IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Nancy L. CASTILLO Machinist's Mate Fireman (E-3) U.S. Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201300280 USCA Dkt. No. 14-0724/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
Carrie.Theis@navy.mil
Bar no. 35815

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Issue Presented

WHETHER THE LOWER COURT IMPROPERLY DETERMINED THAT DUTY TO SELF-REPORT ONE'S OWN CRIMINAL ARRESTS FOUND IN OFFICE OF THE CHIEF OF NAVAL OPERATIONS INSTRUCTION 3120.32C WASS VALID DESPITE THE INSTRUCTION'S OBVIOUS CONFLICT WITH SUPERIOR AUTHORITY AND THE FIFTH AMENDMENT.

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1) (2012). Appellant now invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

A general court-martial, composed of officer and enlisted members, found Fireman (FN) Castillo guilty of the following Article 92, UCMJ Charge:

> In that Machinist's Mate Fireman Nancy L. Castillo, U.S. Navy, *USS Ronald Reagan* (CNV 76), on active duty, did, at or near Bremerton, Washington, on or about 8 February 2012, violate a lawful general order, to wit: paragraph 510.6, OPNAVINST 3120.32C, dated 30 July 2011, as amended by NAVADMIN 373/11, dated 8 December 2011, by wrongfully failing to report an arrest for Drunken or Reckless Driving.

(Joint Appendix (J.A.) at 17, 185-86); 10 U.S.C. § 892. The members also convicted FN Castillo, contrary to her pleas, of being absent without authority, making a false official

statement, and larceny in violation of Articles 86, 107, and 121, UCMJ. 10 U.S.C. §§ 886, 907, 921.

The members sentenced FN Castillo to a reduction to pay-grade E-1, a $12,120 fine, twelve months of confinement if the fine was not paid, and a bad-conduct discharge. (J.A. at 46.) On June 27, 2013, the convening authority approved the reduction to pay-grade E-1, only $5,000 of the fine, and the bad-conduct discharge. (J.A. at 52.) With the exception of the bad-conduct discharge, the convening authority then ordered the sentence executed. (*Id*.)

The lower court affirmed the findings and sentence in an authored opinion issued on May 27, 2014. (J.A. at 1-16); *United States v. Castillo*, No. 201300280, 2014 CCA LEXIS 328 (N-M. Ct. Crim. App. May 27, 2014). On October 7, 2014, this Court granted review of FN Castillo's case and ordered briefing.

Statement of Facts

A. Fireman Castillo's Arrest

In February 2012, late on a Friday night, the police pulled over Fireman Castillo for suspicion of driving while under the influence of alcohol. (J.A. at 38, 47-50.) The next workday, a Monday, FN Castillo told her Leading Petty Officer that she had received a ticket over the weekend, but did not specify that she was arrested or that her ticket was for drunk driving. (J.A. at 39, 42-43.) FN Castillo worked through the civilian court system and was ultimately not convicted of drunk or reckless driving. (J.A. at 45.)

The *USS Ronald Reagan*, FN Castillo's command, had a computer tracking system in place to enter sailors' arrests. (J.A. at 30.) The ship's legal officer testified that the most common way the ship learned about an arrest was through the arresting officer calling the quarterdeck and informing the command. (*Id.*) That did not happen in this case.

Seven months later, in August 2012, FN Castillo's chief was at Kitsap County Courthouse for another sailor's case and noticed FN Castillo's name on the court docket. (J.A. at 30-31.) Her chief reported this to the legal department. (*Id.*) FN Castillo was then charged for not self-reporting her arrest as required by Office of the Chief of Naval Operations Instruction (OPNAVINST) 3120.32C, dated July 30, 2011. (J.A. at

17.) The military judge denied trial defense counsel's motion to dismiss this charge on the grounds that the self-reporting requirement violated FN Castillo's rights against self-incrimination.

