IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issues Presented

I. WHETHER 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.

II. WHETHER 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.

Statement of Statutory Jurisdiction

This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012), because it is a case reviewed by the Coast Guard Court of Criminal Appeals (CGCCA) in which this Court has granted Appellant's petition for review. The CGCCA had jurisdiction over this case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

Appellant was convicted, contrary to his pleas, at a general court-martial composed of officers and enlisted members, 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, 10 U.S.C. §§

907, 920, 930 (2012). J.A. at 256. The military judge conditionally dismissed one of the two sexual assault specifications (Specification 1 of Charge II). J.A. at 228. The panel sentenced Appellant to reduction to E-1, confinement for seven years, and a dishonorable discharge. J.A. at 256–57. The convening authority approved the findings and adjudged sentence on March 9, 2015. J.A. at 25.

The CGCCA reviewed the case and issued a decision on November 10, 2016. *United States v. Harpole*, No. 1420, *15-16 (C. G. Ct. Crim. App. Nov. 10, 2016); J.A. at 15-16. The court affirmed the findings and the sentence, ordering a corrected promulgating order to reflect the conditionally dismissed Specification 1 of Charge II. *Id*. On May 1, 2017, this Court granted review of Appellant's petition.

Statement of Facts

The charges arise from an incident that occurred onboard the *USCGC Polar Star* ("*Polar Star*") on February 27, 2014 while the ship made a port call in Pape'te, Tahiti. During the course of the afternoon and evening of February 27th, the victim drank at least twelve alcoholic drinks before returning to her stateroom on the ship in the early morning hours of February 28th. J.A. 59, 61, 64–66.

The victim shared a four person stateroom. On the morning of the assault, two of her roommates, SK3 Robinson and OS3 Putnam, were present in the stateroom along with the victim. J.A. at 55. Appellant woke SK3 Robinson when

he opened her rack curtain while looking for the victim. J.A. at 145. All three female petty officers testified they did not let Appellant into the room. J.A. at 80, 133, 146. SK3 Robinson and OS3 Putnam were later woken by the sounds of intercourse. J.A. at 129, 149.

The next morning, the victim thought she might have had intercourse. J.A. at 75. Over the course of the day, she remembered flashes of seeing Appellant on top of her and a feeling of discomfort. *Id*. OS3 Putnam confirmed that Appellant was the one who came out of the victim's rack. J.A. at 131. The victim and her roommates proceeded to report the assault to their command. J.A. at 76. The victim was subsequently removed from the *Polar Star*. J.A. at 160.

A. Appellant disclosed his statement to SNBM Childers.[1]

After the victim was removed from the *Polar Star* on February 27th, Appellant spoke with his roommate and friend SNBM Childers. J.A. at 160. Appellant told SNBM Childers that "he needed to talk to somebody because he might have done something or something might have happened to him." J.A. at 264. Appellant told SNBM Childers that he went to the victim's room for a backpack, that she answered, grabbed his hands, placed them on herself, and that he could not remember anything else due to alcohol-induced memory loss. J.A. at

[1] Petty Officer Childers is alternatively listed as BM3 Childers in the J.A., but for consistency, Government follows suit with Appellant and uses SNBM Childers, his rank at the time of the charges. *See* Brief of Appellant at 3.

242. Appellant and SNBM Childers then went to speak with the ship's victim advocate. *Id*.

B. Appellant disclosed the same information to YN1 Nipp.

SNBM Childers went with Appellant to a female berthing area on the ship at 2130 to speak with a victim advocate, YN1 Nipp. J.A. at 160. The victim advocate knew that Appellant had been recently accused of sexual assault involving the victim, but did not know if this was why Appellant and SNBM Childers had come to see her. J.A. at 165, 261. The victim advocate, Appellant, and SNBM Childers went to a private area and the victim advocate asked Appellant whether he wanted SNBM Childers to remain while she and Appellant spoke. J.A. at 161. Appellant said that he had already explained "everything" to SNBM Childers and wanted him to stay. J.A. at 261. YN1 Nipp then informed Appellant that as a result, his report of an alleged sexual assault on himself would be an unrestricted report. *Id*. Appellant chose to stay and tell YN1 Nipp his story with SNBM Childers present. *Id*.

YN1 Nipp asked, "[w]hat's going on?" J.A. at 239. She described the flow of conversation as erratic, stating, "I wasn't really sure exactly where he was going at this time with the conversation. It was kind of bouncing all over the place . . . so at that point I didn't want to push the issue because it's a sensitive topic . . . and I wasn't there to actually try to pull information out of him." J.A. at 164. Appellant

then related the same version of events he had previously made to SNBM Childers, explaining that after a night of drinking, he came back to the ship, went to retrieve his backpack from the victim's berthing, knocked on her berthing door, the victim opened it, and he did not remember anything thereafter due to alcohol-induced memory loss. J.A. at 162–64, 239, 261. He further stated he had been a prior victim of sexual abuse and believed something happened between him and the victim. *Id*. YN1 Nipp again reminded Appellant that she would have to notify the command about his statement. J.A. at 239. YN1 Nipp complied with reporting requirements for unrestricted reports of sexual assault and informed the command. J.A. at 261. Over three weeks later, CGIS requested YN1 Nipp provide a statement about Appellant's conversation with her. J.A. at 251. SNBM Childers confirmed in his testimony that the statement given to YN1 Nipp was the "exact same" statement Appellant told him previously. J.A. at 264.

Summary of Argument

The military judge did not abuse her discretion denying defense counsel's motion to exclude Appellant's statements to the victim advocate because (1) the contents of his statement were previously relayed to a third party and (2) his communications were not "confidential" since a third party was present.

Defense counsel were not ineffective in choosing not to attempt to suppress Appellant's statement to YN1 Nipp on the basis of an Article 31(b), UCMJ, rights

warning violation because (1) it was a reasonable strategic decision and (2) the motion would have been meritless since the victim advocate did not view Appellant as a suspect, did not conduct an interrogation, and was not acting in a law enforcement or disciplinary capacity.

Argument

I. The Military Judge did not abuse her discretion in allowing the victim advocate to testify about the contents of a non-confidential, unrestricted report.

A. Standard of review.

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006). The Appellant bears the burden of presenting "conclusive argument on the claim," and "all inferences from the evidence of record [are] to be drawn in the Government's favor." *United States v. Brown*, 50 M.J. 262, 266 (C.A.A.F. 1999) (citing *United States v. Farouil*, 124 F.3d 838, 843 (7th Cir.1997)); *United States v. Lanier*, 50 M.J. 772, 777 (A. Ct. Crim. App. 1999), *aff'd*, (C.A.A.F. Mar. 20, 2000) (citing *United States v. Mosley*, 42 M.J. 300, 303 (1995)). A military judge does not abuse his or her discretion unless their actions are "arbitrary," "fanciful," "clearly unreasonable," or "clearly erroneous," and where "a miscarriage of justice would otherwise result." *Mosley*, 42 M.J. at 303; *United States v. Travers*, 25 M.J.

61, 62 (C.M.A. 1987); *Lanier*, 50 M.J. at 777 (citing *United States v. Fisher*, 21 M.J. 327, 328–29 (C.M.A.1986)).

Whether a communication is privileged is a mixed question of fact and law. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). The burden of establishing that a communication is privileged is on the party asserting the privilege. *United States v. McCarty*, 45 M.J. 334, 336 (C.A.A.F. 1996) (marital privilege); *Shelton*, 64 M.J. at 45 (clergy privilege). This Court reviews findings of fact under a "clearly erroneous" standard and reviews conclusions of law *de novo*. *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2013).

B. Appellant's statement to the victim advocate was not privileged under M.R.E. 514 because he previously disclosed the substance of the statements to a third party resulting in waiver under M.R.E. 510(a).

M.R.E. 514 sets out a privilege allowing crime victims to refuse to allow the disclosure of statements made to victim advocates for the purpose of facilitating advice or supportive assistance. M.R.E. 514(a). A communication to a victim advocate is confidential if made in the course of the victim advocate-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or reasonably necessary for transmission of such a communication. M.R.E. 514(b)(3). Appellant made statements to a victim advocate whom he sought out. He made these statements with his friend, SNBM

Childers present, and after he had already disclosed the same information to SNBM Childers. Appellant asserts that SNBM Childers was a person present to aid in the rendition of assistance to him, and therefore the privilege under M.R.E. 514 was not waived. Appellant is incorrect.

