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	APPELLEE'S 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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Issues Presented

I. WAS THE VICTIM ADVOCATE REQUIRED TO ADVISE APPELLANT OF HIS RIGHTS UNDER ARTICLE 31(b), UCMJ?

II. WERE TRIAL DEFENSE COUNSEL INEFFECTIVE WHEN THEY FAILED TO MOVE TO SUPPRESS APPELLANT'S STATEMENT TO THE VICTIM ADVOCATE WHEN SUCH STATEMENT WAS TAKEN IN VIOLATION OF ARTICLE 31(b), UCMJ?

Statement of Statutory Jurisdiction

This Court has jurisdiction to review this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of false official statement, two specifications of sexual assault, and housebreaking in violation of Articles 107, 120, and 130, UCMJ, 10 U.S.C. §§ 907, 920, 930 (2012), respectively. The Military Judge conditionally dismissed Specification 1 of Charge II, which alleged sexual assault by bodily harm, pending appellate review. The members sentenced Appellant to seven years confinement, reduction to paygrade E-1, and a dishonorable discharge. The Convening Authority approved the sentence and, except for the punitive discharge, ordered the sentence executed. J.A. at 037-8.

On appeal, before the lower court, Appellant alleged multiple Assignments of Error, to include that his Trial Defense Counsel (TDC) were ineffective for failing to move for suppression of his unwarned statements to a Victim Advocate (VA) under Article 31, UCMJ, 10 U.S.C. § 831 (2012) (hereinafter Article 31(b), UCMJ). The Coast Guard Court of Criminal Appeals (CGCCA) affirmed the findings and sentence as approved by the Convening Authority and ordered a corrected promulgating order to reflect the conditional dismissal of Specification 1 of Charge II. *United States v. Harpole*, CGCMG 0322, (C.G. Ct. Crim. App. Nov. 10, 2016) (unpub. op.).

This Court granted Appellant's petition for review on three issues, including the same allegation that TDC were ineffective for failing to file a motion to suppress Appellant's statements to the VA in violation of Article 31(b), UCMJ. This Court, in a 4-1 decision, set aside the lower Court's decision and remanded the case for a post-trial hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) to further develop the record on the Appellant's ineffective assistance of counsel claim.[1]

[1] This Court detailed four issues for the *DuBay* