

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

UNITED STATES)	VICTIM'S MOTION OPPOSING
)	PRODUCTION OF T.K. AS DEFENSE
V.)	WITNESS
)	
)	
)	
XXXX X XXXX)	
XXX/X-X, USN)	

1. Nature of Motion

Per R.C.M. 703(e) (2)(F) , N.B., through counsel, respectfully requests that this Court to deny the Defense's request to produce T.K. at trial and direct the government to withdraw their subpoena.

2. Summary of Facts

- a. N.B. is the mother and legal guardian of T.K., now aged seven years old. See Enclosure (1) of Defense Request for In Camera Review, dated 11 June 2014.
- b. In 2012, T.K. was interviewed by NCIS and reported that daddy hurts mommy. Id.
- c. In 2014, T.K. was interviewed by the government and indicated he did not remember what happened. See Supplement Request for Production of Witnesses, dated 11 August 2014.
- d. The defense has now requested that T.K. be produced to testify that he does not remember what happened. Id.

3. Standing

R.C.M. 703(e) (2)(F) gives the right for the person subpoenaed to request relief from the Court on the grounds that compliance would be unreasonable or oppressive. As the custodial

parent of T.K., N.B. has standing to petition the Court for relief. See United States v. Ferdinand, 29 M.J. 164, 165-166 (C.M.A. 1989) (for contempt proceedings, service was effective when the child's mother was served directing her to produce the child in court)¹.

4. Discussion

T.K., now age seven, is being called for the purpose of testifying to events that happened from ages three to five. "Childhood amnesia," or the inability to access early childhood memories, is a phenomenon first recognized by Sigmund Freud.² It is now thought that this occurs because the brain is still learning to encode long-term memories. The neural architecture that underlies this ability needs time to develop. When children are very young the hippocampus, a part of the brain crucial to memory, is still undergoing neurogenesis: new neurons are constantly being produced and high rates of decay render hippocampus-dependent memories inaccessible at later time points.³ The formation and retrieval of memory depends upon consolidation, or in other words, experiences being stabilized for long term storage.⁴ During much of childhood, the long, slow development of structures within the brain impact this consolidation process so new memories are stored slowly and less effectively.⁵ As a consequence, the long-term memories formed in our early years of life are the least stable

¹ Although the government issued a subpoena, N.B. is not conceding it was proper in form or properly served.

² Sigmund Freud. (1905/1953) *Childhood and concealing memories*. The Basic Writings of Sigmund Freud. (Brill, A.A., transl. and ed.).

³ Katherine G. Akers, *Hippocampal Neurogenesis Regulates Forgetting During Adulthood and Infancy*, *Science*, Vol. 344 no. 6184, at 598-609 (May 2009)

⁴ Patricia Bauer, *The Life I Once Remembered, The Waxing and Waning of Early Memories*, www.zerotothree.org (2009).

⁵ Id.

memories we ever make and highly prone to disintegrating as we age.⁶ Clinical studies have shown that early memories fade between ages seven and eight.⁷

In this case, T.K.'s inability to recall events at age seven that he could recall at age five appears to be part of normal, childhood development. It is unreasonable and oppressive to ask him to recall events that he may no longer have the neurological capacity to access.

5. Relief Requested

N.B., through counsel, respectfully requests that this Court order the respectfully requests that this Court to deny the Defense's request to produce T.K. at trial direct the government to withdraw their subpoena.

6. Argument N.B., through counsel, desires oral argument on this motion.

A.M. LUNDWALL
LCDR, JAGC, USN
Victims' Legal Counsel
For N.B.

⁶ Id.

⁷ Patricia Bauer and Marina Larkina, *The Onset of Childhood Amnesia in Childhood: a Prospective Investigation of the Course and Determinants of Forgetting of Early-Life Events*, *Memory* (2013) (children tested aged five, six, and seven remembered 60 percent or more of the early-life events from age three but children aged eight and nine years remembered fewer than 40 percent of the early-life events); See also Patricia Bauer, *The Life I Once Remembered, The Waxing and Waning of Early Memories* (five-and-a-half-year-olds remembered more than 80 percent of experiences they had at age three, whereas six-and-a-half year olds remember 60 percent, and seven-and-a-half-year-olds remembered less than 40 percent).

