IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issue Presented

WHETHER THE LOWER COURT IMPROPERLY DETERMINED THAT DUTY [sic] 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 Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to her pleas, of unauthorized absence, violating a lawful general order, making false official statements, and larceny, in violation of Articles 86, 92, 107, and 121, UCMJ, 10 U.S.C. §§ 886, 892, 907, 921 (2012). The Members sentenced Appellant to reduction to pay grade E-1, to pay a fine of $12,120, a bad-conduct discharge, and, if the fine was not paid, to twelve months of confinement. The Convening Authority approved only so much of the sentence as provided for reduction to pay grade E-1,

a fine of $5,000, and a bad conduct discharge, and, except for the punitive discharge, ordered the sentence executed.

On May 27, 2014, the lower court affirmed the findings and approved sentence. (J.A. 1-16.) On July 18, 2014, Appellant filed a Petition for Grant of Review of the lower court decision.

Statement of Facts

A. Appellant fraudulently obtained extra pay, made false statements, and was absent without authorization.

Appellant lured a man into a false marriage and abandoned him immediately thereafter. (J.A. 3.) She used this false marriage to obtain housing and dislocation pay over the next few years. (J.A. 3.) During this period, Appellant occasionally submitted fraudulent administrative documents to ensure her continued receipt of pay to which she was not entitled. (J.A. 3-4.) Appellant also absented herself without authorization. (J.A. 4.)

B. Appellant violated an order to report her arrest for driving under the influence.

In February, 2012, while awaiting disposition of her other misconduct, Appellant was arrested for driving under the influence (DUI) in Kitsap County, Washington. (J.A. 44, 47-50.) She was given a Breathalyzer test, handcuffed, taken to the police station, and issued a ticket mandating a court appearance

for “driving under the influence of intoxicating liquor + [sic] or drugs.” (J.A. 41-44, 50.)

At the time of her arrest, Appellant was subject to OPNAVINST 3120.32C, the Standard Organization and Regulations of the U.S. Navy (the Instruction). (J.A. 144-173.) The Instruction required Sailors to report to their immediate commander any arrest or criminal charge by civil authorities. (J.A. 137-148.)

Appellant did not report her arrest or the underlying charge to her immediate commander. (J.A. 42.) Instead, she told her Lead Petty Officer that she “got a ticket.” (J.A. 42.) Appellant’s arrest was discovered in August 2012 by another Chief Petty Officer when he went to the Kitsap County Courthouse for an unrelated matter. (J.A. 33-35.)

Appellant was eventually charged with and convicted of violating the Instruction. (J.A. 17 ,51.)

C. The order Appellant violated, amended in 2011 in response to *United States v. Serianne,* limited the scope of the reporting requirement and protected self-reporters from disciplinary action.

The reporting requirement in the Instruction was altered in December 2011 as a result of this Court’s decision in *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010). The Navy-Marine Corps Court of Criminal Appeals in *United States v. Serianne*, 68 M.J. 580 (N-M Ct. Crim. App. 2009), held that the order

impermissibly compelled an incriminatory, testimonial communication to which no regulatory exception applied. The lower court further noted that the order was inconsistent with superior authority, Section 1137 of the United States Navy Regulations, which required Sailors to report offenses they observed unless they were involved in the commission of those offenses. *Id*. at 584-85. This Court agreed that the order was inconsistent with Section 1137, and affirmed on that basis. *Serianne*, 69 M.J. at 11.

In response to *Serianne*, the Secretary of the Navy changed Section 1137 to permit the Chief of Naval Operations and Commandant of the Marine Corps to promulgate orders requiring Marines and Sailors to report civilian arrests and charges, provided the orders served a regulatory or administrative purpose. (J.A. 136.) The Chief of Naval Operations acted on this guidance and altered the Instruction to require Sailors to report to their immediate commanders that they were arrested or criminally charged by civil authorities. (J.A. 137-138.)

