting an STD to her because they had kissed.[98] The military judge gave a false exculpatory statement instruction and trial counsel argued in closing that this proved his consciousness of guilt.[99]

D. Ms. [redacted] testified that PFC Williams assaulted her in his car in November 2019.

Ms. [redacted] lived in Greensboro, North Carolina.[100] She allegedly met PFC Williams on Meetme, a dating application.[101] Although she was seventeen when he asked her how old she was, she said she was eighteen.[102] The two corresponded for a few weeks before making plans to meet.[103] According to Ms. [redacted], they decided to meet in person because "He kept bugging me about it. He kept asking and 'can I see you? Can I see you? Can I see you? When am I going to see you, basically, so I was just tired of him asking."[104]

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[97] *See* App. Ex. XXXII at 1-3, 21-23.
[98] Pros. Ex. 4; App. Ex. XXXII at 22.
[99] R. at 1111, 1133.
[100] R. at 541.
[101] R. at 541.
[102] R. at 567.
[103] R. at 559.
[104] R. at 544.

She knew he wanted to have sex with her when they met.[105] The night of November 23, 2019, Ms. [redacted] gave PFC Williams the address to her neighbor's house.[106] He let her know he would pick her up around eleven at night.[107] The two first headed toward an area with restaurants, but then turned toward a quieter area and parked in a lot near a store and a church.[108]

Ms. [redacted] said they had several "altercations" in the parking lot. She said that once PFC Williams parked, he tried to persuade her to have sex with him.[109] She could only remember small parts of the conversation and could not answer as to what he specifically said except that he asked.[110] Then "they got in an altercation over [her] phone and [they] started fighting."[111] She testified that he pulled her hair bow out, pulled her hair, hit her face, punched her in the face, and put his hands around her neck.[112] She was also "swinging" at him.[113] Then "everything calmed down" and Ms. [redacted] "got [herself] together again."[114] When trial counsel

[105] R. at 544.
[106] R. at 571.
[107] R. 547.
[108] R. at 546-47.
[109] R. at 547.
[110] R. at 548-49.
[111] R. at 551.
[112] R. 552.
[113] R. at 552.
[114] R. at 553.

asked her why things calmed down, she said "I have no clue. If you want me to answer that, I really don't know."[115] Then she took her phone out of her pocket.[116]

Confusingly, it appears that she then pulled mace out of her pocket and said "if you don't give me my phone back. I will mace you."[117] He allegedly then "snatched" her mace and told her if she didn't get in the back seat he would mace her.[118] She got in the backseat, he followed her, and then started "explaining . . . You're going to suck my dick."[119] She told him no.[120] Then they got into another altercation "because of [redacted] phone again."[121] She said he started to try to pull his pants down and pulled her hair toward him, which she resisted.[122]

Then there was "another altercation," but in the middle of it Ms. [redacted] started to fake that she was having an asthma attack.[123] He "calmed down" and walked to the front of the car, turned it on, and put her window down.[124] She said that she asked to get out, he said no, but then "snatched" her phone and told her to

[115] R. at 553.
[116] R. at 553.
[117] R. at 554.
[118] R. at 554.
[119] R. at 555.
[120] R. at 555.
[121] R. at 555.
[122] R. at 556.
[123] R. at 556.
[124] R. at 556.

get out.[125] She ran toward the road and he drove past her.[126] She flagged down officers who took a report and drove her home.[127] The police helped her locate her phone the next day near a highway ramp.[128]

The military judge allowed the government to introduce body camera footage from the police officer who took Ms. [redacted] statement on the night of the incident.[129]

PFC Williams was convicted of assault and battery for hitting Ms. [redacted] in the face and acquitted of attempted rape and putting his hands around her neck.[130]

E. Trial counsel misquoted a witness and argued that PFC Williams was disrespectful and controlling toward the alleged victims (as exhibited in part by his handling of their phones).

1. The military judge warned trial counsel before trial not to argue propensity.

Private First Class Williams faced the accusations of five women at his court martial. The military judge repeatedly warned government counsel before trial "not to go [sic] propensity route."[131] Defense counsel, in a pre-trial motions hearing to

[125] R. at 556.
[126] R. at 557.
[127] R. at 557.
[128] R. at 557-58.
[129] R. at 1011; Pros. Ex. 8
[130] Entry of judgement.
[131] R. at 47, 48

compel a recidivism expert, asserted that the government was likely going to try to present a case of escalating misconduct and "some type of theme" that the accused "is somewhat of a sexual predator."[132]

The military judge responded, "I can tell you that there is case law that says the government cannot and shall not use propensity evidence like that"[133] and later, "I'm telling the government they're not going to be able to argue [that the misconduct was an escalating pattern] either, because they are not going to be able to argue propensity."[134]

2. Trial counsel's opening theme was "the truth catches up with you."

Trial counsel's first line of his opening statement was "eventually the truth catches up with you."[135] He detailed that accusations that [redacted] made in November 2019. He summarized that when police investigated that incident, "the truth caught up to the accused" because the police saw he was already being investigated for other allegations.[136] In lieu of explicitly saying propensity, the trial counsel spent time detailing how PFC Williams looked at, held, or used the phones

[132] R. 43.
[133] R. at 43.
[134] R. at 48.
[135] R. at 521.
[136] R. at 521.

of Ms. [redacted], Ms. [redacted], LCpl Whiskey, and LCpl Romeo.[137] He then emphasized that all the alleged incidents happened within one year of each other.[138]

The defense requested an immediate curative instruction, but the military judge denied the request.[139]

3. The military judge assured defense that he would only let the government argue "control" and "disrespect" as to each individual charge and would not allow the government to argue a general criminal disposition.

Before closing arguments, the government attempted to present a powerpoint presentation that had a timeline with the word "escalation" and used that word three times.[140] The defense objected and the government assured the military judge that they were not going to argue propensity.[141] The military judge ordered them to remove the references to escalation and they did.[142]

The defense further raised that they anticipated that the government would argue that because PFC Williams was allegedly "disrespectful here or because he used control here, that he's also going to do it in later cases."[143] The military judge said he would only allow the government to argue "a disrespect associated with

[137] R. at 523.
[138] R. at 529.
[139] R. at 539.
[140] R. at 1085-86.
[141] R. at 1087.
[142] R. at 1089.
[143] R. at 1088.

each individual case."[144] The military judge then cautioned the government that "argument of a general criminal disposition is inappropriate."[145]

4. Trial counsel argued that PFC Williams was "marked by his misconduct," that there were commonalities of disrespect and control across almost all the woman, and that PFC Williams did not respect the law, and that Ms. [redacted] said "no" and "stop".

Trial counsel again started with "the truth always catches up with you . . . for the accused, that the truth is out."[146] Trial counsel directed the members that it was time for them to "hold him accountable for his misconduct and to provide justice for his victims,"[147] and that they take notes on his closing.[148] He then told them that "the accused was marked by his misconduct" as soon as he began at his MOS school.[149]

After emphasizing that the women accusing him were both military and civilian and did not know each other, he argued that "what is common across the accused's misconduct, is very important factors."[150]

The first was that "his first year in the fleet was characterized by misconduct, consistent misconduct."[151]

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[144] R. at 1088.
[145] R. at 1089.
[146] R. at 1114.
[147] R. at 1114.
[148] R. at 1115.
[149] R. at 1115.
[150] R. at 1116.
[151] R. at 1116.

"[T]he second, disrespect, is a common thread running through each of these. Disrespect for these females and their own autonomy, respect for their bodies. Disrespect for the law and the protections it affords each and every one of us to be left alone when we want to be. And instead treating them like objects for his sexual gratification."[152]

The "third" common, important factor that he emphasized was "the element of control" . . . "his preoccupation with . . . females [sic] phones and who they're talking to . . . and he wants to control what they're doing and what you see with multiple witnesses, multiple victims. When they defied him, the accused didn't react well, he used violence against them."[153]

Trial counsel then went through the allegations, starting with the alleged crime against LCpl Whiskey. Trial counsel next summarized the allegations of LCpl Romeo, who dated PFC Williams and accused him of sexual assault for an encounter after they broke up. Trial counsel argued that because he took her phone and looked through it while LCpl Romeo used the bathroom, "he wanted to see who she was talking to . . . that's the sort of control, that's what we're dealing with."[154]

[152] R. at 1116.
[153] R. at 1117.
[154] R. at 1124.

When describing the allegations from Ms. [redacted], trial counsel focused on cell phones again and departed from the facts as relayed by Ms. [redacted] testimony. He stated that the two had been talking only a few days on the Monkey app before "he wants to come down there and she agrees."[155] Trial counsel said that as soon as the two began watching television, "he immediately shows, again, this same preoccupation with her cell phone like he showed with [LCpls Whiskey and Romeo]."[156] Trial counsel characterized Ms. [redacted] as "a young female who doesn't know any better" and argued the accused saw "this target of opportunity."[157] He then stated PFC Williams "won't take no for an answer" and that Ms. [redacted] "*told him to stop repeatedly*."[158]

Trial counsel concluded with the allegations made by Ms. [redacted]. Again he emphasized that PFC Williams "asserted control."[159] He again emphasized the phone evidence and said that when Ms. [redacted] left the car, "he makes sure that he's got her phone with him, that's evidence of a guilty conscience."[160]

In his final minute of closing, the trial counsel repeated that the "truth, finally, all these months later, has caught up with the accused here in this

[155] R. at 1128.
[156] R. at 1129.
[157] R. at 1129.
[158] R. at 1130 (emphasis added).
[159] R. at 1137.
[160] R. at 1138.

courtroom. He did not respect these young women in any way. He viewed them as sexual objects. He did not respect the law and the protections it afforded them."[161] Trial defense counsel did not object during the closing.

In his closing, trial defense counsel pointed out inconsistencies in the witnesses' testimony and their motives for making the allegations. The defense counsel frequently brought up the absence of evidence that one would expect the government to present at trial—like interviews or testimony of Ms. [redacted] sister and neighbors, additional Ring doorbell videos, and PFC Williams' other interrogation, all of which had been alluded to in testimony. Trial counsel objected at least eight times.[162]

In rebuttal, the trial counsel started with criticism of the defense counsel. "They spent 90 minutes focused on blaming victims for not acting the way they think victims are supposed to act, and that's offensive."[163] Trial counsel told members to focus on witness testimony, but then told members that [redacted] said "no" and "stop" and tried to pull her shorts up.[164] Trial counsel added, "the second she did that, that defense [mistake of fact] is eliminated. And that's what happened in this case."[165] Trial counsel then warned the members "to focus on the actual

[161] R. at 1142.
[162] R. at 1158, 1163-64, 1168-69, 1172, 1178, 1180.
[163] R. at 1181; *see also* R. at 1182.
[164] R. at 1184, 1185.
[165] R. at 1184, 1185.

evidence that's been admitted. Not just objectionable argument from defense counsel."[166]

Despite all the admonitions about propensity, one of the last things the members heard from the government before entering deliberations was "there's few things that we know for absolute certainty in this world. One thing we do know, is that lightening does not strike the same place five times."[167] Trial counsel concluded by stating, "go back there and do your duty. Go back there and convict the accused of all charges and specifications."[168]

5. In sentencing argument, trial counsel asked for fifteen years' confinement and said PFC Williams was dangerous, anti-social, and violent.

Trial counsel argued that "every instance of [sexual assault] in the Marine Corps is a disgrace to the service and every single time it happens, it has to be stamped out in a case like this where the accused has been convicted."[169] Trial counsel went on to describe PFC Williams as having a pattern "of extended, anti-social, violent, dangerous, lawless behavior over an extended period."[170] The trial counsel asked for fifteen years' confinement.[171]

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[166] R. at 1186.
[167] R. at 1187.
[168] R. at 1188.
[169] R. at 1319.
[170] R. at 1321.
[171] R. at 1319.

F. The government introduced PFC Williams's observational and disciplinary reports against PFC Williams at court-martial even though he faced a separate pending criminal proceeding for those alleged offenses.

1. The government's sentencing case consisted of two witnesses, an NJP, a counseling record, and brig records.

At sentencing, the government offered an exhibit that they titled "brig progress summary" under R.C.M. 1001(b)(2).[172] They also offered an NJP and counseling records, all of which detailed minor, non-violent offenses (not having a good shave, going off base in MARPAT, etc).[173] Their witnesses were a brig counselor and Ms. [redacted] mother. The brig counselor testified that, based on his thirty interactions with PFC Williams, he did not believe he had much rehabilitative potential.[174]

2. The government introduced brig disciplinary reports by asserting they were personnel records.

Private First Class Williams was placed in pre-trial confinement on November 29, 2019, and stayed in pretrial confinement throughout the court-martial.[175] He spent much of his time in segregation and had a series of disciplinary incidents. The government sought to introduce evidence of these incidents.

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[172] R. at 1212.
[173] Pros. Ex. 11, 12.
[174] R. at 1270-71.
[175] Charge Sheet; Entry of Judgement (Appellant spent 377 days in pretrial confinement).

The brig records were part of the government's late October discovery dump.[176] Specifically, on October 30, 2020 (less than a week before the trial was scheduled to start), the government provided in its "Twenty-ninth additional discovery" nearly twenty-pages of what the government labeled Prisoner Disciplinary/Action Reports.[177] These reports were dated between December 2019 and September 15, 2020.

They were also part of a separate case against PFC Williams. On November 9, 2020—immediately after the court-martial was continued to December 2020 because of the government's discovery violations—the government preferred charges against PFC Williams for his brig misconduct.[178] An Article 32 preliminary hearing was held and the preliminary hearing officer recommended, in a report dated December 4, 2020, that all charges and specifications be referred to general court-martial.[179] The charges were: one specification of Article 90, two specifications of Article 115, one Specification of Article 124a, and twelve specifications of Article 128, UCMJ.[180]

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[176] App. Ex. LXXV at 2.
[177] App. Ex. XXXIV at 170-98 (Defense Motion to Dismiss for Discovery Violations).
[178] App. Ex. LXXV at 2 (Defense's Bench Brief).
[179] App. Ex. LXXV at 2, 15-17.
[180] App. Ex. LXXV at 2, 10-13.

There was no evidence that the brig records were ever entered into PFC Williams' personnel file.

The trial counsel told the military judge that their theory of admissibility for the brig records was that they were "a service document maintained in accordance of [*sic*] service regulations reflective of the accused's character of service and admissible under R.C.M. 1001(b)(2)."[181] According to the government, because there was a Secretarial Instruction (SECNAV M-1640.1, Naval Corrections Manual) that allowed the brig to create and keep these records, the records were admissible under R.C.M. 1001(b)(2) and were character of prior service.[182] Trial counsel specifically disavowed admission under any other section of R.C.M. 1001, and the military judge directed the defense to focus their objection on the government's theory of admissibility.[183]

The government called MSgt [redacted], a brig programs officer, to lay the foundation for the records.[184] He testified that the purpose of the reports was for "programming prisoners" (determining what types of programs are required for prisoners) and disciplinary action.[185] He explained that observation reports, DD

[181] R. at 1212.
[182] R. at 1235
[183] R. at 1237.
[184] R. at 1223.
[185] R. at 1226.

2713s, are for lower-level disciplinary issues and disciplinary reports; DD 2714s, are a little higher on the scale.[186]

3. The defense objected to admission of the brig records.

The defense submitted a bench brief and orally objected to the brig records, thoroughly explaining the several bases for their objection.[187] First, they articulated that the records were not were not admissible under R.C.M. 1001(b)(2) because they were not permitted by JAGMAN paragraph 0141.[188] Although the defense acknowledged that the particular paragraph referenced NJPs, they articulated the due process protection behind that paragraph and why it applied more broadly to ensure certain protections, like access to an attorney and a chance to rebut the charges.[189]

They further argued that the reports were unduly prejudicial and were inadmissible under M.R.E. 403. They predicted that "The accused is to only be sentenced for the offenses for which he was found guilty. By introducing evidence of numerous instances of alleged misconduct—for which the accused has received no meaningful due process to challenge—there is a significant risk that this unrelated misconduct will overshadow the offenses for which the accused has been

[186] R. at 1225.
[187] App. Ex. LXXV.
[188] R. at 1239-40.
[189] R. at 1240.

found guilty at this court-martial and cause the members to place unfair consideration on it."[190]

The defense articulated that they could not rebut the records and there was not any evidence that the records were finally adjudicated.[191] They brought up that the underlying misconduct was the subject of separately preferred charges that had already been through an Article 32 hearing. Based on the pending in charges in this case, the defense distinguished a case the government cited.[192] And lastly, they characterized that the government attempted, through the brig reports, to bring in extrinsic evidence relating to the accused's rehabilitative potential.[193]

The military judge determined that the DD 2713 and DD 2714 forms were admissible under R.C.M. 1001(b)(2) (personal data and character of prior service of the accused), but not 1001(b)(3) (evidence of prior convictions of the accused).[194] He relied on *United States v. Davis*—a CAAF case considering brig records created for a post-trial prisoner based on a United States Disciplinary Barracks regulation.[195] He ordered the synopsis of allegations and narrative redacted in each of the 2714s and did not allow statements appended to the

[190] App. Ex. LXXV at 7.
[191] R. at 1244.
[192] R. at 1244.
[193] R. at 1245.
[194] R. at 1250-51.
[195] R. at 1251; *Davis*, 44 M.J. 13 (C.A.A.F. 1996).

records.[196] He found that the records would be "a possible distraction to the fact finder" but said he would provide a limiting instruction if requested.[197]

The military judge offered a curative instruction to the effect that the records from the brig were to be considered only as personnel records.[198] The defense explained that a curative instruction was insufficient, articulating that "in light of the evidence at issue and the unfair prejudice that will be attached to it, we believe that there's no curative instruction that we could come up with that would begin to adequately address the harm."[199]

Argument

I

PFC WILLIAMS'S CONVICTION FOR ABUSIVE SEXUAL CONTACT IS NOT LEGALLY AND FACTUALLY SUFFICIENT WHERE PFC WILLIAMS TOUCHED LCPL WHISKEY'S BUTT DURING AN EXPLICITLY-CONSENTED-TO HUG AFTER AN EVENING SPENT TOGETHER AT A SKATING RINK.

Standard of Review

This Court reviews issues of factual and legal sufficiency *de novo*, and may substitute its judgment for the judgment of the trial court.[200]

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[196] R. at 1253.
[197] R. at 1253.
[198] R. at 1257.
[199] R. at 1257.
[200] 10 U.S.C. § 866 (2012); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Discussion

A. The evidence is neither legally nor factually sufficient to sustain a conviction for abusive sexual contact.

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[201] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt.[202] In doing so, this Court "applies neither a presumption of innocence nor a presumption of guilt."[203] When testing for legal sufficiency, this Court looks at whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.[204]

B. The government had to prove both that PFC Williams acted with specific intent to arouse his sexual desire and that the act was done without consent.

The government's charge reads:

> In that Private First Class Williams, U.S. Marine Corps, on active duty, did, on board Camp Johnson, North Carolina, between on or about 1 February 2019 to on or about 28 February 2019, touch the buttocks of Lance Corporal [redacted] Whiskey, U.S. Marine Corps, with his hand

[201] Art. 66(c), UCMJ.
[202] *Turner*, 25 M.J. at 325.
[203] *Washington*, 57 M.J. at 399.
[204] *United States v. Roderick*, 62 M.J. 425, 428 (C.A.A.F. 2006).

with an intent to arouse his sexual desire without the consent of Lance Corporal [redacted] Whiskey.[205]

The military judge instructed the members that, to find the accused guilty, the members had to be convinced that the government had proved beyond a reasonable doubt that PFC Williams had touched LCpl Whiskey's buttocks without her consent and with the intent to arouse his sexual desires.[206] Although it was not relevant to the specification, he also provided the definition of bodily harm.[207] He concluded the instructions as to that charge by giving a mistake of fact instruction for a general intent offense.[208]

C. The government failed to prove PFC Williams' intent to arouse his sexual desire because the testimony did not provide sufficient evidence of the circumstances leading to the butt touch.

The government did not elicit sufficient evidence to prove beyond a reasonable doubt that PFC Williams touched LCpl Whiskey's buttocks with an intent to arouse his sexual desire.

The government may rely on circumstantial evidence to prove intent.[209] The service courts of criminal appeals have cited a variety of evidence to sustain an abusive sexual contact conviction challenged for legal and factual sufficiency on

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[205] Charge Sheet.
[206] R. at 1098; Appellate Ex. LXXXI at 4.
[207] *Id*.
[208] R. at 1098-99.
[209] *See United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014).

the element of intent. In *United States v. Rice*, for example, the appellant "firmly grabbed [the victim's] right buttock and applied 'a lot' of pressure."[210] Moreover, he had earlier touched the victim's bare leg above her knee, and after grabbing her butt he first acted like he was shocked, then grinned, then asked if the victim liked it.[211] The court took all of these factors into consideration when it determined the appellant had the specific intent to satisfy his sexual desire.[212]

But that level of circumstantial evidence is absent here. First, there was insufficient detail about the actual physical contact from which to draw conclusions about PFC Williams' intent. LCpl Whiskey described how PFC Williams "grabbed [her] butt" during a hug that PFC Williams verbally requested and to which she explicitly consented.[213] Lance Corporal Whiskey was able to describe the hug—that it was a side hug, with her left arm, her body was just outside his, and it was a "very loose" hug—[214]but she provided no description of the butt grab. She didn't say where it was on her butt (presumably, the lower down on the butt would be of a more sexual nature and more "arousing"), how long the touch was, or how much pressure was applied during the "grab,". The absence of

[210] *United States v. Rice*, No. 39071, 2021 CCA LEXIS 37 at *12, *14 (A. F. Ct. Crim. App. Jan. 29, 2021).
[211] *Id*. at *14.
[212] *Id.* at *14-16.
[213] R. at 859; 868.
[214] R. at 859.

such detail leaves open more than the mere possibility that PFC Williams sought to bring her closer to him for the hug and did not intend to grab her butt. There was no testimony about PFC Williams's other actions during the hug.