B. The Precedent

In 2009, Naval Operations Instruction (OPNAVINST) 5350.4C required sailors to self-report civilian arrests for driving under the influence to their commands.[1] Failure to report resulted in criminal liability under Article 92, UCMJ, 10 U.S.C. § 892. In the case of *United States v. Serianne*, that instruction was challenged at trial as an impermissible violation of the accused's Fifth Amendment rights. The military judge agreed and dismissed the charges. The Government appealed pursuant to Article 62, UCMJ, 10 U.S.C. § 862.

The lower court determined that the requirement to report one's own arrest violated the Fifth Amendment and was not entitled to a regulatory exception. *United States v. Serianne*,

[1] Office of the Chief of Naval Operations, Drug and Alcohol Abuse Prevention and Control, OPNAVINST 5350.4C ¶ 8n (Oct. 15, 2003), states: "All personnel are responsible for their personal decisions relating to drug and alcohol use and are fully accountable for any substandard performance or illegal acts resulting from such use. Members arrested for an alcohol-related offense under civil authority, which if punished under the UCMJ would result in a punishment of confinement for 1 year or more, or a punitive discharge or dismissal from the Service (e.g. DUI/DWI), shall promptly notify their [Commanding Officer]. Failure to do so may constitute an offense punishable under UCMJ Article 92, UCMJ."

68 M.J. 580 (N-M. Ct. Crim. App. 2009). This Court upheld the lower court's decision without addressing the constitutional grounds. *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010). Instead, this Court held that the self-reporting requirement in OPNAVINST 5350.4C conflicted with the superior authority of Section 1137 of the United States Regulations. *Id*. at 11.

C. The Navy's Response

After this Court's decision in *Serianne*, the United States Navy amended several orders and instructions in an attempt to revive the requirement for sailors to self-report their civilian convictions.

1. Secretary of the U.S. Navy, ALNAV 049/10, Change to U.S. Navy Regulations in Light of U.S. v. Serianne (2010) [hereinafter ALNAV 049/10]

ALNAV 049/10 amended Article 1137 of the 1990 United States Navy Regulations to include a paragraph specifying:

> The Secretary of the Navy, Chief of Navy Operations, and Commandant of the Marine Corps may promulgate regulations or instructions that require service members to report civilian criminal charges if those regulations serve a regulatory or administrative purpose.

(J.A. at 136.)

2. Chief of Naval Operations, NAVADMIN 373/11, Change to U.S. Navy Regulation in Light of U.S. v. Serianne (2011) [hereinafter NAVADMIN 373/11]

NAVADMIN 373/11 cancelled the previous self-reporting requirement of OPNAVINST 5350.4C that this Court

invalidated and sought to revive it in a different form in Office of the Chief of Naval Operations, Standard Organization and Regulations of the U.S. Navy, OPNAVINST 3120.32C ¶ 510.6 (May 26, 2005) [hereinafter OPNAVINST 3120.32C]. (J.A. at 137-39.)

Paragraph 510.6 of OPNAVINST 3120.32C, as amended by NAVADMIN 373/11 states "Any person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged."[2] (J.A. at 138.)

Further, it specifies: (1) no person is under a duty to disclose underlying facts concerning the basis of arrest and criminal charges; (2) disclosure is required to "monitor and maintain personnel readiness, welfare, safety and deployability of the force;" (3) a self-disclosure is not an admission of guilt and may not be viewed as such; (4) a self-report is not intended to elicit an admission; and (5) no person subject to the UCMJ may question a person self-reporting an arrest regarding any aspect of the self-report unless they first advise the person of their rights under Article 31(b), UCMJ. (J.A. at 138.)

[2] OPNAVINST 3120.32D superseded OPNAVINST 3120.32C on July 16, 2012, after FN Castillo's civilian arrest. The language and reporting requirement listed in OPNAVINST 3120.32D is the same reporting requirement in OPNAVINST 3120.32C ¶ 510.6.