Privileges should be construed narrowly, as they run contrary to a court's truth-seeking function. *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2008) (citing *Trammel v. United States*, 445 U.S. 40, 50–51 (1980)). There are three conditions for a communication privilege to be upheld: (1) a communication, (2) intended to be confidential, (3) between people with a relationship defined under M.R.E. 502–04 or 513–14. *See United States v. McElhaney*, 54 M.J. 120, 131 (C.A.A.F. 2000). For a communication to be confidential there must be "an intent to maintain secrecy." *See United States v. McCollum*, 58 M.J. 323, 336 (C.A.A.F. 2003) (quoting *United States v. Peterson*, 48 M.J. 81, 82 (C.A.A.F.1998)).

This Court has held, "in harmony with federal civilian law," that "communications made in the presence of third parties, or revealed to third parties, are not privileged." *McElhaney*, 54 M.J. at 131–32; *see also United States v. Bishop*, 149 F.3d 1185, unpublished opinion at *5 (6th Cir. 1998) (holding prior disclosure of the "same information" to a third party waived any privilege). The application of the waiver of privilege by voluntary disclosure rule "has never turned on anything more than … the privilege holder 'voluntarily discloses … any

significant part of the matter or communication.'" *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting M.R.E. 510(a) (2012)). A significant part of the matter has alternatively been characterized as "the overall substance of the conversation." *McElhaney*, 54 M.J. at 132. Waiver under M.R.E. 510(a) "does not require that the privilege holder have knowledge that the waived statements would otherwise be privileged, or of how the waived statements will be used." *Jasper*, 72 M.J. at 278.

In *McElhaney*, the defendant engaged in a sexual relationship with his minor niece. *McElhaney*, 54 M.J. at 130–31. When discovered by his wife, he admitted his conduct to her and also sent letters warning his niece and informing her parents. *Id*. at 131. At trial, the military judge refused to suppress statements made by defendant to his wife under the marital privilege. *Id*. The lower court held—and this Court upheld—that the disclosure of a "significant part" of what he had told his wife to a third party amounted to waiver of the privilege. *Id*. at 132.

Bishop involved the psychotherapist-patient privilege. *See Bishop*, at *4–5. M.R.E. 514, the victim advocate-victim privilege, was modeled on M.R.E. 513, the psychotherapist-patient privilege. Manual for Courts-Martial, United States (2012) [hereinafter MCM], at App. 22-46. In *Bishop*, a former soldier at a Veterans Administration mental health facility bludgeoned another resident and pushed him down the stairs. *See id*. at *1–2. The defendant made a statement to an investigator

prior to speaking with his therapist. *See id*. The defendant told his therapist what occurred and the therapist testified against him at trial. *See id*. The court found the previous disclosure to the investigator waived any psychotherapist-patient privilege. *Id*. at *5. The court made special note of the fact that the therapist warned the defendant that where he had previously disclosed the statement, if defendant told the therapist, the therapist would not be able to keep it confidential. *See id*. However, the prior disclosure was sufficient without the warning. *See id*.

In the present case, Appellant sought out SNBM Childers several days after the victim reported what occurred and had been removed from the ship. Appellant told SNBM Childers "he might have done something or something might have happened to him." J.A. at 264. Appellant told SNBM Childers that he went to the victim's berthing looking for a backpack, knocked on the door, upon entering the victim took Appellant's hands and forced them onto herself, and then Appellant remembered nothing due to alcohol-induced memory loss. J.A. at 242, 264. YN1 Nipp testified that when Appellant and SNBM Childers spoke with her, she was told Appellant went looking for a backpack, knocked on the door, and then remembered nothing due to alcohol-induced memory loss. J.A. at 163–64. SNBM Childers describes the conversation with Appellant as containing the "exact same" information as what Appellant told YN1 Nipp. *See* J.A. at 242, 264. Thus, Appellant shared the overall substance of his statement with SNBM Childers, and

just as this Court held in *McElhaney* and civilian courts have held in cases like *Bishop*, this Court should find that any available privilege was thus waived. Where Appellant bears the burden to establish a communication is privileged, he has failed to carry this burden.

C. Appellant voluntarily waived any privilege as to the conversation with the victim advocate because he chose to have a third party present during the conversation.

Communications within the scope of one of the evidentiary privileges in Part V of the Military Rules of Evidence can be waived. M.R.E. 510(a) "does not require that the privilege holder have knowledge that the waived statements would otherwise be privileged…." *Jasper*, 72 M.J. at 278; *Shelton*, 64 M.J. at 38–39. M.R.E. 510(a) only requires a waiver be voluntary, not "knowingly" or "intelligently." *Jasper*, 72 M.J. at 281. For a communication to be confidential there must be "an intent to maintain secrecy" *and* "physical privacy between the individuals." *See McCollum*, 58 M.J. at 336 (quoting *Peterson*, 48 M.J. at 82). This Court has held that generally "communications made in the presence of third parties . . . are not privileged." *McElhaney*, 54 M.J. at 131–32.

Appellant disclosed the contents of his potentially privileged conversation with a victim advocate to his friend prior to his conversation with the victim advocate and then had the same friend present during his conversation with the victim advocate. He asserts that this did not waive the privilege as his friend was

present in furtherance of the rendition of advice and assistance by the victim advocate and thus, under M.R.E. 514(b)(3) the communication remained confidential and should not have been admitted at his trial. In interpreting a Military Rule of Evidence, this Court previously held it is appropriate to look to (1) the text of the rule; (2) the analysis of the rule in the MCM, and if ambiguities still arise; (3) to the federal common law, consistent with M.R.E. 101(b). *See United States v. Matthews*, 68 M.J. 29, 36 (C.A.A.F. 2009).

1. *The text of M.R.E. 514(b)(3) does not support a finding that SNBM Childers falls within the third party exception*.

The applicable part of the victim advocate-victim privilege rule states:

> A communication is "confidential" if made in the course of the victim advocate-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

M.R.E. 514(b)(3). The CGCCA addressed whether the plain language of M.R.E. 514(b)(3) placed authority in the victim or the victim advocate to determine whether disclosure is in furtherance of the rendition of assistance to the victim. J.A. at 7. The trial judge noted, "the word 'rendition' is the verb form of 'to render,' which is defined as 'to give (something) to someone.'" J.A. at 269–70 (citing *Render*, MERRIAM-WEBSTER (ONLINE), http://www.merriam-webster.com/dictionary/render). Combining this understanding of render with "to

the victim," the judge found the plain meaning was that the person rendering the assistance, the victim advocate, determined whether the disclosure to a third party was needed. *See id*. *Shelton* discussed the clergy privilege, where confidential is defined in substantially the same manner, and interpreted the words "in furtherance" as a reference to the pastor's belief. *Shelton*, 64 M.J. at 39 (holding a wife's presence did not waive privilege because she shared a bond of blood, marriage, or legal common interest, but in discussing "in furtherance" noted that "*Rev. Dennis* believed that Appellant's wife's presence was necessary for his redemption") (emphasis added).[2] YN1 Nipp asked whether SNBM Childers should remain, to which Appellant stated he had already told him everything. J.A. at 161. YN1 Nipp put Appellant on notice that anything said after that would constitute an unrestricted report. J.A. at 261. In this context it is apparent YN1 Nipp did not believe disclosure to SNBM Childers was in furtherance of the rendition of her assistance to the Appellant.

2. *The analysis of the rule offers reasons why M.R.E. 514(b)(3) should not be interpreted to include friends acting in a moral support role*.

The analysis of Rule 514 states that the rule originated from The Defense Task Force on Sexual Assault in the Military Services 2009 Report, where service

[2] Contrary to Appellant's argument, the CGCCA did not interpret *Shelton* to require a special relationship as a pre-condition to M.R.E. 514(b)(3), but only distinguished *Shelton* from the present case. *See* J.A. at 7; *cf*. Brief of Appellant at 7.

members reported "being 're-victimized' when their prior statements to victim advocates were used to cross-examine them in court-martial proceedings." App. 22, M.R.E. 514, at A22-46. Victims did not believe their conversations would be confidential. *See id*. The victim advocate-victim privilege was based on the psychotherapist-patient privilege. *See id*. In reference to the exceptions to the rule, the analysis specifically noted that "exceptions to Rule 514 are similar to the exceptions found in Rule 513, and are intended to be applied in the same manner." *Id*. M.R.E. 513(b)(4) when defining what constitutes a confidential communication within the meaning of that rule refers to third persons whose presence is in furtherance of the rendition of "professional services." Untrained friends of the patient present at the request of the patient for moral support do not aid in providing professional services. Nor do they aid in the transmission of the communication as would, for example, a translator. The phrasing of the similar definition of what constitutes a confidential communication in M.R.E. 513 supports the military's judge's interpretation that the determination of who is needed in furtherance of advice or assistance, or professional services, is determined by the service provider.

