IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Koda M. Harpole Seaman (E-3) U.S. Coast Guard, Appellant	BRIEF OF APPELLANT Crim. App. Dkt. No. 1420 USCA Dkt. No. 20-0142/CG

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

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Statement of Statutory Jurisdiction

This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

In December 2014, a general court-martial composed of officer and enlisted members convicted Appellant, 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. 10 U.S.C. §§ 907, 920, 930 (2012); (JA 37-38.) After the military judge conditionally dismissed

one of the sexual assault specifications,[1] the members sentenced Appellant to confinement for seven years, reduction to E-1, and a dishonorable discharge. (JA 38.) The Coast Guard Court of Criminal Appeals (CGCCA) affirmed the findings and sentence. *United States v. Harpole*, No. 1420, slip op. at 15-16 (C.G. Ct. Crim. App. Nov. 10, 2016).

On February 14, 2018, this Court set aside the decision of the CGCCA and returned the record of trial to the Judge Advocate General of the Coast Guard for remand to an appropriate convening authority to order a *DuBay* hearing. *United States v. Harpole*, 77 M.J. 231, 238 (C.A.A.F. 2018). The purpose of the *DuBay* hearing was to develop the record regarding Appellant's ineffective assistance of counsel claim. Specifically, this Court identified four issues which needed findings of fact and conclusions of law:

> (1) Whether legal and tactical considerations were involved in trial defense counsel's decision not to file a motion to suppress Appellant's statements pursuant to Article 31(b), UCMJ;
>
> (2) Whether trial defense counsel's failure to seek suppression of Appellant's communication with the victim advocate pursuant to Article 31(b), UCMJ, was a reasonable strategic decision;

[1] This is found in the trial transcript at lines at 20247-250. It is not found in either the Staff Judge Advocate's Recommendation or the Promulgating Order.

(3) Whether there is a reasonable probability that such a motion would have succeeded; and

(4) Whether there is a reasonable probability that the member's findings would have been different had [Yeoman First Class (YN1)] Nipp's testimony been suppressed. *Id*.

On February 21, 2018, the record was remanded to Commander, Coast Guard Pacific Area, who then, on June 25, ordered a *DuBay* hearing. (JA 40.) The hearing was held on July 24-25 in San Diego, CA. The *DuBay* judge published his findings of fact and conclusions of law on October 18, 2018. The record with findings was then referred back to the CGCCA.

On October 18, 2019, one year after the hearing officer completed his findings, the court *sua sponte* remanded the record to the *DuBay* judge. The court ordered him to make supplemental findings of fact regarding specific questions asked of Appellant, responses given, and whether such responses were incriminating. The hearing officer provided the court supplemental findings on November 3, 2019.

The CGCCA heard oral argument on November 21, 2019. On December 18, 2019, the court found no ineffective assistance of counsel because, in its opinion, there was no reasonable probability a motion to suppress would have succeeded.

United States v. Harpole, 79 M.J. 737, 745 (C.G. Ct. Crim. App. 2019). It affirmed the findings and sentence. *Id* at 746.

Statement of Facts

Around 2130 on March 2, 2014 and onboard the USCGC POLAR STAR (WAGB 10), Appellant, accompanied by his friend, Seaman Boatswain's Mate (SNBM) SC, sought to speak with YN1 Nipp in her role as a victim advocate. (JA 290.) After Appellant told her that he needed to talk to her as a victim advocate, she took them to the first-class petty officers' lounge so they could speak privately. (JA 290-91.) Appellant then began talking about the last day the cutter was moored in Papeete, Tahiti, and his interactions with Storekeeper Third Class (SK3) GR. (JA 291-92.) Unbeknownst to Appellant, the cutter's operations officer informed YN1 Nipp on February 27 that SK3 GR named Appellant as her assailant. (JA 416.)

During his meeting with YN1 Nipp, Appellant made several statements which were later used against him in his court-martial. According to YN1 Nipp, Appellant told her that he needed to get his backpack from SK3 GR, that he went to her berthing area to get it, that he knocked on the door to the berthing area, that SK3 GR answered the door, and that at that moment he blacked out. (JA 415-16.)

Upon its initial review, this Court stated that "[t]he only Article 31(b), UCMJ, predicate in dispute . . . is whether the victim advocate, YN1 Nipp,

interrogated or requested any statement from Appellant." *Harpole*, 77 M.J. at 236. At that time, this Court knew of only two questions that YN1 Nipp asked Appellant: (1) Was it "okay that SNBM [SC] [was] in the room?" and (2) "[W]hat was going on?" *Id*. at 237.