Finally, OPNAVINST 3120.32C, as amended by NAVADMIN 373/11, also specifies that "Commanders shall not impose disciplinary action for the underlying offense unless such action is based solely on evidence derived independently of the self-report." (J.A. at 138.)

Summary of Argument

OPNAVINST 3120.32C requires sailors to report to their immediate commander any civilian arrest, no matter the basis for the arrest. The immediate commander is not required to do anything with this information, but may then read the sailor his or her Article 31(b) rights and attempt to obtain more information with an interrogation.

This self-reporting requirement is clearly aimed at extracting information on criminal activity. Full immunity is not offered to the service member who self-reports. And there is no regulatory exception for this type of report under the Fifth Amendment. Moreover, the requirement to self-report an arrest exceeds the authorization of U.S. Navy Regulation 1137 that permits required self-reporting of criminal charges.

Consequently, the requirement conflicts with U.S. Navy Regulation 1137, the Fifth Amendment, and Article 31(a), UCMJ. FN Castillo's conviction for failing to report her arrest for drunken or reckless driving under this instruction should be set aside.

Argument

THE DUTY TO SELF-REPORT ONE'S OWN CRIMINAL ARRESTS, FOUND IN OPNAVINST 3120.32C, CONFLICTS WITH SUPERIOR AUTHORITY AND THE FIFTH AMENDMENT.

Standard of Review

Constitutional questions and interpretations of instructions are legal questions this Court reviews *de novo*. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Discussion

A service member's right against self-incrimination is protected by the Constitution, the Uniform Code of Military Justice, and military regulations. U.S. Const. amend. V; Art. 31, UCMJ; MIL.R.EVID. 301; U.S. Navy Reg. 1137; *see also United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). Yet OPNAVINST 3120.32C attempts to supersede these superior authorities and degrade these protections by requiring service members to self-report any arrest.

This case is the first challenge to the Navy's attempt to circumvent this Court's ruling in *Serianne* by amending Navy Regulation 1137 and OPNAVINST 3120.32C. For the reasons explained below, the amendments still conflict with superior competent authority and continue to violate service members' Fifth Amendment right to not incriminate themselves.

A. The reporting requirement of OPNAVINST 3120.32C conflicts with superior competent authority.

Article 1137 of the U.S. Navy Regulations is superior in authority to OPNAVINST 3120.32C. *See Serianne*, 69 M.J. at 9 (citing U.S. Navy Regulations, Section 0103 (Sept. 14, 1990)). ALNAV 049/10's amendment to U.S. Navy Regulation Article 1137 authorizes regulations or instructions to require service-members to self-report civilian criminal charges **only** if the requirement serves a regulatory or administrative purpose. The self-reporting requirement conflicts with Article 1137 of the U.S. Navy Regulations for two reasons: 1) Article 1137 of the U.S. Navy Regulations only authorizes the self-reporting of charges not arrests; and 2) The self-reporting requirement is not entitled to a regulatory exception.

1. Requiring a service member to self-report arrests is not authorized by Article 1137

ALNAV 049/10 amended Article 1137 of the 1990 United States Navy Regulations to include a paragraph specifying:

> The Secretary of the Navy, Chief of Navy Operations, and Commandant of the Marine Corps may promulgate regulations or instructions that require service members to report **civilian criminal charges** if those regulations serve a regulatory or administrative purpose.

(J.A. at 135-36); U.S. Navy Regulations, Section 1137 (Sept. 14, 1990) as amended by ALNAV 049/10 (emphasis added). Arrests are not civilian criminal charges. A charge is "a formal accusation

of an offense as a preliminary step to prosecution." Black's Law Dictionary 13c (9th ed.) An arrest is "a seizure or forcible restraint." Black's Law Dictionary 14c, (9th ed.) These are two different legal terms. NAVADMIN 373/11 also notes this difference. (J.A. at 138 (defining arrest and criminal charges separately).) The newly revised Article 1137 does not include the word arrest. (J.A. at 136.) Accordingly, OPNAVINST 3120.32C's expansion of self-reporting to include requiring the reporting of arrests is not authorized by Article 1137. This alone should invalidate that portion of the self-reporting requirement. However, even if this Court finds that "criminal charges" encompasses arrests, the self-reporting requirement does not serve a regulatory or administrative purpose.