3. *The common law does not support a finding that SNBM Childers should be included within the exception where the federal courts have never recognized a moral support exception, but specifically rejected it.*

Federal common law is limited as to the extent of counselor- and victim advocate-victim privileges. The attorney-client privilege, the only privilege specifically recognized in the Federal Rules of Evidence is helpful, as is federal case law concerning the psychotherapist patient privilege.

a. Common law attorney-client privilege would not allow disclosure in front of SNBM Childers where no legal special relationship exists.

Privilege is preserved if a third party present for an otherwise confidential communication shares a relationship by blood, marriage, or common interest. *See Shelton*, 64 M.J. at 39 (citing *In re Grand Jury Investigation*, 918 F.2d 374, 385–88 (3d Cir.1990)). The common interest doctrine permits parties who share "legal interests" to share privileged materials with one another "in order to more effectively prosecute or defend their claims." *Am. Mgmt. Servs., LLC v. Dep't of the Army*, 703 F.3d 724, 732 (4th Cir. 2013) (quoting *Hunton & Williams v. DOJ*, 590 F.3d 272, 277 (4th Cir. 2010)) (emphasis added). The Federal Circuit Courts of Appeal have rejected expansion of attorney-client privilege to parties outside the privileged relationship beyond recognized exceptions of blood, marriage, or legal common interest. *See, e.g.*, *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684–85 (1st Cir. 1997). In *Mass. Inst. of Tech.*, the court noted exceptions that

allow a lawyer to communicate with others serves a functional purpose, to consult with others needed in the representation, but problems would arise when the client controls expansion of the privilege. *See id*. "*Fairness* is also a concern where a client is permitted to choose to disclose materials to one outsider while withholding them from another." *Id*. (emphasis added). This exception exists only so far as it is applicable under M.R.E. 501(a)(4). Appellant concedes no legal special relationship exists. Brief of Appellant at 13.

Third persons properly involved in rendering the attorney's legal services, the "circle of intimates," includes other lawyers in the same firm, non-lawyer staff, interpreters, or retained private investigators, experts, or other agents retained by the lawyer to assist in the representation. *See* GEOFFREY C. HAZARD ET AL., *The Law of Lawyering* § 9.9 (2008 Supp.). Courts have refused to allow expansion of privileges to incorporate friends whose sole purpose is moral support. *See, e.g.*, *United States v. Evans*, 113 F.3d 1457, 1461-66 (7th Cir. 1997) (holding a defendant's attorney-client privilege waived because a friend and former attorney attended an initial interview with new counsel for moral support); *see, e.g.*, JEFFREY R. BAKER, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 338 (2011) ("The client's desire for confidentiality, however pronounced and critical, simply does not justify extending the privilege under

present and ancient rules."). The language regarding what communications are confidential in attorney-client privileges and victim advocate-victim privileges—M.R.E. 502(b)(4) and 514(b)(3) specifically—are substantially similar and should be interpreted as such: moral support persons are not privileged.

b. Common law counselor- or victim advocate-victim privilege is broader than attorney-client privilege, but presence of third parties waives privilege unless the service provider deems their presence "in furtherance" of service.

Existing case law varies on whether victim advocate-victim privileges are encompassed within their own privilege rule or within the psychotherapist-patient privilege. The M.R.E. analysis states they have the same common law source. Courts have only consistently recognized one class of third parties that do not share a legal special relationship or agency relationship with the service provider, as not waiving privilege—group therapy members. *See, e.g.*, *Doc v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) (rejecting sexual harassment plaintiffs claims of confidentiality because her emotional and mental state were at issue, but protecting privilege interest of others in a joint therapy session because of their "substantial privacy interest"); *Ferrell L. v. Superior Court*, 203 Cal. App. 3d 521, 527 (1988) (rejecting criminal defendant's appeals to the Confrontation Clause and his motion to reveal statements from his victim-daughter's group therapy sessions, holding that "the communication with the other participants in the group therapy is reasonably necessary for the accomplishment of the purpose for which the

psychotherapist was consulted ...."); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *Federal Evidence* § 5:43 (3d ed. 2007); JACK B. WEINSTEIN, *Weinstein's Federal Evidence*, §504.08[4] (Joseph M. McLaughlin, ed., 2d ed. 2009).

Group therapy participants do not share a common legal interest, but share a common mental health need. They are also deemed necessary to the rendering of service by the service provider. While not deciding the issue at that time, in *Shelton*, this Court noted that the priest believed the wife's presence was necessary, even if she had not shared a bond of marriage. A male victim advocate might reasonably find the presence of a female makes it easier for a victim to communicate with him. Under these circumstances, a victim advocate might seek the aid of a third party to use their training and experience to choose the best person to help them in rendering aid. Vesting the power with the victim to determine what third parties to whom disclosure is made is in furtherance of assistance provides no limiting factor in the expansion of the scope of the victim advocate-victim privilege.

Here, the trial judge noted that to find otherwise would "clearly not be a narrow construction of the privilege . . . ." J.A. at 271. The long standing precedent regarding the narrow construction of rules of privilege, the language of M.R.E. 514(b)(3), the purpose as outlined in the analysis of the rule, and the federal

common law do not support a finding that M.R.E. 514(b)(3)(A) includes SNBM Childers, nor that whose presence is "in furtherance" is determined by the victim rather than the service provider.

D. If there was an error in admitting YN1 Nipp's testimony, any error that occurred as to the Articles 120 and 130 charges was harmless error because all *Kerr* factors weigh in favor of the government.

YN1 Nipp's testimony was central to the Article 107 false official statement charge. Specifically, her testimony covered Appellant's statements to her that the victim let him into her berthing area. She did not testify about the sexual assault charge and her testimony only touched indirectly on the housebreaking charge. Thus, even if this Court finds that YN1 Nipp's testimony should not have been admitted, such a determination does not impact the findings as to Charges II and III, violations of Article 120 and 130 respectively.

An appellate court conducts *de novo* review of whether an error regarding the admission of evidence, constitutional or otherwise, was harmless. *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015). An error in admitting privileged communications is not constitutional in nature. *McCollum*, 58 M.J. at 342. For non-constitutional errors, the government must demonstrate that the error did not have a substantial influence on the findings; an appellate court determines whether prejudice resulted from an erroneous evidentiary ruling by weighing four *Kerr* factors:

(1) The strength of the government's case,
(2) The strength of the defense case,
(3) The materiality of the evidence in question, and
(4) The quality of the evidence in question.

Norman, 74 M.J. at 150 (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). As described below, Appellant suffered no prejudice as a result of YN1 Nipp's testimony when applying the *Kerr* factors.

1. *The government had a strong case and the consciousness of guilt argument could have been made regardless of YN1 Nipp's testimony*.

Given the very limited scope of YN1 Nipp's testimony and her limited interaction with either Appellant or the victim, Appellant's argument creates a remarkably broad estimate of the impact of her testimony, particularly since, as reviewed above, the same evidence was presented to the members through other witnesses. It also significantly minimizes the strength of the case against Appellant, specifically the direct evidence of guilt. This was not a traditional, he-said, she-said case, but rather the government had the benefit of the testimony of SK3 Robinson and OS3 Putnam about what actually occurred in the berthing area, the testimony of LTJG Harris who extracted a tampon impacted four inches into the vaginal canal of the victim, the day following the sexual assault, and a forensic biologist who confirmed the presence of Appellant's semen in the victim. Appellant may disagree with the conclusion the members came to regarding his guilt, but YN1 Nipp's testimony was not necessary to the government's case as to

those charges and their specifications. The *Kerr* factor regarding strength of the government's case weighs in favor of the government.

2. *The Defense's case centered on consent.*

Appellant argued consent, and some of the evidence, particularly from the other petty officers in the victim's berthing gave them the opportunity to make a solid argument in that regard. Additionally, cross-examination of SN Caron was designed to show the victim's ability to consent and the fact the victim did not report until confronted by her roommates who were angered that she had sex in the berthing area. On the other hand, the victim did not come back to the ship with Appellant. Evidence indicated the victim had been drinking a significant amount over a number of hours. Appellant let himself into the female berthing area without permission. He did not know where the victim's rack was. The victim did not remove a tampon before sex and it was impacted four inches into her vaginal canal. OS3 Putnam, who was present in the stateroom, reported no sounds of movement from the victim after the assault and no trips to the bathroom. Appellant's proffered explanation for his presence in female berthing very late at night, that he needed to retrieve a backpack, was discredited by testimony that indicated the backpack Appellant claimed to be so concerned he find was not his and, in the end, he left the victim's berthing area without it.

