

**NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL**

UNITED STATES v. MAYS, Ryan S. SR/E-1 U.S. NAVY	DEFENSE RESPONSE TO GOV'T MFAR (Portable Toilet and Ship Graffiti) 10 AUG 22
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RESPONSE

The defense opposes the Government's Motion for Appropriate Relief seeking to exclude any evidence of graffiti referencing the fire aboard *USS Bonhomme Richard* (LHD-6).¹ This evidence is central to Seaman Recruit Mays' defense that if anyone set fire to *Bonhomme Richard*, it was not him. Preclusion of this evidence would violate SR Mays' Fifth Amendment right to due process, as well as his Sixth Amendment rights to confront the witnesses against him and to present a complete defense.

SUMMARY

The Government seeks to preclude evidence that then-Fireman Elijah McGovern—a Sailor who was stationed aboard *USS Bonhomme Richard* and was seen running from the scene of the alleged arson minutes before fire was detected—scrawled "I set the ship on fire" and other incriminating phrases on the wall of a portable toilet located on the pier where *Bonhomme Richard* had been moored. The defense opposes the Government's request. Evidence of FN McGovern's graffitied confession is highly probative of the fact that someone other than SR Mays set the fire aboard *Bonhomme Richard*. The rules of evidence do not preclude its admission, and the Government's motion should be denied.

FACTS

1. Seaman Recruit Mays is accused of willfully and wrongfully setting a fire aboard *USS Bonhomme Richard* (LHD-7) on July 12, 2020, in violation of Articles 110 and 120, Uniform Code of Military Justice (UCMJ).²
2. Then-Fireman Elijah McGovern was aboard *Bonhomme Richard* at the time of the fire.³

¹ Gov't MFAR (Portable Toilet and Ship Graffiti), App. Ex. ___, (3 August 2022).

² Charge Sheet.

³ Enclosure (A) at p. 1, ¶2.

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3. Fireman McGovern stood duty from 0645 on July 11, 2020, until 0745 on July 12.⁴
4. Sometime “around 0700,” MM2 Pitt Mitchell, who stood watch with FN McGovern, assigned FN McGovern to take out trash bins located either in Lower Vehicle Storage (“Lower V”) or in the Hangar Bay.⁵
5. Another Sailor on duty with FN McGovern that day, MMFN Danny Nickelmedina, does not recall seeing FN McGovern at muster of the duty section at 0745, nor does he recall seeing FN McGovern walk back to the barge after the duty shift had ended. He cannot say for sure whether or not FN McGovern was physically present at muster.⁶
6. At 0803, DCFN Maya Polion, a member of *Bonhomme Richard*’s Engineering Section 4, stopped at a vending machine on the well deck of the ship, just between the ramps leading to Upper and Lower V.⁷ She purchased snacks, including *Doritos* and *Gatorade*.⁸ The time DCFN Polion made these purchases is confirmed by DCFN Polion’s Navy Federal Credit Union records which reflect a transaction from that vending machine at 1103 Eastern Time, or 0803 Pacific.⁹
7. At the time she saw the individual running from Lower V, DCFN Polion observed a “haziness in the air” but did not smell anything and was not concerned about fire.¹⁰ Petty Officer Velasco, who says he was standing watch between the Upper and Lower V, first noticed smoke sometime shortly after 0805.¹¹
8. After making her purchases from the vending machine, DCFN Polion observed a Black male, “possibly mixed ethnicity, brown, light colored/caramel colored skin, approximately 69-70 inches in height, [with] curly black hair,” “sprinting from the ramp leading to the lower V up to the hangar-bay from the upper bay.” The individual she saw was wearing blue coveralls, black boots, and a black facemask, and she believed he was part of the engineering department.¹²
9. On September 20, 2022, Naval Criminal Investigative Service (NCIS) agents invited DCFN Polion to the NCIS Resident Agency in San Diego to identify the individual she saw running up from Lower V on the morning of the fire.¹³ There, she watched as members of *Bonhomme Richard*’s engineering sections 3 and 4 completed screening questionnaires, took off facemasks and posed for photographs. Without any prompting by NCIS agents, DCFN Polion identified FN McGovern as the person she saw running from the Lower V just before the fire.¹⁴

⁴ *Id.*

⁵ *Id.*

⁶ Enclosure (B).