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel on 27 August 2014.

A.M. LUNDWALL

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

UNITED STATES

V.

[REDACTED]

[REDACTED] /E-4, USN

) DEFENSE'S RESPONSE TO
) VICTIM'S MOTION OPPOSING
) PRODUCTION OF T.K. AS DEFENSE
) WITNESS
)
)
)
)

1. Nature of Motion

The Defense respectfully requests this Court to deny N.B.'s Motion Opposing Production of T.K. as Defense Witness.

2. Summary of Facts

For purposes of this motion only, Defense adopts the facts presented in N.B.'s motion.

3. Discussion

The Victim's Legal Counsel May Not Move the Court to Quash the Subpoena for T.K.

a. LCDR Lundwall has moved the court on behalf of N.B. to quash the subpoena requiring the production of T.K. as a witness in HM3 Berger's general court-martial. As an initial matter, the Victim's Legal Counsel may not raise this motion before this Court as such activity exceeds the scope of her limited representation of N.B. Navy Victims' Legal Counsel (VLC) are limited in their scope of representation by the Secretary of the Navy and the Judge Advocate General of the Navy. NAVADMIN 087/14, 151543Z APR 14, CNO WASHINGTON DC, SUBJECT: ESTABLISHMENT OF NAVY VICTIMS' LEGAL COUNSEL (VLC) PROGRAM; *See*, U.S. DEP'T OF NAVY OFFICE OF THE JUDGE ADVOCATE GENERAL, INSTR. 5803.1C, PROFESSIONAL

CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE
ADVOCATE GEN. R. 1.2 09 Nov. 2004. Only sexual assault victims who are members or
dependents are entitled to representation by Victim's Legal Counsel. *See*, 10 U.S.C. §1565B.
T.K. is not the named alleged victim of sexual assault. As such, he is not entitled to
representation by Victim's Legal Counsel.

b. Although N.B., as the parent of T.K., has standing to oppose the production of T.K. as
a witness for trial, N.B.'s VLC may not argue for this relief because of the limited scope of
representation authorized by competent authority. The scope of representation provided by
competent authority is limited to "represent[ation of] the victim in military justice proceedings
where the victim has an interest and right to be heard by the court." ESTABLISHMENT OF NAVY
VICTIMS' LEGAL COUNSEL (VLC) PROGRAM NAVADMIN 087/14. This scope cannot be read so
broadly as to permit advocacy on all issues affecting the client that are tangentially related to
alleged sexual misconduct.

**Compliance With the Subpoena is Not Unreasonable or Oppressive, and Production
is Required Under R.C.M. 703**

a. The person requesting relief from the subpoena must claim that compliance is
unreasonable or oppressive. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M.
703(e)(2)(F) (2012). Once claimed, the military judge must determine if withdrawal is
appropriate. *Id.*

b. While N.B. has alleged that compliance is unreasonable and oppressive, N.B. has not
explained how this is so. Rather, N.B. makes a wholly conclusory claim that the mental exercise
by a child of trying to recall events at the time of testifying is *per se* unreasonable and
oppressive. N.B. cites no judicial opinion – military or otherwise – for this proposition, nor can

any be found. This bald assertion contradicts the reality that child witnesses can and do testify in courts-martial.

c. Compliance is far from unreasonable or oppressive. T.K. lives with N.B., who will be travelling to the site of this Court to give live testimony. Travel for T.K. to this Court is then no obstacle to be overcome. The Defense is unaware of any fact that T.K. requires special needs or assistance and is, by all accounts, in good health and of sound (albeit adolescent) mind. Lastly, T.K. has demonstrated he is capable of speaking to adults about this matter – he was interviewed *ex parte* by the Government with the assistance of a child forensic interviewer –and there is no showing that said interview caused T.K. any anguish or trauma. Based on these facts, withdrawing or modifying the subpoena would not be appropriate.

d. The defense is entitled to production of T.K. because his testimony is relevant and necessary. MCM, R.C.M. 703. In agreeing to produce T.K., the government conceded as much. T.K. is relevant and necessary because the Government claims he is an eyewitness to several of the alleged acts charged and his expected testimony will likely undermine and perhaps contradict the expected testimony of N.B.

