IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App.No. 1420
	)	USCA Dkt. No.17-0171/CG
KODA M. HARPOLE Seaman (E-3) United States Coast Guard, Appellant	)	

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

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Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012)[hereinafter UCMJ]. This honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel composed of officer and enlisted members, sitting as a general court-martial, convicted Seaman (SN) Koda Harpole, contrary to his pleas, of one specification of false official statement, two specifications of sexual assault, and

one specification of housebreaking in violation of Articles 107, 120, and 130, UCMJ, respectively. JA at 256. Finding that the sexual assault specifications were pled in the alternative, the military judge conditionally dismissed one of the two sexual assault specifications. JA at 228. The members then sentenced SN Harpole to be reduced to E-1, to be confined for seven years, and to receive a dishonorable discharge. JA at 256-57. The convening authority approved the sentence. JA at 25.

On 10 November 2016, the CGCCA affirmed the findings and sentence and ordered a corrected promulgating order to reflect the conditionally dismissed sexual assault specification. JA at 15-16.

SN Harpole was notified of the CGCCA's decision, and in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel previously filed a Petition for Grant of Review. On 1 May 2017, this honorable Court granted the Petition as to the granted issues above.

Statement of Facts

In the early morning hours of 27 February 2014, after a night of liberty in Pape'te, Tahiti, SN Harpole went into a female berthing area onboard the USCGC POLAR STAR (WAGB-10) to get his backpack from SK3 GR. JA at 147-48. Due to their consumption of alcohol, neither SK3 GR nor SN Harpole could recall much of what happened in the berthing area. JA at 70, 163.

On 28 February, SK3 GR's roommates confronted her about having sex in their shared berthing area. JA at 135. SK3 GR claimed she could not remember what happened. JA at 136. She then realized she had sex with SN Harpole instead of her ex-boyfriend, who was stationed on the cutter. JA at 75. Accompanied by her roommates, SK3 GR reported the incident to an officer as a sexual assault. JA at 76-77. SK3 GR then left the cutter and returned to the United States. JA at 160.

Several days later, on 2 March, SN Harpole spoke to his close friend then-Seaman Boatswain's Mate (SNBM) Childers, who was stationed on the cutter. JA at 239. Appearing upset, SN Harpole asked SNBM Childers if he could talk to him on the fantail of the cutter away from the ship's crew. JA at 242. SN Harpole then told SNBM Childers all he could remember about the last night in Tahiti when he walked into SK3 GR's room. *Id.* Since SN Harpole thought that something sexual might have happened, SNBM Childers told SN Harpole to talk to a victim advocate. *Id.* Together, they went back inside the cutter to find Yeoman First Class (YN1) Holly Nipp. *Id.*

SN Harpole worked in the cutter's administration office under the supervision of YN1 Holly Nipp. JA at 261. YN1 Nipp also was a victim advocate on board the cutter. *Id.* As a victim advocate, YN1 Nipp understood her role to be about supporting victims of sexual assault. *Id.*

Around 2330 on 2 March, SN Harpole went to speak to YN1 Nipp in her role as a victim advocate. *Id.* SNBM Childers accompanied SN Harpole at his request and for support. JA at 265,267. When SN Harpole explained why he wanted to talk, YN1 Nipp took SN Harpole and SNBM Chliders to a lounge on board the cutter for privacy. JA at 161.

Before SN Harpole spoke, YN1 Nipp asked SN Harpole if he approved of his friend's presence. *Id.* SN Harpole explained that he already told SNBM Childers what he wanted to tell YN1 Nipp and permitted him to stay. *Id*. YN1 Nipp then explained to SN Harpole that he would be unable to make a restricted report because he already talked to SNBM Childers. JA at 261, 267. SN Harpole acknowledged this situation. *Id.*

In addition, before their conversation began, YN1 Nipp knew SK3 GR had accused SN Harpole of sexual assault. JA at 165. However, she failed to inform SN Harpole that she already had knowledge of SK3 GR's complaint and that he was under investigation as the accused. JA at 166. SN Harpole shared with YN1 Nipp what he remembered had transpired on 27 February. JA at 162. SN Harpole confided in her that he was having marital problems, that he had been sexually abused in the past, and that he felt something sexual may have happened on that night. *Id.* SN Harpole told her that he went to SK3 GR's berthing room on board

the cutter to get his backpack. JA at 163. However, he could not remember anything after SK3 GR answered the door to her berthing area. JA at 164.