⁷ Enclosures (D), (E).

⁸ Enclosure (D).

⁹ Enclosure (E).

¹⁰ Enclosure (D).

¹¹ Enclosures to Gov’t MFAR (Exclusion of Evidence and Argument), App. Ex. ____, (3 August 2022), at p. 18 and 22.

¹² Enclosures (E), (F).

¹³ Enclosure (F).

¹⁴ *Id.*

10. Between 0725 and 0727 the morning of the fire, FN McGovern was searching the internet for “heat scale. White” and “fire color heat scale” on his mobile phone.¹⁵

Title of Investigation: USS Bonhomme Richard Fire	Investigation Number: 76 J-20-0015	Report Number: 78
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SEARCH TIME (PST)	SEARCH TERM	IMAGE SEARCH	URL
7:25:17 AM	heat scale. White		https://www.google.com/search?q=heat+scale.+white#spf=1614753656438
7:25:21 AM		heat scale, white	https://www.google.com/search?q=heat+scale.+white&tbm=isch
7:25:44 AM	heat scale fire, white		https://www.google.com/search?q=heat+scale+fire.+white&tbm=isch
7:25:58 AM		isabeleats.com	https://www.isabeleats.com/wp-content/uploads/2019/08/the-scoville-scale-heat-units.jpg
7:26:24 AM	fire color heat scale		https://www.google.com/search?q=fire+color+heat+scale&tbm=isch
7:26:28 AM		gph.fs.quoracdn.net	https://gph.fs.quoracdn.net/main-qimg-53335f0fbf03abfa07f3c86082aecc52
7:27:05 AM		LUT Editor - ImageJ	https://imagej.nih.gov/ij/plugins/lut-editor.html

Table 1: heat and fire related searches conducted by McGovern on July 12, 2020

Figure 1.¹⁶

11. When asked about these searches by Special Agent Matthew Beals, the lead Alcohol, Tobacco, Firearms and Explosives (ATF) investigator assigned to the *Bonhomme Richard* fire, FN McGovern explained that he was researching a novel he planned to write about dragons.¹⁷

12. Fireman McGovern was also questioned extensively by investigators about his whereabouts on the day of the fire.¹⁸ At various points his explanations were contradicted by extrinsic evidence obtained by law enforcement. For example, FN McGovern told law enforcement officers that he went to the Navy Exchange to buy food after leaving the ship, but investigators reviewed records from the NEX and determined there was “no record at the NEX of him buying anything.”¹⁹

13. On August 21, 2022, graffiti was discovered on a portable toilet at Pier 2, where *Bonhomme Richard* had been moored. The graffiti included the phrases: “I set the ship on fire”, “Fuck the

¹⁵ Enclosure (C).

¹⁶ Enclosure (C).

¹⁷ *Id.*

¹⁸ See Enclosure (G).

¹⁹ *Id.*

ship, "I did it", and "1 down three to go".²⁰ Around the graffiti was a drawing of a ship engulfed in flames and the letters "BHR" crossed out with an "X".²¹