The changed language also prohibited commanders from imposing disciplinary action for any self-reported offense

Unless the action was "based solely on evidence derived independently of the self-report." (J.A. 138.)[1]

Summary of Argument

No violation of the Fifth Amendment occurred. The Instruction prohibited criminal action on the underlying basis of reported arrests, shielding reporters from criminal prosecution. Appellant failed to report her arrest, and was punished only for that failure. Reports of arrests themselves are not incriminating statements. However, under the regulatory exception test of *United States v. Oxfort*, even if the required reporting was potentially incriminating, the Instruction demanded disclosure of only public information necessary to promote the Navy's legitimate administrative needs.

Argument

THE INSTRUCTION REQUIRES LIMITED DISCLOSURES TO PROMOTE THE LEGITIMATE ADMINISTRATIVE AIMS OF READINESS AND DEPLOYABILITY. THE COMPELLED COMMUNICATIONS ARE NOT INCRIMINATING BECAUSE THEY ARE PUBLIC IN NATURE, ARE ADMINISTRATIVE, AND BECAUSE REPORTERS ARE SHIELDED FROM PROSECUTION.

A. Standard of Review.

This Court reviews the constitutionality and interpretation of instructions *de novo*. *United States v. Serianne*, 69 M.J. 8,

[1] OPNAVINST 3120.32C has since been replaced with OPNAVINST 3120.32D, which directly incorporates the changes made to OPNAVINST 3120.32C by NAVADMIN 373/11.

10 (C.A.A.F. 2010) (citing *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000)).

B. The communications compelled by the Instruction are not incriminating. They are public in nature and administrative, and reporters may not be prosecuted for the underlying offenses.

1. The Fifth Amendment prohibits the compulsion of testimonial, incriminating communications.

The Fifth Amendment and Article 31(a), UCMJ, prohibit compulsory self-incrimination. *See United States v. Oxfort*, 44 M.J. 337, 339 (C.A.A.F. 1996); *see also Fisher v. United States*, 425 U.S. 391, 408 (1976). The privilege against compulsory self-incrimination forbids the compulsion of incriminatory statements that are "testimonial or communicative." *Schmerber v. California*, 384 U.S. 757, 761 (1966) (addressing the Fifth Amendment implications of a compulsory blood draw)). To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004) (citing *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000)).

For an act to be testimonial, it must explicitly or implicitly relate a factual assertion or disclose information. *Oxfort*, 44 M.J. at 339 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990)); *Doe v. United States*, 487 U.S. 201, 210 (1988). The privilege is intended to spare the accused from having to reveal, directly or indirectly, his knowledge of facts

relating him to the offense or from having to share his thoughts and beliefs with the Government. *Doe*, 487 U.S. at 213.

2. OPNAVINST 3120.32C prohibits prosecutions on the basis of disclosed arrests. The disclosures are not legally incriminating.

An incriminatory fact is one that, if disclosed, would pose "a real danger of legal detriment" to an individual or, in the case of self-incrimination, to the proponent of that fact. *Rogers v. United States*, 340 U.S. 367, 372-73 (1951). Incriminatory statements are not only those that would support a conviction in and of themselves, but also "those which would furnish a link in the chain of evidence needed to prosecute [an individual] for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citing *Blau v. United States*, 340 U.S. 159 (1950)).

For an accused to claim the privilege, he must demonstrate that there is a chance of prosecution and that the statement will tend to a conviction when combined with evidence from other sources. *See In re Kave*, 760 F.2d 343, 354 (1st. Cir. 1985) (citing *Kastigar v. United States*, 406 U.S. 441 (1967). The danger of legal detriment must be "real and appreciable" and "not a danger of an imaginary or unsubstantial character." *Brown v. Walker*, 161 U.S. 591, 599 (1896) (citation omitted).