After SN Harpole made these statements to YN1 Nipp, she informed SN Harpole that she was required to report this incident to the command. JA at 239. During her meeting with the command, YN1 Nipp recommended a new victim advocate for SN Harpole because she had prior knowledge of the incident and there was a possible conflict of interest. *Id.* YN1 Nipp then relayed SN Harpole's statements to the command and eventually to CGIS. JA at 167, 261.

Prior to the Article 32 hearing, the trial defense counsel asserted the victim-victim advocate privilege under Military Rule of Evidence (MRE) 514 for the conversation SN Harpole had with YN1 Nipp on 2 March. JA at 259. The Article 32 hearing officer denied the trial defense counsel's assertion of the privilege and permitted YN1 Nipp to testify about the communications SN Harpole made to her in the cutter's lounge. JA at 260.

At the Article 32 hearing, YN1 Nipp testified that she talked to SN Harpole that night in her capacity as a victim advocate. JA at 262. She also testified that it was her idea to go take SN Harpole (and SNBM Chalmers) to the lounge so they could have privacy. *Id.* And, regarding SNBM Childers, YN1 Nipp testified that she believed he was there for SN Harpole in a support role. *Id.*

Candidly, YN1 Nipp admitted she knew SN Harpole was suspected of sexually assaulting SK3 GR but did not advise SN Harpole of his rights under Article 31(b), UCMJ. *Id.* After meeting with SN Harpole, YN1 Nipp said that she immediately went to a superior in her chain of command and reported to him her conversation she had with SN Harpole. *Id.*

SNBM Childers also testified at the Article 32 hearing. He testified that he recommended SN Harpole speak to YN1 Nipp. JA at 264. He noticed that SN Harpole was "really stressed out" and "needed help going to the [victim advocate]." JA at 265. SNBM Childers testified that he and SN Harpole were very close friends, and he believed his presence was necessary for SN Harpole to talk to YN1 Nipp. *Id.*

Although YN1 Nipp knew SN Harpole was under investigation for sexual assault when she questioned him, the trial defense counsel failed to submit a motion seeking to suppress these statements under Article 31(d), UCMJ.

However, before trial, the trial defense counsel again asserted the M.R.E. 514 privilege on behalf of SN Harpole. JA at 231. Based on written statements YN1 Nipp and SNBM Childers made to CGIS during the course of investigation as well as their testimony at the Article 32 hearing, the military judge ruled the privilege did not apply because the conversation with YN1 Nipp was not confidential. JA at 275.

During closing argument, the government repeatedly used SN Harpole's statements to YN1 Nipp as proof for all charges. JA at 185, 187-91, 225-27. The government argued SN Harpole chose to "blame the victim, avoid responsibility, and lie." JA at 191.

Summary of Arguments

The military judge abused her discretion when she permitted the prosecution, over defense objection, to admit SN Harpole's confidential communication to a victim advocate. Although a third person was present when SN Harpole communicated with the victim advocate, that communication remained confidential because that person furthered the rendition of assistance to SN Harpole. This is consistent with the plain language of MRE 514 and is supported by evidence in the record. The rule does not state that the test for determining whether a third party furthers the rendition of assistance is determined by the person rendering assistance. The rule also does not require the third person to be a blood or marital relative with an interest in preserving the confidential nature of the communication.

Although the trial defense counsel asserted SN Harpole's MRE 514 privilege, inexplicably, they did not also try to suppress his statement pursuant to Article 31(d), UCMJ. While the victim advocate held herself out to SN Harpole as a victim advocate, she reasonably should have suspected SN Harpole of

committing an offense when he sought her for assistance. Likewise, her inquiry into what SN Harpole knew of the night of the incident was reasonably likely to elicit an incriminating response. Had the trial defense counsel filed a motion to suppress for failure to comply with Article 31(b), UCMJ, there is a reasonable probability that the results of the court-martial would have been different.

I.