Figure 1.²²

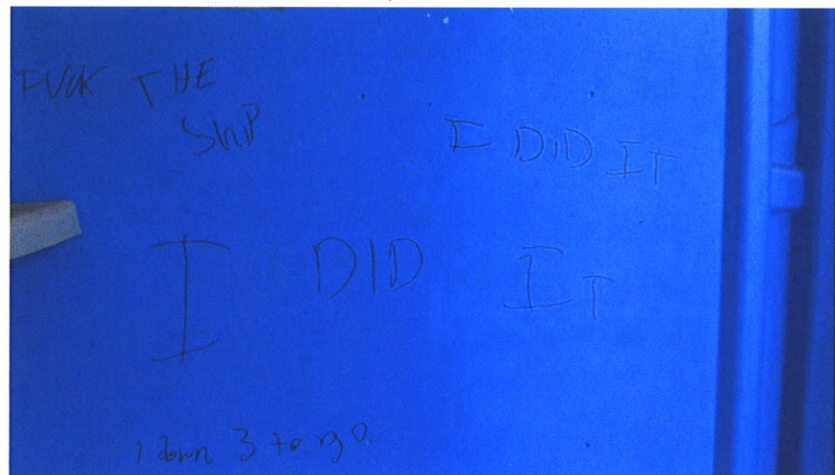


Figure 2.²³

14. On September 7, 2020, LCDR Anna Hook, then acting as Command Duty Officer (CDO) aboard *Bonhomme Richard* reported graffiti on an interior wall of the ship.²⁴ The graffiti included the words "Its me" and "I did it."²⁵

²⁰ Enclosure (L).

²¹ *Id.*

²² Enclosures to Gov't MFAR (Portable Toilet and Ship Graffiti), App. Ex. ____, (3 August 2022).

²³ *Id.*

²⁴ Enclosure (H).

²⁵ Enclosure (I).

15. Based on the traffic around the area where the graffiti was located, law enforcement agents determined that the graffiti was most likely created between 0900 on September 4, 2020, and 1700 on September 6, 2020.²⁶

16. According to deck logs from *Bonhomme Richard*, FN McGovern came aboard *the ship* from 0622 to 1011 on September 5, 2020 at the well deck. The reason given was “Eng”.²⁷

17. From August 20, 2020, to October 14, 2020, SR Mays was being held in pre-trial confinement at Navy Consolidated Brig Miramar, California.²⁸

18. Special Agents from NCIS determined that the graffiti found aboard *Bonhomme Richard* “was similar to the graffiti found on 21AUG20 on Pier 2, where the ship [was] moored,” so they sent images of the handwriting, along with a known sample to compare from FN McGovern, to the US Army Criminal Investigation Laboratory (USACIL).²⁹

19. The USACIL Forensic Document Examiner concluded with respect to the graffiti on Pier 2 that “[t]he possibility of observing the same combination of characteristics from [a writer other than FN McGovern] is considered low.”³⁰

20. Special Agents from ATF and NCIS, including Agent Beals, confronted FN McGovern about the graffiti on September 6, 2020.³¹ Shortly thereafter, FN McGovern attempted to take his own life.³²

21. Fireman McGovern was generally dissatisfied with his life aboard *Bonhomme Richard*, and co-workers described him as angry at times over little things.³³

22. Fireman McGovern is no longer on active duty in the US Navy. He was recommended for involuntary separation from the Navy on February 4, 2021, for wrongfully using marijuana and introducing it onto the Berthing Barge for *Bonhomme Richard*.³⁴

BURDEN

23. As the proponent of the evidence, the defense would bear the burden of establishing its admissibility.³⁵

²⁶ *Id.*

²⁷ Enclosure (J).

²⁸ Enclosure (K).

²⁹ Enclosures (L), (N).

³⁰ *Id.*

³¹ Enclosure (M).

³² Enclosure (P).

³³ Enclosure (O).

³⁴ Enclosure (Q).

³⁵ R.C.M. 905(c).

LAW

At court-martial, an accused has the constitutional right to present a complete defense and to confront the witness against him by relevant cross-examination and impeachment.

24. The Due Process Clause of the Fifth Amendment applies to a service member facing court-martial.³⁶ For the accused in a criminal trial, due process amounts to having a fair opportunity to defend against the Government's accusations.³⁷ Furthermore, the right to present witnesses in one's own defense is a fundamental element of due process.³⁸ In fact, few rights are as fundamental.³⁹ This right includes an opportunity "to present legally and logically relevant evidence at a trial."⁴⁰

25. Separately, the right to cross-examine a witness for impeachment purposes also has "constitutional underpinnings because of the right to confront witnesses under the Sixth Amendment and the due process right to present a complete defense."⁴¹ Indeed "[t]he partiality of a witness...is always relevant as discrediting the witness and affecting the weight of his testimony." In part, M.R.E. 608(c) implements this constitutional maxim, allowing the parties to impeach a witness' testimony by evidence of "[b]ias, prejudice, or any other motive to misrepresent."