Causality is not the test: the likelihood of a compelled self-report "touching off a chain reaction . . . is not the

litmus test for self-incrimination." *United States v. Medley*, 33 M.J. 75, 77 (C.M.A. 1991)); *see also United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986) ("While the information disclosed may focus attention on the reporting servicemember and may eventually lead to criminal charges being brought against him, this possibility alone does not invalidate the reporting requirement.").

The 2011 version of OPNAVINST 3120.32C specifically prohibited use of any information derived from a report in disciplinary action against the reporter. (J.A. 138.) Also, reporters were not required to provide any details underlying their civilian arrest. (J.A. 138.) The Instruction merely demands that those arrested or charged by civilian authorities provide the date of the arrest or charges, the arresting or charging authority, and the offense for which they were arrested or charged. (J.A. 138.) The Instruction further provides that disclosure is not an admission of guilt and is not intended to elicit an admission. (J.A. 138.)

The Instruction forbids the use of information gathered as a result of the self-report in disciplinary action. (J.A. 138.) Indeed, reporting the arrest would actually protect Appellant from prosecution based on any information developed as a result of the report. The plain language of the Instruction obviates any fear of prosecution by explicitly eliminating that

possibility. (J.A. 138.) Further, there is was no danger that reporting her arrest to her command would provide the State of Washington or any other non-military authority with incriminating information where only information about the arrest itself must be reported.

Appellant's claim, (Appellant's Br. at 23), that revealing her arrest would lead to incriminating evidence is exactly the sort of vague apprehension rejected by this Court in *Medley* and by the Supreme Court in *Brown*. Appellant——despite not having been prosecuted for the underlying offense here——complains that her report might have triggered additional investigation and carried the threat of prosecution. Yet, given the limits of the reporting requirement, which excluded any explanation of the underlying conduct, and the explicit protection from prosecution for the offenses underlying the arrest, it is unreasonable to fear that the required report would be incriminating.

3. Arrest Records, and the mere fact of arrest, as public records and information, are not legally incriminating, regardless of the prohibitions in the Instruction.

The disclosures compelled by the Instruction are not incriminating because they are public in nature. Federal circuit courts have determined that arrest records are not covered by the Fifth Amendment privilege. *United States v. Morrison*, 491 F.2d 344, 346-347 (8th Cir. 1974). Similarly, because sanctions

are public orders, they are akin to a defendant's rap sheet, a matter of public record not covered by the privilege. *In re Maurice*, 73 F.3d 124, 126 (7th Cir. 1995).

In *Morrison*, a federal circuit court held that an appellant could not, through the Fifth Amendment, prevent the introduction into evidence of a defendant's prior arrest record in order to show that he possessed the intent to defraud when passing counterfeit bills. *Morrison*, 491 F.2d at 346-347. The court explained that the appellant's criminal record was a matter of neither privilege nor privacy. *Id*. As a matter of public record, it was "clearly not a matter of self-incrimination." *Id*.; *see also Pasdon v. City of Peabody*, 417 F.3d 225, 228 (1st Cir. 2005) (release of information in a police report, a public record, did not affect the appellant's right against self-incrimination); *and Doe v. United States (Doe II)*, 487 U.S. 201, 210-211 (1988) ("[i]t is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind that implicates the Self-Incrimination Clause.") An arrest is a fact known to the public and should not be covered by the Fifth Amendment privilege.

The fact that Appellant was arrested and charged, by itself, could never form the basis for prosecution against her and alone could not establish any element of an offense. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)

(presumption of innocence is a long standing feature of both military and civilian law and underscores the instruction given to members that they may not presume that the defendant is guilty simply because charges have been referred to trial); *see also United States v. Owens*, 21 M.J. 117 (C.M.A. 1985) (discussing the limited admissibility of the appellant's prior arrest record). Accordingly, it could not "furnish a link in the chain of evidence" or create a "real and appreciable" danger of incrimination.

4. The disclosures compelled by the Instruction are not incriminating because they fall under the regulatory exception set out in *Oxfort*.