But testimony from two witnesses at the *DuBay* hearing showed those were not the only questions YN1 Nipp asked Appellant. First, SNBM SC, the third party who was present during the meeting between YN1 Nipp and Appellant, testified that he remembered at least one additional question: "What were you doing in the female berthing area?" (JA 315.) SNBM SC remembered this because of YN1 Nipp's "defensive" and "kind of agitated" demeanor she had when she asked it. (*Id*.) After YN1 Nipp asked that question, SNBM SC saw YN1 Nipp make a gesture with her hands that SNBM SC interpreted as YN1 Nipp not expecting Appellant to answer. (JA 319.)

Second, Appellant provided a complete account of the interaction he had with YN1 Nipp during their meeting, which included interruptions by YN1 Nipp in the form of questions. Appellant testified that YN1 Nipp asked him four questions: (1) why did he need his backpack; (2) what was in his backpack; (3) who did he recall seeing when he entered the berthing area; and (4) what else could he remember. (JA 295-297.) He also testified that he felt he had an obligation to

be truthful to YN1 Nipp and answer her questions because of her superior rank. (JA 309-310.)

Yeoman First Class Nipp also testified at the *DuBay* hearing. Yet, she could not recall asking Appellant any questions other than the two that this Court identified. (JA 339-340, 348.) According to her, Appellant talked without interruption. (JA 340.)

Evidence provided to the *DuBay* judge indicates that Appellant's trial defense counsel knew about the additional question asked by YN1 Nipp. A portion of the trial defense counsel's file introduced at the *DuBay* hearing reveals that on November 18, 2014, one or both counsel interviewed SNBM SC. (Hr'g Ex. XIII.) He was asked if YN1 Nipp asked questions, and if so what sort of questions they were. (*Id*.) He responded that YN1 Nipp interrupted Appellant and asked him, "So what was your business in female berthing anyway," but then said, "Never mind, besides the point." (*Id*.) This interview occurred eight days after an Article 39(a), UCMJ, hearing on November 10, 2014, in which the military judge heard evidence and argument on pre-trial motions, including a motion to suppress Appellant's statement as a violation of Military Rule of Evidence 514.

Appellant's counsel never filed a motion to suppress Appellant's statement taken in violation of Article 31(b), UCMJ.

Summary of the Argument

Just as is the case involving missing or stolen weapons in the Marine Corps, *United States v. Gilbreath*, 74 M.J. 11, 18 (C.A.A.F. 2014), there is no such thing as a casual discussion of sexual assault in the military between a senior petty officer who suspects a non-ranking seaman of a sexual offense. That is certainly the case regarding the meeting between Appellant and YN1 Nipp. As a senior petty officer and a victim advocate, YN1 Nipp's interaction with Appellant carried with it the marks of officiality and law enforcement/disciplinary responsibility. Coupled with the pre-formed suspicion YN1 Nipp had of Appellant, her specific question about Appellant's reason for being in the female berthing area constituted an interrogation and should have been preceded with an advisement of his rights.

Appellant's immediate answer to YN1 Nipp's question and his statements made thereafter directly affected the outcome of the case on all charges and specifications. Appellant's trial defense counsel could have timely filed a motion to suppress those statements as obtained in violation of Article 31(b), UCMJ, but they failed to do so. That failure constitutes ineffective assistance of counsel. All findings of guilty should be set aside.

Argument

I.

THE VICTIM ADVOCATE INTERROGATED APPELLANT WITHOUT PROVIDING HIM

NOTICE OF HIS RIGHTS UNDER ARTICLE 31(B), UCMJ.

Standard of Review

The *DuBay* judge's ruling that Appellant was not entitled to an Article 31(b), UCMJ, advisement is a mixed question of law and fact. *United States v. Ramos*, 76 M.J. 372, 375 (C.A.A.F. 2017). This Court accepts the *DuBay* judge's findings of fact unless they are clearly erroneous and reviews the conclusions of law *de novo*. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1998).