4. Relief Requested

For the foregoing reasons, the Victims' Legal Counsel's motion should be denied.

5. Argument

Defense does not request oral argument on the issue presented.

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cn=ROBERTS.JASON.WILLIAM.114349
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Date: 2014.09.03 15:45:39 -0400

J. W. ROBERTS
LT, USCG
Assistant Defense Counsel

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

UNITED STATES)	VICTIM'S SUPPLEMENTAL MOTION
)	OPPOSING PRODUCTION OF T.K. AS
V.)	DEFENSE WITNESS
)	
)	
XXXX X XXXX)	
XXX/X-X, USN)	

1. Nature of Motion

Per R.C.M. 703(e) (2)(F) , N.B., through counsel, respectfully requests that this Court to deny the Defense's request to produce T.K. at trial and direct the government to withdraw their subpoena.

2. Standing and Scope of Representation

The Defense has objected to Victims' Legal Counsel's ability to raise this motion with the Court as being beyond the scope of her representation. *See Defense Brief* at 1-2. However, the Defense has conceded that N.B. has standing to oppose the production of T.K. at trial. *Id.* at 2. Section 1716 (b) of the *National Defense Authorization Act* (NDAA) of 2014 defines the types of legal assistance which are authorized for Victims' Legal Counsel. This includes legal consultation and assistance for "any proceeding of the military justice process in which a victim can participate as a witness or other party." *NDAA*, Section 1716 (b)(8)(2). In addition, the plain language of the authority provided by the Defense indicates this is within the scope of representation of N.B.'s counsel. *See ESTABLISHMENT OF NAVY VICTIMS' LEGAL COUNSEL (VLC) PROGRAM NAVADMIN 087/14*. Since N.B. has the right to participate and

be heard by the Court in this proceeding per RCM R.C.M. 703(e) (2)(F) and an interest not only in the wellbeing of her son and but also her own liberty (risking possible contempt proceedings), this appears to be squarely within the scope of services authorized to be provided by N.B.'s counsel. It would be ludicrous to argue that counsel for N.B. can advise and advocate for her in all other aspects of the proceedings but, for this particular issue, she is to be deprived of the assistance of counsel and must approach the Court on her own to plead relief on behalf of her son.

3. Discussion

The burden of establishing that compliance would be unreasonable or oppressive rests, of course, on the subpoenaed witness. *U.S v. R. Enterprises, Inc.*, 498 U.S. 292 (1991)(concurring opinion). In determining what is reasonable, the Supreme Court found that "(t)his standard is not self-explanatory. As we have observed, 'what is reasonable depends on the context.'" *Id.*, quoting *New Jersey v. T. L. O.*, 469 U.S. 325, 337 (1985). Interestingly in *Enterprises Inc.*, the Supreme Court chooses to quote language from a case dealing with searches and seizures by school authorities.

Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, **what is reasonable depends on the context** within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, supra, at 536-537. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

New Jersey v. T. L. O., 469 U.S. at 337 (emphasis added).

It appears that the same balancing of judicial needs against the invasion of individual privacy and security could apply in the context of evaluating the need for T.K. to testify in court. The Defense is requesting that T.K. be produced to testify that he doesn't remember anything, presumably in order to argue his lack of memory means the events recounted by N.B. did not happen. However, T.K.'s inability to recall events at age seven that he could recall at age five appears to be part of normal, childhood development. It is unreasonable invasion of his privacy and security to ask him to recall events that he may no longer have the neurological capacity to access.

5. Relief Requested

N.B., through counsel, respectfully requests that this Court to deny the Defense's request to produce T.K. at trial direct the government to withdraw their subpoena.

6. Argument N.B., through counsel, desires oral argument on this motion.

A.M. LUNDWALL
LCDR, JAGC, USN
Victims' Legal Counsel
For N.B.

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel on 5 September 2014.