In addition, as to the specifics of YN1 Nipp's testimony, SNBM Childers could testify to Appellant's statement made to the victim advocate as Appellant had made the same statements to him in an unprivileged setting. Thus, regardless of whether YN1 Nipp testified at trial, the trial testimony of SNBM Childers was equally available to create an inference of consciousness of guilt and desire by Appellant to blame the victim after the fact. The only additional testimony of YN1 Nipp, that Appellant was greeting the command regularly each morning, where he had never previously done so, had nothing to do with her role as a victim advocate and would not have been privileged, even absent SNBM Childers's presence or prior knowledge. The defense case relied largely on discrediting the victim and selective use of the testimony of government witnesses.

3. *YN1 Nipp's testimony was limited and Appellant was not prejudiced by its use*.

In discussing the materiality and quality of the evidence, Appellant's argues that admission of his statement to YN1 Nipp was the sole basis for prosecution to demonstrate Appellant's consciousness of guilt and intent to blame the victim to avoid responsibility. *Cf.* Brief of Appellant at 14–15. Regardless of whether YN1 Nipp testified, SNBM Childers testified that Appellant sought him out several days after the victim reported what occurred and she had been removed from the ship. Childers testified he and Appellant discussed whether Appellant should seek a victim advocate and allege that it was Appellant who was the victim. *See* J.A. at

264. The statement regarding knocking on the victim's berthing door, her opening it and taking Appellant's hands and forcing them onto herself were made to SNBM Childers as well as YN1 Nipp. J.A. at 242. SNBM Childers' testimony changed from the statements being the "exact same," as stated in his affidavit and Article 32 testimony, to his trial testimony that Appellant had told him SK3 Robinson had opened the door. To the extent Childers' trial testimony differed from his previous sworn statements he was subject to impeachment on those differences. *See* J.A. at 178, 242, 264. The statements are in direct contradiction with the testimony of SK3 Robinson and OS3 Putnam. Both women testified Appellant let himself in the room. J.A. at 133–34, 146. SK3 Robinson stated Appellant woke her by opening her berthing curtain, while she was in a state of undress, in search of the victim because he did not know where the victim was. J.A. at 145–46. Thus, the same argument that these statements evidence a consciousness of guilt and the intent to blame the victim and avoid responsibility would still have been available to prosecution. The preference to introduce the statements through YN1 Nipp rather than SNBM Childers, who stated he was good friends with Appellant and was still in regular contact with him, *see* J.A. at 179, was a reasonable, strategic decision, but a prosecutor could have gotten the same information from SNBM Childers. When looking to the quality and materiality of YN1 Nipp's testimony, these factors weigh in favor of the government, where the testimony resulted in no

prejudice; the statement served a corroborative purpose, making any error in admitting the statement through YN1 Nipp harmless. All *Kerr* factors weigh in favor of the government.

E. Even if there was error in admitting YN1 Nipp's testimony, requiring the dismissal of the Article 107 charge, the error was harmless as to sentence.

An error is harmless as to sentence if "the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity," and no rehearing is necessary. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A.1986)); *see also United States v. Hawes*, 51 M.J. 258, 258 (C.A.A.F. 1999). The Court in *Moffeit* looked to:

> (1) the experience of the court in regards to the greater charge,
> (2) the sentence adjudged compared to the remaining maximum sentence available, and
> (3) what charge was the most serious offense and its impact.

See Moffeit, 63 M.J. at 41–42.

With regard to the first step in the evaluation set out in *Moffeit*, sexual assault cases constitute a significant portion of the trial docket of all five armed forces, and correspondingly, of the appellate docket of the service courts of appeal and this Court, giving military trial and appellate judges great familiarity with how panels apply sentences to the underlying facts.

As to the second step, when comparing the adjudged sentence against the maximum sentence available, previously this Court, after setting aside the findings on a charge that resulted in a relatively small change to the maximum period of confinement found a sentence reassessment or rehearing unnecessary. *See Custis*, 65 M.J. at 369. In *Custis*, the solicitation to obstruct justice charge was set aside. *See Custis*, 65 M.J. at 369. Removal of the obstruction charge did not necessitate a sentence reassessment or rehearing. *Id*. at 372. The original maximum sentence was 103 months and the defendant received one month confinement, less than 1% of the eligible maximum. *See id*. at 367; *see also* MCM, App. 12 at 12-3, 12-6, & 12-7. The maximum sentence after reversal of the solicitation charge was 67 months, meaning one month confinement was then under 3% of the eligible maximum, a two percent change. *See id*.

Similarly, if Article 107 charge here, should find the error is harmless as to sentence. Even if this Court should determine YN1 Nipp's testimony should not have been admitted, and therefore the finding as to the Article 107 charge would need to be set aside, the sentence as to the remaining charges, sexual assault under Article 120 and the housebreaking charge and specification under Article 130, is appropriate. Appellant was sentenced to reduction to E-1, confinement for seven years, and a dishonorable discharge. J.A. at 256–57. Articles 107, 120, and 130 each individually allow for reduction to E-1 and dishonorable discharge. *See*

MCM, App. 12-2, 12-4, 12-5. The maximum period of confinement for violation of Article 107 is five years, for the Article 120 specification of which Appellant was convicted 30 years, and for Article 130 the maximum period of confinement is also five years, for a total of 40 years. *See id*. Even absent the Article 107 charge, Appellant received seven years where the maximum period of confinement was 35 years. In other words, Appellant received 17.5% of the maximum period of confinement at trial and if his sentence remained in place after dismissal of the Article 107 charge his sentence would amount to 20% of the maximum, an increase of 2.5%.

Finally, as to *Moffeit's* third step, Appellant's case centered on the sexual assault charge and the housebreaking that facilitated it, much more serious charges than the false official statement. The change in sentence would result in a similar percentage change as the change in *Custis* where this Court found there was no need to reassess the sentence, and here the underlying offense is more severe than in *Custis*. In addition, the government had a strong case notwithstanding YN1 Nipp's testimony.[3] And as previously noted her testimony was not directly related to the sexual assault and housebreaking charges and any error in admitting her testimony was not prejudicial as to the sentence.

[3] For a full factual analysis, see *supra*, at I.D.

II. Defense counsel was not ineffective for making the strategic decision not to file a motion to suppress Appellant's statement.

A. Standard of review.

Courts review claims of ineffective assistance of counsel *de novo*. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In reviewing whether Article 31(b), UCMJ, rights warning should have been given, Courts review the military judge's findings of fact on a clearly erroneous standard and conclusions of law *de novo*. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000). Military courts review the issue of ineffective assistance of counsel using the test established in *Strickland v. Washington*, and require an appellant demonstrate that their: (1) counsel's performance was deficient; and (2) that this deficient performance prejudiced their defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (incorporating *Strickland* test in the context of military justice case law).

B. Defense counsel's performance was not deficient.

In reviewing whether a counsel's performance was deficient, courts begin with a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *see also Mazza*, 67 M.J.at 474 (applying high level of deference to a counsel's performance). In order to overcome this presumption of competence,

a counsel's performance must fall "below an objective standard of reasonableness." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). This requires Appellant "show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" *Mazza*, 67 M.J. at 475 (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). However, reasonableness is not based on the success of counsel's strategy, but instead on whether counsel made an objectively reasonable choice in strategy from the available alternatives. *Akbar*, 74 M.J. at 379 (citing *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)). Thus, courts will not "assess [a] counsel's actions through the distortion of hindsight" or "second guess the strategic or tactic decision made by trial counsel." *Mazza*, 67 M.J. at 474–75.

1. *Defense counsel made a reasonable strategic decision in opting to move to suppress Appellant's statement on the basis of the victim advocate privilege under M.R.E. 514.*

Here, defense counsel's decision not to file a motion to suppress Appellant's statement to YN1 Nipp for an Article 31(b), UCMJ, rights warning violation was an objectively reasonable trial strategy. The decision to move to suppress Appellant's statement on the basis that it was a confidential communication under M.R.E. 514 was a far stronger argument than the argument that Article 31(b), UCMJ, applied. Specifically, the facts and circumstances surrounding Appellant's statement to YN1 Nipp indicated that YN1 Nipp was speaking to Appellant in her

capacity as a victim advocate, and that the victim advocate privilege under M.R.E. 514 applied, absent waiver. J.A. at 164, 262–63. In contrast, the argument that YN1 Nipp—the victim advocate Appellant sought out—should have provided Article 31(b), UCMJ, rights warnings prior to speaking with Appellant was highly tenuous.[4] As such, defense counsel's decision to move to suppress Appellant's statement under M.R.E. 514 was an objectively reasonable trial strategy.

