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	APPELLANT'S REPLY BRIEF 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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I.

THE *DUBAY* JUDGE'S FACTUAL FINDINGS ARE CLEARLY ERRONEOUS.

1. Trial defense counsel's notes have scant, if any, reliability for the *DuBay* judge's finding that Appellant did not make an incriminating response.

The government asserts the *DuBay* judge's finding that Appellant gave no incriminating response is supported by trial defense counsel's notes. Appellee Br. at 13. Yet the *DuBay* judge's findings do not appear to be based on the notes. The *DuBay* judge adopted SNBM SC's in-court testimony about the specific question asked (JA 228, 235) and the gesture YN1 Nipp made (JA 228, 235) instead of adopting the information contained in the notes. The notes exhibit a different phrasing of the question and suggest YN1 Nipp verbally said, "Never mind, besides (*sic*) the point." (JA 239.) To be sure, the notes indicate that, according to SNBM SC, "[Appellant] did most of the talking," (JA 239), but that does not mean he did all of the talking. And more importantly, the notes are silent regarding whether Appellant answered YN1 Nipp's specific question.

While the notes could be read in support of the government's claim that Appellant mentioned he was going to the berthing area to get his backpack before YN1 Nipp asked her question, it is not clear that the notes capture SNBM SC's exact chronological retelling of the events. Counsel made the notes, not SNBM SC,

and it makes little sense that YN1 Nipp would ask a question to which Appellant already provided the answer, if one assumes she heard Appellant. Of course, if she did not initially hear Appellant, then there is a ready explanation for why she asked the question. But the notes do not explore this issue, and again, the notes are silent about whether Appellant answered the question about why he entered the berthing area and cannot be the basis on which the *DuBay* judge made his findings.

2. By disbelieving Appellant solely because of his standing as an appellant, the *DuBay* judge abused his discretion, rendering his findings regarding the extent of the conversation between Appellant and YN1 Nipp clearly erroneous.

The government tries to have its cake and eat it too regarding Appellant's testimony. It argues the *DuBay* judge rejected Appellant's testimony, then claims Appellant's testimony supports the judge's finding that Appellant did not answer YN1 Nipp's question. Appellee Br. at 14. Appellant recognizes that he also did not testify that he answered the specific question, "What were you doing in the female berthing area?" nor did he corroborate the phrasing of that single question. Rather, he told the *DuBay* judge that he felt he was duty bound to answer her questions. (JA 300).

The only way the *DuBay* judge could find that YN1 Nipp only asked the one additional question was by disbelieving Appellant. As the ultimate fact finder, the *DuBay* judge is free to disbelieve the testimony of any witness. However, the *DuBay* judge abused his discretion in finding Appellant had less credibility solely

as a result of his "participation in the lengthy appellate review process . . . while he has been in confinement . . . ." (JA 233.) This finding, which the lower court found clearly erroneous (JA 009), colored the *DuBay* judge's findings regarding the questions asked and answered and is additional ground for setting them aside.

Normally, "[w]hen the testimony of a witness is not believed, the trier of fact may simply disregard it." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). But if the trier of fact acts "arbitrarily" and without a "rational ground," the reviewing court need not be bound by the trier of fact's determination. *See Hamlin v. Yates*, No. 2:11-CV-00604-JKS, 2012 WL 6571055, *4 (E.D. Cal. Dec. 17, 2012) (citation omitted).

The *Military Judges' Benchbook* contains a standard *voir dire* question for prospective members: "Will each of you use the same standards in weighing and evaluating the testimony of each witness and not give more or less weight to the testimony of a particular witness *solely* because of that witness's position or status?" U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK, para 2-5-1, p. 55 (29 February 2020) (emphasis added). Clearly, the *DuBay* judge did not; the sole reason he disbelieved Appellant was because of his participation in his appeal. By letting a bias dictate his credibility determination, the *DuBay* judge acted arbitrarily and without a rational ground. Thus, this Court should set aside the finding that YN1 Nipp only asked one additional question to which there was

no response and instead find that YN1 Nipp also asked the following additional questions and that Appellant provided incriminating responses: (a) "What was in your backpack that you needed so importantly?" (JA 286); (b) "Who was the first person you saw when you entered the berthing area?" (JA 287); and (c) "Is there anything else you can remember?" (JA 288).

II.

BECAUSE THE VICTIM ADVOCATE HAD A LAW ENFORCEMENT RESPONSIBILITY TO REPORT APPELLANT'S INFORMATION TO HER CHAIN OF COMMAND FOR FURTHER INVESTIGATION, SHE HAD TO ADVISE APPELLANT OF HIS ARTICLE 31(b), UCMJ, RIGHTS BEFORE SHE QUESTIONED HIM ABOUT OFFENSES SHE SUSPECTED HE COMMITTED.

1. Article 31(b), UCMJ, does not strictly demand questioning be pursuant to a law enforcement or disciplinary investigation.