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE ALLOWED A VICTIM ADVOCATE TO TESTIFY AS TO APPELLANT'S PRIVILEGED COMMUNICATIONS, IN VIOLATION OF M.R.E. 514.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006)(citation omitted). Whether a communication is privileged is a mixed question of fact and law. *Id.* The Court reviews findings of fact a "clearly erroneous" standard and reviews conclusions of law *de novo*. *Id.*

Law and Argument

In 2011, the President created an evidentiary privilege to exclude from courts-martial certain communications between alleged victims and victim advocates. Exec. Order No. 13,593, 76 Fed. Reg. 78451 (Dec. 13, 2011). This privilege followed the recommendation in 2009 from the Defense Task Force on

Sexual Assault in the Military Services, which found that victims were hesitant to speak with service providers due to fear that their statements would be used at trial to undermine their credibility, thereby leading to re-traumatziation. DEP'T. OF DEFENSE TASK FORCE REPORT 69 (2009), http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf . By providing victims a privilege to prevent disclosure of their communications with victim advocates, victims would be more likely to seek assistance. *Id.*

For the privilege to exist, the following conditions must be present: (1) there must be a communication between a victim and a victim advocate; (2) the communication must be for the purpose of facilitating advice or supportive assistance to the victim; and (3) the communication must be "confidential." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 514 (2012 Supp.) [hereinafter MCM].

Originally, the rule defined a confidential communication as one made to a victim advocate acting in that role and not intended to be disclosed to third persons other than (A) those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim or (B) an assistant to a victim advocate reasonably necessary for such transmission of the communication. Exec. Order No. 13,593, 76 Fed. Reg. 78451. In 2013, the President modified the rule to simply

permit disclosure to "those" reasonably necessary for transmitting the communication. Exec.Order 13,643, 78 Fed. Reg. 29559 (May 15, 2013).

Neither the Court nor the service courts of criminal appeals has examined the victim-victim advocate privilege or the meaning of the phrase "in furtherance of the rendition of advice or assistance to the victim." However, the Court has considered the extent a communication remains confidential when it is made in the presence of a third party.

In *United States v. Shelton*, the Court analyzed the penitent-clergyman privilege's requirement of confidentiality. There, the privilege before the Court had a substantially similar definition of "confidential" as the victim-victim advocate privilege has, differing only in context. *Compare* MCM, Mil. R. Evid. 503 (2002) *with* MCM, Mil. R. Evid. 514 (2012 Supp.). The Court explained that, regarding the penitent-clergyman privilege, a communication must have been intended by the claimant to be confidential in order to be privileged. 64 M.J. at 37. To discern the intent of the one seeking advice, the Court looked to the evidence in the record. *Id.* at 38-9. Largely due to the privilege claimant's testimony at an Article 39(a) session, the Court found that the communicant intended the conversation he had with his wife (who was the third party) and his pastor to be confidential. *Id.* at 39.

The Court, though, did not specify any parameters for extending confidentiality to third parties. *Id.* Rather, the Court stated that the penitent-clergyman privilege is preserved when a communication is made in the presence of a blood or marital relative with a common interest to the speaker. *Id.*

In this case, at an Article 39(a), UCMJ session, both parties agreed that whether the victim-victim advocate privilege existed in this case turned on whether SN Harpole's communication to YN1 Nipp was confidential. JA at 268-69. The trial defense counsel argued that SNBM Childers was a person who furthered the rendition of advice or assistance to SN Harpole. JA at 35. Meanwhile, the prosecution countered that SN Harpole never intended to keep any communication with YN1 Nipp confidential because he had already made a non-confidential communication about the matter before speaking with YN1 Nipp. JA at 46.

The military judge denied SN Harpole's claim of privilege primarily on two grounds: (1) that SNBM Childers was not a person who furthered the rendition of advice or assistance to SN Harpole, and (2) even if he was, SNBM Childers did not have a "special legal relationship" to SN Harpole or his claim. JA at 270, 272. Both conclusions rest on erroneous conclusions of law.

First, the military judge reasoned that the person rendering assistance, rather than the person seeking assistance, determines whether the third person present

furthers the rendition of advice or assistance. JA at 269-70. However, neither the plain language of MRE 514 nor *Shelton* supports this proposition.

The privilege says nothing about the victim advocate deciding whether a third party furthers his ability to render advice or assistance to the victim. Rather, whether another person furthers the rendition of advice or assistance to the victim is a factual matter satisfied by evidence in the record. More importantly, the Court's decision in *Shelton* is clear that the privilege's claimant must intend a communication to remain confidential when a third person is present for the communication. 64 M.J. at 37. Therefore, if there is evidence in the record that the person claiming the privilege intended the communication to be confidential, and there is evidence that the third person furthered the advice or assistance to the victim, then the communication is privileged unless waived.