The United States is permitted to gain access to items or information vested with a "public character" without running afoul of the Fifth Amendment. *Oxfort*, 44 M.J. at 340-41. (citation omitted); *see also California v. Byers*, 402 U.S. 424 (1971) (holding that a regulatory scheme requiring drivers to divulge their name and address after an automobile accident did not violate the Fifth Amendment).

This Court asks three questions to determine whether the United States may request potentially incriminating information for regulatory purposes: (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 a chain of evidence. *Oxfort*, 44 M.J. at 341 (internal citations omitted).

a. The compelled communications are regulatory and not criminal.

In *Kennedy v. Mendoza-Martinez*, the United States Supreme Court utilized a seven-factor test to determine whether an act of Congress is punitive or regulatory in nature. 372 U.S. 144, 168-70 (1963). Without deciding the applicability of the *Mendoza-Martinez* test in reviewing alleged violations of Article 13, UCMJ, this Court applied the test to a regulation in *United States v. Fischer*, 61 M.J. 415, 420 (C.A.A.F. 2005). The *Mendoza-Martinez* test as applied in *Fischer* includes the following factors:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation promotes retribution and deterrence . . .; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Fischer, 61 M.J. at 420 (citing *Mendoza-Martinez*, 372 U.S. at 168-69). This Court should analyze the reporting requirement in the Instruction using this same test, as the lower court did.

1. The Instruction does not involve an affirmative disability or restraint.

OPNAVINST 3120.32C imposes an affirmative duty and does not disable or restrain those subject to it. (J.A. 138.) The lower court correctly noted that the Instruction expressly prohibits disciplinary action based on the self-report and dictates no negative action. (J.A. 11.) Under those circumstances, there is no affirmative disability or restraint created by the Instruction.

2. The requirement has not historically been regarded as a punishment.

Compulsory disclosure of information is not a traditional criminal punishment and Appellee is aware of no precedent finding it to be so. This requirement is distinctly different from the forfeiture of pay at issue in *Fischer*, which has long been regarded as a means of punishment. 61 M.J. at 420. Accordingly, this factor weighs against concluding that the Instruction is punitive.

3. The regulation is not concerned with a scienter.

Consciousness of guilt is not a factor in determining whether to implement the Instruction. *See Fischer*, 61 M.J. at 420. The obligation to report arises when a Sailor is arrested or charged, regardless of their mental state at the time. This

factor favors a conclusion that the Instruction is administrative and not punitive.

4. The regulation does not promote retribution or deterrence.

The Instruction, by its own terms, exists to promote the personnel readiness, welfare, safety, and deployability of the Navy. (J.A. 138.) By prohibiting commanders from pursuing disciplinary action based on information derived from a compelled report, the Instruction seeks to promote the valid regulatory aims of readiness rather than the punitive aims of retribution or deterrence. (J.A. 138.)

In *Serianne*, the lower court determined that an instruction promoted retribution and deterrence because it emphasized commanders' responsibility to discipline those who committed alcohol-related misconduct. 68 M.J. at 584. The Instruction here is markedly different because it explicitly restrains commanders' exercise of disciplinary authority following a compelled report. (J.A. 138.) Accordingly, OPNAVINST 3120.32C does not promote retribution or deterrence, but instead advances legitimate administrative aims.

5. The behavior to which the Instruction applies is already criminal.

OPNAVINST 3120.32C's self-reporting requirement is triggered by arrests or charges for conduct that is already

criminal. This is the only factor that supports Appellant's position.

6. An alternative purpose is assignable for the Instruction's self-reporting requirement.

Appellant trivializes the United States' interest in learning of Sailors' arrests. (Appellant's Br. 12-13.) As discussed above, the Instruction exists to promote personnel readiness, welfare, safety, and deployability. (J.A. 138.) Sailors are trusted to pilot and maintain the most advanced aircraft in the world, to operate ships and submarines propelled by nuclear power and carrying nuclear arms, to manage equipment accounts worth millions of dollars and to maintain the secrecy of classified material. They deploy under stressful and dangerous conditions.