The government mistakenly claims Appellant has argued that his meeting with YN1 Nipp was presumptively for law enforcement or disciplinary purposes. Appellee's Br. at 24. Appellant does not argue for that presumption because it is not necessary to his argument. Article 31(b), UCMJ, exists to relieve the pressures on suspects on account of military pressure and military position. *United States v. Duga*, 7310 M.J. 206, 209 (C.M.A. 1981). Petty Officer Nipp was senior to Appellant and occupied an official position as a victim advocate. She did not have to conduct a formal law enforcement or disciplinary investigation in order for

Article 31(b), UCMJ, to apply to her because she interrogated Appellant and, by doing so, implicated the law enforcement responsibility that a victim advocate must perform – report to the chain of command for further investigation.

The government conflates the terms "interrogation" and "investigation." *See* Appellee Br. at 19-21. Military Rule of Evidence 305(b) defines "interrogation" as formal and *informal* questioning that is reasonably likely to elicit an incriminating response. (emphasis added.) "Interrogation" is synonymous with but not the same as an official law enforcement or disciplinary investigation. Article 31(b), UCMJ, does not require all interrogations to be part of such. *See United States v. Carter*, 26 M.J. 1002, 1004 (A.F.C.M.R. 1988) (holding that unwarned statements made to two noncommissioned officers assigned to a drug rehabilitation program were made for official purposes rather than part of a casual conversation and should have been suppressed).

Just like everyone else in the Coast Guard who is not part of the Coast Guard Investigative Service, the victim advocate is forbidden from conducting criminal investigations into sexual assault allegations. COMMANDANT INSTRUCTION MANUAL 1754.10D, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (19 Apr 12). But this does not prohibit the victim advocate from asking questions of personnel who come to the victim advocate for assistance. The victim advocate's official position as a victim advocate permits questioning and distinguishes such

encounters from those where questions are asked out of personal curiosity. *See generally United States v. Jones*, 24 M.J. 367, 369 (C.M.A. 1987).

Victim advocates have the freedom to ask questions of persons seeking their assistance; this is a natural part of communicating. Indeed, that a privilege is afforded confidential conversations between the victim and victim advocate implies an understanding that questions will be asked. *See* MIL. R. EVID. 514(a). But, as in this case, where privilege does not exist, a victim advocate who, based on suspicion, asks questions about an offense that are likely to elicit an incriminating response thereby interrogates that person and, as a result of the attendant law enforcement responsibility to report, must provide that person a warning under Article 31(b), UCMJ.

Appellant argues that Article 31(b), UCMJ, applies to persons beyond those conducting formal law enforcement or disciplinary investigations to persons who by their questioning of suspects implicate a service-imposed law enforcement responsibility. This argument does not "render every member of the military community a criminal investigator," *United States v. Raymond*, 38 M.J. 136, 138-39 (C.M.A. 1993), as the government suggests through its citations to various service instructions that impose reporting requirements. *See* Appellee Br. at 26.

The reporting requirement in each of the government's cited regulations is indeed the same type of law enforcement or disciplinary responsibility applicable

to victim advocates. Hypothetically, under the instructions the government cites, any member on active duty *could* be subject to Article 31(b)'s requirement *if* in addition to reporting misconduct the member observes (an altogether different position than one in which a victim advocate sits), the member also questions someone suspected of an offense. However, this Court's longstanding rank or position test, which applies here, restricts the literal application of Article 31(b) and forecloses the so-called "absurd result" of widespread application of the article's exclusionary rule.

2. This Court should not apply the Army Court of Criminal Appeals' decision that uniformed social service practitioners have no duty to warn to this case.

Although not cited by the government, Appellant asks this Court to not apply to this case the Army Court of Criminal Appeals' reasoning in *United States v. Randall*, ARMY 201330452, 2015 WL 9595629 (A. Ct. Crim. App. Dec. 17, 2015) (unpublished). Writing for the three-judge panel, Judge Wolfe directly applied *Raymond* and held that a military officer social worker did not need to advise Specialist Randall of his Article 31(b), UCMJ, rights before he spoke to him. *Id.* at *7. Appellant asserts that portion of *Randall* was wrongly decided. First, the Army court did not analyze whether the social worker's role in the "Case Review Committee," which included a representative from Army Criminal Investigative Command, implicated a law enforcement or disciplinary responsibility. *See Id.* at *3. Second, the court relied on *Raymond* and *United*

States v. Moore, 32 M.J. 56 (C.M.A. 1992), to find that psychiatric health workers' regulatory duty to report offenses with military supervisors did not require a rights warning. *Id.* at *7. But in neither case were the questioners subject to the code, making these cases inapposite.

3. Providing victim advocate services does not meet either of this Court's necessity exceptions to the warning requirement.

The government misapprehends this Court's Article 31(b), UCMJ, necessity exceptions jurisprudence. It claims that the *Loukas* and *Bradley* line of cases, which this Court should apply here, are about there being "some non-law enforcement purpose for the questions." Appellee Br. at 18, 22. This is akin to the primary purpose test the government advocated in *United States v. Ramos* that this Court expressly rejected three years ago. 76 M.J. 372, 380 n.3 (C.A.A.F. 2017).

