IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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 WAS VALID DESPITE THE INSTRUCTION'S OBVIOUS CONFLICT WITH SUPERIOR AUTHORITY AND THE FIFTH AMENDMENT.

Statement of the Case

On October 7, 2014, this Honorable Court granted Fireman (FN) Castillo's petition for review of the issue and ordered briefing. On November 6, 2014, FN Castillo filed her brief with this Court. The Government responded on December 8, 2014. FN Castillo replies herein.

Argument

The Government argues that the disclosures required by OPNAVINST 3120.32C are not "legally incriminating" for the following reasons: 1) the instruction prohibits the use of any information derived from the report (Appellee's Br. at 8); 2) arrest records are public records and self-compelled disclosure of one's own public record can never violate the Fifth Amendment (Appellee's Br. at 9-10); and 3) the instruction is entitled to a regulatory exception because it does not have a punitive effect (Appellee's Br. at 11-16).

1. The instruction does not offer full immunity.

Fifth Amendment concerns are only ameliorated by full immunity. *Brown v. Walker*, 161 U.S. 591, 594 (1896) ("[N]o statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.") OPNAVINST 3120.32C does not offer full immunity because it does not prohibit all punitive uses of information derived from a self-report of an arrest. At least two points illustrate this.

First, the Government's Answer contradicts itself with regard to whether a person who self-reports is entitled to immunity. The Government argues that no disciplinary action can befall a person who self-reports (Appellee's Br. at 8), but

later in its Answer states that "the instruction itself does not provide . . . a direct grant of immunity" (Appellee's Br. at 22 citing J.A. 138). Indeed, as FN Castillo pointed out in her original brief, the supposed immunity of the instruction does not follow the Rules for Courts-Martial regarding immunity. (Appellant's Br. at 16-19.) Something less than immunity is all that the instruction offers. So the Fifth Amendment concerns still exist.

Second, the application instruction itself demonstrates that a self-reporter is not granted full immunity. First, the instruction's authorization of reading Article 31(b) rights and questioning an individual who self-reports directly affords the command the opportunity to create usable evidence against a service member. Furthermore, the instruction does little to prevent a self-reporter from reporting details beyond the scope of the instruction. The service member has not negotiated for the immunity, is not given counsel before reporting, nor is the service member given warnings reminding him/her about the limited parameters of the reporting. The service member's self-report will likely include incriminating details beyond the requirements of the instruction and the instruction allows the command to use these details. Finally, a self-reporter that does not make it to the command before the command finds out confirms their identity and involvement in the crime by their

self-report. Accordingly, without the offer of full immunity, the Fifth Amendment is still implicated by requiring a service member to self-report their crimes.

2. Requiring a service member to self-report a "fact known to the public" violates the Fifth Amendment.

The requirement to furnish a punitive authority with information of a public character can still violate the Fifth Amendment. The Government argues that arrest records are public information and, therefore, requiring the arrested individual to furnish this information to a person who has punitive authority over them can never violate the Fifth Amendment. (Appellee's Br. at 9.) The Government cites *United States v. Morrison*, 491 F.2d 344 (8th Cir. 1974), *In re Maurice*, 73 F.3d 124 (7th Cir. 1995), and *Pasdon v. City of Peabody*, 417 F.3d 225 (1st Cir. 2005) to support its argument. These cases are not controlling precedent and do not apply to the present case.

United States v. Morrison concerned whether, incident to a lawful arrest, a person may be compelled to disclose their own prior convictions to law enforcement. *Morrison*, 491 F.2d at 347. The self-reporting requirement in this case is distinctly different from *Morrison* because the self-disclosure of a service member's arrest is usually unknown to the command. In *Morrison*, the record of the appellant's prior conviction was only an administrative formality of his identification after the police

had already arrested him. In the present case, the command is given the key to start an investigation through Article 31b rights once the service member self-reports. A member's self-report identifies illegal activity to the command and confirms the service member's identity and involvement. There is clearly a Fifth Amendment implication present in this case that is not present in *Morrison.*