2. The self-reporting requirement of OPNAVINST 3120.32C is not entitled to a regulatory exception

In determining whether OPNAVINST 3120.32C is a regulatory exception, this Court considers the following factors: (1) whether the disclosure requirement is essentially regulatory as opposed to criminal in nature; (2) whether the regulation focuses on a highly selective group inherently suspect of criminal activities; and (3) whether there is more than a mere possibility of incrimination but a significant link in the chain of evidence. *United States v. Oxfort*, 44 M.J. 337, 341 (C.A.A.F. 1996)); *California v. Byers*, 402 U.S. 424, 430-31

(1971). These factors compel a finding that the regulatory exception does not apply here.

a. *Oxfort* Factor 1: The self-reporting requirement of OPNAVINST 3120.32C is not essentially regulatory in nature.

First, this Court looks to whether the regulation is essentially regulatory in nature. *Oxfort*, 44 M.J. at 341. The self-reporting requirement of OPNAVINST 3120.32C states that its purpose is to "monitor and maintain the personnel readiness, welfare, safety, and deployability of the force." (J.A. at 138.) However, this self-declaration that the instruction is regulatory in nature is not dispositive and does not change the actual nature of the instruction. *Helwig v. United States*, 188 U.S. 605, 611 (1903) ("Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character.")

The broad requirement to self-report an arrest of any type of crime is unrelated to any purpose within OPNAVINST 3120.32C. The requirement is an anomaly within the instruction. (*See* J.A. 140-73.) If this information were truly necessary, then there would be a corresponding command action accompanying the report of an arrest. There is not. In fact, the only requirement following a self-report is the mandate to provide Article 31(b) warnings before questioning the service member.

i. The balance of the Government's need and the individual service member's rights weighs against finding a regulatory exception.

The broad nature of the requirement also weighs against finding it to be essentially regulatory in nature. In examining whether there is a regulatory or administrative need, this Court balances the Government's desire for the information against the individual's right against compelled disclosure:

> Tension between the state's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on one hand, and the individual claim to constitutional protection on the other; neither interest can be treated lightly.

Byers, 402 U.S. at 427. The broad nature of the required disclosure undermines the Government's claim of need for the self-report and tips the balance towards the service member. Under the new self-reporting requirement a service member must report any type of arrest, no matter the crime.

Also weighing against the Government's need is the fact that there is no reason that the service member must provide this information. This is because arrest information is available to the Government through other sources. The service member does not hold the key to this information. In fact, the legal officer for the *USS Ronald Reagan* testified that the most

common way the ship learned about an arrest was through the arresting officer calling the quarterdeck and informing the command. (J.A. at 30.) The blanket self-reporting requirement in OPNAVINST 3120.32C far surpasses any readiness needs of the Government in light the of Government's demonstrated ability to obtain the information through other means.

Additionally, the facts of FN Castillo's case weigh against finding any regulatory reason for this requirement. FN Castillo's arrest occurred in February 2012. (J.A. at 38, 47-50.) Her command did not find out about the arrest until August 2012, while at Kitsap County Courthouse for another sailor's matter. (J.A. at 30-31.) There is no indication that anything about FN Castillo's arrest impacted her ability to perform the mission for the seven months the command was unaware of her arrest. This is despite being attached to a ship. FN Castillo's very real exemplar disputes the broad, generalized statement that self-reporting is required for mission readiness.

ii. Precedent supports finding the self-reporting requirement is not regulatory in nature.