The necessity exceptions apply "where immediate operational issues are implicated." *Id.* at 378. The government calls this Court's attention to *United States v. Bradley*, which held that Staff Sergeant (SSgt) Bradley's commander was not, as SSgt Bradley alleged, conducting a pretextual criminal investigation when his commander sought information related to SSgt Bradley's security clearance. 51 M.J. 437, 442 (C.A.A.F. 1999).

Appellant does not argue YN1 Nipp was conducting a pretextual criminal investigation. Appellant argues YN1 Nipp's questioning implicated the law enforcement responsibility that made her a mandatory reporter of suspected

criminal offenses.

Moreover, what has been recognized as the "administrative exception" in *Bradley*—questions relating to one's security clearance—is a limited one that is inextricably entwined with operational issues. In contrast, victim advocate services have no connection with immediate operational issues, and the government does not argue that they do. Therefore, the Court should not find a necessity exception applies to questioning by victim advocates.

III.

A MOTION TO SUPPRESS FOR FAILURE TO WARN WOULD HAVE SUCCEEDED. INSTEAD, ERRONEOUSLY ADMITTED EVIDENCE PREJUDICED APPELLANT ON ALL THE FINDINGS. BECAUSE THE DECISION NOT TO FILE THE MOTION WAS UNREASONABLE, TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

1. Absolute certainty about whether a motion that should have been filed is meritorious is not required because absolute certainty is impossible.

Contrary to the government's assertion, Appellee Br. at 31, this Court's decision in *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997), does not lessen the burden to prove ineffective assistance of counsel. Other circuit courts of appeals have employed language different from the alleged certainty language found in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *United States v. Mercedes-De La Cruz*, 787 F.3d 61, 68 (1st Cir. 2015) ("[A] timely motion to suppress . . .

would quite likely have been meritorious."); *Grumbley v. Burt*, 591 F. App'x 488, 501 (6th Cir. 2015) ("The motion to suppress likely would have been meritorious"). Such language does not alter the test but expresses the truth that certainty of an event that should have happened is epistemologically impossible without making assumptions.

In truth, had the defense counsel filed the motion to suppress on the ground articulated in Appellant's brief, the counsel should have and would have prevailed, assuming the military judge had a correct understanding of the law and correctly applied it. But the government's overly literal reading of *Kimmelman* would almost certainly deprive an accused of his Sixth Amendment right to effective counsel. *United States v. Kunishige*, 79 M.J. 693, 711 (N-M. Ct. Crim. App. 2019) (comparing an assessment of prejudice for the government's failure to provide discovery regarding ineffective assistance of counsel based on failure to file a motion to suppress).

2. The erroneously admitted evidence affected all of the findings. While there may have been a tactical reason not to file a motion to suppress, that decision was unreasonable because a successful motion would have forced a dismissal of the Article 107, UCMJ, charge and specification.

The government persists in misapplying the prejudice test. The government steadfastly believes that because it could have called SNBM SC to testify to Appellant's original statement before Appellant spoke to YN1 Nipp, no prejudice extends to the sexual assault and housebreaking charges and specifications.

Appellee's Br. at 36. The government cites no support for this formulation and for good reason—it stands the prejudice test on its head.

In the context of erroneously admitted evidence, prejudice is entirely about the effect the evidence had on the factfinder. *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019). The government does not argue that the erroneously admitted evidence, amplified by the trial counsel's closing argument, did not affect the entire outcome.

Whether the government could have called SNBM SC to testify about Appellant's earlier statement that Appellant made to SNBM SC may be relevant to whether the defense counsel had tactical decisions for not suppressing Appellant's statement to YN1 Nipp. The trial defense counsel recalled ". . . the fact that [Appellant] had gone to a victim advocate was going to be in play even if the statement to [YN1] Nipp was suppressed . . . . The cross-claim of sexual assault we felt was – could be a liability in the case[1], so it was important to paint the command as being somewhat out to get [Appellant] . . . ." (JA 261.)

Ultimately, however, that decision was not reasonable. Appellant had to defend against a false official statement charge by using SNBM SC's testimony, which was unsuccessfully used to call into doubt YN1 Nipp's veracity. Although it

[1] At Appellant's court-martial, the government did not go so far as to say that Appellant made a false cross-claim of sexual assault against SK3 GR.

is indicative that the defense counsel did not abandon Appellant to an inevitability, there is no world in which defending a charge using disputed evidence is preferable to not having to defend against a charge—a point the trial defense counsel recognized at the *DuBay* hearing (JA 260-61)—which a successful motion to suppress would have guaranteed.

Conclusion

Appellant respectfully requests this Court reverse the lower court's decision and set aside the findings and sentence.

Respectfully submitted,

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I certify that the foregoing was delivered electronically to this Court and to Appellate Government on 6 August 2020.

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