

### INVESTIGATING OFFICER'S REPORT

*(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)*

1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i>  Keske, Zenon W.	b. GRADE  O4	c. ORGANIZATION  HQSVCBN, MCRD San Diego	d. DATE OF REPORT  29 November 2010
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i>  Richie, Frank A.	b. TITLE  Commanding Officer	c. ORGANIZATION  Marine Corps Air Station, Miramar	
3a. NAME OF ACCUSED <i>(Last, First, MI)</i>  Bell, Marcus S.	b. GRADE  E7	c. SSN  XXXXX9737	d. ORGANIZATION  HHS, MCAS Miramar
			e. DATE OF CHARGES  20 Sep 10/29 Oct 10


*(Check appropriate answer)*

4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	YES	NO	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X		
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)	X		
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i> Puckett, Neal A.	b. GRADE Civ	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i> Marshall, Meridith L.	b. GRADE O4
c. ORGANIZATION <i>(If appropriate)</i> NA		c. ORGANIZATION <i>(If appropriate)</i> Joint Law Center, MCAS Miramar	
d. ADDRESS <i>(If appropriate)</i> NA		d. ADDRESS <i>(If appropriate)</i>	
9. <i>(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)</i>			
a. PLACE		b. DATE	

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED		
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>		
a. THE CHARGE(S) UNDER INVESTIGATION	YES	NO
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE <i>(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)</i>	X	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL		

**NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c.") Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."**

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: <i>(Check appropriate answer)</i>				
NAME <i>(Last, First, MI)</i>	GRADE <i>(If any)</i>	ORGANIZATION/ADDRESS <i>(Whichever is appropriate)</i>	YES	NO
Special Agent Minnich, Rick		Naval Criminal Investigative Service	X	
Ms. Charity Henry		Alliance for Children, Arlington, TX	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.				
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL <i>(If not attached)</i>		YES	NO
See attached remarks	All originals are in the possession of the Trial Counsel		X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. <i>(See R.C.M. 909, 916(k).)</i>				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT <i>(If Yes, specify in Item 21 below.)</i>			X	
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. <i>(See R.C.M. 405(d) (1).)</i>			X	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input checked="" type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER <i>(Specify in Item 21 below)</i>				
21. REMARKS <i>(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)</i>				
See attached remarks.				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
Zenon W. Keske		O4	HQSVCBN, MCRD San Diego	
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			29 Nov 10	

**REMARKS IN THE CASE OF U.S. V GUNNERY SERGEANT MARCUS S. BELL**

**REMARKS IN THE CASE OF U.S. V GUNNERY SERGEANT MARCUS S. BELL**

13a. Investigation Exhibits:

- IE 1: Copy of investigation appointing letter dated 23 September 2010
- IE 2: DD 458 charge sheets dated 20 September 2010 and 29 October 2010
- IE 3: Marine Corps Total Force Structure dated 26 August 2010 and 22 November 2010.
- IE 4: Military Protective Order dated 15 August 2010
- IE 5: Military Protective Order dated 3 September 2010
- IE 6: DVD of police "in car" video
- IE 7: Note from GySgt Bell's car
- IE 8: Chronology Record of Medical Care for Mrs. Tyquanta Bell
- IE 9: Medical record from Methodist Mansfield Medical Center for Ms. Makeisha Bell
- IE 10: Chronology Record of Medical Care for Ms. Makeisha Bell
- IE 11: Medical record from Southwestern Women's Center for Ms. Makeisha Bell
- IE 12: Report of Laboratory Examination (DNA results) dated 29 October 2010
- IE 13: DVD of forensic interview of Ms. Makeisha Bell
- IE 14: CD of brig call log "first set"
- IE 15: CD of brig call log
- IE 16: RCM 706 request and denial letters
- IE 17: Government closing argument
- IE 18: Defense continuance request and IO approval.
- IE 19: IO email to all parties.

