



UNITED STATES MARINE CORPS  
OFFICE OF THE STAFF JUDGE ADVOCATE  
3250 CATLIN AVENUE  
MARINE CORPS BASE  
QUANTICO, VIRGINIA 22134-5001

IN REPLY REFER TO  
5800  
B 0524/baw  
20 Jun 11

From: Captain Bret A. White, Detailed Defense Counsel  
To: Commanding General, Training Command

Via: Military Justice Officer, Marine Corps Base Quantico

Subj: R.C.M. 704(e) REQUEST FOR IMMUNITY FOR DEFENSE WITNESS ICO UNITED STATES V. STAFF SERGEANT MARINA D. LOPEZ

Ref: (a) R.C.M. 704(e)

1. The Defense requests a grant of immunity for defense witness GySgt Jennifer Kelton per the reference. GySgt Kelton is assigned to Officer Candidates School, Marine Corps Base Quantico, VA. This witness is material to the charges alleged against SSgt Lopez and her testimony is exculpatory in nature of information that may tend to mitigate the offenses charged in Charges I - IV and all specifications thereunder. SSgt Lopez is currently charged with willful disobedience of a superior commissioned officer in violation of Article 90, UCMJ; disobeying a lawful order in violation of Article 92, UCMJ; maltreatment of a subordinate in violation of Article 93, UCMJ; and obstruction of justice in violation of Article 134, UCMJ.

2. **R.C.M. 703 and U.S. v Rockwood, 52 M.J. 98 (CAAF 1999) witness request synopsis and relevancy.** This proffer of expected testimony is intended to be treated as "statements in the course of plea discussions" under Military Rule of Evidence 410. If you grant this request for testimonial immunity, GySgt Kelton could be expected to testify as follows in the court-martial of United States v. Lopez: that SSgt Lopez was not the staff member who took photos on her cell phone of candidates, that SSgt Lopez did not make the platoon do footlocker drills (carrying footlockers up and down the ladderwell), that numerous other staff members - from the company and from the battalion - were present and witnessed certain events on the charge sheet. She may also be able to testify as to other acts or omissions on the charge sheet which were committed by GySgt Kelton rather than SSgt Lopez. She can testify as to the verbal orders the platoon staff received from the platoon commander which they are now alleged to have violated.

3. **Showing of R.C.M. 704(e) conditions required for immunity.**

a. No person may be compelled to be a witness against himself. U.S. Const., Amend. V. However, for cases where witnesses necessary to the just resolution of cases cannot truthfully testify without necessarily implicating themselves, the law provides that witnesses may be granted testimonial immunity. This eliminates the danger that a critical witness, when called to testify, would invoke his or her rights against self-incrimination and refuse to testify. Immunity, by offering protection against the use of the incriminating testimony, also assures that the Fifth Amendment rights of the witness will be protected. Testimonial or "use" immunity is distinguished from transactional immunity in that it does not immunize a witness from prosecution for a particular offense, it merely protects the witness from the use of this testimony against him "in any court."

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b. The Defense believes that GySgt Kelton will invoke her right to remain silent if called to testify. The reason for this belief is that GySgt Kelton is herself currently facing nearly identical charges in her own case which has just completed the Article 32 Investigation and referral. She is represented by counsel, both detailed military defense counsel and civilian counsel, who would undoubtedly advise her to invoke her right to remain silent if called to testify in this case without a grant of testimonial immunity.

c. This testimony is vital because GySgt Kelton can testify who actually did certain of the acts charged, she can clarify mitigating circumstances to which no candidate or staff member will be able to testify, and she can give a fuller picture to the Court and the Members of the environment in which SSgt Lopez's alleged actions occurred. Without GySgt Kelton's testimony, the Defense is not able to show that (1) certain charges against SSgt Lopez are inaccurately charged against her in that GySgt Kelton was the actual party at fault, which may greatly diminish SSgt Lopez's exposure to liability, and (2) the specifics of certain of the orders allegedly given to the two SNCOs and the full nature of any further instruction or counseling, if any, during the course of training the candidates of First Platoon, Charlie Company, which will likely dramatically mitigate the other acts with which SSgt Lopez is charged. GySgt Kelton's testimony is 1) material, 2) clearly exculpatory, 3) is non-cumulative, 4) cannot be obtained from another source, and 5) would not be offered merely on the issue of another witness's credibility. Note that the only persons who can testify to certain of the acts and alleged orders given to SSgt Lopez and GySgt Kelton are either the candidates themselves, in some cases, or only these two SNCOs. However, testimony of the candidates cannot address certain of these issues. And, in their statements, during interviews with counsel, and during GySgt Kelton's Article 32 Investigation, the candidates (now second lieutenants) and OCS staff detail the hectic environment of OCS and state specifically that the candidates often do not know who is telling them to do what and often confuse the names of their own staff. The Defense cannot present this testimony unless the Convening Authority grants immunity. Only then can this material witness speak freely about her knowledge of the full facts and circumstances surrounding the offenses charged without fear of potential prosecution for such testimony.

4. **Immunity Request.** The Defense intends to call GySgt Kelton as a witness during the court-martial proceedings in the case of *United States v SSgt Marina D. Lopez*. Testimonial immunity is hereby requested for GySgt Kelton.

5. POC for this request is Captain Bret A. White at 703-784-4628/4615.



BRET A. WHITE