Findings without evidence or even with evidence but also with "a firm conviction that a mistake has been committed" are clearly erroneous. *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 365 (1948)). If the findings of fact are clearly erroneous or the conclusions of law "are influenced by an erroneous view of the law," this Court will reverse. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

Law

A servicemember must be advised of his rights under Article 31(b), UCMJ, whenever (1) a person subject to the UCMJ; (2) suspects a servicemember has committed an offense under the Code; (3) interrogates or requests any statement from that servicemember regarding the suspected offense; and (4) the suspect

provides a statement regarding the suspected offense. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).

"An interrogation means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MANUAL FOR COURTS-MARTIAL (M.C.M.), United States, Supplement (2012), Military Rule of Evidence (M.R.E.) 305(b)(2). An incriminating response is any response that the prosecution seeks to admit at trial. *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980).

No statement obtained from any servicemember may be used against that servicemember in a trial by court-martial if the questioner did not properly advise the suspect servicemember before questioning him. Article 31(d), UCMJ; 10 U.S.C. § 831(d) (2018). However, not all suspect interrogations must be preceded with rights advisements. If the questioner has a personal motivation for questioning the servicemember, then no advisement is necessary even if the response is incriminating. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). Whether a questioner is interrogating a suspect depends on "all of the facts and circumstances" surrounding the questioning. *Gilbreath*, 74 M.J. at 17.

Argument

A. Appellant gave an incriminating response.

In addition to the questions this Court identified, the *DuBay* judge found that YN1 Nipp asked Appellant, "What were you doing in the female berthing area?" (JA 232.) YN1 Nipp knew that SK3 GR alleged she was assaulted by Appellant in the berthing area and, as a result, suspected Appellant assaulted SK3 GR. Once Appellant began to talk about the event, YN1 Nipp reasonably should have known the question she asked about the event would likely illicit an incriminating response. And indeed, Appellant gave an incriminating response to the above question. Appellant told YN1 Nipp that he went to the female berthing area to retrieve his backpack. (JA 295.) The trial counsel then used this statement against him. (JA 178.)

The *DuBay* judge concluded otherwise. He found that Appellant did not provide an incriminating response to the question because YN1 Nipp had "withdrawn" the question. (JA 232). Instead of answering her question, Appellant "disregarded the question and carried on with his recitation on what happened in the manner Appellant chose with no interference from YN1 Nipp." (*Id.*) He ultimately decided, "While Appellant's statements to YN1 Nipp were incriminating, they were not in any way impacted by YN1 Nipp's withdrawn question." (*Id.*)

The *DuBay* judge clearly erred by finding that Appellant did not provide an incriminating response. Appellant responded to the question by stating he needed

to get his backpack. The *DuBay* judge erred by finding that this statement, though incriminating, was not a response.

This is clearly erroneous. The *DuBay* judge overlooked Appellant's statement about needing his backpack as an answer to YN1 Nipp's question. The *DuBay* judge also provided no hint of when Appellant made the statement. Either Appellant made the statement before or after the question was asked. None of the evidence the *DuBay* judge relied on provides the answer. YN1 Nipp testified that she never interrupted Appellant, but that is false. Meanwhile, SNBM SC testified only about the question YN1 Nipp asked, not whether Appellant answered it.

Evidence disregarded by the *DuBay* judge indicates Appellant made the statement following the question. Appellant testified that he answered YN1 Nipp's questions and considered it rude and disrespectful if he refused to answer them given that she significantly outranked him.

Because no witness other than the Appellant provided any facts regarding the timing of the statement, the *DuBay* judge has nothing on which to base a permissive inference that the statement was made prior to the question. *See* M.C.M., M.R.E. 602 (2012); *See United States v. Soccio*, 24 C.M.R. 287, 294 (C.M.A. 1957) (Latimer, J., concurring) ("I understand an inference to be a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts already established."). Thus, the most logical

and likely conclusion consistent with all of the evidence is that Appellant responded to the question asked of him. The *DuBay* judge's factual finding is, therefore, without evidentiary support and should be set aside.

B. Yeoman First Class Nipp implicated her law enforcement/disciplinary responsibility as both a superior non-commissioned officer and as a victim advocate.

That Appellant gave an incriminating response, though, does not answer whether YN1 Nipp was participating in a law enforcement investigation or a disciplinary inquiry.

Despite this Court's recognition of some significance regarding the role victim advocates have in sexual assault investigations, 77 M.J. at 236-37, the *DuBay* judge gave zero consideration to it. The lower court, though, did consider victim advocates' reporting responsibilities in relation to the law enforcement/discipline question. However, it ultimately held that YN1 Nipp was not acting in a law enforcement or disciplinary capacity. 79 M.J. at 744-45.