Testimony about what happened immediately after the hug also does not provide support for an intent to arouse PFC Williams' sexual desire. When the trial counsel asked how she "got out of the situation," Lance Corporal Whiskey replied that she simply "told him goodnight and moved him all the way and closed my door."[215] Immediately afterward, she did not feel violated, and instead thought "at that point it was just weird."[216] She wasn't sure later about whether she even mentioned what happened to her roommate, and she did not mention it to anyone else.[217] NCIS learned of the alleged butt grab when they interviewed her nearly three months later about a separate allegation against PFC Williams.[218]

Reaching the necessary intent from this cursory description of the actual contact is conjecture rather than the level of circumstantial evidence required under the circumstances.

[215] R. at 860.
[216] R. at 868.
[217] R. at 870.
[218] R. at 869.

D. The government relied on the act itself and did not provide sufficient evidence or argument about PFC Williams' intent.

At the end of LCpl Whiskey's testimony, at least one member was troubled by the lack of evidence of intent. He drafted the question for LCpl Whiskey: "Do you feel Travonte Williams touched your buttocks with the intent to arouse his sexual desire?"[219] The government objected and the military judge did not ask the question.[220]

But the military judge's response to defense's motion in accordance with R.C.M. 917 later accurately summarized the little evidence the government had elicited to prove intent: that PFC Williams and LCpl Whiskey had a "skating outing" earlier and Lance Corporal Whiskey testified about "their snack that they had."[221] Lance Corporal Whiskey testified that PFC Williams tried to pay for her at the skating rink, he came over and tried to flirt with her when she stopped skating and stood by the wall, and he tried to put his arm around her when they shared a booth at the food court.[222] Her response was to "just back into the wall that was near me. Just brushed it off." [223] There was no evidence she said anything. And

[219] App. Ex. LXI.
[220] R. at 871.
[221] R. at 1026.
[222] R. at 857.
[223] R. at 858.

after they finished skating, they shared a taxi ride home, and he walked her to her room.[224]

The government did not provide much argument in closing about intent. Instead, they focused on LCpl Whiskey's testimony about her lack of consent: "It was without [Whiskey's] consent, as she explained very straightforwardly . . . she made it very clear she did not want this to happen, she didn't do anything to invite it, and the accused just didn't respect her personal space."[225] The government described the "intent to gratify a sexual desire" as a "legal definition" and then described the fact that the act was intentional as sufficient to satisfy the element that he had done it to gratify his sexual desire.[226]

In sum, the government had *some* evidence to show that PFC Williams had a romantic interest in LCpl Whiskey; he spent an evening alone with her in an activity for which she could find no other takers among her forty other classmates, he tried to pay for her expenses during the evening, he walked her to her room, he told her he had a good time with her,[227] and he asked her for a hug. But this Court

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[224] R. at 858-59.
[225] R. at 1120 (Trial counsel did not provide examples of how she made it clear she did not want the butt touch).
[226] R. at 1121. "In this circumstance, where he leans in after what he hoped was a date and deliberately squeezed her buttocks, that's an intentional act. And you can infer, as the military judge instructed you, that he did it for a purpose and I submit to you that he would have done that for no other purpose but to gratify sexual intent. Because he did it intentionally as a volitional act by him." R. at 1121.
[227] R. at 867.

should not allow the government to presume intent for PFC Williams' sexual arousal for a specific act from signs of his romantic interest respectfully displayed throughout the night. Finding the evidence factually sufficient on such a flinty record opens the floodgates to prosecution on otherwise societally acceptable human behavior.

E. Private First Class Williams had an honest and reasonable mistake of fact that after a date-like evening, explicit consent to a hug was consent to a more-than-friends hug that included an over-the-clothes butt touch.

Evidence of a misunderstanding of the circumstances surrounding an offense may give rise to the defense of mistake of fact.[228] "Although the appellant bears the burden of raising some evidence of mistake of fact, the burden remains on the government to prove, beyond a reasonable doubt, that there was neither consent nor an honest and reasonable mistake of fact as to consent."[229]

The government used the indications that the skating outing was a date, or at least that PFC Williams intended it to be a date, as a sword against him.[230] But even the military judge acknowledged that the date cut in favor of PFC Williams because it provided the foundation for his mistake of fact as to consent.[231]

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[228] Rule for Courts-Martial 916, Manual for Courts-Martial, United States (2019 ed.); *United States v. Brown*, NMCCA No. 201700003, 2018 CCA LEXIS 316 (N-M. Ct. Crim. App. July 2, 2018).
[229] *Brown*, 2018 CCA LEXIS 316, at *20.
[230] R. at 1119 ("Now, of course, he wanted this to be a date and we'll talk more about that later.").
[231] R. at 1033.

There was, at least, ambiguity in the evening. Although LCpl Whiskey said at trial that she told PFC Williams it was not a date when he tried to pay her admission to the rink, their actions throughout the rest of the evening undermined that statement.[232] The two ate together after she told him it was not a date. They later left together in a taxi after she told him it was not a date. Lance Corporal Whiskey allowed PFC Williams to walk her to her door after she told him it was not a date, where they told each other they had a nice time. Despite LCpl Whiskey's assertions during the court-martial that the evening was not a date, the evening had all the classic characteristics of a date. Private First Class Williams was reasonably mistaken that it was a date.

This Court has acknowledged the common-sense principle that as a date progresses, what physical contact is perceived as acceptable also progresses.[233] In *United States v. Dawkins*, this Court considered whether the evidence for an attempted sexual assault and abusive sexual contact was sufficient when the complaining witness and the appellant consensually kissed immediately before the

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[232] R. at 857; *see Brown*, 2018 CCA LEXIS 316, at *32 (considering appellant's assertion that complaining witnesses' s non-verbal behavior undermined her utterances of "no" and holding the evidence to be factually insufficient where this Court was left to speculate about the circumstances preceding sexual intercourse because "Without more information, we find that we cannot determine, beyond a reasonable doubt, that the appellant's mistake of fact as to the [complaining witnesses'] consent to sexual activity was unreasonable.").

[233] *See United States v. Dawkins*, No. 201800057, 2019 CCA LEXIS 386 (N-M. Ct. Crim. App. Oct. 4, 2019).

appellant touched her genitals with his penis.[234] At that point, the complaining witness told him "not to do it" and there was no further sexual touching.[235] This Court determined that "since the complaining witness actually consented to the kissing, it is reasonable to believe that the other contemporaneous sexual touching was at least perceived as consensual up until the point when she asked the appellant 'not to do it'."[236]

A whole circumstances analysis reveals that same reasonableness of PFC Williams' actions here. When PFC Williams returned from what he (reasonably) perceived to be a date and asked for a hug, a mistake in thinking explicit consent to a hug under these circumstances was consent to a more-than-friends hug with an over-the-clothes butt touch was entirely reasonable.

Conclusion

This Court should dismiss the specification, set aside the sentence and remand the case for a sentence rehearing. The members awarded the sentence. And in his argument to the members, trial counsel consistently linked the crimes together through what he argued were common themes and escalating

[234] *Dawkins*, 2019 CCA LEXIS 386, at *16.
[235] *Id*.
[236] *Id*.

misconduct.[237] Under these circumstances, this Court cannot reasonably estimate the impact the charge had on the adjudged sentence.

II

PFC WILLIAMS' CONVICTION FOR SEXUAL ASSAULT IS NOT LEGALLY AND FACTUALLY SUFFICIENT WHERE THE COMPLAINING WITNESS, MS. [redacted], TESTIFIED THAT PFC WILLIAMS INSERTED HIS PENIS IN HER DURING THE COURSE OF A MASSAGE AND STOPPED INTERCOURSE AS SOON AS HE REALIZED SHE WAS TRYING TO GET UP.

Standard of Review

This Court reviews issues of factual and legal sufficiency *de novo*, and may substitute its judgment for the judgment of the trial court.[238]

Discussion

The government charged PFC Williams, in Charge II Specification 2, with sexually assaulting Ms. [redacted] by committing a sexual act upon her without her consent.[239] Private First Class Williams incorporates the discussion of law regarding legal and factual sufficiency from Assignment of Error (AOE) I, paragraph A.

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[238] 10 U.S.C. § 866 (2012); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).
[239] Charge Sheet.

A. The government failed to prove that Ms. [redacted] did not consent and that PFC Williams did not have a mistake of fact as to her consent.

The members were instructed as to the elements of sexual assault: that the accused committed a sexual act upon Ms. [redacted] by penetrating her vulva with his penis, and that he did so without her consent.[240] The military judge also instructed the members on mistake of fact as to consent.[241]

1. Ms. [redacted] account is improbable and, even taking her testimony at face value, PFC Williams had an honest and reasonable mistake of fact as to consent based on her actions.

This case is similar to the relevant facts underlying *United States v. Dawkins*, discussed above.[242] There, the alleged attempted sexual assault and abusive sexual contact happened only after the appellant and complaining witness engaged in consensual kissing and the appellant had touched her genitalia earlier in the evening. In *Dawkins*, the appellant "ceased sexual contact with [the complaining witness] once she manifested a lack of consent."[243] This Court recognized that, under the circumstances, "it would have been reasonable for the appellant to believe that the sexual contact was consensual up until [the complaining witness] asked him 'not to do it.'"[244]

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[240] R. at 1096.
[241] R. at 1099.
[242] 2019 CCA LEXIS 386.
[243] *Id.* at *17.
[244] *Id*. at *18.

Ms. [redacted] testified that she and PFC Williams, after weeks of talking on the Monkey app, would meet at her house.[245] After PFC Williams spoke to her mother, the two went immediately to Ms. [redacted] room. PFC Williams took off his pants. Ms. [redacted] testified to not remembering how physical contact started, but the two kissed. She also admitted on cross-examination that she consented to fondling.[246] Then PFC Williams straddled her while she was on her stomach so that he could give her a back massage. Ms. [redacted] shirt was up.[247] Even at trial, she admitted that all of these actions were consensual.[248]

The facts that were elicited from Ms. [redacted] next do not support a finding that the government disproved mistake of fact beyond a reasonable doubt. Ms. [redacted] started her description of what happened once the massage began with "he was trying to do what I didn't *expect*."[249]

First, he pulled down her shorts. Her sole reaction to this was to say, "what are you doing?" and "why?"[250] Private First Class Williams allegedly told her "nothing . . . it's part of the massage to get to the lower back." At this point, his

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[245] R. at 651.
[246] R. at 683. She then immediately backtracked and said they kissed. Her statement to Detective Lima indicates that she was ok with more than kissing. App. Ex. LXVI at 2.
[247] R. at 657.
[248] R. at 655-57.
[249] R. at 658.
[250] R. at 658.

hands were "down by her leg."[251] Ms. [redacted] did not say anything else.[252] The next thing she remembered was PFC Williams holding her wrists by her head and then "he took his penis and entered [her] vagina."[253] Ms. [redacted] testified that instead of saying anything, she tried to get off the bed, and that once he realized she was trying to get up, he stopped and let go of her wrists, and she got up off the bed.[254]

The allegation appears to be that PFC Williams did not sufficiently apprise Ms. [redacted] of what he intended to do before he did it. While in many circumstances it would not be reasonable to assume consent from a lack of verbal or physical resistance, it was reasonable under these circumstances. Ms. [redacted] was older than PFC Williams, and they met in the privacy of her bedroom late at night. The act followed consensual kissing and a skin-to-skin back massage in which the accused straddled her.

The escalation to removal of clothing appeared to happen rather quickly. And Ms. [redacted] said *something* about having her shorts pulled down—but that something wasn't "no" or "stop" or "I don't want you to do this." The lack of verbal or physical protest after his wholly unbelievable reply—that he needed to

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[251] R. at 658.
[252] R. at 659.
[253] R. at 659. There is no indication that Ms. [redacted] consumed alcohol or drugs that night. R. at 677.
[254] R. at 660.

take her shorts and underwear down her legs to massage her lower back—would appear to most reasonable people in a similar situation to indicate coyness rather than lack of consent.

There was a noticeable gap in the sequence of what happened next. Ms. [redacted] offered no explanation as to how PFC Williams' hands went from being on her leg to being on her wrists above her head. And because he was holding her wrists while her arms were outstretched by her head when he entered her (while she remained lying on her stomach), PFC Williams must have changed positions from straddling her to lying on top of her—but this also went unmentioned in Ms. [redacted] testimony. Ms. [redacted] further neglected to explain how she failed to realize that PFC Williams had pulled his penis out of his boxers, or how he was able to penetrate her from this position without either some assistance from her or some manual positioning from him—which would mean his hands were not on her wrists the whole time.

In sum, PFC Williams put his penis in Ms. [redacted] vagina only after she showed no signs of protest to actions that obviously indicated he was going to put his penis in her vagina. To disprove a reasonable mistake of fact under these circumstances, the government needed more.[255]

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[255] *See Dawkins*, 2019 CCA LEXIS 386. The Government argued more. But the testimony does not support the government's assertions that Ms. [redacted] said "no" and appellant ignored it. This is discussed below in Issue VI, section A.

2. PFC Williams' reaction indicated his mistake of fact as to Ms. [redacted] consent.

Private First Class Williams' actions during and immediately after sex underscored his mistake of fact as to consent. Again, *by Ms.* [redacted] *account*, PFC Williams stopped as soon as he noticed that she was trying to get up and there was no further sexual touching.[256] This was after he had inserted his penis twice. In other words, he immediately halted at the first and only clear sign of Ms. [redacted] lack of consent.

Ms. [redacted] reaction after getting up seemed to further catch PFC Williams by surprise. She said that once she got dressed she told PFC Williams he had to leave. He "repeated what I said."[257] Repeating what someone says is generally understood to indicate confusion—Ms. [redacted] gave no alternative explanation. Likewise, she said he "tried to comfort her" immediately after.[258] But trying to comfort someone is consistent with a misunderstanding, not with an assault.

3. Ms. [redacted] actions immediately afterward indicated that neither she nor PFC Williams believed a sexual assault had just occurred.

Ms. [redacted] external actions immediately afterward were not consistent with her later allegation that she was assaulted, and her post-facto

[256] R. at 659-60, 684.
[257] R. at 660.
[258] R. at 661.

explanations for her actions were unconvincing. Private First Class Williams asked Ms. [redacted] to walk him to the car and she did.[259] She explained at trial that she did this because "she was just going with the flow."[260] While walking to the car, the two held hands.[261] But she asserted this was only because PFC Williams grabbed her hand.[262] When defense counsel asked Ms. [redacted] whether she kissed PFC Williams before he left, she asserted she could not remember doing that.[263] When defense counsel questioned her about whether and why she told PFC Williams to call her when he got home, she again asserted that she could not remember doing that.[264] But later, during her victim impact statement, she admitted she had asked him to call. She asserted that she only did it because "that's how she was raised" and it was "muscle memory."[265] Finally, she discussed PFC Williams with her mother, but did not tell her mother she was sexually assaulted until after she called the police when PFC Williams revealed he may have given her an STD.[266]

[259] R. at 661.
[260] R. at 661.
[261] Pros. Ex. 9.
[262] R. at 692.
[263] R. at 684.
[264] R. at 684.
[265] App. Ex. LXXXII.
[266] R. at 702.

The defense counsel questioned her on the continued contact that she and PFC Williams had after the alleged assault.[267] The conversation continued back-and-forth for weeks, and Ms [redacted] confided in PFC Williams that she was unhappy with her job and the trajectory of her life.[268] Although she alleged that he apologized to her that night and later, there was no independent evidence of the alleged apology.[269]

4. Ms. [redacted] testimony was inconsistent with other witnesses, uncorroborated, and undermined both by her lack of memory and her reporting the assault only after PFC Williams disclosed that he may have given her an STD.

When examining factual and legal sufficiency, this Court must weigh the credibility of witnesses and may examine whether discrepancies in witness testimony resulted from an innocent mistake or a deliberate lie.[270] Ms. [redacted] was contradicted on several points. First, her mother had a slightly different their home. Her mother described the layout of the house as her and Ms. [redacted] rooms being separated only by a closet.[271] But Ms. [redacted] testified that her mother's room was across the hall from hers, not next door. Regardless, Ms. [redacted] mother explained that she was in her room the entire time Ms.

[267] R. at 678, 684-86.
[268] R. at 685-86.
[269] *See* R at 691, 695.
[270] *United States v. Guin*, 75 M.J. 588, 594 (N-M. Ct. Crim. App. 2016).
[271] R. at 705-06.

[redacted] and PFC Williams were in her room. Ms. [redacted] mother was within easy hearing range if voices had been raised in disagreement.

It was also clear that Ms. [redacted] either (charitably) did not have a full recollection of the night or (more realistically) did not have logical explanations for her interaction with PFC Williams in her room. When discussing what happened during and immediately after the alleged assault, trial counsel asked at least three times "what [do] you remember happening" instead of the more direct, "what happened next?"[272] And during the more damaging cross-examination questions, Ms. [redacted] repeatedly asserted that she "forgot" because she "wanted to forget," and that she could not recall "because it's been a whole year."[273] Specifically, she asserted that she did not remember the conversations she had through text messages with PFC Williams and even that she did not remember the "conversations we had during times when we were in the room" [274]—just the sort of details that are crucial to determining consent or mistake of fact as to consent.

Ms. [redacted] also testified she did not remember whether her sister was home at the time of the assault. The New Hanover, NC, detective who first investigated the assault testified that the sister was home at the time of the alleged

[272] R. at 659, 661.
[273] R. at 681.
[274] R. at 682.

assault.[275] (He admitted though, that he never tried to interview the sister.) Ms. [redacted] allegedly told her sister the day after the assault that she had been raped, but that sister never testified.[276]

Both Ms. [redacted] and the New Hanover County sheriff's detective admitted to weaknesses in the investigation. No forensic extraction was performed on Ms. [redacted] phone and Ms. [redacted] had deactivated her Monkey account and erased her profile.[277] No messages were admitted into evidence. There was no non-speculative explanation for why the Ring videos did not show PFC Williams leaving, and Ms. [redacted] reentering, the house in August, and the Sheriff's detective did not ensure that he had all that was actually available from the Ring camera.[278]

Finally, the timing of Ms [redacted] report also undermined her account that she immediately understood the interaction as an assault. She reported the assault to the police nearly a month later, only after PFC Williams told her that he may have given her a sexually transmitted disease that he picked up from another woman. Upon cross-examination, she denied that she was angry about the STD but

[275] R. at 998.
[276] R. at 681.
[277] R. at 998, 695 (Ms. [redacted] told Detective Lima she had erased her profile, but later said PFC Williams deleted some of her stuff from the Monkey app).
[278] R. at 987-88.

admitted that she threatened to get her uncles "to handle" PFC Williams.[279] She explained that this was for "protection" before the military judge cut off that line of questioning.[280]

5. Ms. [redacted] testified that PFC Williams apologized to her, but the CAAF has found that ambiguous apologies are not strong evidence.

The only evidence before the members that PFC Williams apologized to Ms. [redacted] came from Ms. [redacted] In response to a member's asking whether he "apologized for raping" her, she alleged that he apologized the night of the incident and later, in person.[281] She did not provide the wording of the apology, and neither party followed up to ask for a more specific account or context.[282]

The CAAF has, at least twice, considered whether an appellant's apologies established consciousness of guilt. In *United States v. Tovarchavez*, the complaining witness told the appellant he forced her to have sex after she said

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[279] R. at 690 (Ms. [redacted] did not admit this was directly related to the STD).
[280] R. at 690.
[281] R .at 695.
[282] [redacted]

no.[283] The appellant then said via text that he "was sorry for whatever happened between us. . . . I made a mistake by crossing the line, and I'm sorry for that . . . ." The CAAF found that the texts did not "unassailably establish consciousness of guilt."[284]

In *United States v. Prasad*, after finding legal error, the CAAF considered whether evidence of a sexual assault was overwhelming. In a text exchange, the complaining witness asked appellant why he didn't stop when she asked him to.[285] He replied that he understood what he did was wrong and was sorry he hurt her, and he also directly admitted that he fingered the complaining witness after she said no.[286] The CAAF determined that the exchange did not constitute "overwhelming" evidence of the appellant's guilt. This was, in part, because the complaining witness conceded that appellant "stopped his sexual contact as soon as he realized she did not want to participate," so the messages "could also have been . . . from someone who knows they have acted inappropriately, but not criminally."[287]

Here, the members knew far less than those in *Tovarchavez* and *Prasad* about the content of PFC Williams's alleged apology. Such an apology, if it

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[283] 78 M.J. at 461
[284] *Id*. at 469.
[285] 80 M.J. 23, 32 (C.A.A.F. 2020).
[286] *Id*.
[287] *Id*.

actually occurred, cannot make up for the government's failure to prove Ms. [redacted] lack of consent or that PFC Williams did not have a reasonable mistake of fact as to her consent.

Conclusion

This Court should set aside Charge II, Specification 2, and the sentence. The sentencing was awarded by members. In his argument to the members, trial counsel consistently linked the crimes together through what he argued were common themes and escalating misconduct.[288] Under these circumstances, this Court cannot reasonably assess the impact the charge had on the adjudged sentence.

III

PFC WILLIAMS' CONVICTION FOR ASSAULTING MS. [redacted] BY HOLDING A KNIFE TO HER FACE IS NOT FACTUALLY SUFFICIENT WHERE THE DOORBELL FOOTAGE THAT MAY HAVE SHOWN THE ALLEGED ENCOUNTER WAS NEVER PROVIDED TO THE GOVERNMENT AND MS. [redacted] ACCOUNT WAS INCONSISTENT WITH THE FOOTAGE PROVIDED.[289]

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo, and may substitute its judgment for the judgment of the trial court.[290]

Discussion

The government charged PFC Williams, in Charge III Specification 7, with assaulting Ms. [redacted] by holding a knife to her face and neck on or about August 15, 2019.[291] Private First Class Williams incorporates the discussion of law regarding legal and factual sufficiency from AOE I, paragraph A.