Defense counsel's strategy was also reasonable because it would have been factually and legally inconsistent to argue that Appellant's statement was a confidential communication to a victim advocate under M.R.E. 514 and yet have required an Article 31(b), UCMJ, rights warning from the same victim advocate. As noted by the Coast Guard Court of Criminal Appeals, the argument that Appellant's statement should have been suppressed because it was made without an Article 31(b), UCMJ, rights warning is in direct conflict with the argument that the statement should have been suppressed because it was subject to the victim advocate privilege under M.R.E. 514. J.A. at 8–9. A statement gathered for a law enforcement purpose, as part of a law enforcement or disciplinary investigation, is not gathered under circumstances where it is confidential; it is gathered to be used as evidence or information in a subsequent proceeding. While lawyers frequently make arguments in the alternative, arguing both the victim advocate privilege

[4] *See supra*, at II.B.2.

applied, and in the alternative that the victim advocate engaged in a law enforcement interrogation, would have involved making arguments that undercut the basis for each of the alternatives. As such, defense counsel was reasonable in choosing one of the possible arguments, and in the particular circumstances, deciding to focus their efforts on attempts to suppress Appellant's statement solely on the basis of it being subject to the victim advocate privilege, regardless of the success or outcome of this strategic decision at trial. *Akbar*, 74 M.J. at 379.

2. *Defense counsel made a reasonable strategic decision in opting not to move to suppress Appellant's statement on the basis of an Article 31(b), UCMJ, violation as such a motion would have been unsuccessful.*

Based on the facts and circumstances surrounding YN1 Nipp's discussion with Appellant, Appellant was not entitled to an Article 31(b), UCMJ, rights warning. In looking to whether an Article 31(b), UCMJ, rights warning was required, courts look to: (1) whether the service member being interrogated was a suspect at the time of the questioning; and (2) whether the questioner subject to the UCMJ was participating in an official law enforcement or disciplinary investigation. *Swift*, 53 M.J. at 446.

a. <u>YN1 Nipp did not suspect Appellant of an offense.</u>

In order to determine whether a service member is a suspect at the time of an interview, courts apply an objective test that considers all the facts and circumstances at the time and looks to whether the questioner believed, or

reasonably should have believed, that the service member committed an offense. *Swift*, 53 M.J. at 446 (citing *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)). YN1 Nipp was informed by her command that Appellant was the suspect in the sexual assault reported by the victim. J.A. at 165–66, 261. However, that is not the same as her suspecting Appellant of committing the offense.

b. YN1 Nipp did not interrogate Appellant.

Pursuant to M.R.E. 305(b)(2), an interrogation is defined as "any formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning." Here, YN1 Nipp did not seek an incriminating response in speaking to Appellant. Conversely, Appellant sought her out by going to YN1 Nipp's state room at 2130. J.A. at 171. Appellant brought his friend, SNBM Childers, with him when he spoke with YN1 Nipp. She spoke to Appellant solely in her role as a victim advocate and viewed Appellant as a victim. J.A. at 262. Her actions supported her view that she was acting in a victim advocate role when she suggested that they speak in the ship's first class lounger for the sake of privacy. J.A. at 161, 261. In listening to Appellant's version of events, YN1 Nipp acted consistent with her training as a victim advocate by being nonjudgmental and not trying to "pull information out of [Appellant]." J.A. at 164, 263. Further, YN1 Nipp's only questions to Appellant during their discussion were to determine if Appellant was okay with SNBM Childers's presence in the room

and her opening question of "what's going on."[5] Thus, in meeting with Appellant, YN1 Nipp did not seek an incriminating response.

An incriminating response on the part of Appellant was also not a reasonable consequence of YN1 Nipp's question to Appellant of "what's going on." J.A. at 239. The information Appellant provided can hardly be termed the product of an interrogation, as during the course of a five minute conversation he volunteered: he was having marital difficulties; he had previously been sexually abused; on the night of February 27th he sought out the victim's stateroom to retrieve his backpack; the victim answered the door and placed Appellant's hands on her; and after that point he had an alcohol induced blackout. J.A. at 161, 239, 261, 264–65. *see also United States v. Bradley*, 51 M.J. 437, 441–42 (C.A.A.F. 1999) (holding incriminating response to officer's question of "what happened" to be admissible); *contra United States v. Brisbane*, 63 M.J. 106, 113 (C.A.A.F. 2006) (holding Family Advocate's question of "did you do it" and close cooperation with investigators to be an interrogation).

c. YN1 Nipp was not acting in a law enforcement capacity.

In determining whether an individual was questioned as part of an official law enforcement or disciplinary investigation, courts look to "all the facts and circumstances at the time of the interview [and] whether the military questioner

[5] The statements of YN1 Nipp and SNBM Childers indicate that YN1 Nipp did not ask Appellant anything beyond these questions. J.A. at 161, 239, 261, 264–65.

was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." *Swift*, 53 M.J. at 446. A questioner will be deemed to be acting in a law enforcement capacity where they are acting in close cooperation with investigative personnel or where their interview with a service member is aimed at acquiring evidence to support the prosecution of a service member or for determining the sufficiency of evidence against a service member. *Brisbane*, 63 M.J. at 113. Further a questioner can be deemed to be acting in a law enforcement capacity where they intentionally disclose otherwise confidential communications to investigators. *United States v. Benner*, 57 M.J. 210, 213–14 (C.A.A.F. 2002).[6] However, the circumstances in *Benner* and *Brisbane* are clearly distinguishable from those in the case at hand.

In *Benner*, the accused's confession to investigators was inadmissible because it was compelled by the chaplain from whom he sought counseling. *Benner*, 57 M.J. at 212–13. Specifically, the chaplain in *Benner* told the accused that he would report the contents of his privileged communications to investigators if the accused did not make the disclosure himself. In subsequently speaking with investigators, the accused was informed that the chaplain had indeed contacted the investigators regarding the improper conduct, leaving the accused little option but

[6] The United States recognizes the Court's recent opinion in *United States v. Ramos*, M.J., No 17-0143/CG (July 19, 2017) in which the accused was found to have been entitled to an Article 31(b) warning, but asserts that the facts and circumstances supporting that finding are distinguishable from those in this case.

to make the same admissions to investigators. *Id.* at 213. In contrast, Appellant's statement to YN1 Nipp was not compelled and the voluntariness of his statement is not at issue. YN1 Nipp gave Appellant notice that his statement to her would constitute an unrestricted report of a sexual assault since he asserted that the victim had in fact sexually assaulted him—and would therefore be reported to his command per Coast Guard policy—thereby giving Appellant the option to proceed with a restricted report by having SNBM Childers leave the room or decline to provide a report entirely. J.A. at 161; *see* COMDTINST 1754.10D, section 3.C.1 (located at J.A. at 278–79); *cf Benner*, 57 M.J. at 212 (finding chaplain to have informed member that he would report the member's statement to investigators only after the member had made the statement). Similarly, YN1 Nipp's disclosure of the contents of Appellant's statement to Appellant's command was not a violation of a privilege since she was required by Coast Guard policy to make Appellant's command aware of his unrestricted report. *See* COMDTINST 1754.10D, section 3.C.1 (located at J.A. at 278–79). Disclosure of the fact that a member alleged he was the victim of a sexual assault is not the same thing as disclosing the contents of the conversation in which that allegation was made. The report was unrestricted both because SNBM Childers was present when Appellant informed YN1 Nipp that he believed he had been sexually assaulted, and because Appellant had already disclosed his allegations to Childers, and thereby made the

report to someone in the Coast Guard outside the circle of those that can take a restricted report of sexual assault. *Id.*

In *Brisbane*, the family advocate was not only working as part of the Child Sexual Maltreatment Response Team (CSMRT)—which included an Air Force Special Investigations agent and a judge advocate—that responded to the reported misconduct by the accused, but was tasked with conducting the initial interview with the accused in order to determine if there was sufficient evidence to proceed with the investigation. *Brisbane*, 63 M.J. at 108–109. Further, in speaking with the accused, the family advocate asked the accused "[d]id you do it?" *Brisbane*, 63 M.J. at 113. However, YN1 Nipp's actions during her discussion with Appellant were far different. Specifically, YN1 Nipp was not acting in concert with a command investigation. YN1 Nipp only spoke to Appellant after he voluntarily sought her out as a victim advocate. J.A. at 171, 261. Additionally, YN1 Nipp did not ask Appellant any questions beyond whether it was okay for SNBM Childers to be in the room and "what's going on,"[7] nor did she take notes during her approximate five minute discussion with Appellant. J.A. at 166, 161, 172, 262. YN1 Nipp's subsequent report to her command regarding the fact that Appellant asserted he had been sexually assaulted was also not indicative of an investigative

[7] The statements of YN1 Nipp and SNBM Childers indicate that YN1 Nipp did not ask Appellant anything beyond these questions. J.A. at 161, 239, 261, 264–65.

purpose, but instead, in accordance with Coast Guard policy for victim advocates. *See* COMDTINST 1754.10D, section 3.C.1 (located at J.A. at 278–79).