A.M. LUNDWALL

3. Findings of Fact

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom. In doing so, the Court makes the following findings and conclusions:

a. The accused is charged with two specifications of Violating a Lawful Order in violation of Article 92, one specification of Violating a Lawful General Order in violation of Article 92, seven specifications of Rape in violation of Article 120, one specification of Sexual Assault in violation of Article 120, one specification of Aggravated Sexual Contact in violation of Article 120, two specifications of Abusive Sexual Contact in violation of Article 120, one specification of Forcible Sodomy in violation of Article 125, and one specification of Assault Consummated by a Battery in violation of Article 128. With the exception of one charged offense of possession of a synthetic cannabinoid compound in violation of Article 92, the charged offenses arise from alleged offenses the accused committed against his wife, Ms. N.B., between October 2010 and November 2012.

b. Ms. N.B. is the mother and legal guardian of T.K., who is now seven years old.

c. In 2012, T.K. was interviewed by NCIS and reported that "daddy hurts mommy" or words to that effect.

d. In 2014, T.K. was interviewed by the Government and indicated that he did not remember what happened.

e. The Defense requested that T.K. be produced as a witness to testify that he does not remember what happened.

f. The Government subsequently issued a subpoena for T.K. to be produced as a witness at trial.

3. Statement of the Law

a. VLC Scope of Representation

Section 1716 of the Fiscal Year 2014 National Defense Authorization Act (FY 14 NDAA), provides for the designation of "Special Victims' Counsel" to an individual eligible for

military legal assistance who is the victim of an alleged sex-related offense. Section 1716, subsection (b)(8)(B) provides that the legal assistance which may be rendered includes "Legal consultation and assistance...in any proceedings of the military justice process in which a victim can participate as a witness or other party[.]"

NAVADMIN 087/14 (ESTABLISHMENT OF NAVY VICTIM'S LEGAL COUNSEL (VLC) PROGRAM - 151543Z APR 14) implements the provisions of FY 14 NDAA Section 1716 within the U.S. Navy. In Paragraph 1, this message explains that, "...THE NAVY ESTABLISHED A NAVY VICTIMS' LEGAL COUNSEL (VLC) PROGRAM TO PROVIDE INDEPENDENT LEGAL COUNSEL TO ELIGIBLE *SEXUAL ASSAULT VICTIMS*." (emphasis added) Paragraph 4 defines eligibility of sexual assault victims who may receive VLC services to include "ADULT DEPENDENTS, INCLUDING SPOUSES, OF ACTIVE-DUTY NAVY MEMBERS WHEN ASSAULTED BY AN ACTIVE-DUTY NAVY MEMBER." Paragraph 6 of NAVADMIN 087/14 defines the scope of representation by VLC to their clients as follows:

VLC WILL FORM AN ATTORNEY-CLIENT RELATIONSHIP WITH ELIGIBLE VICTIMS. ACCORDINGLY, ALL COMMUNICATIONS BETWEEN VLC AND THE CLIENT WILL BE CONFIDENTIAL AND PRIVILEGED. VLC WILL ADVISE VICTIMS ON SEXUAL ASSAULT REPORTING OPTIONS; PROVIDE LEGAL REPRESENTATION AND ADVICE DURING THE INVESTIGATIVE PROCESS; ADVOCATE ON THE VICTIM'S BEHALF; REPRESENT THE VICTIM IN MILITARY JUSTICE PROCEEDINGS WHERE THE VICTIM HAS AN INTEREST AND RIGHT TO BE HEARD BY THE COURT; AND PROVIDE OTHER LEGAL ADVICE AND SERVICES CONNECTED WITH A REPORT OF SEXUAL ASSAULT. VLC ARE SUBJECT TO AND MUST COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT IN ACCORDANCE WITH [JAGINST 5803.1D].

b. Production of Defense Witnesses and Challenges to Subpoena

The Sixth Amendment to the Constitution of the United States provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor..." Article 46, UCMJ provides in pertinent part, "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..." In turn, R.C.M. 703 provides in pertinent part:

(a) *In general.* The prosecution and the defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) *Right to witnesses.*

(1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits...would be relevant and necessary...