The *DuBay* judge and the lower court erred. They did so by focusing solely on YN1 Nipp's general purpose for meeting with Appellant and not properly considering YN1 Nipp's seniority and law enforcement/disciplinary responsibility.

1. YN1 Nipp's seniority

Both the *DuBay* judge and the lower court concluded that because YN1 Nipp was not in Appellant's chain of command, she was not *presumptively* carrying out a law enforcement or disciplinary function. (JA 229; 79 M.J. at 744.)

While that is consistent with this Court's jurisprudence, *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991), the seniority of the questioner and the unit in which both the questioner and the suspect serve are part of all of the facts and circumstances that must be examined. Moreover, giving short shrift to these facts ignores the purpose behind the enactment of Article 31(b), UCMJ.

The influence and power of superior rank is undeniable, *United States v. Gibson*, 14 C.M.R. 164, 169 (C.M.A. 1954) (citing Winthrop's *Military Law and Precedents*, 2d ed., 1920 Reprint, page 329), and is one of the sources of "subtle pressures that exist in military society." *United States v. Armstrong*, 9 M.J. 374, 378 (C.M.A. 1980) (citation omitted).

"In enacting Article 31(b), Congress was sensitive to the fact that, in the military, some questions by some people under some circumstances are not so much requests, to be answered in the discretion of the person questioned, but commands to be answered without hesitation." *United States v. Loukas*, 29 M.J. 385, 395 (C.M.A. 1990) (Everett, C.J., dissenting). Because of superior rank and "[c]onditioned to obey, a serviceperson…may feel himself to be under a special

obligation…[or] be especially amenable to saying what he thinks his military superior wants him to say…." *Armstrong*, 9 M.J. at 378.

Undesignated seamen quickly learn that first-class petty officers "embody and enforce high standards and live by an austere code of conduct, maintaining an ethical and moral high ground and unwavering dedication to duty." *The Noncommissioned Officer and Petty Officer: BACKBONE of the Armed Forces*, National Defense University Press, Washington, D.C. 2013, p. 7. As a matter of tradition, nowhere is a first-class petty officer more called upon to be a "deckplate leader" than onboard a Naval ship or a Coast Guard cutter. Just because YN1 Nipp was not in Appellant's chain of command, though, does not mean her superior rank was inconsequential. Brushing aside the facts that YN1 Nipp was an E-6 while Appellant was an E-3 on the same cutter is to "yada, yada[2]" away the precise concerns Congress had when it enacted Article 31(b), UCMJ.

The *DuBay* judge considered the facts and circumstances in this case to be "much more benign than those in *Jones*." (JA 229.) The reality is just the opposite. In *Jones*, the questioner had neither superior rank nor any law enforcement responsibility as he was junior to Specialist (SPC) Jones and was also a mere military police (MP) augmentee while SPC Jones was an actual MP. *Jones*,

[2] Made popular by "The Yada Yada," *Seinfeld*, Season 8, Episode 19 (April 24, 1997).

73 M.J. at 363. Simply put, the inherent pressures created by military society based on rank and position for which Article 31(b) stands as a shield flatly did not exist in *Jones*. However, they plainly exist in this case.

2. YN1 Nipp's responsibility

In focusing on YN1 Nipp's purpose for meeting with Appellant, the lower court chiefly relied on *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Private First Class (PFC) Raymond had sought counseling from a civilian social worker employed by the Army. *Id.* at 137. While meeting with him, PFC Raymond admitted to committing indecent acts upon a minor female. *Id.* PFC Raymond later moved to exclude from his court-martial the incriminating testimony of the social worker by arguing the social worker was bound by Article 31(b), UCMJ. *Id.*

Affirming the decision of the lower court against PFC Raymond, the Court of Military Appeals (CMA) found the social worker was not acting as an investigative agent of law enforcement. *Id.* at 139. The CMA analyzed the relevant Army regulation that applied to the social worker, concluded that it was "a personnel regulation, not a law enforcement regulation," and that its purpose was to establish a comprehensive system for handling spousal and child abuse allegations. *Id.* at 138. The CMA noted that the regulation placed not just on the social worker but on "every…member of the military community" a duty to report

information related to child abuse to either a military medical facility or the police. *Id.* Finding that many states also place on health care providers and teachers a similar duty to report allegations of child abuse, just as those persons are not transformed into law enforcement personnel for purposes of complying with *Miranda v. Arizona*, 384 U.S. 436 (1966), the CMA held neither are similar professionals employed with the military. *Id.* at 139.