As seen in the clerical privilege context in *Benner*, an Article 31(b), UCMJ, rights warning is not required when the questioner is acting "in a confidential and clerical capacity." *Benner*, 57 M.J. at 212. Applying this reasoning to the victim advocate privilege context, YN1 Nipp was acting well within her capacity as a victim advocate when she listened to Appellant's statement. In addition, there was nothing YN1 Nipp might have recognized as potentially incriminating in Appellant's statements to her. He claimed that he had been sexually assaulted whereas in *Benner*, the accused admitted to offenses he was suspected of committing. *Id.*

Finally, Appellant sought YN1 Nipp in her capacity as a victim advocate. J.A. at 171. Appellant's argument would potentially require victim advocates to give rights warnings during the course of conversations that are otherwise privileged. This would have a chilling effect on the ability of members the Coast Guard to seek the assistance of victim advocate, the exact types of situations M.R.E. 514 was designed to avoid. App. 22, M.R.E. 514, at A22-46

d. <u>YN1 Nipp's superior rank did not create a presumption that she was acting in a disciplinary capacity.</u>

Questioning of a service member by a superior that is in their immediate chain of command will normally create a presumption that such questioning was

for disciplinary purposes. *Swift*, 53 M.J. 439, 446. However, an Article 31(b), UCMJ, rights warning is required only if the service member is a suspect at the time of the question and the questioning is part of an official law-enforcement investigation. *Good*, 32 M.J. at 108.

The testimony of SNBM Childers rebuts this presumption that because of YN1 Nipp's superior rank, she was acting in a disciplinary capacity as he states that it was Appellant's own idea to go to speak with YN1 Nipp and that the meeting lasted no more than five minutes. J.A. at 171–72. Additionally, YN1 Nipp testified that she knew Appellant prior to their discussion since he had wanted to strike Yeoman and had worked with her "off and on." J.A. at 159, 261. The voluntariness of Appellant's discussion with YN1 Nipp, and the familiarity he had from previously working with her, are in stark contrast with instances where a questioner's superior rank created a presumption that they were acting in a disciplinary capacity. Specifically, in *Swift*, a member's First Sergeant—an Air Force Master Sergeant—was held to be acting in a disciplinary capacity after ordering the service member to report to his office for questioning after becoming concerned that the member was engaged in bigamy. *See Swift*, 53 M.J. at 448. In *Good*, a service member's direct supervisor—a U.S. Army Special Agent—was held to be acting in a disciplinary capacity based on his status as a criminal

investigator and role as the member's immediate superior in the chain of command. *Good*, 32 M.J. at 109.

Thus, as Appellant was neither in YN1 Nipp's direct chain of command, or ordered by YN1 Nipp to speak with her, there was no presumption that she was acting in disciplinary capacity. J.A. at 171, 261.

3. *Additional fact-finding is not required in order to determine that defense counsel's decision not to suppress Appellant's unwarned statement was a reasonable strategic decision.*

In order to show that a counsel's strategy was objectively unreasonable—and therefore deficient, an appellant "must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" *Mazza*, 67 M.J. at 475 (quoting *Perez*, 64 M.J. at 243). As such, Appellant bears the burden of identifying how defense counsel's decision not to suppress Appellant's unwarned statements was an unreasonable strategic decision.

Here, Appellant has failed to meet this burden and instead, claims that in order for defense counsel's decision to be considered a reasonable strategic decision, it is the government's burden to provide factual support showing that the decision was made for a strategic purpose. *See* Brief of Appellant at 24. Such an assertion is not only made without citation to any authority, but is also in conflict with the well-established burden required of appellants in making ineffective assistance of counsel claims. *Id.* Further, evidence from defense counsel that the

decision was made for strategic purposes—which Appellant asserts is required—would do little to answer the question of whether the decision was reasonable, as the question is not whether defense counsel themselves thought it was a reasonable strategic decision, but whether it was an objectively unreasonable strategic decision under "prevailing professional norms." *Id.* Instead, the record indicates that a motion to suppress Appellant's unwarned statement was without merit. Thus, the weakness of Appellant's proposed Article 31(b), UCMJ, claim is sufficient in and of itself to indicate that defense counsel's decision was aimed at ensuring the much stronger argument that Appellant's statement was subject to the victim advocate privilege under M.R.E. 514 could be made—and was therefore a reasonable strategic decision.

C. Appellant was not prejudiced by defense counsel's performance.

Under the second prong of the *Strickland* test, the accused must show that "there is a reasonable probability that but for counsel's [deficient performance], the result of the proceeding would have been different." *Akbar*, 74 M.J. at 379 (citing *Strickland*, 466 U.S. at 694). Where an appellant's claim of ineffective assistance of counsel is based on their counsel's failure to file a motion to suppress evidence, the appellant must show that there was a reasonable probability that the motion would have been successful. *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007) (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)).

Absent such a showing, an appellant's claim of ineffective assistance of counsel will not succeed. *Jameson*, 65 M.J. at 164.

Appellant has failed to meet his burden and show that a reasonable probability existed that a motion to suppress Appellant's statement to YN1 Nipp would have been successful or that there was a reasonable probability that the outcome of the proceedings were different as a result of defense counsel's decision not to suppress Appellant's statement on this basis. Specifically, a motion to suppress Appellant's statement on the basis of an Article 31(b), UCMJ, violation would have been without merit as: YN1 Nipp did not suspect Appellant of an offense at the time of her discussion with Appellant; YN1 Nipp's discussion with Appellant did not constitute an interrogation as defined under M.R.E. 305(b)(2); and YN1 Nipp was acting solely in her capacity as a victim advocate and not in a law enforcement or disciplinary capacity.[8]

Additionally, Appellant has failed to identify how that outcome of the proceedings would have been different had Appellant's statement to YN1 Nipp been suppressed on the basis of an Article 31(b), UCMJ, rights violation. As outlined above, the contents of Appellant's statement to YN1 Nipp were also available to be introduced by the prosecution through the testimony of SNBM

[8] For a full factual analysis, see *supra*, at II. B.2.

Childers.[9] Prior to speaking with YN1 Nipp, Appellant had discussed the matter with SNBM Childers and "talked to [him] about everything . . . ." J.A. at 161, 261, 264. As such, had the prosecution not called YN1 Nipp to discuss Appellant's statement, the prosecution could have introduced the same testimony through SNBM Childers and achieved the same result.

As a motion to suppress on the basis of an Article 31(b), UCMJ, violation would have been without merit, and the content of Appellant's statement to YN1 Nipp would have been available through the testimony of SNBM Childers, Appellant has failed to meet his burden and show that the outcome of the proceedings would not have been different. *Akbar*, 74 M.J. at 379 (citing *Strickland*, 466 U.S. at 694). Thus, Appellant was not prejudiced by defense counsel's decision not to attempt to suppress Appellant's statement to YN1 Nipp on the basis of a violation of Article 31(b), UCMJ.

Conclusion

The Appellant is entitled to no relief because the military judge did not abuse her discretion in allowing YN1 Nipp to testify as to Appellant's statement and defense counsel was not ineffective. As such, this Court should affirm the findings and sentence in this case.

[9] *See supra*, at I.E.

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(c) because it contains 9,713 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in proportional typeface with Times New Roman 14-point typeface.

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Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the Court on July 28, 2017, and that Appellant's counsel, LCDR Jason W. Roberts, was copied on the email at jason.w.roberts@navy.mil.

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149 F.3d 1185
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
David Lee BISHOP, Defendant-Appellant.

No. 97-1175.
|
July 1, 1998.

On Appeal from the United States District Court for the Western District of Michigan.

Before KRUPANSKY, SILER and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

***1** A jury convicted Defendant-Appellant David Lee Bishop for the first-degree murder of a fellow patient at the Veterans Administration Medical Center. Bishop now appeals his conviction, arguing that the district court erred: 1) by denying his motion to suppress statements; 2) by allowing the trial testimony of privileged statements by a psychiatrist and a nurse; 3) by instructing the jury improperly; and 4) by denying his motion for judgment of acquittal. For the reasons that follow, we AFFIRM the judgment of the district court.

I. BACKGROUND

David Lee Bishop has a long history of various mental disorders, beginning with hyperactivity and impulsive behavior as a youth. Bishop's first psychiatric hospitalization was in 1992 while he was serving in the United States Army. At that time, Bishop was diagnosed with "bipolar disorder with psychotic features" and "schizotypal personality disorder." Following his discharge from the Army, Bishop was hospitalized on numerous occasions, both voluntarily and involuntarily. Throughout this time, Bishop exhibited suicidal tendencies and engaged in severe substance abuse. In November 1994, Bishop became a patient at the Veterans Administration Medical Center (VAMC) in Battle Creek, Michigan, following his commitment by the Northville Regional Psychiatric Center. While a patient at VAMC, Bishop befriended another patient, Harold Dearman.