**PROCEDURE**

The Article 32 hearing ICO Gunnery Sergeant Marcus S. Bell began was conducted on 22 November 2010. This Article 32 hearing was originally scheduled for 12 October 2010. The defense submitted a continuance request which I granted (see IE 18). The Article 32 was rescheduled for 22 November 2010. Per defense request, all time between 12 October and 22 November 2010 are excludable for RCM 707 speedy trial and Article 10 purposes.

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When asked if there was reason to believe that the accused was not mentally competent and unable to participate in the proceedings or was not mentally responsible for his actions, the defense stated that there was. After a brief discussion with defense and government counsel I decided to continue with the proceedings. A more detailed discussion can be found below.

### Witness Production

There were no witness production issues/objections during this investigation.

### Summary of Witness Testimony

#### Special Agent Rick Minnich, NCIS

Special Agent (SA) Minnich is a criminal investigator for Navy Criminal Investigative Service. SA Minnich provided a brief professional background. SA Minnich testified substantially to the following:

SA Minnich was first notified of the allegations on or about 15 August 2010, by a base investigator from Naval Air Station, Fort Worth Texas. He was briefed by Captain Perez that GySgt Bell was taken into custody by police and he had made an admission to them of possible child abuse. He was transferred to a hospital for a psychological evaluation. The evaluation was to determine if he was a threat to himself or others. GySgt Bell released by the hospital some time later.

GySgt Bell was first apprehended by the police after they received a suicide hotline complaint from him. GySgt Bell had several phone conversations with a police officer while the officer was searching for him. These conversations were recorded by the police car's onboard video camera. During the conversations, GySgt Bell told police that he had "copulated" his daughter, and made several other admissions of wrongdoing.

On 16 August 2010, SA Minnich interviewed the wife of GySgt Bell, Mrs. Tyquanta Bell. Mrs. Bell told him that her husband told her that he had molested their daughter, Makeisha Bell. She asked him if he had penetrated her and he said "I think so" or words to that effect. Mrs. Bell then went into shock and passed out. She was transported to a hospital and later released. After this incident, the family moved to Texas. Mrs. Bell then took Makeisha to a doctor where she was administered a pregnancy test which returned a positive result. This test was confirmed by a sonogram at another medical facility. With the consent of her mother, Makeisha Bell terminated the pregnancy. NCIS was present at the procedure and, with the consent of Mrs. Bell, collected the product of conception (POC). The POC was sent to the Armed Forces Institute of Pathology for DNA analysis along with DNA samples from Makeisha Bell and GySgt Bell. The results of the test determined that GySgt Bell could not be excluded as the father of the POC.

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The SA was also observed the forensic interview of Makeisha Bell when she told the interviewer that her father has sex with her, for the first time, on 26 June 2010 which was also her 11<sup>th</sup> birthday. She also stated that her father had shown her adult pornography. GySgt Bells personal computer was seized. Although the official report has not been completed, adult pornography was in fact found on it.

On cross examination, SA Minnich testified that he did not personally interview GySgt Bell. When the agent attempted to interview him he elected his right to remain silent and speak with an attorney. GySgt Bell was advised to contact his command. The allegations came to the attention of authorities when GySgt Bell called a suicide hotline, and attempted to turn himself in. GySgt Bells wife was interviewed by another NCIS agent on 16 August 2010. She told the agent that her husband had told her that he may have penetrated Makeisha. The witness was not sure if GySgt Bells admission to his wife took place on or off base. Sometime after the admission to his wife, GySgt Bell made arrangements for his wife and two daughters to fly back to Texas. NCIS has not interviewed Makeisha, and to his knowledge she has only been interviewed by Ms Charity Henry, a Forensic interviewer, one time. Mrs. Bell has generally been cooperative with the investigation and NCIS would interview her again if it was requested.

On re-direct, the witness testified that the family was currently staying with an Aunt, Ms. Diane Harris. They obtained bucal swabs from Makeisha, however, it took a few weeks for the Mrs. Bell to allow them to proceed with the swabs.