Similarly, *In re Maurice* is inapplicable. That case concerned an attorney's appeal of sanctions for his failure to abide by a judicial order that required him to produce all monetary sanctions levied against him in federal courts. 73 F.3d at 126. In this civil case, the Seventh Circuit did note that in some cases production of public documents can violate the Fifth Amendment "by linking a person to an illegal act or by verifying that the documents are authentic." *Id.* However, in the *Maurice* case, the context was a professional disciplinary hearing and not a criminal case, so the Fifth Amendment concerns of producing public court orders were not present. Here, the Fifth Amendment concerns are present because the act of the self-report links the service member to an illegal act that the command was previously unaware of and confirms to the command his or her identity as the person arrested. As discussed above, in some situations, the command can then use some of the

information to pursue a further criminal investigation against the service member.

Finally, *Pasdon v. City of Peabody* is similarly inapplicable to this case. *Pasdon* concerned the police department's release of the contents of its own report to the press in the context of a civil lawsuit. 417 F.3d at 228. In evaluating the claim that the disclosure of the police report violated the appellant's right against self-incrimination, the First Circuit noted from the outset that "Pasdon was not subjected to a criminal trial." *Id*. The public nature of the contents of the police report were a factor considered, but not the dispositive factor as the Government argues in its answer. In the present case, the concern is that reporting an arrest will furnish a link in the chain to a criminal trial under the UCMJ. Clearly, *Pasdon* is not controlling or applicable to FN Castillo's case.

Rather, it is this Court's precedent regarding self-reporting that should guide. In *United States v. Heyward*, the Court of Military Appeals held, despite any concerns about military readiness, "that where, at the time the duty to report arises, the witness to [a crime] is already an accessory or principal to the illegal activity that he fails to report, the privilege against compelled self-incrimination may excuse his non-compliance [of self-reporting]." 22 M.J. 35, 38 (C.M.A.

1986). *Heyward* is directly on point. Finding that the Fifth Amendment concerns do not apply in this case would require overturning *Heyward*. An arrest, although somewhat public in character, still implicates a criminal act on the part of the person reporting. Therefore, rather than rely on tenuous analogies to circuit court cases, this Court should continue to follow *Heyward* and find that the requirement to report one's own misconduct violates the Fifth Amendment in this case.

C. The *Mendoza-Martinez* factors are inapplicable.

The Government also argues that this Court should undertake an evaluation of whether the self-reporting requirement is entitled to a regulatory exception in light of the factors set forth in *United States v. Mendoza-Martinez*, 372 U.S. 144, 168-70 (1963). These factors are inapplicable in this case. First, in *United States v. Fischer*, this Court declined to expressly adopt these factors. 61 M.J. 415, 420 (C.A.A.F. 2005). Second, this Court applied the factors to determine if there was a punitive effect, rather than an implicitly punitive purpose, to a regulation that required stopping a service member's pay after the member is placed in pretrial confinement. *Id*. at 418. Here, it is not necessary to evaluate a possible punitive effect because there is an implicit punitive purpose to the instruction. Failing to report an arrest is a criminal violation and reporting one's own arrest leads to questioning

that in some circumstances can lead to prosecution under the UCMJ. Comparing stopping pay to a criminal violation to the facts at issue here is not the correct comparison. Moreover, *Mendoza-Martinez* was decided in 1963, but is not cited in any Fifth Amendment jurisprudence from this Court. This is simply not the right test to apply to this case.

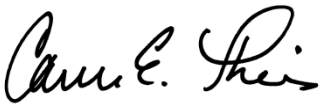
This Court should apply the test articulated in *California v. Byers that* balances the Government's desire for the information against the individual's right against compelled disclosure:

> 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.

402 U.S. 424, 427 (1971). Indeed, this Court did apply this test in *Heyward* and considered the Government's need for military readiness and still found that a service member cannot be compelled to report his/her own criminal misconduct. 22 M.J. at 38. The Navy's concerns are no different than they were at the time of *Heyward*. The balance of a perceived need for disclosure does not outweigh a service member's constitutional protection.

Conclusion

Accordingly, appellant prays that this Court reverse FN Castillo's conviction for failing to report her arrest, and remand the case to the lower court for reconsideration of her sentence.



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
C.A.A.F. Bar No. 35815