On January 22, 1995 at approximately 11:45 a.m., Dearman was discovered lying on the landing of a stairwell in a large pool of blood. After futile attempts at resuscitating Dearman, doctors pronounced him dead.

Officials at VAMC believed that the circumstances of Dearman's death were suspicious and asked the FBI to investigate. FBI Special Agent Michael Brown interviewed VAMC patient Ron Burdette. According to Burdette, Defendant Bishop told him that he had seen Dearman enter the stairwell where he died and was probably the last person to see Dearman alive. Agent Brown also learned that Bishop's room at VAMC was close to the stairwell.

On February 15, 1995, Agent Brown interviewed Bishop at the adult foster care home where he was then residing. Agent Brown stated that upon identifying himself to Bishop, Bishop exclaimed, "Am I in trouble, I didn't hit that old man on the head and throw him down the stairs." Bishop then told Agent Brown that at the time of Dearman's death, he was sleeping in his room. Bishop again stated that he did not throw Dearman down the stairs, and that he liked the "old man" and that they had been friends.

Agent Brown, along with Michigan State Police Detective Gary Hoag and Special Agent Greg Hirstein from the VA Office of the Inspector General, interviewed Bishop again on March 21, 1995 in a conference room at VAMC.[1] Prior to interviewing Bishop, the agents received permission to talk to Bishop from his treating psychiatrist, Dr. Cleon Michael. Dr. Michael advised the agents that, in his opinion, Bishop would be able to understand the conversation and respond coherently.

***2** At the March 21, 1995 interview, Bishop's story changed. According to Agent Brown, Bishop stated that

he had awakened, decided to go to lunch, and saw Dearman on the stairwell at approximately 11:30 to 11:45 a.m. As Dearman was going down the stairs, Bishop said that he kicked him in the back, sending him flying down the stairs. Bishop then stated that he went down the stairs and kicked Dearman in the head and side with his combat boots. After this statement, Bishop was advised of his *Miranda* rights and asked if he wished to speak to Dr. Michael. Bishop replied affirmatively.

According to Dr. Michael, Bishop was lucid and calm when he talked to him. Dr. Michael testified as to his conversation with Bishop on March 21, 1995:

> [Bishop] said, "I had the feeling that I wanted to put my foot in the middle of his back and push. I don't know why I felt that way, and I don't know why I wanted to do that, but I did. And so I put my foot on his back and pushed hard." ... He said that the patient fell to the bottom of the stairs and that he was not moving much. And he went down to the bottom of the stairs to try to ascertain whether or not the patient was living or not, and he wasn't sure the patient was living. And he said that it would be a pity to leave someone like that hurt like that, and so he hit his head against the steps a few times just to be sure that he was dead. And at that point he said he had nothing else to do, and so he went back upstairs and went to bed.

After Bishop spoke to Dr. Michael, Agent Brown asked Bishop if he would make a written statement of his confession; Bishop agreed. Agent Brown then wrote a statement which Bishop signed, detailing the events of Dearman's death. Agent Brown later testified that there were no threats, force, promises or coercion used in obtaining Bishop's written statement.

Agent Brown returned to VAMC the following day with an arrest warrant. When Bishop saw Agent Brown, Bishop said that "[e]verything I told you yesterday was b ____s ____." After a brief discussion with Agent Brown, however, Bishop again admitted that he killed Dearman. In addition to the events that he described the day before, Bishop stated that he had smashed Dearman's skull against the stairs several times. Bishop then signed a waiver of rights and a second written statement that was prepared by Agent Brown. Thereafter, Bishop also made incriminating statements to a psychiatric nurse, Michelle Peters.

On April 26, 1995, a federal grand jury charged Bishop with one count of first-degree murder at a facility within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 1111 and 18 U.S.C. § 7(3). On September 4, 1995, the district court granted the government's motion for a mental examination of Bishop, and on January 17, 1996, granted Bishop's motion for an independent psychological evaluation. Both evaluations opined that Bishop was competent to stand trial and could be held criminally responsible for his actions at the time of the offense. Following completion of the evaluations, the district court conducted a hearing and concluded that Bishop was competent to stand trial.

***3** On September 11, 1996, Bishop filed a motion to suppress his statements of March 21 and 22, 1995, arguing that those statements were involuntary and that he was not properly informed of his *Miranda* rights. The district court held a hearing on the motion on September 18, 1996, at which time Agent Brown and Dr. Michael testified. The district court found that there was no evidence that Bishop's statements had been coerced and denied Bishop's motion to suppress the statements.

Trial commenced on October 8, 1996. Bishop objected to the testimony of Dr. Michael and Nurse Michelle Peters, arguing that the testimony was protected by the psychotherapist-patient privilege. The district court ruled that Bishop had waived any privilege by prior disclosure of the information to law enforcement agents and thus allowed the testimony.

At the close of the government's case Bishop moved for judgment of acquittal, arguing that there was no evidence of premeditation to support a finding of first-degree murder. The district court denied the motion, as well as Bishop's renewed motion for judgment of acquittal at the end of trial. The district court instructed the jury on the offenses of first-degree murder and second-degree murder, but did not give a manslaughter instruction.

The jury convicted Bishop of first-degree murder. Thereafter, the district court sentenced Bishop to life imprisonment. This timely appeal followed.

III. ANALYSIS

A. Motion to Suppress Statements

On appeal, Bishop argues that the district court erred by denying his motion to suppress the statements that he made to Agent Brown on March 21 and 22, 1995, because the statements were involuntary. Bishop contends that his statements could not have been voluntary, because he was a mental patient on a psychiatric ward and was taking six different psychotropic medications at the time. In addition, Bishop asserts that the agents coerced his confession. [2]

In reviewing a district court's decision to suppress evidence, we review findings of fact for clear error and legal conclusions de novo. *See United States v. Murphy,* 107 F.3d 1199, 1204 (6th Cir.1997). This standard applies to determinations regarding the voluntariness of a confession. *See United States v. Murphy,* 763 F.2d 202, 206 (6th Cir.1985).

In order for a confession to be admissible, it " 'must be free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." ' *Bram v. United States,* 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897) (quotation omitted). The test for voluntariness of a confession involves three factors: first, whether the police used coercive activity in obtaining the confession; second, whether the coercion was sufficient to overbear the will of the accused; and third, whether the accused's will was overborne because of the coercive police activity. *See McCall v. Dutton,* 863 F.2d 454, 459 (6th Cir.1988). If coercion by law enforcement agents was not the "crucial motivating factor" behind a defendant's decision to confess, the confession may not be suppressed. *See id.* (citing *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). Thus, evidence that a defendant suffered from a condition or deficiency that impaired his cognitive or volitional capacity is never, by itself, sufficient to warrant the conclusion that a confession was involuntary; some element of coercion by law enforcement agents is necessary. *See United States v. Newman,* 889 F.2d 88, 94 (6th Cir.1989) (citing *Connelly,* 479 U.S. at 167). In determining the voluntariness of a confession, it is necessary to examine the totality of the circumstances surrounding the confession. *See United States v. Brown,* 557 F.2d 541, 546 (6th Cir.1977).

***4** In the present case, Bishop argues that his confession was involuntary because of his mental status, medication and the coercive activities of the agents. In denying Bishop's motion to suppress, the district court considered the testimony of Agent Brown and Dr. Michael and determined that there was no evidence that Bishop's statements were coerced by law enforcement agents; in addition, the district court found that Bishop was lucid, able to respond, alert, oriented and rational at the time of the confessions.

Bishop's claims of coercion are based on the following facts: he suffered from mental illness and was taking mood-altering drugs [3] at the time of the interviews; the interviews took place in a psychiatric ward that was tantamount to a prison; Agent Brown was armed during the interviews; Bishop was outnumbered during the interviews; Detective Hoag offered cigarettes to Bishop; Agent Brown attempted to establish a rapport with Bishop; and Agent Brown drafted the written statements which Bishop signed. Accepting these factual allegations as true, these facts do not indicate coercion by law enforcement agents. The totality of the circumstances fail to establish that the agents induced Bishop's confession by promises, threats, or the use of fear or undue influence. At most, Bishop may have felt somewhat intimidated by the agents; this does not mean that the agents coerced Bishop's confession.