The government did not meet its burden to prove the specification beyond a reasonable doubt. First, the members acquitted PFC Williams of two specifications related to Ms. [redacted] that allegedly happened in the same course of conduct: that PFC Williams assaulted her by putting his hand on her mouth and that he

[289] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[290] 10 U.S.C. § 866 (2012); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).
[291] Charge Sheet.

assaulted her by picking her up and putting her in his car. (Charge III, Specifications 3 and 4.) It appears from their mixed findings that the members did not find Ms. [redacted] a credible witness and did not believe her version of events.

In theory, the Ring video should have corroborated at least some of Ms. [redacted] account of what happened—especially because she testified that she wanted to go back outside because she knew the Ring video would film.[292] But the only video she provided from that night, Prosecution Exhibit 3, picks up when Ms. [redacted] and PFC Williams entered the house. It does not show when they left shortly thereafter, or when Ms. [redacted] ultimately went inside. No other videos were provided to the police, and the police made no attempt to get a search warrant or ensure that there was no other relevant video on the Ring.[293]

The video of Ms. [redacted] and PFC Williams entering starts when they appear to be at least five steps outside the front door.[294] What is likely a wide-eye lens captured all the surrounding area. Both sides of the house's overhang, most of the front yard, the street, and driveway are visible.[295] The front end of what appears to be a Jeep (PFC Williams' car) is also visible (Ms. [redacted] testified that he

[292] R. at 665.
[293] R. at 989, 1004.
[294] Pros. Ex. 3.
[295] The porch column blocks some of the driveway. R. at 984.

parked at the end of the driveway).[296] Streetlights and the lights of other houses illuminated much of the street, driveway, and yard.[297]

Ms. [redacted] mother testified that on that night, she "kept hearing the door open," but did not hear her daughter come back in, so she left her room to look for her.[298] She later clarified that she did not actually hear the door and instead heard the Ring.[299] The door was open, and Ms. [redacted] mother stood there for a minute or two then went back to her room and checked the Ring app on her phone, which did not reveal anything.[300] She did not hear anything standing at the door.

The breadth, visibility, and apparent range of the Ring camera undermined Ms. [redacted] account of the night. She testified to trying to "make my way back to the door" after PFC Williams allegedly held a pocketknife up to her but he "kept blocking me from getting to the door."[301] But the distance between the end of the driveway and where the Ring video is triggered in Prosecution Exhibit 3 is short. And when PFC Williams was in the back seat of the car or next to the car, the only thing between Ms. [redacted] the Ring video trigger, and her home was

[296] R. at 665.
[297] Pros. Ex. 3.
[298] R. at 702.
[299] R. at 707.
[300] R. at 702.
[301] R. at 670.

a wide open yard.[302] If Ms. [redacted] was actually scared or wanted to go inside at that point, she only had to go this short distance to trigger the Ring recording, which would also make in real time a video image available to her mother. That Ms. [redacted] either did not try to trigger the Ring video, or the video was triggered but did not show favorable evidence to her case and thus was not provided to the police,[303] makes her account of being threatened with a pocket knife incredible. Because the only proof of the specification is her incredible testimony, the conviction is factually insufficient.

Conclusion

This Court should set aside the finding on Specification 7 of Charge III, and should reassess the sentence.

[302] Ms. [redacted] also testified she went to the road instead of towards the house when she left PFC Williams' car because she "figured he might" try to block her from the door again. But this also does not make sense because there was nothing between her and the house except the wide-open yard. R. at 672.

[303] The time between when PFC Williams left and when she called the police was significant. The defense counsel alleged in argument that if the Ring video substantiated her account, it would have been provided. R. at 673, 1168.

IV

PFC WILLIAMS'S CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY IS FACTUALLY SUFFICIENT WHERE THE COMPLAINING WITNESS'S, MS. [redacted] LACK OF INJURIES WERE INCONSISTENT WITH THE INCIDENT SHE DESCRIBED.[304]

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo, and may substitute its judgment for the judgment of the trial court.[305]

Discussion

The government charged PFC Williams, in Charge III Specification 5, with unlawfully striking Ms. [redacted] in the head with his hand on or about November 24, 2019.[306] Private First Class Williams incorporates the discussion of law regarding factual sufficiency from AOE I, paragraph A.

The government did not meet its burden to prove the specifications involving Ms. [redacted] The members acquitted PFC Williams of two specifications related to Ms. [redacted] that PFC Williams attempted to rape her (Charge I, Sole Specification), and that PFC Williams put his hands around her

[304] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[305] 10 U.S.C. § 866 (2012); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).
[306] Charge Sheet.

neck (Charge III, Specification 6).[307] It appears from their mixed findings that the members did not find Ms. [redacted] was a credible witness and did not believe her version of events.

The charge for which the members did convict PFC Williams was the sole charge relating to Ms. [redacted] that was allegedly corroborated by additional evidence. The government admitted a series of photographs that police took immediately after she reported the alleged assault. One photograph allegedly shows the split lip.[308] The responding police officers also reported that Ms. [redacted] had a split lip.[309]

But the evidence about the split lip was weak and was undermined by Ms. [redacted] testimony. The injury is not particularly visible in the photograph introduced and does not appear much different, if at all, from chapping or other superficial injuries caused by weather. The alleged incident occurred late in the evening at the end of November in North Carolina—a time when chapped lips would be normal.

Moreover, a single split lip, and no other injuries, is inconsistent with the assault Ms. [redacted] described. She was at least a couple inches shorter than PFC

[307] Entry of Judgement at 1, 4.
[308] Pros. Ex. 5.
[309] R. at 609.

Williams and appears petite in the photos.[310] She testified that although she tried to shield herself, PFC Williams punched her in the face maybe five or six times.[311] She admitted to the responding officer that, based on PFC Williams' picture, it was unlikely such a person could have hit her and not left a mark.[312] And, although she accused PFC Williams of pulling her hair repeatedly, her hair also does not appear mussed.[313] The photographs taken after the assault do not bear out her description of what occurred. The assault charge is therefore factually insufficient.

Conclusion

This Court should set aside the finding on specification 5 of Charge III and should reassess the sentence.

[310] R. 542; Pros. Ex. 5.
[311] R. at 580.
[312] R. at 584.
[313] Pros. Ex. 5.

V

DEFENSE COUNSELS' REPRESENTATION WAS INEFFECTIVE WHEN THEY FAILED TO MOVE TO SUPPRESS THE STATEMENTS PFC WILLIAMS MADE AFTER LAW ENFORCEMENT FAILED TO ADVISE HIM OF ANY CRIME OF WHICH HE WAS SUSPECTED.

Standard of Review

Issues of ineffective assistance of counsel are reviewed *de novo*.[314]

Discussion

Ineffective assistance of counsel claims are analyzed under the test in *Strickland v. Washington*, which requires the appellant show trial defense counsel's performance was deficient and that the deficiency deprived the appellant of a fair trial.[315] To prevail on an ineffective assistance of counsel claim based on counsel's failure to make a motion to suppress evidence, an appellant must demonstrate a reasonable probability both that that: 1) such a motion would have been meritorious, and 2) that the verdict would have been different absent the excludable evidence.[316] "A reasonable probability is a probability sufficient to

[314] *United States v. Grigoruk*, 56 M.J. 304, 306 (C.A.A.F. 2002) (citation omitted).
[315] *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
[316] *United States v. Harpole*, 77 M.J. 231, 235 (C.A.A.F. 2018).

undermine confidence in the outcome"[317]—an accused "need not show that counsel's deficient more likely than not altered the outcome" in the case.[318]

A. The defense did not have a tactical reason for their failure to suppress PFC Williams' statement to Detective Lima and Special Agent [redacted] based on the lack of Article 31(b) warnings when they sought to suppress the statement on other grounds. And there is a reasonable probability that such a motion would have been meritorious.

The defense had no tactical reason for failing to file a motion to suppress PFC Williams' statement pursuant to an Article 31(b) violation when they filed a motion to suppress the same statement due to the government's discovery violation.[319]

A trial defense counsel's performance is presumed to be competent, but "this presumption may be rebutted by showing specific errors that were unreasonable under prevailing professional norms."[320] An appellant's burden is based on the understanding that defense is an art and no two attorneys will defend a client the same way.[321] But "an attorney's ignorance of a point of law that is fundamental to

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[317] *United States v. McCall*, 81 M.J. 625, (N-M. Ct. Crim. App. 2021) (*citing Strickland*, 466 U.S. at 694).
[318] *Strickland*, 466 U.S. at 694.
[319] *See* App. Ex. XXXII.
[320] *Harpole*, 77 M.J. at 236.
[321] *See, e.g., Strickland*, 466 U.S.at 681 (recognizing "advocacy is an art and not a science"); *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) ("[A] defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the wide range of professionally competent assistance.") (internal citation omitted).

his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance."[322]

In *United States v. Harpole*, the CAAF considered the defense counsel's failure to move to suppress their client's statement pursuant to Article 31(b) when the defense counsel had already sought to preclude the same evidence on the grounds that the statement was a privileged communication.[323] In that case, Seaman Harpole sought a victim advocate. The victim advocate knew the appellant was suspected of a crime when she met with him, yet she did not advise him of his rights before asking two general questions.[324]

The CAAF first rejected the claim that the appellant's statement to a victim advocate was privileged.[325] Next, the CAAF rejected the CCA's assertion that the defense counsel faced a dilemma because arguing that the statements should be precluded because of the privilege was "factually inconsistent" with the theory that

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[322] *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (noting defense attorney acknowledged that the expert he procured was inadequate, but he did not seek new expert because he failed to understand the resources that state law made available to him).
[323] *Harpole*, 77 M.J. 231. After remand and a *Dubay* hearing, the CAAF ultimately determined that an Article 31(b) rights advisement was not required because the victim advocate "did not do anything that suggested that she was acting for law enforcement or disciplinary purposes," and in light of that determination, appellant's ineffective assistance of counsel claim was moot. 81 M.J. 8 (C.A.A.F. 2021) (per curiam).
[324] *Id*. at 236.
[325] *Id*. at 236.

the victim advocate had to provide appellant his 31(b) rights.[326] Instead, the CAAF found that the victim advocate's gathering of information from the appellant while knowing that she would supply the evidence to commanders and law enforcement raised a colorable claim that she engaged in the conversation with dual roles—as both a victim advocate and as a participant in an official law enforcement or disciplinary inquiry.[327] This colorable claim "provided a reasonable basis for trial counsel to argue before the military judge that appellant's statements . . . should have been suppressed pursuant to the provisions of Article 31(b), UCMJ."[328]

Ultimately, the CAAF rejected the CGCCA's decision on the existing record that this was a "tactical decision" by the defense to seek to suppress all the statements to the victim advocate under the grounds of privilege rather than to seek to suppress some statements due to an Article 31(b) violation.[329]

Here, the defense filed a motion seeking to suppress appellant's statement to Detective Lima because the government failed to provide video of the interrogation (or notice of the existence of the video) until less than two weeks before the scheduled court-martial.[330] Defense counsel then articulated that they did not object on other grounds until they had more time to "sort through" the substantive issues

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[326] *Id*.
[327] *Id.* at 237.
[328] *Id*. at 237.
[329] *Id*. at 237 n.11.
[330] App. Exs. XXXII, XCII at 4.

for suppression.[331] But no later motions were filed.[332] As in *Harpole*, there is no reasonable basis for the defense to file a motion to suppress on only one ground when two grounds were reasonably available.[333]

1. Article 31(b) rights are greater than the *Miranda* rights warning Detective Lima provided PFC Williams.

Officer [redacted] provided PFC Williams a *Miranda* warning, but failed to advise PFC Williams of the nature of the accusation against him.[334]

It is axiomatic that the protection afforded Service Members by Article 31(b) is greater than the protection afforded by the Fifth Amendment.[335] "Article 31(b) prohibits interrogations of Service Members accused of a crime without first

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[331] R. at 297-98; App. Ex. XCII at 6.
[332] App. Ex. XCII.
[333] While this issue is raised as ineffective assistance of counsel, the government does not have clean hands. PFC Williams had been confined nearly a year, and the the government possessed the video for more than a year before finally disclosing it (without a transcript). And the government's disclosure of the video came at the same time as other new, significant disclosures—including videos of complaining witness interviews, police body camera videos, and brig reports—essentially a shot gun blast of discovery. As soon as the joint motion for a continuance was granted, the trial counsel preferred new charges (based on PFC Williams' brig violations) and held an Article 32—all within the timeframe of the relatively short continuance granted upon the government's gross delay. *See* App. Ex.s XXXII, XXXIV, LXXV.
[334] Pros. Ex. 4.
[335] *United States v. Mapes*, 59 M.J. 60, 64 (C.A.A.F. 2003) ("A servicemember's protection against compulsory self-incrimination is unparalleled in the civilian sector.").

advising them of the 'the nature of the accusation.'"[336] "The purpose of this rights advisement is to 'orient the accused' to the nature of the offenses so as to allow him to intelligently weigh the consequences of responding to an investigator's inquiries."[337]

2. Because the investigation with military authorities merged, Officer [redacted] was required to provide the PFC Williams an Article 31(b) rights advisement that included the offenses of which he was suspected.

Article 31(b) warnings are required when: (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.[338]

Three of the four qualifiers in this case are beyond dispute. Officer [redacted] interrogated PFC Williams, he suspected him of offenses when he interrogated him, and he asked PFC Williams questions about the crimes he suspected PFC Williams committed.

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[336] *United States v. Nelson*, 80 M.J. 748, 752 (N-M. Ct. Crim. App. 2021) (*petition for rev. granted by* No. 21-0216/NA, 2021 CAAF LEXIS 741 (C.A.A.F. Aug. 10, 2021))
[337] *Nelson*, 80 M.J. at 752 (citing *United States v. Reynolds*, 16 C.M.A. 403, 405 (C.M.A. 1966)).
[338] *Harpole*, 77 M.J.at 235.

a. Whether an Article 31(b) rights warning was required turns on the joint nature of the investigation at the time of the interrogation, or whether the civilian law enforcement officer was acting as an agent of the military investigation.

Whether a person is subject to the UCMJ is defined in M.R.E. 305. It means "a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code" and also includes "a knowing agent of any such person or of a military unit."[339]

Normally, when not employed by the military, civilian law enforcement interrogators have no obligation to give military members Article 31(b) rights warnings. The entitlement to rights warnings in those interrogations is "determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations."[340] But there are "at least two instances" when even civilian law enforcement officers must provide Article 31(b) warnings.[341] These occasions are when "(1) the scope and character of their cooperative efforts demonstrate that the two investigations merged into an indivisible entity, [or] (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military."[342] To act as

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[339] MCM, MIL. R. EVID. 305(b)(1) (2019); *United States v. Pearson*, 81 M.J. 592, 601 (N-M. Ct. Crim. App. 2021).
[340] MCM, MIL. R. EVID. 305(f)(1) (2019).
[341] *United States v. Rodriguez*, 60 M.J. 239, 252 (C.A.A.F. 2004).
[342] *United States v. Lonetree*, 35 M.J. 396, at *16 (C.M.A. 1992) (internal citations omitted).

an agent in the context of military investigations does not require "the kind of underlying agreement that is required for creation of the legal relation of principal and agent."[343]

In *United States v. Rodriguez*, the Court examined whether a civilian investigator acted as an agent for the military and whether investigations merged when the Bureau of Alcohol, Tobacco and Firearms (ATF) and of the Naval Investigative Service (NIS) cooperated in surveillance on a Sailor suspected of illegally dealing in guns.[344] The ATF asked for NIS's assistance in surveilling appellant at his workplace and home.[345] The NIS complied. Appellant was surveilled (with agents from both agencies) locally for five days, then from unmarked cars during his trip to New York.

After agents were themselves pulled over for speeding, an ATF agent enlisted the help of state troopers. A trooper pulled the appellant over and the appellant consented to a search—which was conducted by ATF agents. In the meantime, the lead ATF agent pulled appellant to the side, read him his *Miranda* rights, and elicited admissions.[346] After no guns were found in the car, the ATF turned the appellant over to NIS. NIS and ATF agents conducted a joint interview

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[343] *United States v. Tuugasala aau*, 12 U.S.C.M.A. 332, 338 (C.M.A. 1961).
[344] 60 M.J. 239, 241 (C.A.A.F. 2004).
[345] *Id*.
[346] *Id*. at 243.

of appellant at a Maryland trooper barracks.[347] At this second interrogation, the appellant received both an Article 31(b) and a *Miranda/Tempia* warning.[348] He sought to suppress the first statement given along the highway to the ATF agent.[349]

The CAAF focused on the ATF's role as the decision-makers in all respects related to the surveillance and investigation.[350] Moreover, although NIS assisted with surveillance during the New York trip, the ATF had already begun the search and questioning of the appellant before NIS arrived on the scene. The lead ATF agent questioned the appellant alone, and NIS did not participate in the search. The court characterized the relationship between the two agencies as "ATF running its investigation with NIS in tow, providing surveillance support"[351] Under the circumstances, the ATF agent was not required to provide an Article 31(b) rights warning before the roadside questioning.[352]

Two years later, the CAAF decided *United States v. Brisbane*.[353] In *Brisbane*, Family Advocacy received a report that the appellant had showed his stepdaughter a picture of a naked adult woman.[354] To address the report, a multi-

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[347] *Id*.
[348] *Id*.
[349] *Id*. at 251.
[350] *Id*. at 253.
[351] *Id*.
[352] *Id*.
[353] 63 M.J. 106, 108 (C.A.A.F. 2006).
[354] *Id.* at 108.

disciplinary team (the Child Sexual Maltreatment Response Team or "CSMRT") convened.[355] The team included Air Force Office of Special Investigations (AFOSI) and the family advocacy treatment manager.[356] After reviewing the report, the CSMRT agreed that the Family Advocacy treatment manager would conduct initial interviews of the appellant and his stepdaughter.[357] The treatment manager did this initial interview as planned, did not read the appellant his Article 31(b) rights, and elicited an admission.[358]

The statement was suppressed because Article 31(b) rights were required. When CAAF considered the case, it found the fact that the treatment manager's "primary purpose"—treatment—was not controlling.[359] Nor was the fact that there was "no direct evidence of an understanding between her and the military authorities 'designed to subvert the purposes of Article 31.'"[360] It was enough that she had acted in furtherance of a military investigation—as evidenced by her "close coordination" with legal and investigative personnel.[361]

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[355] *Id*. at 111.
[356] *Id*. at 111.
[357] *Id.* at 112.
[358] *Id.* at 109.
[359] *Id.* at 112; *see also United States v. Pearson*, 81 M.J. 592, 605 (N-M. Ct. Crim. App. 2021) (As an initial matter, we observe that in …*Brisbane*¸ CAAF articulated that the test for whether Article 31's requirement for rights warning is not "an issue of the questioner's primary purpose.").
[360] *Id*.
[361] *Id*.

b. PFC Williams' case is a merged investigation and is easily distinguishable from *Rodriguez.*

Appellant's case lies somewhere between *Rodriguez* and the later *Brisbane* case—but aligns much more closely to *Brisbane*. The Army Court of Criminal Appeals, in *United States v. Redd,* was faced with similar facts and determined that Article 31(b) rights were triggered because the military and civilian law enforcement were jointly investigating.[362] In *Redd,* an allegation was made to civilian law enforcement, who notified a special agent in charge at CID, who asked that a CID agent be present when civilian law enforcement conducted the interrogation. The CID agent asked questions during the interrogation, and the Army court decided the CID agent's questioning was enough to make it clear that there were two merged investigations at the point of questioning.[363]

Here, there are more indications of a merged investigation than in *Redd*. And there is *Brisbane*-level cooperation. First, NCIS was already investigating PFC Williams when the investigation into Ms. [redacted] allegations began. Their investigation preceded the sheriff's office involvement.[364] From his initial

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[362] *United States v. Redd*, 67 M.J. 581, 587 (Army Ct. Crim. App. 2008) (framing the issue as "Whether appellant's rights under Article 31…were triggered when appellant was interviewed by [a civilian police detective and a CID special agent] *See United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). . . .").
[363] *Id.* at 587. The statement was not ultimately suppressed because the appellant had received the functional equivalent of Article 31b warnings when he was Mirandized and told of the allegation against him.
[364] App. Ex. LXVI at 8.

steps, the North Carolina sheriff coordinated with NCIS. He appeared motivated to do so in part because of what he believed were "similar" accusations that he reviewed from NCIS's investigation documentation on a shared law enforcement database.[365] He called the NCIS case agent immediately after he began his investigation and the two spoke "in depth [about] the two cases" and "exchanged information about each of [the] investigations."[366] The NCIS agent was to notify PFC Williams' Commanding Officers about the new allegations.[367] Over the following days, the sherriff's deputy and NCIS agent "spoke several times . . . about the investigations," then met in person at midway point between the towns to exchange copies of their reports, and finally agreed to exchange "more documentation" as it was completed.[368] This was all before the interrogation.