### **Ms. Charity Henry**

Ms. Charity Henry is a forensic interviewer that specializes in interviewing children who have experienced sexual abuse. She is employed by the Alliance for Children in Arlington, Texas. The Alliance for Children is a multi-disciplinary team consisting of educators, family advocates, attorneys, and law enforcement personnel. Her training includes 200 hours of child forensic interviewing in which she was trained to interview children in a non-leading fashion using a protocol established by the Corner House. The process of interviewing children consists of the acronym RATAAC which stands for Rapport, Anatomy identification, Touch inquiry, Abuse Scenario, and Closure. The rapport stage is established to make sure the child is comfortable and allows the interviewer asses the child's communication skills as well as establish a common language. It also establishes whether or not the child knows what the difference between the truth and a lie. The anatomy stage establishes a common language between the interviewer and the child. The interviewer uses the same words the child uses for body parts. The touch inquiry has the child talk about whether or not they have been touched by anyone. The abuse stage allows the child to talk about what has happened to them through non leading questioning. The interview then ends with the closure stage in which they talk about a neutral subject and don't conclude the interview having only spoken about what has happened to them.

Ms. Henry stated that she was contacted by NCIS to conduct the interview. She did not have much information on the allegations going into the interview. She only knew that the child had alleged

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that her father had sexually abused her. During the interview she went over with Makeisha how important it was not to lie.

On cross Ms. Henry testified that she had made notes after the interview when she watched the video tape. She did not take notes during the interview; the video of the interview was the actual work product. The notes she created after the interview were done to help her remember what Makeisha had said. She described Makeisha as cooperative but shy. Children respond differently, while some cry, others have a more matter of fact attitude. She described Mrs. Bell's demeanor as sad and compassionate but she did not interview her or get any information from her. Ms. Henry stated that she had done 515 interviews of children. She has done interviews of children in which she believed abuse had not occurred, however she did not have a number but believed it was a very small percentage. She also did not know how many allegations involve a biological parent.

### **Summary of Investigative Exhibits Considered**

- IE 1: Copy of investigation appointing letter dated 23 September 2010. Not Evidence
- IE 2: DD 458 charge sheets dated 20 September 2010 and 29 October 2010. Not Evidence.
- IE 3: Marine Corps Total Force Structure dated 26 August 2010 and 22 November 2010. Considered for all charges and specifications.
- IE 4: Military Protective Order dated 15 August 2010. Considered for the Additional Charge and specifications.
- IE 5: Military Protective Order dated 3 September 2010. Considered for the Additional Charge and specification.
- IE 6: DVD of police "in car" video. Considered for Charges I and II.
- IE 7: Note from GySgt Bell's car. Considered for Charges I and II.
- IE 8: Chronology Record of Medical Care of for Mrs. Tyquanta Bell. Considered for Charges I and II.
- IE 9: Medical record from Methodist Mansfield Medical Center for Ms. Makeisha Bell. Considered for Charges I and II
- IE 10: Chronology Record of Medical Care for Ms. Makeisha Bell. Considered for Charges I and II.
- IE 11: Medical record from Southwestern Women's Center for Ms. Makeisha Bell. Considered for Charges I and II
- IE 12: Report of Laboratory Examination (DNA results) dated 29 October 2010. Considered for Charges I and II

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IE 13: DVD of forensic interview of Ms. Makeisha Bell. Considered for Charges I and II

IE 14: CD of brig call log "first set". Considered for all Charges and specifications as well as possible additional charge of Violation of the UCMJ, Article 134, Obstructing of Justice.

IE 15: CD of brig call log. Considered for all Charges and specifications as well as possible additional charge of Violation of the UCMJ, Article 134, Obstructing Justice.

IE 16: RCM 706 request and denial letters. Not evidence, but considered for the Defenses objection.

IE 17: Government closing argument. Not evidence but considered for all Charges and Specifications.