...(c) *Determining which witnesses will be produced.*

...(2) *Witnesses for the Defense.*

...(D) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule...

R.C.M. 703(e)(2)(F) provides in pertinent part, "If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive...after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate."

4. Conclusions of Law

a. *Counsel for Ms. N.B. Has Exceeded the Scope of her Representation In Filing a Motion to Quash the Trial Subpoena of T.K.*

In its response, the Defense acknowledges that Ms. N.B., as the parent of T.K., has standing to oppose the production of T.K. as a witness for trial, but argues that Ms. N.B.'s VLC cannot argue for this relief because of the limited scope of representation authorized by competent authority. Based on the unique facts and circumstances of this issue, the Court agrees with the Defense's argument. Ms. N.B. has standing to challenge the subpoena of her minor son, T.K., because of her status as his parent, not due to her status as the alleged victim of sexual assault in a case prosecuted under the UCMJ at court-martial. Thus, while it is within the scope of representation of Ms. N.B.'s VLC, as defined under FY14 NDAA and NAVADMIN 087/14, to argue on her client's behalf on issues such as M.R.E. 412, M.R.E. 513, M.R.E. 514, and other statutory privileges that impact Ms. N.B.'s personal rights affected by her status as the alleged victim of a sexual assault prosecuted at court-martial,

the scope of representation cannot be read so broadly to extend to advocate for rights that Ms. N.B. holds solely due to her status as the parent of minor child who has been subpoenaed to testify at trial.

b. Assuming that Ms. N.B. Adopts on her Own Behalf the Motion Filed by Her Counsel, the Court Finds that Her Request for Relief Fails on Its Merits

Although the Court has found that the motion filed by Ms. N.B.'s VLC exceeds the scope of the VLC's authorized representation, the Court will assume that Ms. N.B. adopts the arguments contained in the motion as her own. As such, the Court will address the merits of Ms. N.B.'s request for relief.

Ms. N.B. argues that it would be unreasonable or oppressive for T.K. to testify at trial because his lack of memory of the events which he once professed to recall can be explained by the concept of "childhood amnesia." In turn, Ms. N.B. argues that the "invasion of [T.K.'s] privacy and security" which will occur due to him being required to testify, despite a possible explanation for his inability to recall events which happened in the past, renders his trial subpoena "unreasonable or oppressive."

The Court finds that while childhood amnesia is a possible explanation which the Government may seek to offer the members through expert testimony to show why T.K. no longer remembers the accused abusing Ms. N.B., this theory does not automatically render the subpoena for T.K. to testify at trial as "unreasonable or oppressive." Thus, Ms. N.B. fails to convince the Court that it would be appropriate to quash the subpoena.

5. Ruling

Ms. N.B.'s motion is DENIED.


CDR, JAGC, USN
Military Judge

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

<p>UNITED STATES</p> <p>v.</p> <p>KYLE P. BARSALOU SA/E-2 U.S. Navy</p>	<p>GOVERNMENT RESPONSE TO DEFENSE MOTION TO NOT ALLOW THE COMPLAINING WITNESS TO BE PRESENT DURING THE TRIAL</p> <p>Date: 26 September 2014</p>
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1. **Nature of Motion.** The Government respectfully requests that the Court deny the Defense Motion to not allow the complaining witness to be present during the trial.

2. **Discussion.**

Military Rule of Evidence 615 states that, upon request by either party, “the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses.” However, “[t]his rule does not authorize exclusion of . . . a person authorized by statute to be present at courts-martial.” M.R.E. 615. Article 6(b) of the Uniform Code of Military Justice (U.C.M.J.), adopted in December 2013 and effective as of that date, states that a victim of an offense under the U.C.M.J. has “[t]he right not to be excluded from any [court-martial] unless the military judge . . . after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.”

The Defense has presented no evidence to the Court to satisfy its burden of showing by clear and convincing evidence that the victim’s testimony would be materially altered. The

Defense asserts without support that because the victim previously testified that she lacked memory of portions of the night in question, she will tailor her testimony based on testimony of other witnesses. This is mere speculation that does not satisfy the Defense's evidentiary burden.