Here, the uncontroverted statements and testimony of YN1 Nipp and SNBM Childers indicate that the communication was intended to be confidential and that SNBM Childers' presence furthered the rendition of assistance to SN Harpole. As set forth in the statement of facts, above, YN1 Nipp stated that SN Harpole wanted to speak to a victim advocate, not simply YN1 Nipp in her personal capacity. She also stated that she took SN Harpole to a lounge in order for them to have privacy, which SN Harpole accepted. SNBM Childers said that SN Harpole needed his help going to talk to YN1 Nipp. And finally, SNBM Childers said that SN Harpole

asked SNBM Childers to stay with him in the lounge for support. Thus, SN Harpole met his burden of establishing the confidential nature of his communication through the combined testimony of YN1 Nipp and SNBM Childers.

Second, the military judge interpreted *Shelton's* finding regarding a blood or marital relationship as a necessary rather than a sufficient condition for confidentiality involving third parties. JA at 272; *See also* 64 M.J. at 39 ("It is sufficient here to conclude that this privilege is preserved where there is a 'relationship by blood or marriage' as well as a 'commonality of interest' between the accused and the third party present…."). Given the plain language of MRE 514, which says nothing about special legal relationships between privilege claimants and third parties, *Shelton* should not be interpreted to unnecessarily restrict those who can further the rendition of advice or assistance to the victim.

That said, despite not having a special legal relationship with SN Harpole, the evidence shows SNBM Childers and SN Harpole were shipmates, roommates, and close friends. Furthermore, as shipmates, both Coast Guardsmen have a common interest and responsibility in promoting an environment in which victims are willing to seek assistance in dealing with their experiences of sexual assault. COMMANDANT, INST. MANUAL 1754.10D, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM para. 2.B. (19 Apr. 2012). These facts thus justify

finding SNBM Childers as a person capable of furthering the rendition of assistance to SN Harpole.

Admitting SN Harpole's communication to YN1 Nipp was not harmless. *See United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). YN1 Nipp's testimony of the communication was the sole evidence offered by the prosecution to prove the false official statement charge and was crucial to the specific intent element for the housebreaking charge. JA at 185-86, 189-90. Regarding the latter charge, the prosecution argued that SN Harpole's communication to YN1 Nipp was evidence of a consciousness of guilt in the form of a lie and an attempt to "blame the victim and avoid responsibility." JA at 190-91. Had this evidence been excluded, the prosecution could not have argued that the cover-up was worse than the crime, and without that persuasive argument, the evidence of SN Harpole's voluntary intoxication may have negated the specific intent element for the charge.

Likewise, the prosecution's "consciousness of guilt" argument applied to the two sexual assault specifications. For these specifications, the evidence in support of guilt was extremely weak. None of the witnesses testified convincingly that SN Harpole knew or reasonably should have known that SK3 GR was incapable of consenting to sexual activity or that SN Harpole caused bodily harm to SK3 GR.

At best, the evidence showed SK3 GR experienced memory impairment and innocently mistook SN Harpole for SN Caron, her ex-boyfriend. She testified that

after spending most of the day drinking, she lost her ability to remember, but was still able to talk and have a "good time." JA at 65, 67. Even with that memory impairment, SK3 GR testified that she saw SN Harpole's face, knew she was having sex, and heard SN Harpole tell her to "shush." JA at 71. This latter fact – that SK3 GR was being noisy – was corroborated by SK3 Robinson, one of SK3 GR's roommates, who testified that she could hear SK3 GR having sex, although SK3 Robinson did not know with whom. JA at 155.

SK3 GR also testified that the day following the incident, she spoke to SN Caron and told him, "Last night, I was in my rack sleeping and Harpole came in and I thought it was you." JA at 75. Only once SK3 GR realized that she was with SN Harpole instead of SN Caron did she decide the sexual activity was unwanted. However, the prosecution offered no evidence that SN Harpole tricked SK3 GR into believing he was SN Caron. Yet, with such weak evidence, conviction for sexual assault was all but certain when the prosecution, armed with SN Harpole's privileged communication, argued that SN Harpole was covering his tracks because he specifically intended to sexually assault SK3 GR "when she was too drunk to resist." JA at 186.

Conclusion

Because SN Harpole suffered material prejudice with every charge and specification through the erroneous admission of his privileged communication, the findings and sentence should be set aside.

II.