26. Conversely, "[e]vidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" violate an accused's right to present a meaningful defense.⁴² For example, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."⁴³

The right to due process includes the right to present legally and logically relevant evidence that someone else had the motive, knowledge, or opportunity to commit the charged offenses.

27. In *United States v. Woodheater*, the Court of Military Appeals held that a trial judge erred when he excluded defense evidence regarding an alternative suspect.⁴⁴ In *Woodheater*, the accused was charged with committing arson aboard a US Navy ship.⁴⁵ At trial, the military judge prevented the defense from cross-examining a law enforcement agent about statements the

³⁶ *United States v. Graf*, 35 M.J. 450, 460 (C.A.A.F. 1992) (citing *Middendorf v. Henry*, 425 U.S. 24, 43 (1976)).

³⁷ *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

³⁸ *Washington v. Texas*, 388 U.S. 14, 19 (1967).

³⁹ *Chambers*, 410 U.S. at 302.

⁴⁰ *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1984)).

⁴¹ *United States v. Beauge*,

⁴² *Holmes v. South Carolina*, 547 U.S. 319, 325-326 (2006) (internal quotation marks omitted) (citing *United States v. Scheffer*, 523 U.S. 303, 208 *1998)).

⁴³ *Chambers*, 410 U.S. at 302.

⁴⁴ *Woodheater*, 40 M.J. at 173.

⁴⁵ *Id.* at 171.

alternate suspect had made tending to show he knew where the fire had started.⁴⁶ The judge also precluded evidence offered to prove that the alternative suspect frequented the area of the ship where the fire began.⁴⁷ Furthermore, he prevented the defense from offering evidence that the alternative suspect harbored animosity toward the commanding officer of the ship.⁴⁸ And, finally, after the defense then called the alternative suspect as a witness and the suspect denied making incriminating statements, the judge also prevented the defense from offering extrinsic evidence of those same incriminating statements.⁴⁹

The prohibition against hearsay only applies to statements offered for the truth of the matter asserted. Furthermore, when a witness is unavailable, even some hearsay statements may be admissible at trial. Finally, even some hearsay statements not covered by an ordinary exception may still be admitted in the interests of justice.

28. In general, out of court statements offered for the truth of the matter asserted may not be accepted into evidence.⁵⁰ However, the rules of evidence permit various exceptions to the general rule against the admission of hearsay.⁵¹

29. For example, if a declarant is unavailable to testify at trial, a statement made by the declarant against his or her interests may be admissible if the statement is “supported by corroborating circumstances that clearly indicate [the statement’s] trustworthiness, if [the statement] tends to expose the declarant to criminal liability[,] and [if the statement] is offered to exculpate the accused.”⁵²

30. Additionally, a statement may not be excluded by the rule against hearsay, even if it is not specifically covered by a hearsay exception in [M.R.E. 802 or 804] if: (1) it has “equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.”⁵³

31. Of course, statements which are not offered for the truth of the matter, but are instead offered for some other purpose, such as their effect on the listener, are not hearsay and are not excluded by Mil. R. Evid. 802.⁵⁴ Still, all evidence is subject to being relevant to a material fact under M.R.E. 401, and even relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or waste of time.⁵⁵

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Mil. R. Evid. 802.

⁵¹ See Mil. R. Evid. 803, 804.

⁵² Mil. R. Evid. 804(b)(3).

⁵³ Mil. R. Evid. 807.

⁵⁴ See *United States v. Neeley* 25 M.J. 105, 107 (C.M.A. 1987).

⁵⁵ Mil. R. Evid. 401-403.

ARGUMENT

Evidence that FN McGovern wrote “I set the ship on fire”, “Fuck the ship, “I did it”, and “I down three to go” is relevant to support a defense that FN McGovern is a more likely culprit than SR Mays to have committed the charged offense.