Although concurring in the result, Judge Wiss disagreed with the majority's finding regarding the regulation. Judge Wiss recognized "clear-cut law enforcement concerns and responsibilities throughout the provisions of the regulation." *Id.* at 142. Judge Wiss highlighted those concerns, one of them being the duty to report information about child abuse to appropriate authorities. *Id.*

Eventually, Judge Wiss' method of examining the regulations prevailed. In *United States v. Cohen*, the Court shifted from using the generalized purpose of a service regulation to looking whether the regulation places *any* law enforcement or disciplinary responsibility upon the questioner. 61 M.J. at 51.

In *Cohen*, the Court overturned the military judge's finding that the questioner had no law enforcement or disciplinary responsibilities. *Id.* at 52. In doing so, the Court first looked at the relevant service instruction to determine whether the questioner had a law enforcement or disciplinary function. *Id.* at 51. The questioner was an Air Force inspector general (IG) whose primary

responsibilities were administrative. *Id.* However, that instruction also provided the IG with law enforcement and disciplinary responsibilities in four ways: (1) by permitting the IG to breach confidentiality with complainants and provide information obtained therefrom to criminal investigators; (2) by empowering the IG to determine violations of law; (3) by requiring the IG to consult with the staff judge advocate and criminal investigator's office if a complainant alleges certain criminal offenses; and (4) by requiring the IG to consult with the staff judge advocate about the need for advising individuals of their Article 31(b), UCMJ, rights. *Id.* at 52.

In this case, the lower court erred by adhering to the *Raymond* approach instead of following *Cohen*. If the lower court had used the *Cohen* test, the lower court (and the *DuBay* judge) would have drawn the undeniable conclusion that YN1 Nipp had at least one law enforcement responsibility.

The relevant service instruction at the time of the meeting between Appellant and YN1 Nipp is Commandant Instruction Manual 1754.10D, *Sexual Assault Prevention and Response Program* (19 Apr 2012). Though that instruction has been revised and replaced, both the previous and current versions require victim advocates to notify the chain of command of unrestricted reports of sexual assault. (JA 457.)

The instructions also specify that the Coast Guard Investigative Service (CGIS) has sole responsibility for conducting the criminal investigation of a sexual assault allegation. (JA 458.) Despite the clear reservation of investigative authority, that provision is not fatal to Appellant because, similar to the reporting requirement of the IG in *Cohen*, the victim advocate is obligated to forward unrestricted reports of sexual abuse up the chain of command for mandatory criminal investigation. Fundamentally, even though victim advocates are not criminal investigators, victim advocates gather information from sex crime victims and turn it over for use by law enforcement. Thus, the victim advocate's reporting responsibility is as much of a law enforcement responsibility as the Air Force IG's responsibility to notify criminal investigators of possible criminal activity, and the lower court erred by not determining whether the additional question YN1 Nipp asked Appellant implicated that authority.

Undoubtedly it did. The *DuBay* judge found that immediately after asking the question, YN1 Nipp made a gesture which was a recognition, at least to her, that she should not have asked the question. Having then obtained an incriminating response, YN1 Nipp did not withhold that information when CGIS agents came to interview her. Indeed, CGIS only knew to identify her as a person with information on account of the unrestricted report she provided the command.

If the victim advocate's reporting requirement is not a law enforcement responsibility, the potential exists for the government to achieve an end-run around Article 31(b), UCMJ, whenever such persons acting in an official capacity obtain information from suspects through questions that are reasonably likely to elicit an incriminating response. The lower court seemingly recognized this, noting that YN1 Nipp's question "approached, if not crossed this line" between victim advocacy and law enforcement/disciplinary inquiry. 77 M.J. at 745. Yet if YN1 Nipp, as a victim advocate, does not implicate any law enforcement or disciplinary responsibility when she interrogates a suspect, then the government suffers no sanction even though all textual predicates of Article 31(b) are satisfied. *See* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1, 76 (Fall 1995).