Supreme Court precedent supports finding that the self-reporting requirement is not essentially regulatory. For example, in response to a Fifth Amendment self-incrimination challenge, the Supreme Court characterized filing income taxes as a regulatory act because it was a "neutral" act contained

within a comprehensive income tax code, a code that is essentially noncriminal. *United States v. Sullivan*, 274 U.S. 259 (1927).

In *California v. Byers*, the Supreme Court similarly found a regulatory character to California's "hit and run" statute that required the driver of a vehicle involved in an accident to stop and give his name and address. 402 U.S. at 430. The Court looked to the entirety of the statute to determine the regulatory character. The Court noted that "although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal . . . [The statute] was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id*.

The self-reporting requirement in this case is not part of a complex code like the federal tax code or the vehicle code. Moreover, a service member's self-report does not facilitate any part of a regulatory scheme where there is no after-action response other than authorizing questioning relating to criminal conduct. The self-reporting requirement does not fulfill a regulatory or administrative need.

b. *Oxfort* Factor 2: The self-reporting requirement focuses on a highly selective group inherently suspected of criminal activity.

The next *Oxfort* factor looks to whether the regulation permits the Government to compel information from a "highly selective group [of people] inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965). In *Albertson*, the Supreme Court considered a provision of the Subversive Activities Control Act that required members of the Communist party to register with the Government and imposed penalties for those who did not register. *Id*. The Court found that Communists were a group that was inherently suspect of criminal activities. *Id*. at 78-79.

The net cast in the present case is even more targeted at criminal activity than the net in *Albertson*. The OPNAVINST's self-reporting requirement is aimed squarely at only those members of the public who have been charged with committing a crime. Due to this focus on criminal activities, this factor weighs against finding the self-reporting requirement is a regulatory exception.

c. *Oxfort* Factor 3: The self-reporting requirement establishes a significant link in the chain of evidence.

The final *Oxfort* factor looks to whether there is a mere possibility of incrimination from the disclosure or whether it

is a significant link in the chain of evidence. 44 M.J. at 341 (internal citations and quotation marks omitted). Here, there is a great probability of self-incrimination because the supposed immunity does not completely protect the service member from the Government's use of the self-reported information. First, the grant of immunity does not comply with the requirements of Rule for Courts-Martial (R.C.M.) 704 and cannot be considered true immunity. Second, the immunity is qualified and allows for the impermissible use of the information.

i. The "immunity" offered does not comply with R.C.M. 704.

Through his congressionally-given Article 36, UCMJ, powers, the President of the United States, in R.C.M. 704, set out the manner in which a general court-martial convening authority may grant immunity. (J.A. at 175-76. 183-84); 10 U.S.C. § 836; R.C.M. 704(c); *Samples v. Vest*, 38 M.J. 482, 486 (C.M.A. 1984); *United States v. Kirsch*, 25 C.M.R. 56, 66 (C.M.A. 1964). Failure to follow R.C.M. 704 results in a legally void immunity grant. *See Cunningham v. Gilevich*, 36 M.J. 94, 100 (C.M.A. 1992). R.C.M. 704 requires that a grant of immunity be "written and signed by the convening authority who issues it. . . [and] [t]he grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends." (J.A. at 176); R.C.M. 704(d). OPNAVINST 3120.32C

purports to offer immunity to self-reporters. But the clause does not comply with R.C.M. 704 and is in fact a legal nullity.

The Chief of Naval Operations is empowered to convene a general court-martial, and therefore, to grant immunity. But he must act in conformity with R.C.M. 704. The attempt at a blanket grant of immunity contained in OPNAVINST 3120.32C falls short of complying with R.C.M. 704. First, on the very basic level, OPNAVINST 3120.32C fails to include a "statement of authority under which [the immunity] is made." (J.A. at 176); R.C.M. 704(d).

Secondly, the immunity offered in the instruction is not sufficiently specific to inform a service member as to the matters that the immunity extends. The instruction states: "when a service member does self-report pursuant to a valid self-reporting requirement, commanders will not impose disciplinary action for the underlying offense unless such disciplinary action is based solely on the evidence independent of the self-report." (J.A. at 138.) Although the instruction is "written," the purpose of R.C.M. 704(d)'s requirement for written immunity is not fulfilled.