Further, the sheriff's deputy and NCIS Special Agent [redacted] arranged together to interrogate PFC Williams at the NCIS Cherry Point office.[369] NCIS had PFC Williams' command bring him to their office.[370] In sum, there is no indication leading up to the interrogation that these were ever two wholly independent investigations. The NCIS case agent and sheriff were in contact, investigating the

[365] *See* App. Ex. LXVI at 8.
[366] *Id*.
[367] *Id*.
[368] *Id*.
[369] *Id*.
[370] *Id*.

same person, for similar allegations, and were actively sharing knowledge and resources from the inception of the North Carolina investigation. These steps, in themselves, exceed the level of substantive cooperation in *Rodriguez*, where NCIS merely assisted in surveillance.[371]

The most striking evidence of a merged investigation, or that Detective Lima is at least an agent of the military during the interrogation, is contained in the interrogation video itself. The interrogation video shows PFC Williams sitting alone in the office until two men come in—one is Detective Lima, and the other is NCIS case agent, Special Agent [redacted] Special Agent [redacted] settles into a chair next to Detective Lima and remains there until a break in the interrogation. During the break, the two law enforcement officers walk out together to discuss the interview outside PFC Williams' presence, then return. Detective Lima then asks a couple more questions.[372]

The cooperation *during* the interrogation further places this scenario firmly in the realm of *Brisbane*, where there were shared decisions and mutual cooperation before and after the interrogation. But even *Brisbane* did not have the stark visual evidence here where the agent was sitting in on the interrogation.

[371] 63 M.J. 106.
[372] App. Ex. LXVI at 10.

And *Brisbane* did not have the indications of subterfuge here—which triggers courts to be especially inclined to suppress.[373] Detective Lima and SA [redacted] had a conversation about Article 31(b) rights before the interrogation began, but chose to read only the *Miranda* rights.[374] Near the end of the interrogation, right before the two agents walk out together, PFC Williams is told to wait. After the break to discuss the interview, Detective Lima asked PFC Williams "to be truthful" and to tell "everything that happened during the two [redacted] incidents," and left his business card with PFC Williams.[375]

Immediately after that, Detective Lima and SA [redacted] leave the room. SA [redacted] returns and conducts another interrogation—an interrogation that began with Article 31(b) rights (but that was ultimately not introduced at trial). Detective Lima, who had not actually left and was instead observing this second interrogation, noted that PFC Williams answered these questions "entirely differently than my questions. He spoke in detail about the allegations and was

[373] *See Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (holding post-warning statement inadmissible when addressing police strategy adapted to undermine *Miranda* warnings, considering the unwarned interrogation was conducted in the station house, the questioning was systematic, and the warned phase of questioning proceeded after a pause of only 15 to 20 minutes).
[374] R. at 992.
[375] App. Ex. LXVI at 10.

able to recall specific dates and times which was unlike mine [sic] interview with him."[376]

This is just the sort of law enforcement conduct prohibited by *Missouri v. Seibert*–where the Court prohibited the question first, rights advisement, question again scenario.

B. There is a reasonable probability that the verdict would have been different absent the excludable evidence.

In *Strickland*, the Court acknowledged that "some errors will have had a pervasive effect on the inferences drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect."[377] Courts must look at of the totality of evidence presented at trial; the weaker the evidence, the more likely the outcome was affected by the errors.[378]

In this case, defense counsel's error allowed the government to introduce PFC Williams' words against him—powerful evidence regardless of the context—in the form of a video interrogation shown in court and provided for review in deliberations. This evidence corroborated some of the complaining witnesses' key testimony about what happened on both nights that he visited her. PFC Williams admitted that he and Ms. [redacted] met on the Monkey application and that they

[376] App. Ex. LXVI at 10.
[377] *Strickland*, 466 U.S. at 695-96.
[378] *Id*.

spent time alone in her room together, where they watched movies and she complained about her back hurting.[379] For the second night, PFC Williams admitted that they spent time outside in her front yard, that they got into the back seat of his car, and that he owns a knife—although his description of the knife he owns was different from the knife Ms. [redacted] described.[380] No other evidence was introduced that supported these specific details Ms. [redacted] gave. As such, PFC Williams' statements made Ms. [redacted] appear more credible than she would have appeared had the video not been introduced, and had the government not exploited this in their closing.[381]

More damaging were Ms. [redacted] alleged statements as repeated by Detective Lima during the interrogation. Detective Lima repeatedly confronted PFC Williams with statements attributed to Ms. [redacted] matching some of her testimony.[382] He also referenced text messages (not introduced in evidence) that the two exchanged, highlighting the incriminating ones in which Ms. [redacted] asked for Plan B and PFC Williams asked if she was pregnant.[383] Worse still, some of the statements were significantly more prejudicial than what Ms. [redacted]

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[379] Pros. Ex. 4 at approximately 12:00-18:00, 21:30.
[380] Pros. Ex. 4 at approximately 23:00-26:00.
[381] App. Ex. LXXIII at 5 (closing slide labeled "Accused corroborates [redacted] testimony").
[382] *See, e.g.*, Pros. Ex. 4 at 28:30-30:00 (Detective Lima: "She's giving me a different story. You were on the bed, and you were giving her a massage.").
[383] *Id*. at 32:30.

actually testified to on the stand. For instance, after PFC Williams said that he had only kissed Ms. [redacted] and "nothing more happened," Detective Lima stated that "she's saying that you pulled her pants down, that you pulled your penis out and stuck it in her while you were on top of her and *that she fought you off*."[384] Ms. [redacted] never testified that she fought him off.

In effect, the members heard a highlighted, amplified version of Ms. [redacted] allegations, this time without the crucible of cross-examination and with a favorable gloss from the detective. And because the video interrogation exhibit went back into the deliberation room, the members likely heard these statements an unknown additional number of times.

In contrast to the bolstering that Ms. [redacted] received through the interrogation video, PFC Williams' credibility was destroyed by the video and its later use. First, PFC Williams did not admit to having sex with Ms. [redacted] Instead, he alleged that they had only kissed once. But he later explained that he came to visit Ms. [redacted] the second time because he wanted to tell her that he might have given her an STD. His explanation that he felt the need to disclose an STD to someone he merely kissed was likely incredible to the members, and was obviously received by Detective Lima as such.[385] Detective Lima also made

[384] *Id*. at 31:00-35:30.
[385] *Id*. at approximately 29:30.

statements like, “I can tell you you’re lying right now” and “don’t sit here and lie to me over and over and over again” and referenced “all the lies you’ve already told.”[386] It could not have escaped the members’ attention that the civilian detective’s unambiguous opinion was that PFC Williams repeatedly lied.

Adding to the member’s likely impression that PFC Williams was a liar, the military judge provided the members the false exculpatory statements instruction, tailored to reference the Detective Lima interrogation.[387] The members heard again that PFC Williams lied in the trial counsel’s argument. Trial counsel urged the members to re-watch the interrogation video, highlighted the false exculpatory statement instruction, and summarized that “had the sexual . . . intercourse just been consensual, he would have just said, yes, we had sex. He had no reason to lie but for the fact that he had a guilty conscience.”[388] The instructions and argument meant the trial counsel got the maximum benefit from the interrogation video—and used it to bump factually weak charges over the line to convictions.

In sum, the interrogation video was likely devastating to PFC Williams’ case in the eyes of the members. Based on Ms. [redacted] testimony, PFC Williams’

[386] Pros. Ex. 4 at approximately 32:30, 36:00.
[387] App. Ex. LXXI at 12 (The tailoring included that “he may have made a false statement . . . specifically that he told Detective Lima that he did not have sexual intercourse with [redacted] and that he told [redacted] about possibly transferring a sexually transmitted disease through kissing.”).
[388] R. at 1133; App. Ex. LXXIII at 4 (closing slide labeled “The Accused” listing the alleged falsehoods).

mistake of fact defense was strong (see above, Issue II). Without the video interrogation, the government's evidence of the alleged sexual assault rested solely on Ms. [redacted] account—an account that *did not* include her saying "stop," "no" or "I don't want to have sex" but did include that PFC Williams stopped penetrating her as soon as he saw she was trying to get up.

The interrogation video, in which PFC Williams denied sex instead of asserting that it was consensual, likely torpedoed that defense for the members. As such, there is a reasonable probability that the findings as to Charge II, Specification 2 (sexual assault without consent), and Charge III Specification 7 (assault of Ms. [redacted] would have been different absent the excludable evidence.

Conclusion

Because trial defense counsel inexplicably failed to file a motion, which had a reasonable probability of success, and because there is a reasonable probability that the outcome of the trial would have been different absent the excludable evidence, this Court should set aside the findings for both Charge II, Specification 2 and Charge III, Specification 7, and set aside the sentence and remand for a rehearing on the sentence.[389]

[389] *See Harpole*, 77 M.J. at 235.

VI

PFC WILLIAMS' RIGHT TO A FAIR TRIAL WAS PREJUDICED BY TRIAL COUNSEL'S MISCONDUCT IN REPEATEDLY MISSTATING MS. [redacted] TESTIMONY ON THE CRITICAL ISSUE OF WHETHER SHE CONSENTED, OR APPEARED TO CONSENT, TO SEX; USING PROPENSITY AS A THEME AFTER BEING ORDERED NOT TO MAKE PROPENSITY ARGUMENTS; AND MAKING OTHER ERRORS IN CLOSING, REBUTTAL, AND SENTENCING THAT THIS COURT AND OTHERS HAVE EXCORIATED TRIAL COUNSEL FOR MAKING.

Standard of Review and Standard for Assessing Prejudice

This Court reviews objected-to prosecutorial misconduct, including improper argument, de novo.[390] Whether there has been an improper objected-to reference to an accused's invocation of his constitutional rights is a question of law that this court reviews de novo.[391] When defense counsel object to improper argument at trial, this Court reviews for prejudicial error.[392]

When defense counsel fails to object at trial, this Court reviews improper argument for plain error.[393] Plain error occurs when there is error that is clear or

[390] *United States v. Nichol*, 2020 CCA LEXIS 178, at *6 (N-M. Ct. Crim. App. May 28, 2020) (unpublished) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)).
[391] *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007).
[392] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021).
[393] *United States v. Bodoh*, 78 M.J. 231, 236 (C.A.A.F. 2019).

obvious and results in material prejudice to the substantial rights of the accused.[394] An appellant shows prejudice to his substantial rights if there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different.[395]

But "for Constitutional errors, rather than the probability that the outcome would have been different, courts must be confident that there was no reasonable probability that the error might have contributed to the conviction."[396] In sum, both standards "culminate with an analysis of whether there was prejudicial error."[397]

This Court analyzes the prejudice from a prosecutor's improper argument by considering "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[398]

Discussion

Prosecutors may strike hard blows, but they are not at liberty to strike foul ones.[399] "Prosecutorial misconduct occurs when a prosecutor 'oversteps the bounds

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[394] *Id.*
[395] *Id*.
[396] *United States v. Nichol*, No. 201800286, 2020 CCA LEXIS 178, at *45 (N-M. Ct. Crim. App. May 28, 2020) (internal citation removed).
[397] *United States v. Andrews*, 77 M.J. 393, 401 (C.A.A.F. 2018).
[398] *Andrews*, 77 M.J. at 402.
[399] *Nichols*, 2020 CCA LEXIS 178, at *40 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974) (Douglas, J. dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His

of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'"[400] Prosecutorial misconduct consists of "action or inaction by a prosecutor in violation of some legal norm or standard."[401] Improper argument is a form of prosecutorial misconduct.[402]

A. Trial Counsel may not misstate evidence or argue facts not in evidence.

Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.[403] "It is axiomatic that a court-martial must render its verdict solely on the basis of the evidence presented at trial."[404] Therefore, trial counsel must limit their findings arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence."[405] To do otherwise is error.[406] Misstating the evidence is especially forbidden: "A prosecutor's

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function is to vindicate the right of people as expressed in the law and give those accused of crime a fair trial.").

[400] *Nichol*, 2020 CCA LEXIS 178, at *6 (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005)).

[401] *Id*. at *6 (citing *United States v. Meed*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

[402] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2014).

[403] *United States v. Bodoh*, 78 M.J. 231, 237 (2019) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[404] *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (internal citation removed).

[405] *Bodoh*, 78 M.J. at 237 (emphasis added) (quoting *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009)).

[406] *United States v. Bodoh*, 78 M.J. at 237; *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005).

misstatement of the evidence can so infect the trial with unfairness as to make the resulting conviction a denial of due process."[407]

In *United States v. Riveranieves*, the CAAF considered whether the appellant received a fair trial when trial counsel misstated evidence and the military judge failed to correct the error.[408] The government's case rested on appellant's positive urinalysis for cocaine. The appellant's defense was that the sample had been tampered with. An expert testified on cross that a certain metabolite from cocaine could appear in urine if the cocaine was directly put in the urine.[409] Trial counsel incorrectly argued on rebuttal that the metabolite "only appears when you've been using cocaine."[410] The military judge erroneously overruled defense counsel's objection to this argument.[411] In a three-page opinion, the CAAF agreed there was error, summarized that "the particular circumstances of each case are controlling" as to whether a curative instruction can cure such an error, and then found material prejudice.[412] The court reasoned that the

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[407] *United States v. Fulton*, 837 F.3d 281, 306 (3rd Cir. 2016) (internal citations removed); *see also Andrews*, 2017 CCA LEXIS 283, at *16 (N-M. Ct. Crim. App. Apr. 17, 2017) (citing *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994)) ("It is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation.").
[408] *United States v. Riveranieves*, 54 M.J. 460 (C.A.A.F. 2001).
[409] *Riveranieves*, 54 M.J. at 461-62.
[410] 54 M.J. at 462.
[411] *Id*. at 462.
[412] *Id*. at 462.

misstatement pertained to a "critical issue" in the case, there was no curative instruction, and the error blunted the appellant's defense that his urine had been tampered with.[413] The CAAF returned the record to the Army JAG, allowing a rehearing.[414]

In *United States v. Andrews*, trial counsel misstated the appellant's responses during his interrogation—essentially pulling one line from the interrogation out of context and using it to mischaracterize the appellant's statement as an admission.[415] This Court held that the material misstatements amounted to plain error—but in light of the strength of the other evidence, reversal was not warranted.[416]

Circuit courts have not hesitated to find error and material prejudice when a prosecutor misstates evidence—and to reverse as a result.[417] In *United States v. Watson*, the critical issue was whether the appellant had a connection to a stash of drugs found in a Suburu.[418] The government had some disputed evidence that

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[413] *Id*. at 463.
[414] *Id*. at 463.
[415] 2017 CCA LEXIS 283, at *20.
[416] 2017 CCA LEXIS 283, at *20.
[417] *See, e.g.*, *United States v. Davis*, 863 F.3d 894, 902 (D.C. Cir. 2017) ("Prosecutor's blatant misstatements on the critical issue [of appellant's mens rea] jeopardize the court's confidence that the prosecutor's misconduct during closing arguments did not affect the jury's verdict . . . [and] given that the evidence was not such that his conviction was by any means a certainty [reversal was required]); *United States v. Carter*, 236 F.3d 777, 784-85 (6th Cir. 2001); *United States v. Watson*, 171 F.3d 695 (D.C. Cir. 1999); *United States v. Mastrangelo*, 172 F. 3d 288, 295-98 (3rd Cir 1999).
[418] *United States v. Watson*, 171 F.3d 695 (D.C. Cir. 1999).

connected the appellant to the car—a key that may or may not have been found on him upon arrest, a receipt in his house, and a bag in the car that matched the same store. The government tried to establish that the car's owner was the appellant's girlfriend's car, bungled the questioning, and got an answer that left it unclear.[419] But in closing and rebuttal, the prosecutor told the jury that the car owner was the appellant's girlfriend.

The appellate court reversed, finding that the testimony pertained to the critical issue of the appellant's connection to the car and other evidence of the link was weak and contested. The court found that the standard jury instruction—that argument was not evidence—was inadequate to mitigate the prejudice "that went to the heart of the government's case on a matter with respect to which the government had no other weighty evidence."[420] The substantial prejudice warranted a new trial.[421]

The Sixth Circuit also considered a prosecutor's misstatement of testimony, and like the DC Circuit, concluded that the error was not harmless—despite defense counsel's failure to object.[422]

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[419] *Id*. at 698 (Prosecutor: "Mr. Thomas, you believe that you know Watson's girlfriend, Tyra Jackson, right?" Mr. Thomas: "I never testified I knew her or not.").
[420] *Id*. at 702.
[421] *Id*.
[422] *Carter*, 236 F.3d at 784-85. A key eyewitness to a bank robbery initially identified a different person as the robber but identified the defendant at trial.

1. The error is plain and obvious where trial counsel's repeated misstatement of testimony went directly to the critical issue of whether the alleged sex act with Ms. [redacted] was a crime.

Trial Counsel's blatant, repeated misstatements of evidence constituted clear, obvious error. In this case, the key issues were whether Ms. [redacted] consented to the sexual act and, if not, whether PFC Williams had a reasonable mistake of fact that she consented. What exactly she said and did leading up to penetration was therefore the critical issue in the case.

Here's what trial counsel elicited:

Q. Okay. So what happened after the massage began?

A. He was trying to do what I didn't expect. So he was pulling down my shorts and I was trying to figure out why. He told me that was part of the massage, which I said, it is just my back.

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Q. Explain to the members how you responded.

A. "What are you doing" and "why".

Q. What did he do in response to that?

A. He told me, nothing. It's part of the massage to get lower on the back.

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Defense elicited that a detective told her before she testified that she had gotten the "wrong face" initially. After defense pointed out the discrepancy in closing, the prosecutor said the defense lied when they said she had been told she had identified the wrong person. *Id*.

Q. Did he stop after *you told him, what are you doing*?

A. No.

Q. What's the next thing you remember him doing?

A. The shorts and my underwear were down below and he put both hands on my wrists and was holding me down to the bed.

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Q. Okay. What's the next thing he did?

A. He proceeded to enter. He took his penis and entered my vagina.

Q. Before he did that, did you say anything?

A. No. I was trying to get up off the bed.

Q. Were you able to at the beginning?

A. No.

Q. What happened after he initially put his penis inside your vagina?

A. I was gritting my teeth and I was trying to raise up, and I guess once he realized what I was doing, he let go. And I got off the bed real fast.[423]

What trial counsel argued was dramatically different. In the first closing, the trial counsel asserted that PFC Williams "won't take no for an answer," and that Ms. [redacted] "told him to stop repeatedly."[424] In rebuttal, trial counsel dismissed the defense's argument about PFC Williams' mistake of fact defense by

[423] R. at 658-60 (emphases added).
[424] R. at 1129-30.

telling the members, that Ms. [redacted] said "no" and "stop" and was "trying to pull her shorts up."[425] Trial counsel added, "the second she did that, that defense [mistake of fact] is eliminated. And that's what happened in this case."[426] To further drive home the point, trial counsel repeated again that she said no and stop.[427]

Not only had Ms. [redacted] never testified to this, or anything like this, but trial counsel *used quotes from a different complaining witness—LCpl Romeo—about an entirely different charge*.[428] This was likely especially confusing for the members, who would have found the quotes rang familiar, but likely could not identify that they were from a different witness wholly unrelated to this particular charge.[429] Trial counsel, however, had no such excuse: the government's questioning of Ms. [redacted] had carefully avoided eliciting whether she said stop or no.[430]

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[425] R. at 1184 ("But the second she said; no. Stop. What are you doing? Trying to pull her shorts up; no. What are you doing? Stop.").
[426] R. at 1184-85.
[427] R. at 1185.
[428] R. at 743-44. PFC Williams was acquitted of sexually assaulting LCpl Romeo. Her testimony was that while PFC Williams was pulling her shorts down, she "was just saying no. And when he got my shorts down enough to where he could have sex with me, I was—he was just on me and I was just saying, 'please stop.' . . . He didn't stop until he was finished." *Id.*
[429] *See Davis*, 863 F. 3d at 903 (finding plain error when "the government tarred [appellant] with evidence that it implicitly acknowledges had nothing to do with him").
[430] *See* R. at 658-60.

There were also more subtle misstatements and exaggerations. About how long Ms. [redacted] and PFC Williams had been speaking to each other on the Monkey app. Trial counsel asserted that they had only been communicating "a few days," but Ms. [redacted] testified it was a couple of weeks.[431] (The obvious, misleading implication was that Ms. [redacted] would be less likely to consent to sex, and PFC Williams' mistake of fact as to consent was less reasonable, the shorter the amount of time that they had known each other.) In the same vein, trial counsel asserted that the first visit was PFC Williams' idea when, in fact, Ms. [redacted] "could not remember" whose idea it was.[432]

[431] *Compare* R. 1128 ("Starts talking to her and[,] *a few days later*, goes down to see her in Wilmington. . . . They had not met before, they had just been talking on this app *for a few days* and he wants to come down there and see her and she agrees.") *with* R. at 651 (Trial counsel: "About how long before (he visited) in your memory did you all meet on this Monkey app?" [redacted] "I don't know. Maybe a couple weeks. TC: "A couple weeks?" [redacted] "Yes."). In Prosecution Exhibit 4, PFC Williams said that once they started texting, they did not text every day—only a "few days." (Pros. Ex. 4 at approximately 16:40).

[432] *Compare* R. at 1128 (stating "He wants to come down there and see her and she agrees") *with* R. at 652 (arguing she doesn't remember whose idea it was to meet, then saying "I mean, we both agreed to meet").

2. The misstatements undermined PFC Williams' constitutional rights. But regardless of whether this Court tests for prejudice using the plain error standard or the constitutional standard, the illegitimate argument was so poisonous that this court should set aside the findings.

The impact of the improper argument on the trial determines the appropriate remedy.[433] Three factors are used to analyze the likely impact: 1) the severity of the misconduct, 2) the measures adopted to cure the misconduct and 3) the weight of evidence supporting the conviction.[434]

If a prosecutor's argument amounts to clear, obvious error, a military appellate court then determines "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different."[435] For constitutional error, rather than the probability that the outcome would have been different, courts must be confident that there was no reasonable probability that the error might have contributed to the conviction."[436]

a. The misconduct was severe.