IE 18: Defense continuance request and IO approval. Not evidence.

IE 19: IO email to all parties. Not evidence.

**Form of Charges/Recommendations for Disposition**

**Form of charge – Charge I, Spec’s 1- 2, 4-6 (Rape of a child under 12 and aggravated sexual contact with a child under 12):**

The subject charge substantively comports with the model specifications per Article 120, UCMJ (MCM 2008 Ed.), and does not require any changes.

**Burden- Charge I, Spec’s 1- 2, 4-6 (Rape of a child under 12 and aggravated sexual contact with a child under 12):**

It is well established that the government need only submit evidence that would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the Accused committed it. United States v. Engle, 1 MJ 387 (C.M.A. 1976). Accordingly, the government has met its burden with respect to referring this specification to trial by general court-martial.

**Recommendation - Charge I, Spec’s 1- 2, 4-6 (Rape of a child under 12, aggravated sexual contact with a child under 12):**

I recommend this charge be referred to trial by general court-martial.

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**Form of charge – Charge I, Spec 3 (Aggravated sexual contact with a child under 12):**

The subject charge substantively comports with the model specifications per Article 120, UCMJ (MCM 2008 Ed.), and does not require any changes.

**Burden- Charge I, Spec 3 (Aggravated sexual contact with a child under 12):**

It is well established that the government need only submit evidence that would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the Accused committed it. *United States v. Engle*, 1 MJ 387 (C.M.A. 1976). There does not appear to be any evidence to support this specification. The bulk of the evidence for all specification under Charge I come from the forensic interview of Makeisha Bell. In the early stages of the interview, it is established that Makeisha's vagina would be referred to as her "private area". When asked if anyone has ever touched her private area, Makeisha say's "yes". The interviewer states that they will talk about this touching later in the interview. A short time later, Makeisha is asked to talk about what happened to her. She goes on to describe where they were living while in Japan. One evening, her mother took her two sisters to a movie while she and her father stayed at home. She goes on to describe how her father pulled her pants and underwear down and how her father had touched her. When asked what he touched her with, she states with his "private area". Makeisha later describes a second incident in which her father had sexual intercourse with her as well as incidents in which he placed his mouth on her vagina and he put his penis in her mouth. At no time does she appear to say that he placed his hand on her vagina.

**Recommendation - Charge I, Spec 3 (Aggravated sexual contact with a child under 12):**

Due to the lack of evidence presented at the Article 32 hearing on this specification, I recommend that it be dismissed.

**Form of charge – Charge II, Spec's 1- 2 (Forcible Sodomy with a Child Under 12):**

The subject charge substantively comports with the model specifications per Article 125, UCMJ (MCM 2008 Ed.), and does not require any major changes.

**Burden- Charge II, Spec's 1- 2(Forcible Sodomy with a Child Under 12):**

It is well established that the government need only submit evidence that would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the Accused committed it. *United States v. Engle*, 1 MJ 387 (C.M.A. 1976). Accordingly, the government has **NOT** met its burden with respect to referring this specification to trial by general court-martial **AS DRAFTED**. The government has charged sodomy with a child under the age of 12 using force and without consent. Sufficient evidence has been presented that the victim was under 12 and, in accordance with *United States v. Banker*, 60 MJ 216, the U.S Court of Appeals for the Armed Forces has not recognized the ability of a



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child under the age of 16 to consent to sodomy. The government; however, has presented no evidence to the element of force.

**Recommendation - Charge II, Spec's 1- 2 (Forcible Sodomy with a child under 12):**

I recommend this charge be modified by removing the element of force and without consent and that it be referred to trial by general court-martial as modified. Removal of this element will not change the maximum allowable punishment.

**Form of charge – Additional Charge, Spec's 1- 2 (Order Violation):**

The subject charge substantively comports with the model specifications per Article 90, UCMJ (MCM 2008 Ed.), and does not require any changes.