THE TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO SUPPRESS APPELLANT'S UNWARNED ADMISSIONS. THESE ADMISSIONS WERE MADE TO YNI NIPP WHEN SHE KNEW HE WAS A SUSPECT AND UNDER INVESTIGATION. SHE INTENDED TO REPORT THESE ADMISSIONS TO THE COMMAND AND QUESTIONED HIM WITHOUT ADVISING HIM OF HIS ART. 31, UCMJ, RIGHTS.

Standard of Review

To establish ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. In reviewing for ineffectiveness, the Court looks at the questions of deficient performance and prejudice *de novo*. *United States v. McIntosh*, 74 M.J. 294, 295 (C.A.A.F. 2015). A servicemember's status as a suspect and the nature of the official inquiry as either law enforcement or disciplinary are ultimately legal questions. *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).

Law and Argument

In order to prove ineffective assistance of counsel, an appellant must show that his trial counsel's performance was deficient and that the deficiency deprived him of a fair trial. *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007). The Court of Appeals for the Armed Forces has stated "[w]hen a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious. *United States v. Jameson*, 65 M.J. at 163-64. "A reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Strickland*, 466 U.S. 668, 694 (1994).

Defense counsel failed to file a motion to suppress SN Harpole's statements pursuant to Article 31(d), UCMJ. Article 31(b), UCMJ, provides that no person subject to the Code may interrogate, or request any statement from a person suspected of an offense without first informing him that he does not have to make any statement regarding the offense and that any statement made by him may be used as evidence. In addition, no statement obtained from any person in violation of this article may be received in evidence against him in a trial by court-martial. Art. 31(d), UCMJ. The rights warning mandated by Congress for members of the armed forces is broader than the warnings required in a civilian setting under *Miranda v. Arizona*, 284 U.S. 436 (1966). Article 31(b), UCMJ, mandates rights

warnings for anyone "suspected of an offense," whereas *Miranda* warnings are required only in circumstances amounting to "custodial interrogation." *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000). Article 31(b), UCMJ, requires rights warnings if: 1) the person being interrogated is a 2) suspect at the time of questioning and 3) the person conducting the questioning is participating in an official law enforcement investigation or inquiry. *Id.* at 446.

A person is a suspect if, considering all facts and circumstances at the time of the interview, the "military interrogator believed, or reasonably should have believed, that the service member interrogated committed an offense." *Swift*, 53 M.J. 439, 446; *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982). Thus, this test has both a subjective and objective prong. Under the objective prong, if the totality of the circumstances would cause a reasonable person to believe that the subject had committed an offense, the warnings are required. *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982).

The facts in the present case clearly demonstrate that YN1 Nipp suspected SN Harpole of sexually assaulting SK3 GR. "Only a relatively low quantum of evidence is required to treat an individual as a suspect." *Swift* at 447. Both the objective and subjective prong are satisfied in this case. YN1 Nipp specifically stated that she was aware that he was a suspect under investigation regarding this

offense before she began questioning him. She was also under the belief that she was conflicted out of the case because of her prior knowledge.

1. YN1 Yipp's questioning of SN Harpole was an interrogation.

Military Rule of Evidence 305(b)(2), states an interrogation is "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." The United States Supreme Court has held that actions that could reasonably be expected to elicit a response from a suspect should be considered formal questioning. *Brewer v. Williams*, 430 U.S. 387 (1977).

Here, YN1 Nipp took SN Harpole to a private area where they could talk. She interrogated him, asking "What's going on?" She did not inform him of her prior knowledge of the case, nor did she inform him that she was conflicted from representing him. Instead, she engaged in a conversation that led to SN Harpole's statements regarding the incident. Considering she knew that he was under investigation, she expected that this question and the remaining conversation would elicit responses from SN Harpole. YN1 Nipp asked these questions with the purpose of obtaining evidence. She subsequently informed the chain of command and law enforcement personnel of these statements. "When one takes action which foreseeably will induce the making of a statement and a statement does result, we conclude that the statement has been 'obtained' for purposes of Article 31." *United*

States v. Dowell, 10 M.J. 36, 40 (C.M.A. 1980). Therefore, YN1 Nipp questioned SN Harpole about an alleged criminal offense.

2. YNI Nipp was acting in an official disciplinary capacity at the time of questioning.

Although YN1 Nipp considered herself to be acting in her official capacity as a victim advocate, her subjective belief does not determine her role. Whether YN1 Nipp received any statement from Appellant triggering Article 31(b), UCMJ, "is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." *United States v. Jones*, 73 M.J. 357, 362 (C.A.A.F. 2014). YN1 Nipp's subjective belief is not a factor in the determination.