Having determined that the agents did not coerce Bishop's confession, Bishop's state of mind, alone, could not have rendered his confession involuntary. As a matter of law, a defendant's state of mind is not enough to render a confession involuntary; there must be some element of coercion. *See, e.g., Connelly,* 479 U.S. at 167; *Newman,* 889 F.2d at 94-95. We therefore conclude that the district court did not clearly err in its factual findings that the agents did not coerce Bishop's confession and that Bishop was rational and lucid at the time of the interviews, nor did the district court err as a matter of law in determining that Bishop's confession was voluntary. We therefore affirm the district court's denial of Bishop's motion to suppress statements.

B. Psychotherapist-Patient Privilege

Bishop argues that incriminating statements that he made to Dr. Michael and Nurse Peters were protected by the p sychotherapist-patient privilege, and that the district court erred by allowing Dr. Michael and Nurse Peters to testify about those statements. The district court found that Bishop waived any privilege because he had previously disclosed the information in the statements to law enforcement agents.

Federal Rule of Evidence 501 governs federal evidentiary privileges without defining or identifying specific types of privileges; thus, courts have developed privileges on a case-by-case basis. The Supreme Court has recognized the validity of the psychotherapist-patient privilege. *See Jaffee v. Redmond,* 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). In addition, this court has held that waiver is applicable to the psychotherapist-patient privilege; that is, once a patient has disclosed privileged information to a third party, the privilege regarding that information has been waived. *See United States v. Snelenberger,* 24 F.3d 799, 802 (6th Cir.1994) (citing *In re Zuniga,* 714 F.2d 632, 640 (6th Cir.1983)).

***5** In this case, the district court found that Bishop waived any privilege by prior disclosure of the information to a third party. We agree. Bishop revealed the same information to the agents at the March 21, 1995 interview prior to disclosing the information to Dr. Michael and then to Nurse Peters, thereby waiving any privilege as to the incriminating statements. In addition, Dr. Michael informed Bishop at the time Bishop made the statements that he could not ethically keep the information confidential. [4]

We therefore conclude that Bishop waived any claim to privilege by prior disclosure of the information to third parties; accordingly, the district court did not err by reaching the same conclusion and allowing the testimony of Dr. Michael and Nurse Peters.

C. Jury Instructions

Bishop argues that the district court erred by failing to give a proposed jury instruction regarding the premeditation or deliberation element of first-degree murder, and also erred by failing to give a manslaughter instruction.

We have set a high standard for reversal of a conviction on the grounds of improper jury instructions. *See United States v. Sheffey,* 57 F.3d 1419, 1429 (6th Cir.1995). We have stated that:

> [a]n appellate court must review jury instructions as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a sound basis in law to aid the jury in reaching its decision. A reviewing court may reverse a judgment only if the instructions, viewed as a whole, were confusing, misleading and prejudicial.

Id. at 1430 (quoting *United States v. Clark,* 988 F.2d 1459, 1468 (6th Cir.1993)).

1. Premeditation or Deliberation

Bishop argues that the district court erred by failing to give his proposed Michigan Criminal Jury Instruction with respect to the premeditation or deliberation element required to sustain a conviction for first-degree murder. [5]

Instead, the district court gave the following Fifth Circuit Pattern Jury Instruction with respect to premeditation or deliberation:

> A killing is premeditated when it is the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.
>
> . . .
>
> Premeditation, planning or deliberation, is the only element which distinguishes first degree murder from second degree murder.

We have stated that we will reverse a conviction for failure to give a proposed jury instruction only when: 1) the requested instruction is a correct statement of the law; 2) the requested instruction is not substantially covered by other delivered instructions; and 3) the failure to give the instruction impairs the defendant's theory of the case. *See*

United States v. Chesney, 86 F.3d 564, 573 (6th Cir.1996), *cert. denied,* 520 U.S. 1282, 117 S.Ct. 2470, 138 L.Ed.2d 225 (1997).

***6** In this case, the district court did not err by refusing to give Bishop's proposed jury instruction on deliberation. The premeditation or deliberation instruction given by the court was a correct statement of the law and substantially covered the subject of Bishop's proposed jury instruction on deliberation. Moreover, the instructions, viewed as a whole, were neither confusing, misleading nor prejudicial. Accordingly, the district court's failure to give the proposed jury instruction does not provide a basis for reversal of Bishop's conviction.

2. Manslaughter

Bishop also argues that the district court erred by failing to instruct the jury on the lesser charge of manslaughter. When Bishop objected, the district court explained that because there was no evidence that Dearman provoked Bishop, a manslaughter instruction was not appropriate. We agree with the district court.

We have held that a lesser included offense instruction should be given only when "the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *United States v. Donathan,* 65 F.3d 537, 540 (6th Cir.1995).

Voluntary manslaughter is the unlawful killing of a person, without malice, upon a sudden quarrel or heat of passion. *See* 18 U.S.C. § 1112(a). The absence of malice distinguishes manslaughter from murder because the defendant's showing of adequately provoked heat of passion is said to negate the element of malice. *See United States v. Roston,* 986 F.2d 1287, 1291 (9th Cir.1993). In order to constitute manslaughter, there must be sufficient evidence of provocation to arouse an ordinary and reasonable person to kill the decedent. *See id.*

Bishop argues that the abrasions on Dearman's hands indicated that there was a fight or provocation that caused the so-called "heat of passion" that resulted in Bishop's killing of Dearman. We disagree. The district court did not err in finding that this evidence would not permit a rational jury to find Bishop guilty of manslaughter rather than first- or second-degree murder. Again, we reiterate that the jury instructions viewed as a whole were neither confusing, misleading nor prejudicial and, accordingly, do not warrant reversal of Bishop's conviction.

D. Judgment of Acquittal

Bishop contends that the district court erred by denying his motion for judgment of acquittal pursuant to Fed.R.Crim.P. 29 for the charge of first-degree murder because there was insufficient evidence to support a finding of the necessary element of premeditation or deliberation.

In reviewing a district court's denial of a motion for judgment of acquittal pursuant to Fed.R.Crim.P. 29, we use the same test as that for reviewing a claim of insufficient evidence to support a conviction. *See United States v. Abner,* 35 F.3d 251, 253 (6th Cir.1994). Thus, we must consider the evidence in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom, in order to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Adamo,* 742 F.2d 927, 932 (6th Cir.1984). In addition, we refrain from independently judging the credibility of the witnesses or the weight of the evidence. *See United States v. Welch,* 97 F.3d 142, 148 (6th Cir.1996), *cert. denied,* 117 S.Ct. 999 (1997).

***7** In denying Bishop's motion for judgment of acquittal, the district court noted that the evidence indicated that after Bishop kicked Dearman down the stairs, Bishop descended the stairs and found Dearman injured. At that point, Bishop kicked Dearman and crushed his skull against the stairs to make sure that he was dead because "it would be a pity to leave him like that." The district court found that this conduct was sufficient for a jury to conclude that there was deliberation and premeditation, relying on the fact that "[t]here was an interval of time that Mr. Bishop could have backed off, if he wanted to, or proceed as he did." This conclusion is consistent with the case law, which indicates that there is no particular time interval necessary to constitute premeditation; instead, it is sufficient if the defendant had some prior design to commit murder. *See, e.g., United States v. Shaw,* 701 F.2d 367, 392-93 (5th Cir.1983).

We conclude that the district court did not err in denying Bishop's motion for judgment of acquittal. There were facts from which a rational jury could conclude that

the element of premeditation was present in this case. Accordingly, considering the evidence in the light most favorable to the government together with all legitimate inferences to be drawn therefrom, a rational trier of fact could have found Bishop guilty beyond a reasonable doubt of first degree murder. We therefore affirm the judgment of the district court.

IV. CONCLUSION

For the foregoing reasons, we affirm Bishop's conviction.

All Citations

149 F.3d 1185 (Table), 1998 WL 385898

Footnotes

1 Bishop had been readmitted to VAMC following a suicide attempt at the adult foster care home.

2 In the district court, Bishop also raised the issue of whether he was properly informed of his *Miranda* rights prior to his confession. Bishop does not raise this issue on appeal.

3 Dr. Michael testified that the medications made Bishop more lucid, alert and rational.

4 At the suppression hearing, Dr. Michael testified that "[a]t that point when he said he wanted to tell me about what had happened, I told him that that could not be a confidential conversation because of the nature of the subject and because of what was happening, and that if he didn't want me to be in contact with other people about what he told me, then he shouldn't tell me, and that very likely if he did tell me, I would have to talk to somebody else about what he said."

5 The Michigan instruction provides:

> A killing is premeditated when it is the result of planning or deliberation, which means that the defendant considered the pros and cons of the killing and thought about and chose his actions before he did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the killer, after forming the intent to kill to be fully conscious of that intent. The killing cannot be the result of a sudden impulse without thought or reflection.