Trial counsel's repeated misstatements that both blatantly (she said "no" and "stop" and tried to pull her shorts up) and subtly (it was his idea to meet) misstated the evidence rose to the level of due process violation because they denied PFC

[433] *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).
[434] *Id*.
[435] *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F.2019).
[436] *Id*. (citing *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019)).

Williams his right to a fair trial.[437] The issue of Ms. [redacted] consent, or PFC Williams' reasonable but mistaken belief in her consent, was the single contested issue to PFC Williams's most serious conviction. The misstatements here about what happened before penetration were even more directly tied to the critical issue of the case than in *United States v. Riveranieves* (where trial counsel misstated the witnesses' testimony as to whether a metabolite could exist in urine if cocaine were directly added to it) and *United States v. Watson* (where the issue was the degree of nexus between the drugs and the appellant). But even the argument about the other details of the relationship—how long they had been communicating and who initiated the meeting—shaded the issue of consent.

Trial counsel made his errors worse by bolstering his own credibility. He repeatedly referred to the military judge's instructions that the members only consider the testimony that they heard.[438] But then he providing the members a

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[437] *See United States v. Carter*, 236 F. 3d 777 (6th Cir. 2001) ("[W]e focus primarily on [appellant's] claim that the prosecution deprived him of his right to due process and a fair trial under the Fifth Amendment when the prosecutor committed prosecutorial misconduct during closing arguments by misstating material evidence and accusing defense counsel of lying. Because we believe that the prosecutor committed misconduct that was sufficient to constitute plain error warranting reversal, we reverse . . . and remand for a new trial."); *see also Miller v. Pate*, 386 U.S. 1, 7 (1967) (reiterating that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been not deviation from that established principle. There can be no retreat from that principle here.").

[438] R. at 1188.

false account of what the key witness testified to after telling them to take notes on his closing.[439] The trial counsel did nothing more than vouch for his own misstatements. No member would expect a Marine officer—a major no less—representing the government to state that the actual testimony was all that mattered and then provide a completely erroneous account of that testimony.[440] What trial counsel was really saying was "believe me." But what he told them was untrue.

Likewise, the misstatements eroded PFC Williams' right to confrontation. The misstatements about what Ms. [redacted] testified to were so specific, so different from her actual testimony, and said with such conviction that they eclipsed her sworn testimony.

That these particular errors occurred in both findings and rebuttal is also a factor this Court considers.[441] But this Court has already found lesser misstatements of fact (trial counsel's argument that misstated appellant's admission by taking a line out of context from the interrogation—paired with

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[439] R. at 1115.

[440] *See Carter*, 236 F.3d at 786 ("This court has consistently recognized that a prosecutor's misrepresentation of material evidence can have a significant impact on jury deliberation because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.").

[441] *Andrews*, 2017 CCA 283 at *29 (citing *Fletcher*, 62 M.J. at 184).

additional misconduct) to be severe even when those statements occurred only during findings argument.[442]

In sum, trial counsel misstated the most critical testimony of the most critical witness, bolstered these false claims by referencing the military judge's instructions, and repeated the claims in both closing and rebuttal. Under these circumstances, the misconduct was severe.

b. No curative measures were attempted.

The CAAF has exhorted all parties—defense counsel, trial counsel, and the military judge—to not stand idly by while witnessing improper argument.[443] Trial defense counsel took no action on this particular point during trial counsel's argument. Nor did trial defense counsel directly address trial counsel's misstatements in his closing.

The military judge likewise did nothing to cure the misrepresentation of Ms. [redacted] testimony. Before the closing, he gave an instruction that arguments are not evidence but did not even re-read that instruction after the misstatements.[444] Regardless, it is unlikely any judicial action could undo what the government did

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[442] *Id*.
[443] *United States v. Andrews*, 77 M.J. 393, 403-04 (C.A.A.F. 2018).
[444] *See Davis*, 863 F.3d at 903 ("Standard jury instructions, such as that "statements and arguments of counsel are not evidence . . . and that it is the jury's memory of the evidence . . . that should control during deliberations . . . have long been recognized not to be a cure-all for such errors.").

by misstating key testimonial evidence and then co-opting the military judge's instructions to bolster their misstatements on the crucial issue.

Finally, there is evidence here that the members were confused by the misstatements. Quickly after they were adjourned, they asked if they could have all the transcript in the deliberation room.[445] The military judge denied the request. He then told the members they could only rely on their notes, exhibits, and written instructions and must base their "determination on the issues on the case on the evidence as you remember it."[446] He also instructed them that if they had a "*specific* question" about a "*specific* portion" of the record that they wanted read in open court, he as military judge could evaluate that "*specific* request."[447] Unsurprisingly, the members did not take him up on his (very specific) offer.

c. The other evidence regarding the critical issue was weak.

Ms. [redacted] testimony was the only direct evidence of her lack of consent (which itself required inferences that she actually meant "stop" when she asked "what are you doing?"). The other, limited evidence introduced was either derived from her (her assertion that Appellant apologized after the assault) or was indirect and inferential (PFC Williams' apparent untruthfulness to the sheriff about whether they had sex). This evidence was weak. Ms. [redacted] said PFC

[445] R. at 1193.
[446] R. at 1193.
[447] R. at 1193.

Williams apologized "multiple times" in person but never provided specific information or any context for those alleged conversations.[448]

Likewise, PFC Williams's denial to the sheriff that he had sex with Ms. [redacted] could have been for any number of reasons—because he did not know what he was accused of, because he already knew Ms. [redacted] was angry at him for possibly transmitting a STD, or because he had already been investigated for other alleged misconduct. Regardless, the power of that evidence was nowhere near the power of trial counsel's alleged evidence.

d. This Court should apply the Constitutional standard of prejudice.

Simply put, this Court cannot be satisfied that after trial counsel's arguments, PFC Williams was properly convicted of Charge II, Specification 2 (sexual assault of Ms. [redacted], on the basis of Ms. [redacted] testimony instead of wrongly convicted on the basis of LCpl Romeo's testimony about a wholly unrelated charge. These misstatements fundamentally changed the outcome of the court-martial and amount to a due process violation.[449] The Court should apply the standard set out in *Chapman v. California*—requiring the error be

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[448] [redacted]

[449] *Fulton*, 837 F.3d at 306; *see also Andrews*, 2017 CCA LEXIS 283, at *16 (citing *Davis v. Zant*, 36 F.3d at 1548 n.15 (11th Cir. 1994)) ("It is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation.").

harmless beyond a reasonable doubt to uphold a conviction—to find that there was material prejudice here.[450]

But under these circumstances, PFC Williams has met even a plain error standard of prejudice because there is a reasonable probability that outcome of the court-martial as to Charge II, Specification 2 would have been different but for misstatements. Based on this sub-issue alone, this Court should dismiss Charge II, Specification 2.

B. Trial Counsel's reliance on similar acts preceding the alleged crimes and general criminal disposition was a thinly-veiled propensity argument that violated the military judge's previous rulings, CAAF's caselaw, and PFC Williams' constitutional rights.

"An accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition."[451] In *United States v. Burton*, the CAAF found that trial counsel erred by improperly relying on propensity.[452] Trial counsel had invited the members to "lay [the two crimes] next to each other and compare them and see what this particular person's M.O. is."[453] Trial counsel further highlighted "several similarities from the two incidents, including Appellant's particular actions and the victims' physical appearance and

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[450] *United States v. Tovarchavez*, 78 M.J. 458, 460 (citing *Chapman v. California*, 386 U.S. 18 (1967)).
[451] *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009).
[452] *Id*.
[453] *Id*. at 150.

vulnerability."[454] Ultimately, the court held that "the Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within [the] the rules of evidences, such as M.R.E. 404 or 413."[455]

In *United States v. Hills*, the CAAF further constrained the use of propensity by holding that "it is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."[456]

1. The standard of review is de novo and there was error here where trial counsel used propensity as a theme despite defense counsel's repeated objections.

The standard of review is de novo when, as here, defense counsel object to improper argument.[457] In this de novo review, a court determines whether any error materially prejudiced the accused substantial rights.[458]

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[454] *Id*.
[455] *Id.* at 152.
[456] 75 M.J. 350, 356 (C.A.A.F. 2016).
[457] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021).
[458] *Id*.

Here, all parties appeared, initially, to agree that the use of propensity was verboten. As early as pre-trial motions hearing, the military judge instructed the government that they "could not and shall not use propensity evidence."[459]

But trial counsel did exactly that. The government's theme, plain and simple, was that the accused had a general criminal disposition. In the opening, trial counsel's first line was "eventually the truth catches up with you" and he finished the opening with a similar statement.[460] At various points in the opening, trial counsel emphasized the links between the allegations and emphasized the number of allegations.[461] In response to the opening, defense counsel requested a curative instruction based on spillover.[462] The military judge denied the request.[463]

Before closing, defense counsel objected to the government's use of "escalation" throughout their closing slides because it was a propensity argument; the military judge directed the government to remove it.[464] The defense then alerted the military judge that they anticipated the government would argue "a theme of

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[459] R. at 43; *see also* R. at 47, 48.
[460] R. at 518, 526.
[461] R. at 521 ("And [LCpl [redacted] not the only Marine . . . who didn't consent."); R. at 522 ("[A]nd there's yet another Marine [LCpl Romeo] at Camp Johnson."); R. at 523 ("You've heard about what happened in Greensboro, you've heard about what happened to the three Marines in Camp Johnson, there's more . . . [Ms. [redacted] "); R. at 526 ("Five different women, three different locations across North Carolina, one year, Marines and civilians alike.").
[462] R. at 540.
[463] R. at 1085.
[464] R. at 1088.

because he was disrespectful here or used control here, that he's also doing it in other cases."[465] The military judge replied "if there's a disrespect associated with each individual case, I'm not going to preclude the government from arguing that."[466]

In the opening lines of closing, trial counsel repeated "when you do the wrong thing time after time, the truth catches up with you and you have to answer for it."[467] This was followed with the weird yet memorable phrase that the "accused was marked by his misconduct."[468] Later, trial counsel repeatedly referred to a "year of misconduct,"[469] and apologized to the members that there was so much misconduct to go through.[470]

a. Counsel argued "disrespect" and "control" in lieu of telling the members directly that PFC Williams had a criminal disposition and a propensity to commit sexual assaults.

These general remarks were followed by a much more specific direction to the members to consider "what is in common across the accused's misconduct, is *very important factors*."[471] The first was that PFC Williams' first year in the fleet

[465] R. at 1088.
[466] R. at 1088.
[467] R. at 1114.
[468] R. at 1115.
[469] R. at 1117.
[470] R. at 1137 ("[T]his is a lot of misconduct to go through, all right? And I'll try to make this final bit as quick as I can.").
[471] R. at 1116 (emphasis added).

was "characterized by misconduct, consistent misconduct."[472] Trial counsel then focused the members on two quasi-criminal attributes that PFC Williams allegedly showed with all of the woman he was alleged to have assaulted—disrespect and control.

Trial counsel's analysis of disrespect did nothing to address each of the crimes individually. Instead, he avowed to the members in somewhat lofty terms that "Disprespect is a common thread running throughout each of these. Disrespect for these females and their own autonomy, respect for their bodies. Disrespect for the law and the protections it affords each and everyone [sic] of us to be left alone when we want to be. And instead treating them like objects for his sexual gratification"[473]

The "element of control" was more closely tied to actual testimony, but the recitation of alleged "control" facts from testimony was exaggerated, grouped together rather than parsed out by witness, and irrelevant to the crimes actually charged. Trial counsel argued control was shown by

> LCpl Whiskey and the preoccupation the accused showed for her phone. To his preoccupation with other females [sic] phones and who they're talking to, when they're talking to people, wanting to get at their phones, delete certain content, so that he knew who they were talking to and when they were talking to other people. And he wants to control

[472] R. at 1116.
[473] R. at 1116.

> what they're doing and what you see with multiple witnesses—multiple victims.[474]

When trial counsel later discussed the allegations of each witness, he brought up the phone factor for four of the five women. For Whiskey: "Of course on the way back, she explains how the accused was trying to get at her phone for some reason, didn't make sense to her, she didn't know why."[475] For Romeo: "he's without control over what she's doing and he doesn't respond well to that. So what does he do, he goes and grabs her cell phone while she had stepped away toward the head and immediately starts looking through it, *this is what he does*. *He wants to see who you're talking to, he says you're hiding things . . . that's the sort of control, that's what we're dealing with.*"[476]

"Control" and "disrespect" were then brought up again in the context of this alleged sexual assault against LCpl Romeo. "He didn't take no for an answer because he doesn't respect her. And he wanted to control her and he didn't respect the law . . . . That's the level of control and jealousy that *characterizes* him."[477]

Next up was Ms. [redacted] allegations and an explicit link between the crimes through the phone "control": "And they start watching TV, and he

[474] R. at 1117.
[475] R. at 1119-20.
[476] R. at 1124.
[477] R. at 1125.

immediately shows, again, this same preoccupation with her cell phone like he showed with Whiskey and Romeo. . . .”

Finally, regarding Ms. [redacted], trial counsel said “he starts to assert control or tries to, and he starts attacking [redacted].”[478] And later, “he makes sure that he’s got [Ms. [redacted] phone with him, that’s evidence of a guilty conscience.”[479]

The penultimate paragraph brought it all together by reiterating that the truth “finally caught up with the accused here in this courtroom. He did not respect these women in any way. He viewed them as sexual objects. He did not respect the law and the protections that it afforded them.”[480]

2. Even if this Court tests for non-constitutional error, there is a reasonable probability that but for the error, the outcome of the proceeding would have been different.

a. The misconduct was severe.

By relying on dual “factors” of control and disrespect, counsel brought in the through the back door what they couldn’t get through the front. Neither disrespect nor control was probative of the crimes except as a way to emphasize propensity and a general criminal disposition.

[478] R. at 1137.
[479] R. at 1138.
[480] R. at 1142.

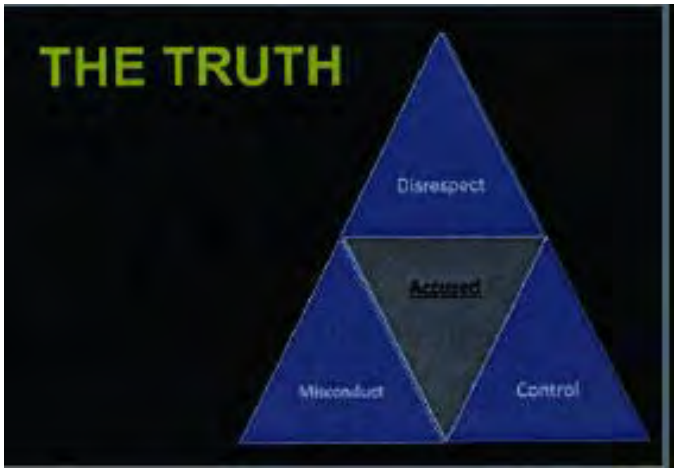
First, there was no actual evidence other than the alleged crimes themselves that PFC Williams was disrespectful to the complaining witnesses. The evidence only served to be circular; he was disrespectful because he allegedly sexually assaulted or abused different women, and he must have sexually assaulted them because he was disrespectful. The power in the label came from the multiple allegations—because he committed sexual misconduct with multiple women, he was disrespectful of women, and because he was disrespectful, he was more likely to have committed each alleged crime. Trial counsel then took this supposed character trait a step further in the final lines of his closing and argued that the disrespect was exhibited not only towards the women, but towards the law in general (in other words, a general criminal disposition towards all crime).

Second, the same is true of labeling PFC Williams as "controlling," particularly in his handling of the complaining witnesses' phones. With the exception of the alleged assault against Ms. [redacted]—who testified that she and appellant got into altercations over her phone—the phone handling was unconnected or simply collateral to the alleged assaults.

Counsel's specific word choice only exacerbated the prejudicial impact. No clearer character argument could be made than when trial counsel blatantly said that "control and jealousy characterizes *him*," completely divorcing the evidence from any alleged crime and making it solely about convicting PFC Williams

because of his supposed criminality and character flaws. Worse still was that trial counsel put the members on his team in the assessment: "that's what *we're* dealing with."[481]

Trial counsel's last slide—a pyramid made of three small pyramids labeled "Disrespect," "Misconduct," and "Control" around a middle pyramid labeled "Accused," and with the title "THE TRUTH"—further drove the point home.[482]



The persuasiveness of these arguments rested solely on what was impermissible—trial counsel's assessment of PFC Williams' general character and propensity to commit crimes against women. Yet as courts are aware, that argument is very persuasive. And the manner in which trial counsel made those arguments was especially egregious. It was the theme consistently argued

[481] R. at 1124.
[482] App. Ex. LXXIII at 7.

throughout the opening, closing, and rebuttal. "One thing we do know, is that lightening does not strike the same place five times."[483] That was one of the last lines the members heard before beginning deliberations. To add to the severity, trial counsel had been warned—strongly by the first judge—not to make propensity arguments. The second judge warned him again—rather weakly, but specifically—not to argue "disrespect" and "control" as propensity.

b. The sole curative measure was inadequate.

The military judge sustained an objection to trial counsel's "lightening doesn't strike the same place five times" line.[484] This was the only curative measure.[485]

c. The evidence of each charge was weak.

The evidence of each charge was weak. There was no corroborating evidence for the alleged sexual contact of LCpl Whiskey.[486] Ms. [redacted] alleged that her lip was injured by PFC Williams. But her testimony was vague in important aspects and she was impeached with her previous statements to her mother and the police, in which she alleged she crawled out a window of the truck

[483] R. at 1187.
[484] R. at 1188.
[485] *Cf. United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) ("The military judge left no stone unturned in ensuring members considered only admissible evidence in this case.").
[486] *See* AOE I, para. A.

and said she had snuck out of her house. And, as discussed above at Issue II, evidence of PFC Williams' alleged crimes against Ms. [redacted] was especially weak.

Under these circumstances, PFC Williams has met the burden on prejudice because there is a reasonable probability that outcome of the court-martial as to all the charges of which he was convicted would have been different but for misstatements. More accurately, the improper propensity argument fundamentally changed the outcome of the court-martial.

C. Trial Counsel's improper findings, rebuttal and sentencing arguments included additional errors that this Court and others have addressed.

In closing and rebuttal, trial counsel committed an array of specific instances of misconduct that this Court and others have found improper.

1. 1. Trial counsel improperly commented on PFC Williams' invocation of a constitutional right.

When discussing LCpl Romeo (who had dated PFC Williams before making the sexual assault allegation), trial counsel argued in his closing that "she, in a measured way, did not shy away from any of the questions that were asked of her, *despite the fact that she was testifying about what [sic] her ex-boyfriend had come into her barracks room and dumped her in front of a panel of strangers*."[487]

[487] R. at 1122 (emphasis added).

"It is fundamentally unjust to incriminate an appellant by improperly commenting on his invocation of a constitutional right."[488] In *United States v. Garcia*, trial counsel argued that "it's not fun to be sexually assaulted and then have to be victimized by the process again."[489] The Army Court of Criminal Appeals concluded this was improper argument because it "tacitly suggested the panel believe [the complaining witness], lest they further victimize her, and invited them to convict the appellant because he had 'revictimized' [her] anew by asserting his constitutional rights to demand a trial and confront her through cross-examination."[490] This Court likewise found trial counsel's argument that the appellant forced victims to testify created "too high of a risk that members interpreted the . . . comment as an indictment of his failure to plead guilty."[491]

While the phrasing is somewhat different here—that PFC Williams "dumped [LCpl Romeo] in front of a panel of strangers"—the implication is the same. The argument exploited PFC Williams' invocation of his right to plead not guilty and to

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[488] *United States v. Garcia*, Army 20130660, 2015 CCA LEXIS 335 (Army Ct. Crim. App. Aug. 18, 2015); *see United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009) (describing it as "blackletter law" that a trial counsel may not comment on accused's exercise of constitutionally protected rights); *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007).
[489] *Garcia*, 2015 CCA LEXIS 335, at *22.
[490] *Id*.
[491] *Nichol*, 2020 CCA LEXIS 178, at *52.

confront witnesses against him. Thus, it was "beyond the bounds of fair comment."[492]

2. Trial counsel maligned PFC Williams' counsel and argument.

Trial counsel started their rebuttal with:

> Members, defense counsel spent 90 minutes talking about everything but what the accused did. And what the evidence has proven that he did. They spent 90 minutes focused on blaming these victims for not acting the way they think victims are supposed to act, and that's offensive. . . . They blamed . . . they want you to judge [Ms. [redacted] based off everything except her actual testimony and the facts in evidence.[493]

This was followed by a mischaracterization of defense's argument: that the defense focused on the complaining witnesses' background to say that PFC Williams had the right to take advantage of them sexually.[494] After manufacturing the argument, trial counsel—in a somewhat jumbled sentence—characterized it as "And just this supposition that gives [sic] the accused the right to do that. And that they somehow have walked themselves into this is offensive."[495] He later told members to focus on the evidence that's been admitted, "not just objectionable argument from defense counsel."[496]

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[492] *Moran*, 65 M.J. at 186 (internal citation omitted).
[493] R. at 1181.
[494] R. at 1182.
[495] R. at 1182.
[496] R. at 1186.

"It is improper for a trial counsel to attempt to win favor with the members by maligning defense counsel."[497] Such attacks detract "from the dignity of the judicial proceedings" and can "cause [the members] to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the facts of the case."[498]

In *United States v. Nichol*, the trial counsel "disparaged the Defense by arguing that they introduced certain evidence to embarrass, humiliate, and slut-shame" the alleged victim.[499] This Court found that undermining the defense in such a way was error—linking it to the violation of a "core legal standard of criminal proceedings, that the Government always bears the burden of proof to produce evidence on every element and persuade the members of guilt beyond a reasonable doubt."[500]

Here, the defense introduced some of material the government referenced—that Ms. [redacted] confided in PFC Williams, that she was not happy with how her life was going, that Ms. [redacted] family needed money, and that Ms. [redacted] asked for money, shoes, and food. But the defense counsel's argument stuck to legitimate uses of this evidence: Ms. [redacted] confided in PFC

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[497] *Nichol*, 2020 CCA LEXIS 178, at *11 (citing *United States v. Fletcher*, 62 M.J. at 181).
[498] *Id.*(citing *United States v. Xiong*, 262 F. 3d 672, 675 (7th Cir. 2001)
[499] *Id*. at *11-12.
[500] *Id*. at *12.