32. The link between FN McGovern and the charged act of setting fire to *Bonhomme Richard* is more than mere speculation:

- Fireman McGovern was dissatisfied with the Navy⁵⁶;
- He was in the Lower V on the day of the fire⁵⁷;
- He was seen “sprinting” from the Lower V just before the first signs of a fire⁵⁸;
- In the hour leading up to the fire, he was searching “heat scales” on his phone⁵⁹;
- He lied to law enforcement about his whereabouts after the fire was first identified⁶⁰;
- He lied to family about where he was at the time of the fire⁶¹;
- When confronted by law enforcement with his lies, he attempted suicide.⁶²

33. On the other hand, there is no physical evidence linking SR Mays to the fire, and he has repeatedly denied any involvement in setting the fire.

34. In order to preserve SR Mays’ right to due process and his right to present a complete defense, SR Mays must be allowed to put forth all of the relevant evidence which suggests that FN McGovern committed the charged offenses, not SR Mays. Part and parcel of this defense is evidence that FN McGovern likely confessed to the crimes on the side of a portable toilet. Without a doubt, this evidence is logically relevant.

35. *Woodheater* is instructive on the importance of ensuring that the accused is not denied the constitutionally mandated opportunity to put on a complete defense.

Evidence of FN McGovern’s graffiti may be offered at trial for a non-hearsay purpose during cross-examination of the Government’s principal law enforcement witness and expert regarding origin and cause of the fire.

36. At trial, Special Agent Matthew Beals of ATF is expected to testify as to his conclusions about the “origin and cause” of the fire aboard *Bonhomme Richard*. Special Agent Beals is also the same agent who interrogated SR Mays for over ten hours demanding that SR Mays confess. He is, in addition, one of the agents who conducted interviews with FN McGovern—to include searching FN McGovern’s phone and confronting FN McGovern with evidence of his lies about

⁵⁶ Enclosure (O).

⁵⁷ Enclosures (A), (B).

⁵⁸ Enclosures (D), (E), (F).

⁵⁹ Enclosure (C).

⁶⁰ Enclosures (G), (O).

⁶¹ Enclosures (G).

⁶² Enclosure (P).

where he was when the fire began to spread. Agent Beals will testify in the Government's case that he has concluded the fire was caused as a result of arson—that is that it was set intentionally.

37. As part of his fire analysis, Special Agent Beals will testify that he considers statements by any relevant witnesses, as well as physical evidence gathered during the criminal investigation. Special Agent Beals will also be cross examined about the investigative steps he took and failed to take when building a case against SR Mays.

38. Special Agent Beals learned about FN McGovern's confessional graffiti during the course of his investigation. To the extent this knowledge did or did not influence his investigation, the graffiti could be offered for a relevant, non-hearsay purpose, and so should not be prematurely excluded. For example, the fact that Special Agent Beals chose not to pursue FN McGovern in the face of all the evidence suggesting him as an alternative suspect is evidence of Agent Beals' bias against SN Mays.

Fireman McGovern's graffitied statements are admissible under the residual hearsay exception.

39. *Trustworthiness.* As detailed above, there is strong evidence tying Fireman McGovern to the fire aboard *Bonhomme Richard*. He had motive and opportunity. He lied about his whereabouts when questioned by law enforcement. He was seen sprinting from the scene of the fire. There is no reason to think that his statement on the portable toilet that he "did it" is untrue. Importantly, he wrote these statements thinking they might remain anonymous. He had no reason to lie.

40. *Material fact.* The confession goes to the most material fact in this case: who started the fire aboard *Bonhomme Richard*.

41. *Probative value.* There is ample evidence of FN McGovern's guilt; however, a confession is one of the strongest forms of proof known to the law.⁶³ Seaman Recruit Mays can expect to find no better evidence that someone else is responsible for the fire aboard *Bonhomme Richard*.

42. *Interests of Justice.* Notably, had the Government sought to prosecute FN McGovern for the offenses now alleged against SR Mays, they would undoubtedly have offered FN McGovern's statements against him at trial as trustworthy indicia of his guilt. Law enforcement in fact did pursue an extensive investigation against FN McGovern. Allowing the Government now to exclude evidence of FN McGovern's confessions—especially in light of all the other evidence pointing to his guilt and away from SR Mays—would subvert the interests of justice and fundamental fairness. It would deny SR Mays his right to put on a complete defense. As the Supreme Court admonished in *Chambers*, the rules of evidence cannot be so mechanically applied as to deny these basic constitutional requirements.⁶⁴

⁶³ *United States v. Trojanowski*, 5 U.S.C.M.A. 305, 312 (C.M.A. 1954).