This Court's decision in *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002) guards against that abuse. There, a chaplain took from a penitent a confession to child abuse. *Id.* at 211. The chaplain erroneously believed, based on faulty advice from the Army's Family Advocacy Center, that he was required to report the confession to law enforcement. *Id*. Finding that the chaplain was "acting outside his responsibilities as a chaplain" by conveying Sergeant (Sgt.) Benner's confession to a non-commissioned officer for further reporting to law enforcement, this Court found the chaplain violated Article 31(b), UCMJ, by

failing to provide Sgt. Benner an advisement. *Id.* at 214. In so doing, it implicitly rejected the Army Court of Criminal Appeals' finding that the chaplain was not "effectively acting in a law enforcement or disciplinary capacity when he told [Sgt. Benner] that he had a duty to report [Sgt. Benner's] misconduct." *United States v. Benner*, 55 M.J. 621, 625 (A. Ct. Crim. App. 2001).

Two factual distinctions exist between *Benner* and this case. *Benner* involved both a confidential communication and an erroneous understanding by the questioner of the relevant service regulation. This case involves the opposite. However, neither distinction matters. Rather, both questioners held superior positions over the suspects and demonstrated that their questions implicated or stemmed from a law enforcement/disciplinary responsibility that was either assumed or based in regulation. *See* 57 M.J. at 214 (describing the chaplain as "acting solely as an Army officer."); *see also Gilbreath*, 74 M.J. at 18 (recognizing the service's cultural knowledge and understanding affects the characterization of the questioning). Thus, in neither case could one conclude the questioners were acting in a personal capacity or for a personal motivation.

C. The limited exception to the warning requirement does not apply.

Since neither the *DuBay* judge nor the lower court found YN1 Nipp did not implicate, let alone had, any law enforcement or disciplinary authority, it did not

examine whether, if she had, the limited exception to Article 31(b), UCMJ, applied.

It would not have applied. As explained in *Ramos*, the limited exception applies in urgent operational contexts where time is of the essence. 76 M.J. at 377-78. While one might argue that because Appellant reported to YN1 Nipp that he may have been sexually assaulted, an operational necessity to investigate his unrestricted report existed, the record does not indicate the command of the USCGC POLAR STAR (WAGB 10) moved with any urgency to accomplish that. Appellant spoke to YN1 Nipp on March 2, 2014. (JA 129.) He was interviewed by CGIS agents as a suspect on March 12, 2014, at which point he invoked his right to remain silent. (JA 443.) At the Article 32, UCMJ, investigation, the CGIS agent testified that, as a result of Appellant's invocation, he did not interview him as a potential victim. (*Id.*) He also testified that he did not interview SK3 GR as a suspect. (*Id.*) By contrast, the underlying investigation was predicated on February 28, 2014, one day after receiving the report from SK3 GR. (JA 441.)

D. Conclusion

Appellant, as a suspect, provided an incriminating statement to a question which YN1 Nipp reasonably should have known would lead to such a response. As a superior non-commissioned officer and as a victim advocate with a reporting responsibility, YN1 Nipp had official law enforcement/disciplinary duties that she

implicated by asking Appellant an incriminating question. Therefore, she had to advise Appellant of his rights under Article 31(b), UCMJ, prior to asking him the question.

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO FILE A MOTION TO SUPPRESS APPELLANT'S STATEMENT TO THE VICTIM ADVOCATE.

Standard of Review

Whether counsel rendered ineffective assistance involves questions of law and fact. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012). "This Court reviews factual findings under a clearly erroneous standard but looks at the questions of deficient performance and prejudice *de novo*." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008).

Law

The burden of establishing ineffective assistance of counsel rests with the Appellant. An appellant must demonstrate both (1) deficient performance by his counsel, and (2) that the deficiency caused prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To show deficient performance, an appellant must overcome the presumption that counsel acted competently. *United States v. Alves*, 53 M.J. 286,

289 (C.A.A.F. 2000). To do so, the error must be "so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland*, 668 U.S. at 687. This Court examines the allegations of error, and if true, looks for a reasonable explanation for counsel's actions and whether counsel's level of advocacy fell "measurably below" the performance "ordinarily expected of fallible lawyers." *United States v. Polk*, 32 M.J. 150, 153 (C.A.A.F. 1991).

"When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show there is a reasonable probability that such a motion would have been meritorious." *Harpole*, 77 M.J. at 236 (citations omitted).

Prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 668 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Argument

A. Counsel had a reasonable probability of suppressing Appellant's incriminating statements.

Appellant's trial defense counsel knew about the additional question YN1 Nipp asked Appellant approximately two weeks before Appellant entered his plea on December 1, 2014. Thus, they were able to timely file a motion to suppress. M.C.M, R.C.M. 905(b)(3) (2012). While today Appellant has the burden to

demonstrate a motion to suppress had a reasonable probability of success, had the trial defense counsel filed at the opportune time, the government would have had the burden to establish by a preponderance of evidence compliance with Article 31(b), UCMJ. M.C.M Supplement, M.R.E. 304(f)(6)-(7).

A reasonable probability exists that the government would not have been able to meet its burden. As to the law, all the decisions of this Court relied on by Appellant herein were published before the first day of trial, and Appellant has not argued for a novel interpretation of Article 31(b), UCMJ, or of the Court's jurisprudence or asked the Court to overrule itself. As to the facts, having shown that YN1 Nipp asked Appellant, "What were you doing in the female berthing area?", the government would have had to prove that Appellant did not make the statement about retrieving his backpack as a response to the question. Given that no witness at the *DuBay* hearing testified that Appellant stopped talking after YN1 Nipp asked her question, a reasonable probability exists that the government would be unable to prove Appellant made the statement at another time and not in response to the question.

Additionally, the government would be unable to prove that YN1 Nipp's gesture was a proper warning under Article 31(b), UCMJ. Even if YN1's Nipp gesture could be construed as equivalent to warning Appellant about his right to remain silent, YN1 Nipp never provided Appellant with notice of the offense that

she suspected Appellant committed and that any statement he would make would be used against him.

Appellant's trial defense counsel failed to file a motion to suppress for the failure to warn because they did not believe the motion would succeed. (JA 226.) Yet the record is devoid of proof that the trial defense counsel examined whether YN1 Nipp's reporting obligation is a law enforcement/disciplinary responsibility. "Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel." *United States v. Davis*, 60 M.J. 469, 475 (C.A.A.F. 2005). Failure to be so was unreasonable.

B. There is a reasonable probability the result of the proceeding would have been different.

Undoubtedly the results of the proceedings would have been different had the defense counsel prevailed on a motion to suppress. According to YN1 Nipp, after Appellant told her he needed his backpack, he told her that he knocked on the door of the female berthing area and SK3 GR answered the door. He followed by saying that he blacked out without knowing what happened in the room. . All of these statements incriminated Appellant.

Had Appellant's statements following the question asked of him been suppressed, the government could not have convicted Appellant for making a false official statement about knocking on the door and SK3 GR answering it. *Ramos*, 76 M.J. at 378-79.

For the housebreaking charge, the government alleged that Appellant specifically intended to sexually assault SK3 GR, interweaving this offense with the two specifications of sexual assault. In introducing its case, the government identified Appellant's statements about his backpack, about knocking on the door, and about blacking out to set out its theory that Appellant "targeted a drunken shipmate and sexually assaulted her" and offered a "bizarre explanation" for what happened. The government then upped the ante in the closing argument by claiming "the story about the backpack" was "to distract [the members] from the real reason [Appellant] went into the berthing area: to sexually assault SK3 GR when he knew she was too drunk to resist." (JA 178-179.) Appellant's incriminating statements were, therefore, essential to the government's theory of criminality on the housebreaking and sexual assault offenses.

The *DuBay* judge held that no prejudice would have befallen Appellant on the sexual assault and housebreaking offenses because the government could have introduced through SNBM SC Appellant's earlier incriminating statements he made to him, which were allegedly the same as the statements Appellant made to YN1 Nipp. (JA 230.) This is the wrong test. The *Strickland* test asks whether the outcome in this trial would have been different if the inadmissible evidence introduced was excluded, not whether the government could have perfected its case through alternate available witnesses.

C. Conclusion

Appellant's counsel failed to file a motion to suppress Appellant's unwarned statements. Had they done so, there is a reasonable probability they would have succeeded, thereby changing the outcome of the case on all charges and specifications. This deficient performance prejudiced Appellant.

Conclusion

The *DuBay* judge and the lower court erred when they found YN1 Nipp did not need to advise Appellant of his rights provided in Article 31(b), UCMJ. They further erred when they found that Appellant's counsel was not ineffective. Because Appellant suffered prejudice at trial as a result of the admission of his involuntary statements, Appellant respectfully requests the Court reverse the lower court's decision and set aside the findings and sentence.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Appellate Government Counsel on June 25, 2020.

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