Williams *after* he had allegedly sexually assaulted her, which buttressed the argument that she had only decided the sex was nonconsensual after finding out about the STD. As to Ms. [redacted] the defense counsel argued that the loss of her very expensive phone was the true reason she alleged an assault.

Trial counsel's aspersions on defense counsel's argument did several things—none of them acceptable. First, trial counsel made it socially—and ethically—unacceptable for members to fully consider the facts the defense relied on to question the allegations. By considering whether Ms. [redacted] allegations were motivated in part by the loss of her expensive phone, it was completely fair to consider that she was poor and the loss of the phone would be a blow to family finances. But trial counsel twisted this; by trial counsel's account, any consideration that she was poor meant a member would be "judging her based off everything except her testimony"— implying that consideration of her impoverished circumstances could only be improperly taking "class" into account[501] This likely chilled deliberation.

Further, by mischaracterizing the defense's argument and then maligning both the argument and the counsel who made it, the trial counsel undermined the member's trust in defense counsel and bolstered their own trustworthiness. Adding to the problem, the trial counsel improperly implied that the military judge was on

[501] R. at 1181.

their side with their characterization of "objectionable argument"—using the military judge's rulings on some of defense counsel's argument to curry favor with the members.[502] And trial counsel's reference to spending "90 minutes" was a similar move, as the military judge had interjected in defense counsel's argument to warn him that he was "already at 90 minutes."[503] This created the risk of turning the trial into a popularity contest, and members basing their decision on something other than the facts of the case before them.

3. Trial counsel invoked "duty" and "doing justice" by convicting—a role beyond evaluating the evidence.

It is generally impermissible to ask members to perform a role beyond evaluating the evidence.[504] The kind of pressure—telling the jury to "do it's job"—has no place in the administration of criminal justice."[505] Courts have historically viewed arguments that jurors don't do their job if they acquit as one of

[502] *See United States v. Pomarleau*, 57 M.J. 351, 364 (C.A.A.F.2002) (finding it inappropriate in argument to suggest that a military judge's rulings to admit or exclude evidence or sustain an objection itself amounts to a comment on the veracity of the evidence or witness).
[503] *See United States v. Clifton*, 15 M.J. 26, (C.M.A. 1983) ("[Appellant] need apologize to no one for putting the Government to its burden; thus he may "talk for a long, long time about reasonable doubt.") (internal citation omitted).
[504] *United States v. King*, No. 201800016, 2019 CCA LEXIS 304, at *13 (N-M. Ct. Crim. App. July 23, 2019).
[505] *United States v. Young*, 470 U.S. 1, 18 (1985).

the most egregious forms of prosecutorial misconduct.[506] Such arguments are made to inflame and are irrelevant to determining guilt.[507]

As the Air Force Court of Criminal Appeals explained addressing similar phrases, the message the members receive is that "doing justice" for the alleged victim can only mean a conviction, and it risks that the members will "disregard the presumption of innocence and apply the wrong standard of proof."[508]

Here, in the beginning and end of their closing and rebuttal, the government exhorted the members to "hold the accused accountable . . . and provide justice for his victims,[509] "do justice" for the "victims,"[510] and "go back there and do your duty. Go back there and convict the accused."[511] The trial counsel also referred to the law "protecting" the victims.[512] But pressuring members to "do justice" is at best a distraction, and at worst tells the members to ignore their limited, lawful role as evaluators of the evidence.

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[506] *Young*, 470 U.S. at 30 (J. Brennan, concurring in part and dissenting in part).
[507] *United States v. Boyer*, 2012 CCA LEXIS 906 (N-M. Ct. Crim. App. Dec. 27, 2012).
[508] *United States v. Cueto*, No. 39815, 2021 CCA LEXIS 239, at *50 (A. F. Ct. Crim. App. May 18, 2021) *petition for rev. granted by* No. 21-0357, 2022 CAAF LEXIS 114 (C.A.A.F. Feb. 7, 2022).
[509] R. at 1114.
[510] R. at 1142.
[511] R. at 1188.
[512] R. at 1142, 1185 ("the law is the law on it, it protected her").

4. Trial Counsel's sentencing argument was also improper.

During the sentencing argument, the trial counsel returned to arguing "justice for the victims"—this time that a sentence of fifteen years' confinement was necessary to provide justice "for the victims that he victimized."[513] He also included "justice for the victims" as a sentencing principle that the military judge would instruct on.[514] He argued that "every instance of [sexual assault] in the Marine Corps is a disgrace to the service and every single time it happens, it has to be stamped out in a case like this where the accused has been convicted."[515]

Trial counsel went on to describe PFC Williams as having a pattern "of extended, anti-social, violent, dangerous, lawless behavior over an extended period."[516] He vouched that there would be "lifelong consequences for these young women, without question,"[517] and argued that PFC Williams "used his status as a Marine to earn the trust of [redacted] and [redacted]."[518]

Trial counsel's argument was that members were obligated to the victims and the Marine Corps to render a lengthy sentence. In doing so, he misstated the law (because the sentencing factors do not include "justice for the victim") and the

[513] R. at 1319.
[514] R. at 1318.
[515] R. at 1319.
[516] R. at 1321.
[517] R. at 1324.
[518] R. at 1324.

facts (there was no indication beyond bare speculation that the victims would suffer "lifelong consequences").[519] And he provided no discussion of the details of the actual case to back up this assessment. Instead, he resorted to an inflammatory string of labels—antisocial, violent, and dangerous—which seemed to play more to a stereotype and were particularly cruel and potent in light of PFC Williams' unsworn statement that he spent most of his teenage years in a group home after suffering child abuse and being removed from his family.[520]

5. Even if this Court tests for non-constitutional error, there is a reasonable probability that but for the error, the outcome of the proceeding would have been different.

In accordance with the *Fletcher* factors, this additional misconduct throughout closing, rebuttal, and sentencing was severe in its own right, was sustained throughout the closing and rebuttal and related to each charge. There were no curative measures taken to correct these errors, and the evidence of each of the charges was weak.

[519] App. Ex. LXXXIII at 2.
[520] R. at 1298-1307; *see Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (finding ineffective assistance of counsel when counsel elicited "potent evidence" from an expert because the testimony "appealed to a powerful racial stereotype—that of black men as 'violence prone'").

But the real prejudice lies in how all the improper arguments build on one another, infecting both findings and sentencing.[521] Trial counsel misstated testimony on the key issue to garner a conviction as to the alleged victim that the members appeared most inclined to view as inexperienced[522]—and likely sympathetic. The details of that allegation, along with the others, was then used to argue both general criminal character and personality traits on display throughout the crimes to show a pattern that in turn made each of the individual allegations appear more credible. And then the members were repeatedly told at each stage to render justice to these victims and do their duty, which could only mean conviction, and to provide justice again in sentencing through a lengthy, double-digit sentence that might give PFC Williams a chance at rehabilitating his "anti-social, violent, dangerous" personality. In light of the combined impact of such arguments and the evidentiary weaknesses of each of the charges, there is a reasonable probability that outcome of the court-martial as to all of the charges of which he was convicted and the sentence would have been different but for the improper arguments.

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[521] *See Nichol*, 2020 CCA LEXIS 178, at *48 (finding improper argument on findings was relevant to analyzing the prejudice arising from improper sentencing argument).

[522] *See* App. Ex. LII (member question asking whether [redacted] had any romantic experience with men before her first meeting with the accused).

Conclusion

This court should set aside the findings and sentence and remand for a rehearing.

VII

DEFENSE COUNSEL'S REPRESENTATION WAS INEFFECTIVE WHEN THEY FAILED TO OBJECT TO PORTIONS OF TRIAL COUNSEL'S CLOSING, REBUTTAL, AND SENTENCING ARGUMENTS.

Standard of Review

Issues of ineffective assistance of counsel are reviewed *de novo*. [523]

Discussion

Ineffective assistance of counsel claims are analyzed under the test in *Strickland v. Washington*, which requires appellant show trial defense counsel's performance was deficient and that the deficiency deprived appellant of a fair trial.[524] If an IAC claim is based on defense counsel's failure to object, an appellant must "show that counsel's performance fell below an objective standard of reasonableness" and he must "demonstrated that there is a reasonable probability that, but for counsel's error, there would have been a different result."[525]

[523] *United States v. Grigoruk*, 56 M.J. 304, 306 (C.A.A.F. 2002) (citation omitted).
[524] *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007).
[525] *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007).

Defense counsel cannot sit "like a bump on a log"; "they owe a duty to the client to object to improper argument early and often," and the failure to do so "may give rise to meritorious ineffective assistance of counsel claims.[526]

Here, the defense's failure to object to the government's misstatement of Ms. [redacted] testimony was especially critical. It earned no tactical advantages, as the defense counsel failed to address her statements (or lack of statements) during his own closing. By failing to correct this critical point either through a judicial instruction or by his own argument, the defense counsel allowed the trial counsel to argue a significantly different case than the one they actually had—one in which there was no evidence the complaining witness manifested a lack of consent until after the sex act began. The defense counsel similarly allowed the trial counsel to equate justice with convictions and "justice for the victims" with a long sentence.

Conclusion

This Court should set aside the findings and sentence.

[526] *United States v. Andrews*, 77 M.J. 393, 404 (C.A.A.F. 2018) (internal citations omitted).

VIII

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING PFC WILLIAMS' BRIG OBSERVATIONAL AND DISCIPLINARY REPORTS, ESPECIALLY WHEN SOME OF THE MISCONDUCT UNDERLYING THOSE REPORTS WAS THE SUBJECT OF A SEPARATE PENDING CRIMINAL PROCEEDING.

Standard of Review

The military judge's decision to admit or exclude sentencing evidence is reviewed under the abuse of discretion standard.[527] "A military judge abuses his discretion when he admits evidence based on an erroneous view of the law."[528]

Discussion

A. The military judge erred by admitting the brig reports based on an erroneous view of the law.

"In a sentencing proceeding, the prosecution may introduce certain personnel records of the accused."[529] The defense may object on grounds that the "record is inaccurate, incomplete, not made or maintained in accord with departmental regulations, or that the record otherwise contains impermissible evidence," or that other procedural rights were not provided to the appellant.[530]

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[527] *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019).
[528] *Id*.
[529] *United States v. Kahmann*, 59 M. J. 309, 312 (C.A.A.F. 2004).
[530] *See id*. (discussing NJP and summary court martial).

Here, the military judge did not consider the universe of applicable instructions and instead relied on a manual for brig administration that does not define personnel records. The military judge also failed to ensure that the evidence presented complied with the due process demands afforded by the manual that he did consider.

1. The case on which the MJ relied is distinguishable.

When he decided to admit the brig records, the military judge relied primarily on *United States v. Davis*, stating that "a similar challenged report was maintained in the prisoner's correctional treatment file was [sic] admitted at his court-martial under the authority of R.C.M. 1001(b)(2), specifically, citing United States Disciplinary Barracks Regulations 15-1."[531] The military judge missed several key distinctions between that case and the case before him.

First, the CAAF decided *Davis* under the plain error standard because the *Davis* defense counsel did not object to the admission of the brig records on the basis of R.C.M. 1001(b)(2). Here, the defense objected on several grounds and preserved the issue.

Second, the record admitted in *Davis* was a "Discipline and Adjustment Board Report," which necessarily implied that the records contained a final

[531] R. at 1251.

adjudication. But here there was no indication that the reports received a final adjudication (see below at 3).

Third, the military judge was the sentencing authority in *Davis*, and was presumed to give evidence the weight it deserved. But here, members were the sentencing authority and were likely strongly affected by the presentation of this evidence.

Fourth, the most pronounced distinction was that by the time of his court-martial Prisoner Davis was a post-trial prisoner and he had been for many years. He was initially convicted in 1981 (and sentenced to thirty years). While serving that sentence, he faced more convictions at general courts-martial. He faced convictions in 1987 for attempting to escape and in 1993—when the record was admitted against him—for conspiring to escape.[532] In sum, Davis was far removed from active duty by the time of the board report and its admission into sentencing evidence. There was no reason for an active personnel file to exist outside the brig and there was no evidence that one did exist. Davis' sole military connection by the time the records were created was confinement.

But PFC Williams was in a completely different status when his alleged brig misconduct took place. As a pretrial confinee, he was still part of his unit and his

[532] R. at 15. Amazingly, within that timeframe Davis faced two additional general courts-martial that did not result in convictions, and a disciplinary board.

unit remained administratively and, to some degree, operationally responsible for him.[533] When Marines have disciplinary issues, that misconduct is recorded and entered into the Marine's personnel record in accordance with the Individual Records Administration Manual.[534] Private First Class Williams' unit remained responsible for recording his misconduct if they considered it a personnel matter instead of a brig administrative matter. The unit could have, and should have, recorded that misconduct in a form in his personnel file if they wanted to present some record of it at his court-martial. That fact is highlighted in this case by his command's decision to put the brig misconduct before preliminary hearing in accordance with Article 32, UCMJ.[535]

2. The Individual Records Administration Manual defines Marine personnel record.

In *United States v. Harris*, the CAAF determined there was no error when a convening authority considered the appellant's pre-service misconduct via an enlistment waiver that was contained in his service record book during post-trial

[533] SECNAV M-1640.1, para. 7304 (release from pretrial confinement); *id*. para. 7303 (temporary release must be approved or disapproved by pretrial prisoner's parent command).
[534] Marine Corps Order P1070.12K W Ch. 1, Individual Records Administration Manual (July 14 2000) [IRAM].
[535] App. Ex. LXXV at 14 (Preliminary Hearing Officer's Report) (identifying Commanding General, 2D Marine Aircraft Wing, II MEF as person who directed the preliminary hearing, and identifying PFC Williams' organization as MACS-3, MACG-28, 2D MAW).

review.[536] The court first concluded that Rule 1001(b)(2) is a rule of admissibility intended to regulate the type of evidence submitted by counsel as part of the adversarial process during the presentencing hearing. But it determined that the Individual Records Administration Manual (IRAM), Marine Corps Order P1070.12, was "the relevant regulation" to consider the limits of a Marine's personnel record.[537] Ultimately, the court did not need to decide whether the document was properly maintained in the record because it instead concluded that since the documents were part of the service record book, "a repository of an enlisted Marine's personnel records," the appellant was on notice of the record and on notice that it could be considered by the convening authority.[538]

Here, the government neither argued nor showed any evidence that the disciplinary and observation reports were filed in PFC Williams' service record book. And the IRAM makes no mention of brig disciplinary reports (foreclosing any argument that such records automatically become part of an appellant's personnel file). The Corrections Manual likewise makes no mention of disciplinary reports becoming part of a pre-trial confinee's personnel record. PFC Williams' command likely *could* have entered a record of the underlying misconduct in the

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[536] 56 M.J. 480 (C.A.A.F. 2002).
[537] *Harris*, 56 M.J. at 482 ("Both parties agree that the relevant regulation is Marine Corps Order P1070.12 . . . of which we take judicial notice in this circumstance.").
[538] *Harris*, 56 M.J. at 483.

brig file into his personnel file. But its failure to do so does not open the door to introduction of the underlying material through the brig's own record-keeping system that serves a different purpose.[539]

3. The records were not final, the government presented no evidence of the final adjudication even after the defense attacked it, and the misconduct was set to be adjudicated in an entirely separate court-martial.

Even if this Court was otherwise inclined to accept the brig records as personnel records, it should reject them here for two reasons. First, the defense's challenge to the finality of the records—even related to the brig's own administrative processes—went unanswered. Second, at the time of the sentencing, charges had been preferred against PFC Williams for the misconduct underlying the records—indicating that PFC Williams' command *was* addressing the misconduct but that process, too, was not final.

In *United States v. Jerkins*, the CAAF considered whether a military judge abused her discretion by admitting a general officer memorandum of reprimand (GOMOR) into evidence during sentencing rebuttal.[540] In sentencing, the defense put on evidence of appellant's excellent military character through the testimony of several senior officers. The defense also requested that the rules of evidence be

[539] R. at 1226 (MSgt Moore testified that the records are for "programming" and determining what type of programs are required for prisoners).
[540] *United States v. Jerkins*, 77 M.J. 225 (C.A.A.F. 2018).

relaxed. In rebuttal, the government entered into evidence a GOMOR that had recently been issued to the appellant. The GOMOR stated that the reprimand was imposed as an administrative, not punitive, measure.[541] The major general also had not yet determined whether it would be entered into the appellant's OMPF, but he gave the appellant seven days to make a rebuttal. The defense attorney had requested more time to draft the statement, which had not yet expired at the time the time of the appellant's sentencing.[542]

The CAAF determined that appellant had not had a chance to rebut the statement, and therefore had not been provided "the normal due process required by Army regulations."[543] Furthermore, the record contained "an explicit suggestion that Appellant was not fit for continued service in the Army."[544] The Court decided that, regardless of whether the court applied the standard of prejudice for non-constitutional error or the standard for constitutional error, the government failed to meet its burden.

Here, the evidence was admitted in the government's sentencing case in chief, and the defense had not relaxed the rules of evidence. Yet the military judge

[541] *Id*. at 227.
[542] *Id*.
[543] *Id*. at 228.
[544] *Id*.

allowed admission of the documents even though the government failed to show that they adhered to the manual that the government and military judge relied on.

The Corrections Manual devotes a chapter to discipline, including discipline and adjustment boards. It provides no procedures for an inmate to respond to an observation report.[545] It provides that an appellant has a chance to rebut a disciplinary report, that the appellant may request a disciplinary and adjustment review board to adjudicate the alleged misconduct in a disciplinary report, and that the appellant should be granted access to an attorney before the board convenes.[546]

The foundation for the records in Prosecution Exhibit 10 (containing both disciplinary reports and an observational report) established that they were "created contemporaneously with the incidences they describe."[547] Master Sergeant Mike, when shown the records, testified that he could not determine what the final outcome was.[548] And the observation report did not contain any notation of adherence to procedural protections because there are none—a near-guarantee that none were provided. The government's failure to provide documentation that the procedural protections had been met, and whether the misconduct in the record was substantiated, should have deemed the records inadmissible.

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[545] *See* SECNAV M-1640.1
[546] *Id.* at 5-7.
[547] R. at 1226.
[548] R. at 1274, 1276.

Furthermore, the misconduct was the subject of preferred charges. By sentencing, these charges had already been to an Article 32 hearing, and the hearing officer had recommended referral.[549] As in *Jerkins*, PFC Williams' command had made a decision on how to adjudicate and document the misconduct—by preferring charges—but PFC Williams had not yet been able to fully exercise his rights to that process because it was still pending.

B. Admission of the brig records substantially influenced PFC Williams' sentence.

If evidence is erroneously admitted at sentencing, this Court tests for whether the error "substantially influenced the adjudged sentence."[550] This determination is made on the basis of four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question and (4) the quality of the evidence in question.[551]

Here, the government's sentencing case was relatively weak. The trial counsel submitted an NJP record and a counseling that both addressed minor, non-violent misconduct. They only called two witnesses—Ms. [redacted] mother and MSgt Mike. The mother testified that Ms. [redacted] had changed since the assault and was more withdrawn, but otherwise her testimony was not terribly

[549] App. Ex. LXXV.
[550] *Hamilton*, 78 M.J. 335, 343(internal citation omitted).
[551] *Id*.

impactful. Master Sergeant Mike was likewise not significantly impactful because, although his testimony was highly unfavorable, he had a weak foundation for providing it as he had only interacted with PFC Williams in the brig setting. He did not testify to the nature of his interactions, except that in the past month, he had become PFC Williams' liaison to his command and defense counsel and before that was the "programs officer" who supervised PFC Williams' other counselors.[552]

The defense case was relatively strong. Private First Class Williams' personal statement, corroborated by the testimony and letters of his mother and sisters, revealed a tragic, abusive childhood. But he rose above the abuse, was successful in the group home, and was academically and athletically gifted.

The materiality and quality of the brig report evidence was also strong. While the judge ordered redactions, the members were still exposed to what appeared to be an overwhelming amount of misconduct that, as trial counsel argued, showed someone unwilling to rehabilitate himself. This misconduct, in this format, was highly influential to members who heard that they could consider how poorly PFC Williams had "rehabilitated" thus far to estimate how long it would take him to rehabilitate.

[552] R. at 1267.

Conclusion

This Court should set aside the sentence and authorize a sentencing rehearing.

IX

PFC WILLIAMS HAS A RIGHT UNDER THE FIFTH AND SIXTH AMENDMENTS TO A UNANIMOUS VERDICT IN A COURT-MARTIAL FOR HIS SERIOUS CRIMES.

Standard of Review

The constitutionality of a statute, as applied, is a question of law; therefore, the standard of review is *de novo*.[553]

When an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is forfeited rather than waived."[554] In such a case, this Court reviews for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt."[555]

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[553] *United States v. Hennis*, 79 M.J. 370, 374-75 (C.A.A.F. 2020).
[554] *Tovarchavez*, 78 M.J. at 462. *Ramos* was decided in January 2020. PFC Williams' court-martial occurred in November 2020. Neither this Court nor the CAAF have determined whether a military accused has a right to a unanimous verdict in light of *Ramos*.
[555] *Id*.

Discussion

A. In light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), military accused have the right to unanimous verdicts in criminal trials at courts-martial.