This is because a service member does not know whether he or she has immunity before he or she reports since only "valid self-reports" are spared disciplinary action. At the time of the report, the service member will not know if the report is

"valid" because the service member will not know if the command is aware of the arrest yet or not. A service member who does not pre-empt the command is not afforded any protection. By informing the command in that scenario, the member would confirm their guilt by an additional admission of involvement in the incident that led to arrest or conviction.

Third, the general prohibition that "commanders will not impose disciplinary action for the underlying offense" is not specific enough under R.C.M. 704 to convey to a sailor that immunity from court-martial prosecution is offered or what "matters" are covered by the term "underlying offense." Fifth Amendment jurisprudence requires particularity. And "an accused is entitled to an assurance that he is as protected from use against himself of his immunized testimony as he would be from invocation of the privilege [against self-incrimination] itself." *United States v. Gardner*, 22 M.J. 28, 30 (C.M.A. 1986). The convening authority's assurance must be specific enough that the person receiving immunity understands the scope of the immunity. *United States v. Kastigar*, 406 U.S. 441, 445 (1972) (explaining the focus of inquiry is properly on what the individual giving the disclosure would reasonably believe). The ambiguity of the self-reporting requirement and the attempt to execute blanket immunity causes the language to become too vague to satisfy the particularity required in R.C.M. 704.

Finally, this attempt at blanket immunity thwarts the underlying policy behind grants of immunity. Grants of immunity are intended to be the result of a convening authority considering the individual facts of a case and balancing "the particular needs of the military which might dictate that a [sailor] be exonerated from punishment in order to assist in his command's mission." *United States v. Villines*, 13 M.J. 46, 53 (C.M.A. 1982). This supposed blanket immunity provision precludes the individualized consideration that is supposed to be given to all grants of immunity. Given that the requirements and purpose of R.C.M. 704 are not met by this immunity, the immunity offered is a legality nullity.

ii. The self-reported disclosure establishes a link in the chain of evidence.

The qualified nature of the immunity also impermissibly allows the Government to use the supposedly immunized information for five reasons.

First, the plain reading of the term "underlying offense" only immunizes the service member against discipline from the offense for which the service member is arrested. The service member is still in jeopardy of criminal action for other misconduct that may have been committed during the transaction that accompanied the arrest but did not form the basis for the arrest. Under this instruction, upon the self-report the

command could contact the police department, get the arrest report, and charge the service member with the other crimes because only the "underlying offense" is covered. This is not immunity.

Second, the immunity offered contradicts itself to the point of being nugatory. It claims disciplinary action can only be based on evidence derived independently from the self-report. But it then allows the command to derive more evidence for its prosecution based on the report, so long as the person is read their rights first. The second allowance negates the first prohibition. *See* Randall Leonard & Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy's Treatment of Civilian Arrests After United States v. Serianne*, 213 Mil. L. Rev. 22, n.95 (Fall 2012). The person reading an accused his or her rights must first inform that person of which crime they are suspected. And the interrogator would only know this information because the accused had just been compelled to provide it.

Third, the self-report provides a link in the chain of evidence because it does not leave the service member in "substantially the same position as if [he or she] had claimed his privilege in the absence of a state grant of immunity." *Kastigar*, 406 U.S. at 457 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)). Rather, the service member has now

provided the command with the impetus to question him or her about an event that was previously unknown.

Fourth, it is also likely that a service member will inadvertently reveal additional facts when self-reporting that further strengthen the case against him that the command is free to use under the instruction. The question is whether there is a danger of self-incrimination. Here, where the service member has not negotiated for the immunity and has likely not consulted with an attorney before reporting, human nature dictates that the service member's self-report will include incriminating details beyond the requirements of the instruction. Although the instruction does not require these details, the instruction does nothing to prevent or preclude them from use.

