

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA                    )  
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JOSE ESPINOSA                                    )

CASE NO. 1:10-MJ-453

GOVERNMENT MOTION FOR RECONSIDERATION &  
PRESENTATION OF NEW EVIDENCE

The United States of America, by and through its attorneys, Neil H. MacBride, United States Attorney for the Eastern District of Virginia, and John J. Radacsy, Special Assistant United States Attorney, hereby formally moves this Honorable Court to reconsider its ruling of December 2, 2010 to dismiss this case; further, the United States would move the Court to reopen the record and allow the Government to present evidence it could not reasonably have been expected to produce at the hearing of September 20, 2010.

NEW EVIDENCE

In light of the December 2, 2010 ruling by the Honorable Judge T. R. Jones, Jr. concerning this case, the Government is prepared to present evidence that: 1) the Defendant knew that he would still face civilian prosecution after accepting NJP, and 2) the Defendant understood his basic rights concerning the NJP and civilian prosecution process. This evidence will be presented mainly in the form of the oral testimony of other U.S. Marines who had interaction with the Defendant at the time he accepted NJP. Specifically, the Government is

prepared to present the testimony of Sergeant Jacob McGuire, who recalls counseling the Defendant prior to his acceptance of NJP and who will testify that the Defendant definitely knew that he would still face civilian prosecution after his acceptance of NJP. Additionally, Sergeant McGuire recalls discussing with the Defendant the impact that his pending NJP might have on the sentence the Defendant might receive later in federal court, advising him that “it might help you, or it may not.” Further, the fact that Marines in the Defendant’s command are aware that acceptance of NJP does not preclude a subsequent civilian prosecution has been confirmed with Sergeant Major Scott Schmitt, First Sergeant Joy Bolanos, and Gunnery Sergeant Ronal Morales, all of whom are senior enlisted Marines in the Defendant’s chain of command.

Moreover, Marines like the Defendant generally receive NJP counseling from military defense lawyers prior to their acceptance of NJP. At these sessions, Marines who have been cited for driving while intoxicated on base, and who are facing both NJP and prosecution in federal court, are made aware of all of their rights and options. Specifically, they are reminded that they can refuse NJP and demand a court-martial, and that such option will foreclose a separate federal prosecution in U.S. District Court. These Marines are also informed that if they choose to accept NJP, they may make the fact of their NJP known to the federal judge in Alexandria, and that the end result may be a lesser punishment than if they were to choose a trial by court-martial.

#### ARGUMENT

The Government should be permitted to present this new evidence at the hearing scheduled for January 12, 2011 for the following reasons: the Government could not have been

reasonably expected to present this evidence at the hearing on September 20, 2010, as the Defense motion to dismiss never complained that the Defendant was uninformed concerning his pending civilian prosecution; nor was the Government aware that the Court was concerned about the fairness of this prosecution before September 20, 2010; thus, the Government could not have foreseen the detailed Due Process analysis undertaken by the Court to resolve an issue that the Court itself deemed one of first impression; nor could the Government have foreseen the fact that it might be required to present evidence bearing on the subjective mental understanding of the Defendant preliminary to prosecution of this case.

When the Defense files a pre-trial motion to dismiss that is based upon a novel legal argument, the Government can only reasonably be expected to respond to those specific arguments articulated by the Defense. Thus, on September 20, 2010, when this Honorable Court heard oral argument on the Defense motion to dismiss, the Government was prepared to respond to the legal arguments advanced by the Defense in their written motion. And since the Defense never alleged that: 1) the Defendant did not realize that he would face civilian prosecution subsequent to NJP, or 2) the Defendant did not understand the NJP process or his associated rights; the Government was not obligated to rebut such (unasserted) claims or present evidence concerning these issues, nor did it foresee the need to do so (nor did the Government realize that the Court would ultimately require such evidence, or that the parties would have to delve into such matters). The Defense motion to dismiss argued only that the Defendant should be considered immunized from civilian prosecution, *and not that this particular Defendant actually believed that he had been so immunized, or that he failed to understand what was happening to him*. In other words, the Defense motion never alleged that the Defendant had been tricked, or

that he was confused about his rights. Instead, the Defense motion simply argued that internal military regulations, the legislative history of NJP, and an inter-department memorandum all suggested that Marines like the Defendant should not have to face both NJP and civilian prosecution – or, as the Defense termed it, that all of this amounted to a grant of *de facto* immunity from civilian prosecution once a Marine accepted NJP.<sup>1</sup> Thus, on September 20, 2010, the Government responded to the Defense arguments concerning these legal issues, regulations, and memoranda. Nowhere was the Government put on notice that this matter would devolve into a factual dispute, or that the Government would have to present evidence bearing on the subjective mental state of the Defendant at the time he accepted NJP. Thus, if this motion is granted, the Government will have its first real opportunity to produce such evidence – and not its second, as the Defense may allege.<sup>2</sup>

1985 MEMORANDUM OF UNDERSTANDING BETWEEN  
DEPARTMENTS OF JUSTICE AND DEFENSE

This memorandum, cited by the Defense in paragraph (B) of their brief, serves the informal purpose of generally dividing responsibilities and providing for proper coordination between the two departments. And while this memorandum lays out a default position concerning jurisdiction, the departments are free to alter this informal arrangement if they so

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<sup>1</sup> Put yet another way, the Defense motion to dismiss argued *law* and not *facts*. And so, in response, the Government submitted a brief grounded in law, and not facts. Thus, it was never apparent that additional facts relevant to the mental understanding of each defendant would figure so prominently in this debate until the Court ruled on this matter on December 2, 2010. It was at that point that the Government undertook to determine facts bearing on what these defendants actually knew concerning their NJP and subsequent civilian prosecutions.)

<sup>2</sup> Case law also suggests that a motion for reconsideration is appropriate in a case like the present one. *See, e.g., Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (D.C.Va. 1983) (“The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, *or has made a decision outside the adversarial issues presented to the Court by the parties*, or has made an error not of reasoning but of apprehension.”) (emphasis added).

desire in a particular case, or in a class of cases. Thus, this memorandum is not binding on either department in every case. Further, concerning this memorandum and its relationship to this particular Defendant, the memorandum itself clearly states in paragraph (A): “This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations, or other persons or entities.” DoD Directive 5525.7 (January 22, 1985).

### DOUBLE JEOPARDY

Given the new evidence discussed above, which suggests that the Defendant made an informed decision to accept NJP knowing that he still faced civilian prosecution for the same basic misconduct, the Government believes – as it always has – that this argument should be decided based upon a Double Jeopardy analysis. Indeed, this has been the approach of those courts that have examined this issue in the past. *See United States v. Trogden*, 476 F.Supp.2d 564 (E.D. Va. 2007); *United States v. Reveles*, 1:10-MJ-00453, CR09-5883 (W.D. Wash. 2010); *see also United States v. McAllister*, 119 F.3d 198 (2d Cir. 1997); *United States v. Imngren*, 98 F.3d 811 (4th Cir. 1996).

### CONCLUSION

Accordingly, for the foregoing reasons, the Government respectfully requests this Honorable Court to grant the Government motion to reconsider this case. Further, the Government respectfully requests this Court to determine prior to the hearing currently scheduled for January 12, 2011, whether the Government will be permitted to produce evidence

at that hearing, so that proper coordination with the necessary witnesses can be accomplished prior to that date.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Government's response motion was sent via electronic mail, on this 16th day of December 2010 to:

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