Pursuant to Article 52, UCMJ, a person may be convicted of an offense "in a general or special court-martial with members . . . by the concurrence of at least three-fourths of the members present when the vote is taken." Only an offense punishable by death requires a unanimous finding of guilt.[556]

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[557]

The Supreme Court recently interpreted the Sixth Amendment's right to trial by an impartial jury in *Ramos*, holding:

> Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury trial must reach a unanimous verdict in order to convict.[558]

The Court pointed out that it has "repeatedly and over many years

[556] Art. 52(b)(2), UCMJ.
[557] U.S. CONST. amend. VI.
[558] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020).

recognized that the Sixth Amendment requires unanimity."[559] And the Court held that "[t]here can be no question . . . the Sixth Amendment's unanimity requirement applies to state and federal courts equally."[560]

1. The recognized right to unanimous verdicts in the Sixth Amendment applies to courts-martial.

"Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."[561] In general, the Bill of Rights applies to members of the military absent specific exception or certain overriding demands of discipline and duty."[562] Preceding *Ramos*, the CAAF relied on nearly eighty-year-old Supreme Court precedent to maintain that there is no Sixth Amendment Right to trial by jury in courts-martial.[563]

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[559] *Id*. at 1396.
[560] *Ramos*, 140 S. Ct. at 1397. On 17 May 2021, the Supreme Court held that the new rule of criminal procedure announced in *Ramos* does not apply retroactively to overturn final convictions on federal collateral review. *Edwards v. Vannoy*, No. 19-5807, 2021 U.S. LEXIS 2584 (U.S. May 17, 2021). The *Edwards* decision does not apply to direct appeals like this one.
[561] *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004).
[562] *United States v. Easton*, 71 M.J. 168, 174-75 (C.A.A.F. 2012) (citations omitted).
[563] *See, e.g.*, *Easton*, 71 M.J. at 175 (citing *Ex parte Quirin*, 317 U.S. 1, 39 (1942)); *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001) (citing *Ex parte Quirin*, 317 U.S. at 39-41); *United States v. Loving*, 41 M.J. 213, 285 (1994) (citing *Ex parte Quirin*, 317 U.S. at 39-41). But when the Supreme Court ruled on the Sixth Amendment's applicability to courts-martial, a court-martial only had jurisdiction if no civilian court had jurisdiction. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 20 (1955).

The Supreme Court has since recognized, however, that the "procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."[564] In *Ortiz*, the Supreme Court explained that "courts-martial 'have long been understood to exercise judicial power,' of the same kind wielded by civilian courts."[565] The Court placed the military-justice system fully on par with the District of Columbia courts and federal territorial courts.[566]

Ortiz and *Ramos* have effectively abrogated *Ex parte Quirin* and this Court should find that the Sixth Amendment requirement for unanimous juries extends to courts-martial panels, rendering Article 52, UCMJ, unconstitutional. *Ortiz* established that courts-martial are federal courts with long-standing judicial authority similar to state and federal criminal proceedings. *Ramos* clarified the constitutional procedural right to unanimous verdicts in criminal trials, extending to all federal and state courts. Extending unanimous verdicts to courts-martial acknowledges that courts-martial are long-standing criminal courts providing substantially similar procedural protections to military members.

Properly applying *Ramos* would ensure military members receive the due process protection of unanimous verdicts in criminal trials now clearly guaranteed

[564] *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018).
[565] *Id*. at 2175.
[566] *Id*. at 2178.

under the Sixth Amendment.

2. The Due Process Clause of the Fifth Amendment requires unanimous verdicts for serious offenses, even in courts-martial.

If a right applies under the Due Process Clause, "it applies to courts-martial just as it does to civilian juries."[567] The CAAF has already stated that "impartial court-members are a *sine qua non* for a fair court-martial."[568] If, as *Ramos* held, unanimous verdicts are necessary in the civilian criminal system to ensure impartiality, there is little upon which to base a conclusion that they are not equally necessary in a court-martial.

3. There is no indication in PFC Williams's case that the verdict was unanimous.

The members in PFC Williams's court-martial were instructed that a concurrence of three-fourths members was required for any finding of guilty.[569] Because the panel was eight members, six members had to concur in any finding of guilty.[570] There is no indication whether or not the finding of guilty was unanimous.

4. This Court should remand for a new trial.

This Court should determine that Article 52, UCMJ, permitting non-

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[567] *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).
[568] *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995).
[569] R. at 1189
[570] R. at 1189.

unanimous verdicts is unconstitutional in light of *Ramos* and *Ortiz* and remand PFC Williams's case for a new trial to be heard by a panel that must reach a unanimous verdict.

Private First Class Williams acknowledges that this Court may not believe it has the power to grant the relief sought.[571] Private First Class Williams seeks to preserve this issue for further appeal.

Respectfully Submitted,

3/16/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE.1395417726

Mary Claire Finnen
Major, USMC
Appellate Defense Counsel
1254 Charles Morris Street SE
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[571] *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining lower courts must "leav[e] to [the higher court] the prerogative of overruling its own decisions").

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court, via email, on 16 March 2022. I further certify that a copy of the foregoing was delivered to Director, Appellate Government Division, and electronically filed in CMTIS on the same day.

3/16/2022

X Mary Claire Finnen

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Signed by: FINNEN.MARY.CLAIRE.1395417726

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Subject: RECEIPT - FILING- PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def BRIEF
Date: Thursday, March 17, 2022 7:44:44 AM

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Court of Criminal Appeals

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Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
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Washington Navy Yard, DC 20374
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https://www.jag.navy.mil/nmcca.htm

[redacted]

Subject: PANEL 1- US v. Williams, Travonte NMCCA 202100094- Def Motion for Leave to File out of Time

To This Honorable Court:

Attached please find Appellant's redacted brief ICO U.S. v. Williams, NMCCA No. 202100094, for electronic filing.

Very Respectfully,

Maj Finnen

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
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IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES, Appellee v. Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	APPELLEE'S MOTION FOR SECOND ENLARGEMENT OF TIME Case No. 202100094 Tried at Marine Corps Air Station, Cherry Point, North Carolina, on March 6, April 30, September 22, October 1, November 5 and 30, and December 1–3, 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions) and Colonel K. Phillips, U.S. Marine Corps, (motions and trial) 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 May 15, 2022, to June 14, 2022, to answer Appellant's Brief and Assignments 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 April 6, 2021;

(B) The *Moreno III* date is October 6, 2023;

(C) Appellant is confined with an expected release date of August 31, 2030;

(D) The Record of Trial consists of 1349 transcribed pages and approximately 2882 total pages (excluding sealed exhibits and trial sessions);

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

(F) This case is complex. The United States tried Appellant for several sexual assault and assault charges against multiple Victims. Members convicted Appellant, after a week-long trial, of two specifications of sexual assault and two specifications of assault involving three Victims. He raises nine assignments of error involving: (1) legal and factual sufficiency of each conviction; (2) ineffective assistance of counsel; (3) prosecutorial misconduct; (4) admissibility of Appellant's brig misconduct reports; and (5) Appellant's right to a unanimous verdict.

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

Good cause exists for a Second Enlargement. Counsel has completed review of the Record and begun drafting the Answer but needs additional time to research the issues, complete the Answer, and ensure it completely and accurately represents the United States' settled position on Appellant's Assignments of Error.

Conclusion

The United States respectfully requests the Court grant this Motion and extend the time to file its Answer to June 14, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
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Navy-Marine Corps Appellate Review Activity
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Certificate of Filing and Service

I certify I uploaded this document into this Court's case management system and emailed it to this Court's filing address and Appellate Defense Counsel, Major Mary C. FINNEN, U.S. Marine Corps, on May 10, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel

[redacted]

Date: Tuesday, May 10, 2022 9:22:51 AM

MOTION GRANTED
10 MAY 2022
United States Navy-Marine Corps
Court of Criminal Appeals

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Navy-Marine Corps Court of Criminal Appeals
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Subject: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 2nd Enl (Blair)

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Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals

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Washington Navy Yard, DC 20374

[redacted]

[redacted]

Subject: FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 2nd Enl (Blair)

To This Honorable Court:

Please find attached Appellee's Motion for Second Enlargement of Time for electronic filing in United States v. Williams, NMCCA 202100094.

Thank you

Very Respectfully,
Capt Tyler W. Blair

_____

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[redacted]

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

Before Panel No. 1

UNITED STATES, Appellee	)	APPELLEE'S MOTION FOR THIRD ENLARGEMENT OF TIME
v.	)	Case No. 202100094
Travonte D. WILLIAMS, Private First Class (E-2) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station, Cherry Point, North Carolina, on March 6, April 30, September 22, October 1, November 5 and 30, and December 1–3, 7–10, 2020, by a general court-martial convened by Commanding General, 2d Marine Air Wing, Colonel K. S. Woodard, U.S. Marine Corps (motions) and Colonel K. Phillips, U.S. Marine Corps, (motions and trial) 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 June 14, 2022, to July 14, 2022, to answer Appellant's Brief and Assignments 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 April 6, 2021;

(B) The *Moreno III* date is October 6, 2023;

(C) Appellant is confined with an expected release date of August 31, 2030;

(D) The Record of Trial consists of 1349 transcribed pages and approximately 2882 total pages (excluding sealed exhibits and trial sessions);

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

(F) This case is complex. The United States tried Appellant for several sexual assault and assault charges against multiple Victims. Members convicted Appellant, after a week-long trial, of two specifications of sexual assault and two specifications of assault involving three Victims. He raises nine assignments of error involving: (1) legal and factual sufficiency of each conviction; (2) ineffective assistance of counsel; (3) prosecutorial misconduct; (4) admissibility of Appellant's brig misconduct reports; and (5) Appellant's right to a unanimous verdict.

B. Good cause exists given the need for further drafting, editing, and revision.

Good cause exists for a Third Enlargement. Counsel has completed review of the Record and approximately fifty-percent of the Answer but needs additional time to research the issues, complete the Answer, and ensure it completely and accurately represents the United States' settled position on Appellant's

Assignments of Error. Counsel does not anticipate seeking additional enlargements.

Conclusion

The United States respectfully requests the Court grant this Motion and extend the time to file its Answer to July 14, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
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 I uploaded this document into this Court's case management system and emailed it to this Court's filing address and Appellate Defense Counsel, Major Mary C. FINNEN, U.S. Marine Corps, on June 7, 2022.

Tyler W. Blair Digitally signed by Tyler W. Blair

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel

[redacted]

Subject: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 3rd Enl (Blair)
Date: Tuesday, June 7, 2022 3:33:49 PM

RECEIVED
JUNE 7 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]

[redacted]

Subject: FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 3rd Enl (Blair)

To This Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time for electronic filing in United States v. Williams, NMCCA 202100094.

Thank you

Very Respectfully,
Capt Tyler W. Blair

Tyler W. Blair
Captain, USMC
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]

Subject: RULING - RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 3rd Enl (Blair)
Date: Wednesday, June 8, 2022 10:17:02 AM

MOTION GRANTED
8 JUNE 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]

[redacted]

Subject: RECEIPT - FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 3rd Enl (Blair)

RECEIVED
JUNE 7 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]

[redacted]

Subject: FILING - Panel 1 - U.S. v. Williams - NMCCA 202100094 - Gov 3rd Enl (Blair)

To This Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time for electronic filing in United States v. Williams, NMCCA 202100094.

Thank you

Very Respectfully,
Capt Tyler W. Blair

_____

Tyler W. Blair
Captain, USMC
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Washington Navy Yard, D.C. 20374-5124

[redacted]

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Travonte D. WILLIAMS
Private First Class (E-2)
U.S. Marine Corps

Appellant

NMCCA No. 202100094

Panel 1

ORDER

To Produce
Trial Defense Counsel
Declarations

Upon consideration of the pleadings and the record of trial, we conclude that the standards established by *United States v. Lewis*, 42 M.J. 1, 5 (C.A.A.F. 1995) and *United States v. Melson*, 66 M.J. 346, 350-51 (C.A.A.F. 2008), for the Court-ordered production of sworn declarations, have been met as detailed below.

Accordingly, it is, by the Court, this 8th day of August 2022,

ORDERED:

1. That the Government contact Appellant's trial defense counsel, Mr. Richard McNiel, Esq., Captain Blake A. Dunham, USMC, and Captain Matthew J. Thomas, USMC, and secure, in the form of an affidavit, sworn declaration, or declaration under penalty of perjury in accordance with 28 U.S.C. § 1746, their responses to the following allegations made by Appellant:

a. Trial defense counsel were ineffective when they failed to move to suppress the statement Appellant made after law enforcement failed to advise him of any crime of which he was suspected.

b. Trial defense counsel were ineffective when they failed to object to portions of trial counsel's closing, rebuttal, and sentencing arguments.

2. That the Government will obtain the affidavits or declarations from defense counsel, and will file them with the Court not later than 8 September 2022.

FOR THE COURT:

[redacted]

S. TAYLOR JOHNSTON
Interim Clerk of Court

Copy to:
45 (Maj Finnen);
46; (Capt Blair; LT Rustico)
02

United States Navy–Marine Corps Court of Criminal Appeals

Before
HOLIFIELD, STEWART, and HACKEL
Appellate Military Judges

UNITED STATES
Appellee

v.

Travonte D. WILLIAMS
Private First Class (E-2), U.S. Marine Corps
Appellant

No. 202100094

Decided: 5 October 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
K. Scott Woodard (motions)
Kyle G. Phillips (arraignment and trial)

Sentence adjudged 10 December 2020 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 11 years, forfeiture of all pay and allowances, and a dishonorable discharge.[1]

For Appellant:
Major Mary Claire Finnen, USMC

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[1] Appellant was credited with having served 377 days of pretrial confinement.

For Appellee:
Captain Tyler W. Blair, USMC
Lieutenant Gregory A. Rustico, JAGC, USN

Senior Judge STEWART delivered the opinion of the Court, in which Chief Judge HOLIFIELD and Judge HACKEL joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

STEWART, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of sexual assault, one specification of abusive sexual contact, one specification of assault consummated by a battery, and one specification of assault, in violation of Articles 120 and 128, Uniform Code of Military Justice [UCMJ],[2] for sexually assaulting Ms. [redacted] touching the buttocks of Lance Corporal [LCpl] Whiskey, striking Ms. [redacted] on the head with his hand, and holding a knife to the face and neck of Ms. [redacted].[3]

Appellant asserts nine assignments of error [AOEs], which we combine and renumber as follows: (1) Appellant's convictions for sexual assault and abusive sexual contact are legally and factually insufficient; (2) Appellant's convictions for assault and assault consummated by a battery are factually insufficient; (3) Appellant received ineffective assistance of counsel; (4) trial counsel committed misconduct by repeatedly misstating the evidence in closing arguments, as well as improperly using propensity evidence; (5) the military judge abused his discretion when he admitted Appellant's brig observational and disciplinary reports into evidence; and (6) Appellant's right to a unanimous verdict was violated.[4] We find no prejudicial error and affirm.

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[2] 10 U.S.C. §§ 920, 928.

[3] All names in this in this opinion other than Appellant, the judges, and appellate counsel are pseudonyms.

[4] We find Appellant's sixth AOE lacks merit. *See United States v. Causey*, 82 M.J. 574, 586-87 (N-M Ct. Crim App. 2022) (declining to extend the holding in *Ramos v.*

I. BACKGROUND

Appellant was convicted of offenses against multiple victims, all of which occurred during 2019.

1. Abusive Sexual Contact of LCpl Whiskey

In February, 2019, Appellant and LCpl Whiskey were living in the same barracks. According to LCpl Whiskey, the two were not friends. However, she agreed to go skating with Appellant because no one else wanted to go. When Appellant tried to pay for her admission to the skating rink, LCpl Whiskey told him that it was not a date and paid for herself. During their time at the skating rink, Appellant attempted to put his arm around LCpl Whiskey, but she brushed it off.

After sharing a taxi back to the barracks, Appellant walked LCpl Whiskey to her room. He left, but returned and asked for a goodnight hug. They hugged goodnight and, while hugging her, Appellant grabbed LCpl Whiskey's buttocks without her consent. She immediately moved him out of her room and closed the door. She did not report the incident immediately, but revealed what had happened three months later when she was interviewed concerning Appellant's conduct involving another victim.

2. Sexual Assault and Assault of Ms. [redacted]

During the summer of 2019, Appellant met Ms. [redacted] through a mobile phone software application called Monkey. After chatting for a few weeks, Ms. [redacted] and Appellant agreed to meet. Appellant drove to Ms. [redacted] home and the two of them watched television in her bedroom and kissed. Appellant offered to give Ms. [redacted] a back massage because she had muscle damage in her back and Ms. [redacted] agreed. She lay down on her stomach and Appellant began massaging her. He then proceeded to pull down Ms. [redacted] shorts and underwear. She asked him why he was doing that and explained that only her back hurt. Appellant then held Ms. [redacted] wrists and penetrated her vagina with his penis. Ms. [redacted] struggled to get up, and Appellant stopped and got off the bed. She got off the bed and pulled her shorts back up, then told Appellant he needed to leave. Ms. [redacted] walked Appellant to his car and watched him drive away. She then took a shower, sat in bed, and cried. She did not immediately report the assault to law enforcement, but she told her sister what had happened and had

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Louisiana, 140 S.Ct. 1390 (2020), to courts-martial). *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

her sister drive her to the store to purchase a morning-after emergency contraception pill.

Approximately one month later Appellant returned to the house to talk to Ms. [redacted]. Appellant asked if they could talk in her bedroom, but Ms. [redacted] insisted they talk outside where her Ring security system would record everything.[5] Appellant and Ms. [redacted] talked for a few minutes before Appellant brandished a pocketknife and held it up to Ms. [redacted] face. Appellant pulled her closer to his car, holding the knife against her. While holding the knife against her face he asked, "what if [I] cut [you] here?" He then he moved the knife down to her neck and asked, "what if [I] cut [you] here, too?"[6] Appellant put the knife away, blocked her from entering the door to her home and then, after several failed attempts, forced Ms. [redacted] into the back seat of his car. Ms. [redacted] struggled with Appellant and eventually got out of the back seat. Appellant then told to Ms. [redacted] that he may have given her a sexually transmitted disease. Ms. [redacted] ran off and Appellant drove away. Appellant then called Ms. [redacted] and told her she should get tested. At this point Ms. [redacted] called the police to report Appellant's actions.

3. Assault of Ms. [redacted]

In November of 2019, Ms. [redacted] met Appellant via a software application called MeetMe. After talking, Appellant and Ms. [redacted] agreed to meet and go out to eat. Appellant picked up Ms. [redacted] near her house, but instead of driving to a restaurant he drove her to a secluded area and parked off the road. Appellant asked Ms. [redacted] what they were about to do, to which she replied "You can take me home."[7] Appellant attempted to persuade Ms. [redacted] to have sex with him, but she was adamant that she was not interested.

While they continued to sit in his car, Appellant became angry that Ms. [redacted] was on her phone and attempted to take it from her. He pulled her hair and hit her in the face. Appellant then took the phone from Ms. [redacted] but gave it back when she threatened to use mace on him. Appellant then snatched the mace out of her hand and threatened to mace her if she did not get into the back seat. Ms. [redacted] got into the back seat with Appellant, but remained adamant that she was not going to have sex with him. Appellant

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[5] Pros. Ex. 9. The ring video did not capture Appellant's actions as the front porch pillar obscures Appellant and Ms. [redacted] as they approached his car.

[6] R. 669.

[7] R. 548.

again became violent and tried to pull Ms. [redacted] toward him. She fought back and was able to get out of the car. She screamed for help and ran toward the road, where, after a few minutes, she was able to flag down two police officers. Appellant sped away once Ms. [redacted] left the car.

Ms. [redacted] suffered a split lip from Appellant's attack. She immediately reported the incident to law enforcement.

Additional facts necessary to address the AOEs are provided below.

II. DISCUSSION

A. Appellant's Convictions are Legally and Factually Sufficient

Appellant asserts the evidence is legally and factually insufficient to support his convictions for sexual assault and abusive sexual contact. He asserts that the evidence is factually insufficient to support his convictions for assault consummated by a battery and simple assault.[8] We review such questions de novo.[9]

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[10] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[11]

In evaluating factual sufficiency, we determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the [appellant's] guilt beyond a reasonable doubt."[12] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption

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[8] Although Appellant does not challenge the legal sufficiency of his convictions for assault consummated by a battery and simple assault we nevertheless review the legal sufficiency of every offense in accordance with our mandate under Article 66, UCMJ.

[9] Article 66(d)(1), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[10] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[11] *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

[12] *Turner*, 25 M.J. at 325.

of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[13] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[14]

1. Sexual Assault and Simple Assault

Appellant was found guilty of sexually assaulting Ms. [redacted] on or about 16 July 2019, for committing a sexual act upon Ms. [redacted] by penetrating her vulva with his penis without her consent. He was additionally found guilty of simple assault against Ms. [redacted] on or about 15 August 2019 for holding a knife to her face and neck.

To prove sexual assault as charged, the Government was required to prove that: (1) Appellant committed a sexual act upon Ms. [redacted] by causing penetration, however slight, of the vulva by the penis; and (2) he did so without Ms. [redacted] consent.[15]

To prove simple assault as charged, the Government was required to prove that: (1) Appellant attempted to do or offered to do bodily harm to Ms. [redacted]; (2) the attempt or offer was done unlawfully; and (3) the attempt or offer was done with force or violence.[16]

Ms. [redacted] testified that Appellant penetrated her vulva with his penis, and that he did so without her consent. Ms. [redacted] further testified that Appellant grabbed her and brandished a pocket knife, holding the knife against her face and neck and asking "what if [I] cut [you] here?"[17]

2. Abusive Sexual Contact

Appellant was convicted of abusive sexual contact upon LCpl Whiskey between on or about 1 February 2019 and 28 February 2019, by touching her buttocks without her consent and with the intent to arouse his sexual desire.