Moreover, as the Defense alludes to in its motion, the victim previously testified at an Article 32 hearing regarding this matter. If the victim were to materially alter her testimony at trial, she would be open to cross-examination based on that prior testimony, significantly reducing her credibility. She thus has no incentive to alter her testimony at trial based on what she hears from other witnesses. Absent any evidence that the victim will alter her testimony, the Defense motion to exclude her must be denied.

The Defense request for additional discovery must also be denied. As an initial matter, the Defense is requesting that the Court order the production of evidence that does not even exist yet, and thus are not properly the subject of a judicial order. Additionally, notes taken by the victim – a private individual – are not in the possession, custody, or control of military authorities. See R.C.M. 701(a)(2)(a). As such, they are not subject to discovery. If such notes come into the possession of the Government and are material to the defense, they will be disclosed in accordance with the Government's ongoing discovery obligations.

Lastly, the findings instruction requested by the Defense is wholly speculative and inappropriate. If the victim's testimony at trial is inconsistent with her prior statements or testimony, the Government acknowledges that a Prior Inconsistent Statement instruction would be appropriate. However, the Defense requests significantly more than that standard instruction and essentially asks the Court to provide a Defense argument in the guise of a findings instruction. This is not a proper function of findings instructions and the Court should deny the Defense request.

3. **Relief Requested.** The Government requests that the Court deny the defense motion.

[REDACTED]
LT, JAGC, U.S. NAVY
Trial Counsel

CERTIFICATE OF SERVICE

I certify a copy of this motion was filed with the Court and an electronic copy was served on Detailed Defense Counsel on 26 September 2014.

[REDACTED]
LT, JAGC, USN
Trial Counsel

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

UNITED STATES v. KYLE P. BARSALOU SA/E-2 U.S. Navy	GOVERNMENT RESPONSE TO DEFENSE MOTION TO PROHIBIT CONTACT BETWEEN COMPLAINING WITNESS AND HER COUNSEL Date: 26 September 2014
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1. **Nature of Motion.** The Government respectfully requests that the Court deny the Defense Motion to Prohibit Contact between [REDACTED] and her Victim’s Legal Counsel.

2. **Discussion.**

Section 2-3-1 of the Military Judge’s Benchbook provides that after a witness has testified, the Military Judge should instruct the witness as follows: “As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused.” Additional instructions to a witness not to discuss her testimony with anyone may be appropriate when the Court recesses during the witness’s testimony. The Government does not object to either of these instructions.

Here, the Defense is requesting that the ordinary instructions be significantly expanded without legal justification or rationale. Instructing [REDACTED] not to discuss her testimony with her counsel – or any other individual – while she is actually on the stand is standard and appropriate. However, further instructing her not to discuss her testimony with her counsel or anyone else after she is finished testifying is excessive and unnecessary. Once [REDACTED] has completed her sworn testimony, there is no realistic danger that she will later return to the stand

and change that testimony. Moreover, in order for either party to determine whether recalling her to the stand would be appropriate, she must be allowed to discuss potential rebuttal testimony with counsel for the parties and her own counsel.

None of the case law relied on by the Defense supports such an expansion of standard instructions to a witness. Both cases address instructions to a witness regarding a recess that occurs during testimony. As stated above, the Government does not object to such an instruction. However, neither case addresses the propriety of instructing a witness not to discuss her testimony after its conclusion through the completion of trial. Absent legal authority for such an instruction, the Government requests that the Defense motion be denied.

4. Relief Requested. The Government requests that the Military Judge issue ordinary instructions to [REDACTED] if the Court recesses during her testimony. The Government requests that the Military Judge decline to issue any more restrictive instructions.

5. Evidence. None.

[REDACTED]
LT, JAGC, U.S. NAVY
Trial Counsel

CERTIFICATE OF SERVICE

I certify a copy of this motion was filed with the Court and an electronic copy was served on Detailed Defense Counsel on 26 September 2014.

[REDACTED]
LT, JAGC, USN
Trial Counsel