Here, YN1 Nipp was freelancing as a self-appointed CGIS agent. She acted pursuant to an official investigative or disciplinary function because 1) she had prior knowledge of the case and she was conflicted from acting as his victim advocate; 2) the difference in their rank created a presumptively coercive environment; and 3) YN1 Nipp knew that this case stemmed from a law enforcement investigation and the type of questions she asked induced SN Harpole's admissions.

a. YN1 Nipp was not acting as SN Harpole's victim advocate because she had a conflict of interest.

YN1 Nipp was not acting in her official capacity as a victim advocate because she knew she was conflicted from taking SN Harpole's case. After reporting these statements to the command, she also informed the command that she was conflicted from representing him as a victim advocate. It is not logical that YN1 Nipp could serve as a victim advocate for the purposes of her interview with SN Harpole, gain information from SN Harpole, report that information to the command, and then remove herself as victim advocate because a conflict of interest that was known by her *ab initio*. Rather, it is evident from this conduct that YN1 Nipp acted at all times in an investigatory capacity. Therefore, her questioning was subject to Article 31, UCMJ's requirements.

b. YN1 Nipp's superior rank presumptively created a coercive environment.

When the questioner has some position of authority of which the accused or suspect is aware, the accused or suspect must be advised in accordance with Article 31, UCMJ. *United States v. Dole*, 1 M. J. 223, 225 (C.M.A. 1975). "[Q]uestioning by a military superior in the chain of command 'will normally be presumed to be for disciplinary purposes.'" *Swift*, 53 M.J. at 446 (quoting *Good*, 32 M.J. at 108). This presumption is consistent with the Congressional concern regarding "situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001).

Here, the coercive environment stems from YN1 Nipp's rank and from her position as a victim advocate. By pretending to act in one capacity as a trusted victim advocate, while simultaneously intending to report the statements, YN1Nipp created a deceitful and coercive environment. YN1 Nipp asked questions and discussed the events regarding SN Harpole's conduct that was under investigation. By utilizing her rank and position to create this environment she was able to gain admissions from SN Harpole about the incident.

c. YN1 Nipp acted in a law enforcement capacity when she questioned SN Harpole.

YN1 Nipp acted in a law enforcement capacity when she questioned SN Harpole. A counselor who suspects a person of an offense, questions him about that offense, and turns over the information she gains to law enforcement is acting in a law enforcement capacity. *United States v. Brisbane*, 63 M.J. 106, 109 (C.A.A.F. 2006). In *Brisbane*, CAAF found that a Family Advocacy (FA) treatment manager who initially questioned appellant was acting in furtherance of a law enforcement investigation. In that case, the accused made incriminating statements in response to the FA's questions. *Id*. Similar to YN1 Nipp, the FA had never given anyone Article 31, UCMJ, rights advisements and had not received any training in the matter because that was "just not part of [her] job." *Id*. at 109. The Court focused on her role in the investigation. The FA's action of reporting admissions to investigators, as opposed to procuring treatment for the person

whom she counseled, placed her questioning in the realm of law enforcement, not counseling. The *Brisbane* Court found that the FA's questioning of the appellant and her subsequent notification to law enforcement was in furtherance of a law enforcement investigation and therefore required Article 31, UCMJ warnings. *Id*.

Here, like in *Brisbane*, the nature of YN1 Nipp's questioning was more akin to an investigation. YN1 Nipp induced SN Harpole to make statements regarding the incident. YN1 Nipp's actions after receiving this information, like those of the FA in *Brisbane,* were investigative in nature. The FA, like YN1 Nipp, passed the contents of her questioning to the command. Unlike the FA in *Brisbane*, who informed appellant that his conversation with her was of "limited confidentiality," *id.*, here, YN1 Nipp did not let SN Harpole know of her investigatory intentions. Rather, she sprung a trap for him, in the manner of a bad episode of *Dragnet* or *Miami Vice*. YN1 Nipp's foray into law enforcement was amateurish and violated SN Harpole's rights. This court should not countenance the trickery which YN1 Nipp employed to obtain self-incriminating statements from SN Harpole and should instead insist that servicemembers respect Article 31, UCMJ's protections. Therefore, it should find that YN1 Nipp improperly conducted an unwarned law enforcement interrogation.