To prove the offense as charged, the Government was required to prove that: (1) Appellant committed sexual contact upon LCpl Whiskey by touching

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[13] *Washington*, 57 M.J. at 399.

[14] *United States v. Rankin,* 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

[15] Art. 120, UCMJ.

[16] Art. 128, UCMJ.

[17] R. at 669.

her buttocks with his hand with the intent to gratify or arouse his sexual desire; and (2) he did so without LCpl Whiskey's consent.[18] "Intent can be shown by circumstantial evidence."[19]

Lance Corporal Whiskey testified that there was no romantic relationship between her and Appellant. She agreed to go ice-skating with him because no one else was willing to go, but she was clear that it was not a date. She further testified that after getting back to the barracks, Appellant hugged her goodnight and grabbed her buttocks without her consent. Appellant's actions of grabbing LCpl Whiskey's buttocks, as well as his earlier attempt to put his arm around her at the skating rink, provide circumstantial evidence that the grabbing was done with the intent to arouse his sexual desire.

3. Assault Consummated by a Battery

Appellant was found guilty of assaulting Ms. [redacted] by striking her in the head with his hand.

To prove the offense as charged, the Government was required to prove that: (1) Appellant did bodily harm to Ms. [redacted] by striking her in the head with his hand; (2) the bodily harm was done unlawfully; and (3) the bodily harm was done with force or violence.[20] Bodily harm means "an offensive touching of another, however slight."[21]

Ms. [redacted] testified that Appellant drove her to a secluded area, where he attempted to persuade her to have sex. Appellant became angry when Ms. [redacted] was on her phone and attempted to take it away from her. She testified that when he tried to take her phone Appellant pulled her hair and struck her in the head with his hand.

4. Appellant's Convictions are Legally and Factually Sufficient

After weighing the evidence in the record of trial, and making every reasonable inference in favor of the prosecution, we are satisfied a reasonable factfinder could have found all the essential elements of each charge and specification beyond a reasonable doubt and are legally sufficient to support Appellant's convictions. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,

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[18] Art. 120, UCMJ.

[19] *United States v. Acevedo*, 77 M.J. 185, 189 (C.A.A.F. 2018).

[20] Art. 128, UCMJ.

[21] *Manual for Courts-Martial, United States*, (2019 Ed.), pt. IV, para 77(c)(1)(a) at IV-118.

we are convinced of Appellant's guilt beyond a reasonable doubt and find that the evidence is factually sufficient to support Appellant's convictions.

B. Trial Defense Counsel were Not Ineffective

Appellant asserts that his trial defense counsel were ineffective for failing to move to suppress the statement Appellant made to law enforcement and for failing to object to portions of trial counsel's closing, rebuttal, and sentencing arguments.

We review claims of ineffective assistance of counsel de novo.[22] To prevail on such a claim, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice."[23] The appellant bears the "burden of establishing the truth of factual matters relevant to the claim."[24] Only after an appellant has met his burden and has demonstrated both deficiency and prejudice can we find in the appellant's favor on an ineffective assistance of counsel claim.[25]

To establish the element of deficiency, an appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[26] A military appellate court "will not second-guess the strategic or tactical decisions made at trial by defense counsel."[27] If an appellant raises the issue of ineffective assistance of counsel based upon a challenge against the trial strategy or tactics of the defense counsel, "the appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'"[28] Only after an appellant has met his burden and has demonstrated both deficiency and prejudice can we

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[22] *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009); *United States v. Cooper*, 80 M.J. 664, 672 (N-M. Ct. Crim. App. 2020).

[23] *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (other citation omitted).

[24] *Denedo v. United States*, 66 M.J. 114, 128 (C.A.A.F. 2008).

[25] *Cooper*, 80 M.J. at 672.

[26] *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (quoting *Strickland*, 466 U.S. at 489).

[27] *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001) (quoting *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)).

[28] *Mazza*, 67 M.J. at 475 (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)) (cleaned up).

find in the appellant's favor on an ineffective assistance of counsel claim.[29] Strategic decisions to accept or forgo a potential benefit are not deficient when the decisions are objectively reasonable.[30] Furthermore, "it is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice."[31]

1. Trial Defense Counsels' tactical decision not to challenge Appellant's statement was reasonable

"[W]hen a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious."[32] In this regard, the term "meritorious" is synonymous with "successful."[33] "[T]he decisional issue is whether Appellant has carried his burden to show that his counsel would have been successful if he filed a timely motion."[34]

Appellant argues that his statements made to law enforcement during his interrogation by Detective Lima of the New Hanover County Sheriff's Office should have been suppressed because Appellant was not advised of his rights under Article 31(b), UCMJ, before being questioned.

According to Article 31(b), UCMJ,

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made

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[29] *Cooper*, 80 M.J. at 672.

[30] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012).

[31] *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012). *See also, Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

[32] *United States v. Jameson*, 65 M.J. 160, 163-64 (C.A.A.F. 2007) (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F 2001) (motion to suppress evidence)).

[33] *Id.* at 164.

[34] *Id.*

> by him may be used as evidence against him in a trial by court-martial.[35]

Additionally, under Military Rule of Evidence [Mil. R. Evid.] 305, "person subject to the code" includes "a knowing agent of any such person."[36] Our superior Court has explained that there are at least two scenarios in which civilian law enforcement officers such as Detective Lima working with military investigators must comply with Article 31(b): "(1) When the scope and character of the cooperative efforts demonstrate 'that the two investigations merged into an indivisible entity' and (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military."[37]

In this case, Appellant was interrogated by Detective Lima while Special Agent [SA] [redacted] of the Naval Criminal Investigative Service [NCIS] was in the room observing the interrogation. Appellant was read his *Miranda* rights by Detective Lima before questioning but was not given specific warnings under Art. 31(b).[38] When Detective Lima concluded his interview, SA [redacted] conducted his own interrogation after advising Appellant of his 31(b) warnings. Prior to interrogating Appellant, Detective Lima had discovered through several law enforcement databases that NCIS was also separately investigating Appellant on multiple allegations of sexual assault. He spoke with another NCIS agent, SA [redacted], multiple times to coordinate an interview with Appellant. He met with SA [redacted] the day before the interview and exchanged investigation reports with her as he continued investigating Ms. [redacted] allegations.

In their declarations on the issue, trial defense counsel explained that they discussed the possibility of moving to suppress Appellant's statements but ultimately made a tactical decision not to do so because allowing the statements into evidence was more beneficial to Appellant's case than it was harmful. Specifically, trial defense counsel explained that the admissions made by Appellant during the interrogation helped raise the argument that Ms. [redacted]

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[35] Art. 31(b), UCMJ.

[36] Mil. R. Evid. 305(b)(1).

[37] *United States v. Brisbane*, 63 M.J. 106, 111 (C.A.A.F. 2006) (internal quotations and citations omitted).

[38] *Miranda v. Arizona*, 384 U.S. 436 (1966).

only made her allegation of sexual assault after Appellant informed her that he may have given her a sexually transmitted disease.[39]

Appellant has failed to demonstrate that trial defense counsels' tactical decision to allow his statements into evidence was "unreasonable under prevailing professional norms."[40] Even if we assume trial defense counsels' decision was unreasonable, Appellant has failed to show that a motion to suppress his statements made to Detective Lima would have been meritorious. Although SA [redacted] was present during Detective Lima's interrogation, the record does not demonstrate that the two investigations merged into an indivisible entity, nor that Detective Lima was acting in furtherance of any military investigation. During Detective Lima's interrogation, SA [redacted] remained a passive bystander and did not question Appellant until he conducted his own interrogation later. Appellant argues that Detective Lima and SA [redacted] discussed the interrogation before Detective Lima asked Appellant additional questions. However, this discussion does not demonstrate that Detective Lima's additional questions were in furtherance of SA [redacted] investigation. Indeed, rather than have Detective Lima ask questions for him, SA [redacted] conducted his own interrogation of Appellant after Detective Lima had finished.

Because Appellant has failed to prove that trial defense counsel's tactical decision not to challenge the admission of his statements to Detective Lima was unreasonable and has further failed to demonstrate that a motion to suppress those statements had a reasonable probability of success, he fails to show that his trial defense counsel were ineffective for failing to file a motion to suppress based on the alleged violation of Article 31(b). Furthermore, even assuming that a motion to suppress Appellant's statements would have been successful, we do not believe that the suppression of such evidence would have resulted in a different result at trial as the weight of evidence rested with the testimony of the victims. Moreover, the statement on its face permitted Appellant to provide his account without being subjected to cross-examination. We thus find that Appellant has failed to establish he was prejudiced by trial defense counsels' alleged error.

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[39] Contrary to Appellant's claim in his brief, his denial of sexual assault and later admission that he returned at a later date to inform Ms. [redacted] that he may have given her a sexually transmitted disease are not contradictory under these facts. During his interrogation, Appellant explained to Detective Lima that he kissed Ms. [redacted] and believed that he may have transmitted something to her while kissing. He continued to deny that he ever engaged in sexual intercourse with Ms. [redacted].

[40] *Mazza*, 67 M.J. at 475 (internal citation and quotation omitted).

2. *Trial defense counsels' tactical decision not to object to trial counsel's closing, rebuttal, and sentencing arguments was reasonable*

Appellant argues that his trial defense counsel were ineffective for failing to object during trial counsel's closing, rebuttal, and sentencing arguments in that trial counsel misstated Ms. [redacted] testimony by claiming that she told Appellant "no" and "stop."[41]

Trial counsel argued,

> The defense counsel focused on reasonable mistake of fact as to consent, meaning if he reasonably believed she wanted to have sex then he's not guilty. Well, he may have believed that at some point. But the second she said; no. Stop. What are you doing? Trying to pull her shorts up; no. What are you doing? Stop. The second she did that, that defense is eliminated. And that's what happened in this case.[42]

When Ms. [redacted] testified that, shortly after asking Appellant "what are you doing?" and "why?" Appellant pinned her hands above her head while she was still lying face down on the bed. Once Appellant inserted his penis into Ms. [redacted] vagina against her will, she detailed how she "gritted her teeth and tr[ied] to raise up," as an attempt to get Appellant off of her. Ms. [redacted] also testified that after she finally got Appellant off of her, he said he was sorry in an attempt to make the situation die down. This illustrated Appellant's awareness and acknowledgement of his misconduct. Based on this evidence, and civilian defense counsel's affidavit, in which he stated he felt trial counsel had struck "hard blows, but not foul blows,"[43] trial counsel's closing arguments relating to Ms. [redacted] telling Appellant "no" and "stop" were not improper and were a reasonable characterization of her testimony drawn from the evidence as a whole.[44]

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[41] R. at 1184.

[42] R. at 1184.

[43] Aff. of civilian defense counsel, at 2 (quotations removed).

[44] *See United States v. Patrick*, 78 M.J. 687 (N-M. Ct. Crim. App. 2018) (Trial counsel did not commit misconduct but made "reasonable inferences from the evidence," when he claimed male DNA found inside the victim's vagina proved the appellant penetrated the victim. The Court looked at the totality of the DNA expert's testimony to "conclude the comments [were] not a misrepresentation.")

C. Trial counsel did not commit Misconduct

Appellant argues that trial counsel repeatedly misstated the evidence during his closing and rebuttal arguments. Specifically: (1) that he improperly argued propensity evidence to prove Appellant's guilt; (2) that he improperly commented on Appellant's invocation of a constitutional right; (3) that he maligned Appellant's counsel and argument; (4) that he impermissibly argued that the members would be doing their "duty" and "doing justice" by convicting Appellant; and, (5) that his sentencing argument was improper because he focused on "justice for the victims."

"Improper argument is one facet of prosecutorial misconduct."[45] Prosecutorial misconduct occurs when trial counsel "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[46] Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon."[47]

The context of trial counsel's comment is key.[48] Challenged argument is reviewed not based "on words in isolation," but "must be viewed within the context of the entire court-martial."[49] "When a trial counsel makes an improper argument during findings, 'reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'"[50]

When the accused objects to an improper argument during his court-martial, we review the issue de novo.[51] In that de novo review, we determine

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[45] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

[46] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84, 55 (1935)).

[47] *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

[48] *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) ("A prosecutorial comment must be examined in light of its context within the entire court-martial").

[49] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citing *United States v. Young*, 470 U.S. 1, 16 (1985)) (internal quotation marks omitted).

[50] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *United States v. Andrews*, 77 M.J. at 393, 401-02 (C.A.A.F. 2018)).

[51] *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

whether any error materially prejudiced the appellant's substantial rights under Article 59, UCMJ.[52] On the other hand, "where . . . no objection is made, we review for plain error."[53] "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused."[54] The burden of proof under a plain error review is on the appellant, [55] and, "the lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'"[56]

1. Misstatement of the Evidence

Appellant argues that trial counsel committed error by repeatedly misstating the evidence, specifically, Ms. [redacted] testimony about what happened during the sexual assault. As stated above, we find trial counsel's arguments were not improper, but a reasonable characterization drawn from the evidence as a whole. Even assuming trial counsel's arguments did constitute error, we find that the error was not plain or obvious, and that Appellant has not demonstrated that his substantial rights were materially prejudiced.

2. Propensity Evidence

Appellant argues that trial counsel improperly argued propensity evidence. During the trial counsel's closing argument and rebuttal, civilian defense counsel objected once, when trial counsel stated: "Members, there's few things that we know for absolute certainty in this world. One thing we do know, is that lightning does not strike the same place five times."[57] The military judge sustained the objection and immediately instructed the members to disregard the statement. Having considered trial counsel's statement in the context of the court-martial as a whole, we are convinced that the judge's immediate instruction to the members to disregard the statement was sufficient to address the

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[52] 10 U.S.C. § 859; *Fletcher*, 62 M.J. at 179.

[53] *Voorhees*, 79 M.J. at 9 (citing *Andrews*, 77 M.J. at 398).

[54] *Fletcher*, 62 M.J. at 179 (citation omitted).

[55] *See United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

[56] *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

[57] R. 1187.

improper argument. Further, we are confident that the members convicted Appellant based on the evidence alone and not due to the trial counsel's improper statement.[58]

3. Appellant's remaining allegations of error do not constitute plain error

We test Appellant's remaining allegations for plain error because they were not objected to at trial. Specifically, we review his assertions that trial counsel improperly commented on Appellant's invocation of a constitutional right, that he maligned Appellant's counsel and argument, that he impermissibly argued that the members would be doing their "duty" and "doing justice" by convicting Appellant, and that his sentencing argument was improper because he focused on "justice for the victims."

Having reviewed Appellant's allegations and considering trial counsel's arguments in context of the court-martial as a whole, we are satisfied that trial counsel did not engage in improper argument and there was no error. Trial counsel's arguments fell within the realm of professional norms expected of officers of the court, were reasonable inferences of the evidence, fair responses to the Defense closing argument, and refrained from commenting on Appellant's constitutional right to remain silent. Even assuming trial counsel's arguments did constitute error, we find that the error was not plain or obvious, and that Appellant has not demonstrated that his substantial rights were materially prejudiced.

D. The Military Judge did not Abuse His Discretion in Admitting Appellant's Brig Observation and Disciplinary Record

Appellant objected to the Government's introduction of his brig observational and disciplinary reports in its sentencing case. Particularly, Appellant takes issue with the Government's assertion that the records are admissible under Rule for Courts-Martial [R.C.M.] 1001(b)(2) by asserting they were personnel records, unduly prejudicial and inadmissible under Mil.R.Evid. 403 due to the fact that the unadjudicated misconduct allegations would overshadow the offenses for which he was found guilty. The military judge determined that the DD 2713 (Prisoner Observation Report) and DD2714 (Prisoner Disciplinary Report/Action) were admissible under R.C.M. 1001(b)(2) (personal data and character of prior service of the accused), but not R.C.M. 1001(b)(3) (evi-

[58] We note that the members acquitted Appellant of seven out of eleven specifications of the charges he faced, which further convinces us that they were not improperly influenced by trial counsel's claim and evaluated each specification individually.

dence of prior convictions of the accused). He also ordered the synopsis of allegations and narrative redacted in each of the DD 2713s and did not allow statements appended to the records.

R.C.M. 1001(b)(2) permits trial counsel to submit evidence of the accused's "character of prior service" from "personnel records of the accused" which are governed by "the regulations of the Secretary concerned."[59] This includes "copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions." Per SECNAV M-1640.1, brig observations reports "on DD 2713 provide a means of formally documenting…minor infractions."[60] Disciplinary reports on "DD 2714" document "serious offenses" or "a pattern of unacceptable behavior such as a series of documented minor infractions in a short time period."[61] "Copies of all investigations and [disciplinary board] proceedings will become a part of the prisoner's confinement record . . . [a] disciplinary log must be maintained to record each [disciplinary report] . . . this log information will be populated within the Correctional Management Information System."[62]

We review a military judge's decision to admit sentencing evidence for an abuse of discretion.[63] This standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[64] Abuse of discretion is a strict standard, calling for more than a mere difference of opinion; it must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.[65]

In *United States v. Davis*, our superior Court highlighted R.C.M. 1001(b)(2)'s simple definition that personnel records "include [ ] any records made or maintained in accordance with departmental regulations that reflect past military efficiency, conduct, performance, and history of the accused."[66]

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[59] R.C.M. 1001(b)(2).

[60] SECNAV M-1640.1 § 5102.2.d (May 15, 2019)

[61] *Id*. at § 5102.2.e.

[62] *Id*. at § 5102.3.3.11

[63] *United States v. Stephens*, 65 M.J. 233, 235 (C.A.A.F. 2009).

[64] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

[65] *United States v. White*, 69 M.J. 237, 239 (C.A.A.F. 2010) (citations omitted).

[66] *United States v. Davis*, 44 M.J. 13, 20 (C.A.A.F. 1996) (citing *United States v. Vaughn,* 3 C.M.A. 121, 124 (C.M.A. 1953) ("The commandant of a military disciplinary

Here, like in *Davis*, the military judge found that Appellant's brig disciplinary reports were personnel records in line with R.C.M. 1001(b)(2). Additionally, the military judge appropriately limited the evidence by requiring trial counsel to redact large portions of the reports he believed were inadmissible, which eliminated summaries of the alleged misconduct.[67]

Deference is due to the military judge in this case. Any evidence admitted under R.C.M. 1001(b)(2) is still subject to the balancing test of Mil. R. Evid. 403.[68] Courts give deference to a military judge who articulates the balancing test on the record.[69] Here, the military judge admitted the evidence under R.C.M. 1001(b)(2), appropriately limited the scope of the evidence, and evaluated the evidence under Mil. R. Evid. 403 and placed his reasoning on the record.[70] Consequently, we find the military judge did not abuse his discretion when he admitted the Appellant's brig observation and disciplinary record into evidence.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[71]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

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barracks…is at the same time prison warden and the military commander set over the men confined in his penal institution).

[67] R. 1252-52. (Compare Pros. Ex. 10, with Appellate Ex. XXXIV).

[68] *United States v. Jerkins*, 77 M.J. 225, 229 (C.A.A.F. 2018).

[69] *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000); *see also United States v. Halfacre*, 80 M.J. 656, 661-62 (N-M. Ct. Crim. App. 2020).

[70] *See Halfacre*, 80 M.J. at 661-62.

[71] Articles 59 & 66, UCMJ.

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
1254 CHARLES MORRIS STREET SE
WASHINGTON NAVY YARD DC 20374-5214

5814
40/ 202100094
7 Dec 23

From: Branch Head, Court-Martial Records Branch (Code 40)
To: Commanding General, 2d Marine Aircraft Wing
Via: Officer-In-Charge, Legal Services Support Section East

Subj: NOTIFICATION OF COMPLETION OF APPELLATE REVIEW IN THE GENERAL COURT-MARTIAL OF PRIVATE FIRST CLASS TRAVONTE D. WILLIAMS, USMC – NMCCA 202100094

Ref: (a) Article 57 (c)(2), UCMJ
(b) Article 66, UCMJ
(c) RCM 1209 (a)(1)(B)(ii), MCM 2019

Encl: (1) Post Trial Action of 24 Feb 21 and Entry of Judgment of 23 Mar 21
(2) NMCCA Opinion of 5 Oct 22
(3) CAAF Denial Order of 23 May 23
(4) Naval Clemency and Parole Board Clemency Review of 5 Sep 23

1. Private First Class (PFC) Travonte D. Williams, USMC – NMCCA 202100094 was arraigned, tried, and convicted at a General Court-Martial convened by the Commanding General, 2d Marine Aircraft Wing. PFC Williams was sentenced on 10 December 2020, to reduction to E-1, forfeiture of all pay and allowances, 11 years confinement, and to be discharged from the United States Marine Corps with a Dishonorable Discharge. (Encl. 1)

2. In an Opinion issued 5 October 2022, the United States Navy-Marine Court of Criminal Appeals (NMCCA), affirmed the findings and sentence of the General Court-Martial. (Encl. 2)

3. PFC Williams petitioned the decision of the NMCCA to the United States Court of Appeals for the Armed Forces (CAAF). CAAF denied the petition for review in a CAAF Denial Order issued 23 May 2023. (Encl. 3)

4. The 11 year sentence awarded to PFC Williams triggered an automatic clemency review by the Naval Clemency and Parole Board (NC&PB). PFC Williams was denied clemency by the NC&PB on 16 August 2023. (Encl. 4)

5. Accordingly, all appellate review is now complete in the General Court-Martial of Private First Class Travonte D. Williams. The Dishonorable Discharge awarded to Private First Class Travonte D. Williams may now be executed.

6. Point of contact for this matter is Mr. [redacted] Branch Head, Court-Martial Records; [redacted]

Copy to:
Appellant
SJA, 2d MAW
NAMALA
USDB FT Leavenworth