Finally, valid immunity under Fifth Amendment jurisprudence enjoins the Government from relying upon or using immunized testimony in making the decision to prosecute. *See United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994); *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991). The current instruction does not forbid this use. Accordingly, the immunity offered is too qualified to prevent the use of the self-report by the Government as a link in the chain of evidence under the third *Oxfort* factor.

For these reasons, *Oxfort* does not support a regulatory exception for the self-reporting requirement. The changes the

government made in light of this Court's opinion in *Serianne* have not changed that equation.

B. The self-reporting requirement still violates the Fifth Amendment right against self-incrimination.

The self-reporting requirement also violates a service member's Fifth Amendment right against self-incrimination. (J.A. at 174); U.S. Const. amend. V. For a communication to be protected by the Fifth Amendment, it must be compelled, testimonial, and incriminating. *Hibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). The communication meets these requirements.

First, because failing to self-report is a violation of a "lawful" general order, self-reporting of criminal arrest is plainly compelled.

Second, any self-report under the instruction is testimonial. A communication is testimonial if it "explicitly or implicitly relates to a factual assertion or discloses information." *Doe v. United States*, 487 U.S. 201, 210 (1988). There are very few instances in which a verbal statement, either oral or written, will not convey or assert facts. *Id*. at 213-14. "The Fifth Amendment and Article 31(a) prevent compelling a defendant to furnish direct evidence to past criminal acts." *Oxfort*, 44 M.J. at 340 (citing *Glickstein v. United States*, 222 U.S. 139 (1911).) Requiring FN Castillo to relate facts about

her arrest discloses information that creates a direct link to that past criminal event.

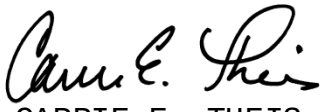
Third, the key question before this Court is whether the communication is incriminating in light of the changes to the instruction. The right against self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to evidence that might be so used against the declarant." *Kastigar*, 406 U.S. at 445. A communication is incriminating if it poses a "real danger of legal detriment," and if the detriment is "real and appreciable" rather than "of an imaginary and unsubstantial character." *Rogers v. United States*, 340 U.S. 367, 372-73 (1951). Those dangers exist here.

The self-reporting requirement still provides a real and appreciable danger of legal detriment. As discussed *supra*, it is reasonable for a service-member to believe that disclosing would lead to incriminating evidence. This is so despite the supposed immunity for those who manage to report before the command discovers the offense. The offer of immunity is vague, qualified, and not absolute. Rather, the command can use the admission and any extraneous facts disclosed during the report to augment a prosecution based on independently derived information, to prompt questioning, and as part of the decision to prosecute. Thus, despite the attempts at blanket immunity,

the self-reporting requirement still violates a service member's right against self-incrimination.

Conclusion

This Court should set aside FN Castillo's conviction for Charge II, and remand the case to the lower court for reconsideration of the sentence because OPNAVINST 3120.32C's self-reporting requirement is not regulatory in nature and violates a service member's Fifth Amendment right against self-incrimination.



CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Carrie.Theis@navy.mil

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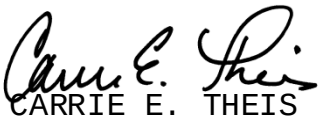
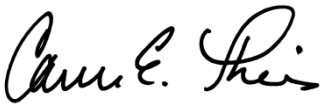


CARRIE E. THEIS
Lieutenant, USN
Appellate Defense Counsel
CAAF Bar No. 35815
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202)685-7390

Certificate of Compliance

This supplement complies with the page limitations of Rule 21(b) because it contains less than 9,000 words. Using Microsoft Word version 2003 with 12-point-Courier-New font, this supplement contains 5,829 words.



CARRIE E. THEIS
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7390
F:(202) 685-7426
carrie.theis@navy.mil
Bar no. 35815