3. Defense counsel's performance was deficient and the CGCCA erred by ruling that trial defense counsels' conduct was a strategic decision where the government failed to provide affidavits or any other evidence from the trial defense counsel

demonstrating they recognized the Article 31, UCMJ, issue and their failure to suppress under Article 31, UCMJ was a strategic decision.

Trial defense counsel were deficient in not moving to suppress SN Harpole's unwarned statements to YN1 Nipp. An appellant rebuts the presumption that his counsel were competent when he shows that their actions or omissions were unreasonable. *United States v. Scott*, 24 M.J. 186, 188 (CMA 1987). A defense counsel's failure to file a motion is not reasonable when there was a substantial probability of success and where there was no strategic value to his case in omitting the motion. *United States v. Jameson*, 65 M.J. at 164. Here, as demonstrated above, there was a reasonable likelihood of success. Further, the record contains no evidence that the defense counsel made a strategic decision not to attempt to suppress SN Harpole's unwarned statements to YN1 Nipp under Article 31, UCMJ. Therefore, trial defense counsel were deficient because their failure to submit of a motion to suppress was not reasonable.

Supporting the position that defense counsels' representation was deficient is that the record is void of any strategic decision that the defense counsel made in failing to suppress the statements. Indeed, the record is void of any evidence that the defense counsel even recognized the Article 31, UCMJ issue. The record is void of such evidence because the government failed to provide affidavits allowing the defense counsel to respond to assertions of ineffective assistance of counsel. Instead, the CGCCA found it appropriate to simply state "appellate courts are not

to second-guess the strategic or tactical decisions made at trial by defense counsel." JA at 8. It appears the CGCCA assumed, without any support from the record, that trial defense counsel recognized the Article 31, UCMJ, issue and made a strategic or tactical decision not to pursue the issue. The CGGCA proposes that defense counsel could not be ineffective because the "theory that [YN1 Nipp] was acting as a Victim Advocate is factually inconsistent with the theory that [YN1 Nipp] was required to give Appellant his Article 31(b) rights." JA at 8. Yet whether the theories conflict matters only if there was a factual determination of the role YN1 Nipp served, which the CGCCA acknowledged, "[T]he military judge did not make a finding that Appellant's communication was made to HN in her capacity as a Victim Advocate." JA at 7.

Appellant, however, agrees with the CGCCA's proposition that YN1 Nipp acting as a victim advocate is factually inconsistent with the theory that YN1 Nipp was required to give Appellant his Article 31(b) rights. However, SN Harpole vehemently opposes the CGCCA's position that because defense counsel attempted to suppress the statements as confidential communications it did not make strategic sense to attempt to suppress them under Article 31, UCMJ. Contrary to the CGCCA's position, suppressing under confidential communications does not diminish the value or importance of asserting suppression under Article 31, UCMJ. In this case, identical to the SN Harpole's

position on appeal, the denial of one theory supports the other theory. Either YN1 Nipp was a victim advocate and the statements were confidential, or they were not confidential and YN1 Nipp was not acting as a victim advocate and they should have been suppressed under Article 31, UCMJ.

4. There is "a reasonable probability" sufficient to undermine confidence in the outcome of this case.

The defense's main argument was that the sexual encounter was consensual or that there was a mistake a fact as to consent. However, the government used SN Harpole's statements to YN1 Nipp as evidence of SN Harpole's consciousness of guilt. The government's theory was that SN Harpole knew he had been caught, so he lied to the victim advocate and made up a story about what had occurred. The government presented this position in their opening statement and submitted SN Harpole's statements as evidence. They also extensively argued during closing and rebuttal that these statements should be used both as the factual basis to convict SN Harpole for making a false official statement and as proof that SN Harpole was trying to cover up his criminal acts. Thus, SN Harpole's admission ties the government's evidence together and paints him as a liar. Without this evidence, there is a reasonable possibility that the results in this case would be different, because the participants in the sex act cannot remember it, and the other witnesses testified that SK3 GR manifested indicia of consent. The admission of

SN Harpole's statements to YN1 Nipp undermined the confidence in the outcome of the case.

Conclusion

Wherefore SN Harpole requests that this Court set aside the findings and sentence. In the alternative, SN Harpole requests this Court order the record of trial to the Judge Advocate General of the Coast Guard for remand to that court to to determine whether the defense counsel recognized the Article 31, UCMJ, issue and made a strategic decision not to pursue it.

/s/

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I certify that a copy of the foregoing was transmitted by email to the Court and the Appellate Government Division on 28 June 2017.

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This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,086 words.

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