**Burden- Additional Charge, Spec's 1- 2(Order Violation):**

It is well established that the government need only submit evidence that would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the Accused committed it. United States v. Engle, 1 MJ 387 (C.M.A. 1976). Accordingly, the government has met its burden with respect to referring this specification to trial by general court-martial.

**Recommendation – Additional Charge, Spec's 1- 2 (Order Violation):**

I recommend this charge be referred to trial by general court-martial.

**Additional Recommended Charges – Article 134 (Obstructing Justice)**

**Burden- Additional Recommended Charges – Article 134 (Obstructing Justice):**

It is well established that the government need only submit evidence that would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the Accused committed it. United States v. Engle, 1 MJ 387 (C.M.A. 1976). During the Article 32 hearing the government introduced IE 14, a brig call log. This CD contained numerous recordings of the accused speaking with his wife. During several of these calls, the accused made insinuations that she should not cooperate with the government's investigation. Taken as a whole, these phone calls clearly convey a message that Mrs. Bell should not assist the government in their investigation. Accordingly, the government has met its burden with respect to referring this specification to trial by general court-martial.

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### **Recommendation – Additional Charge, Spec’s 1- 2 (Order Violation):**

I recommend that an additional charge of violation of article 134, Obstructing Justice be referred to general court-martial.

### **Jurisdiction over the Accused**

The Accused was on active duty at the time of the offenses alleged. Jurisdiction over the accused is not an issue in this case.

### **Defense Objections**

At the outset of the Article 32 hearing, the defense objected to the proceedings on grounds that they believed the accused was not competent to stand trial or participate in his own defense. The defense submitted their request for a 706 Board and its subsequent denial by the convening authority in support of their objection (IE 16). The defense was unable to present any specific evidence of the accused’s lack of mental capacity; however they stated their belief was based on confidential information which they could not share at this time. I determined that there was insufficient evidence that would require me to delay the proceedings based on their request and that it was within the convening authorities purview to deny such a request without sufficient basis. In a subsequent email to all parties, I reiterated my request for any additional information the defense could provide on this matter (see IE 19). At the time of this report, no additional evidence was submitted by the defense.

After reviewing all the evidence submitted by both sides, I do not believe there is sufficient evidence to support the defenses assertion that the accused lacks the mental capacity to stand trial. Specifically, I have listened to the call logs of the accused since he has been in the brig. Nothing in those call logs would lead me to believe the accused is lacking in any mental capacity. During his early calls from the brig, the accused is clearly distraught; however, this is not uncommon for anyone in pre-trial confinement, especially when charged with such serious offenses. During later phone calls, the accused is much more coherent and in fact makes numerous attempts to ensure his family’s financial well being. Based on the evidence presented, and the lack of additional evidence from the defense, I do not believe the accused’s mental capacity is an issue at this time.

### **Credibility of Key Witnesses**

There do not appear to be any issues of credibility for any of the witnesses presented.

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**Summary of Recommendations**

<b><u>Charge/Specification</u></b>	<b><u>Recommendation</u></b>
Charge I, Spec 1	GCM
Charge I, Spec 2	GCM
Charge I, Spec 3	W/D
Charge I, Spec 4	GCM
Charge I, Spec 5	GCM
Charge I, Spec 6	GCM
Charge II, Spec 1	GCM (w/out force)
Charge II, Spec 2	GCM (w/out force)
Additional Charge, Spec 1	GCM
Additional Charge, Spec 2	GCM
Recommended Additional Charge, Spec	GCM

**Conclusion**

Per Rule for Court-Martial 405(j)(2)(H), the government has met its burden to refer the charges above to trial by general court-martial. The evidence presented suggests that the accused had sexual intercourse and oral sodomy with his eleven year old biological daughter. Additionally, he violated two military protective orders on several occasions and attempted to obstruct justice by encouraging his wife to not cooperate with the investigation. Due to the serious nature of these allegations, the appropriate forum for adjudication is trial by general court-martial.

  
Z. W. Keske  
Major, USMC