⁶⁴ *Chambers*, 410 U.S. at 302.

Determining whether or not FN McGovern's admissions may be offered under M.R.E. 804(b)(3) requires a finding of his availability for trial.

43. In this motion, the defense requests the production of FN McGovern. With its own resources, the defense team has not been able to locate and question him. Presumably, FN McGovern may want to invoke his right against self-incrimination, rendering him unavailable for trial.⁶⁵ Until such determination can be made, the defense asks the Court to reserve ruling (to the extent a ruling is necessary) on the admissibility of FN McGovern's graffitied statements.

Nothing about the proffered evidence is confusing, unfairly prejudicial, or a waste of time.

44. Although the Government avers in its motion that the graffiti in question is from an unidentified artist, Government forensic experts have actually tied it to FN McGovern. Given all the evidence to suggest that FN McGovern had the motive and opportunity to start the *Bonhomme Richard* fire, no fact-finder will be confused about the relevance of his confessional graffiti. This evidence directly supports the defense's theory that FN McGovern was always a better suspect. To the extent any portions of the graffiti cannot be directly tied to FN McGovern they are relevant by their proximity to the identifiable, related portions.

RELIEF REQUESTED

The defense requests that this Court deny the Government's Motion for a preliminary ruling to preclude evidence of the *Bonhomme Richard*-related graffiti found on the portable toilets at Pier 2 and on the ship itself.

EVIDENCE AND HEARING

In support of this Response, the defense offers the following enclosures:

- Enclosure (A): NCIS Results of Interview (MM2 Mitchell) dtd 09NOV20
- Enclosure (B): NCIS Results of Interview (MMFN Nickelmedina) dtd 19NOV20
- Enclosure (C): Excerpt of ATF Report re: FN McGovern's phone
- Enclosure (D): NCIS Results of Interview (DFCN Polion) dtd 16SEP20
- Enclosure (E): NCIS Investigative Action (Polion Navy Federal Records) dtd 05NOV20
- Enclosure (F): NCIS Results of Identification by DCFN Polion dtd 22SEP20
- Enclosure (G): NCIS Results of Third Interview of FR McGovern dtd 07JAN21
- Enclosure (H): NCIS Results of Interview with LCDR Hook dtd 07 SEP20
- Enclosure (I): NCIS Review of Logs dtd 17SEP20
- Enclosure (J): Photograph of *Bonhomme Richard* Logs dtd 07SEP20
- Enclosure (K): SR Mays Confinement Order
- Enclosure (L): NCIS Results of USACIL Forensic Document Examination dtd 15JAN21
- Enclosure (M): NCIS Results of Second Interview of FR McGovern dtd 28DEC20
- Enclosure (N): USACIL Results of Examination
- Enclosure (O): NCIS Results of Second Interview (MM3 Kronk) dtd 03FEB21

⁶⁵ See *United States v. Shaffer*, 18 U.S.C.M.A. 362 (1969).

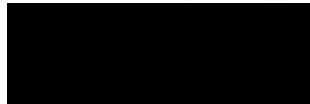
Enclosure (P): NCIS Results of Attempts to Locate FR McGovern dtd 13JAN21
Enclosure (Q): Recommendation of Administrative Separation ICO FN McGovern

The defense also requests that the Government produce either in person or by video-teleconferencing means the following witnesses, whose contact information is provided separately:

1. Mr. Elijah McGovern
2. Mr. Thomas Murray, USACIL Forensic Document Examiner

Pursuant to R.C.M. 905(h), the defense requests an Article 39(a) session to present oral argument and additional evidence unless the Government's Motion is denied in its entirety without hearing by the Court.

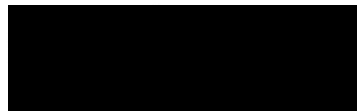
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true copy (via e-mail) of the above has been served on the Military Judge and Trial Counsel on August 10, 2022.



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