Legal entanglements and the mental strain that can accompany criminal arrests have the potential to undermine the readiness and welfare of those entrusted with these challenging and sensitive duties. *See, e.g., Heyward*, 22 M.J. at 37 ("To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past"). Appellant herself was attached to USS REAGAN at the time of her

DUI and her arrest could have affected her readiness and deployability.

Appellant's position ignores that the nature of the Navy's mission requires that its ships and their crews be ready to deploy on short notice, though they may not be called to do so in any given seven-month period. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise"). In promoting readiness and welfare, the Instruction is directly related to an alternative, non-punitive purpose.

7. The compelled communication is not excessive relative to the alternative, administrative purpose.

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the state's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious public questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

California v. Byers, 402 U.S. 424, 427 (1971).

The Instruction compels only very limited communication following an arrest or the imposition of charges. (J.A. 138.) Appellant's contention that the United States need not compel

reports of arrests because it can learn of the information through other means, (Appellant's Br. at 13), is misplaced.

While true that some local officials may report arrests to Sailors' commands, nothing ensures this. Reporting is even less likely when arrests occur in communities with no local military installations. Appellant herself concedes that it took six months for the command to find out about her arrest, which was not reported by local authorities. (Appellant's Br. 13.) During this time, Appellant, like any Sailor, might have been made a command duty driver, to stand watch, or, in accordance with her rate, to operate and heavy equipment, such as a ship's propulsion machinery. The effect on military preparedness of failure to report in such circumstances could be significant. Balanced against the United States' compelling need to ensure the readiness of its Sailors, the requirement cannot be considered excessive.

b. <u>The Instruction does not focus on a selective group suspected of criminal activities</u>.

When statutory schemes are directed "at a highly selective group inherently suspect of criminal activities" they are viewed with a great deal of skepticism by the Court. *Byers*, 402 U.S. at 429 (citing *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)). In *Byers*, the Supreme Court noted that a statute requiring drivers to provide a name and address

following an automobile accident was not aimed at a select group, but at all persons who drove in California. 402 U.S. at 430-31.

In *Heyward*, this Court considered the appellant's duty to report observations of drug use by other servicemembers. 22 M.J. at 37. This Court decided that the requirement was not aimed at a particular group suspected of criminal activity, but instead applied "equally to all Air Force members who know of drug abuse by others." *Id*.

Appellant misunderstands the Instruction to apply only to those who have already been arrested or charged and therefore to focus on a selective group inherently suspect of wrongdoing. (Appellant's Br. at 15.) However, this requirement is like the one in *Heyward*——focused on all members of the Navy who might find themselves charged. The Instruction should be read to apply to all Sailors throughout the Navy, and to impose its obligations at the time that any Sailor is arrested or charged. Thus the Instruction does not focus on a suspect few, but rather extends across the entire Navy.

c. <u>The compelled communications establish no significant link in a chain of evidence</u>.

As discussed above, OPNAVINST 3120.32C specifically prohibits the use of information derived from a compelled report in furtherance of disciplinary action. (J.A. 138.) The

Instruction's protection severs any "link" in the chain of evidence: it permits only disciplinary action that is based on evidence acquired independent of the report. (J.A. 138.) The protection provided by the Instruction is not vague or equivocal, as Appellant suggests. Instead, it eliminates any "real danger of legal detriment" that might otherwise be associated with reporting. *See Rogers v. United States*, 340 U.S. 367, 372-73 (1951).

C. The Instruction does not conflict with superior authority.

A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. Manual for Courts-Martial, United States (2012 ed.), Part IV at 24, ¶ 16c(1)(c); *United States v. Voorhees*, 4 C.M.A. 509, 521 (C.M.A. 1954).

This Court has recognized that Article 1137 of the Navy Regulations is superior authority to operating regulations promulgated by the Chief of Naval Operations. *See Serianne*, 69 M.J. at 11 ("The lower court's description of Article 1137 as 'superior competent authority' is consistent with Article 0103 of the United States Navy Regulations, which states that the United States Navy Regulations serve as 'the principal regulatory document of the Department of the Navy. . .'").

In *Serianne*, this Court decided that an instruction to report arrests by civil authorities for alcohol-related offenses was in conflict with Article 1137. *Id*. at 9-11. This Court noted that the instruction requiring self-reporting did not provide that appellee with the rights afforded by Article 1137. *Id*. at 11.

1. The plain language of the ALNAV message permits the Chief of Naval Operations to require Sailors to report civilian arrests.

Appellant misreads the new reporting requirement in OPNAVINST 3120.32C to be in similar conflict with Article 1137. (Appellant's Br. at 9.) Appellant incorrectly cites ALNAV 049/10, which amended OPNAVINST 3120.32C, as permitting the Chief of Naval Operations and Commandant of the Marine Corps to require reporting only of civilian charges, and not civilian arrests. (Appellant's Br. at 9.) But the amended Instruction clearly permits the compelled reporting of civilian arrests as well as charges:

> THE SECRETARY OF THE NAVY, CHIEF OF NAVAL OPERATIONS, AND COMMANDANT OF THE MARINE CORPS MAY PROMULGATE REGULATIONS OR INSTRUCTIONS THAT REQUIRE SERVICEMEMBERS TO REPORT CIVILIAN ARRESTS OR FILING OF CRIMINAL CHARGES IF THOSE REGULATIONS OR INSTRUCTIONS SERVE A REGULATORY OR ADMINISTRATIVE PURPOSE.

(J.A. 136.) Moreover, this expansion was explicitly made in light of the *Serianne* decisions finding that arrest reporting requirements were inconsistent with Article 1137. (J.A. 136.)

Accordingly, the Instruction's requirement that Sailors report arrests is not inconsistent with Article 1137 of the Navy Regulations.

2. The Instruction's reporting requirement is explicitly intended for regulatory purposes.

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). As the lower court noted, "[t]here is an obvious and compelling need for commanders to be aware of their Sailors' deployability and in turn the effect on command readiness." (J.A. 10.)

The change to Article 1137, contained in ALNAV 049/10, allows the Chief of Naval Operations to require Sailors to report arrests only when that requirement served a regulatory purpose. (J.A. 136.) Indeed, the Chief of Naval Operations stated in the Instruction that: "[d]isclosure is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force." (J.A. 138.)

He further prohibited commanders from imposing disciplinary action for offenses underlying the self-reports unless the disciplinary action was based solely on evidence developed independent of the self-report. (J.A. 138.) As explained in Paragraph D(1), *supra*, this reporting requirement is regulatory in nature: it subordinates discipline to the administrative job

of ensuring the Naval forces' readiness and effectiveness to conduct their "primary business"——fighting wars.

3. Rule for Courts-Martial 704 does not contradict the protections provided by the Instruction.

The President, in R.C.M. 704, describes the process convening authorities must use to provide grants of transactional or testimonial immunity. (J.A. 175-77.) But the Instruction itself does not provide such a direct grant of immunity. (J.A. 138.) Appellant's claim that the Instruction directly grants immunity, fails to do so pursuant to R.C.M. 704, and is a "legal nullity," is misplaced. (Appellant's Br. 16-19.)

Rather, the Instruction constrains commanders' exercise of their disciplinary duties: "[W]hen 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 evidence derived independently of the self-report." (J.A. 138.) This neither implicates R.C.M. 704 nor runs afoul of its restrictions.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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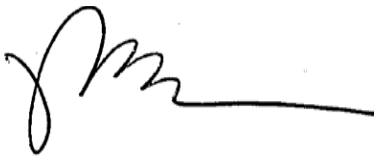

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on December 8, 2014.

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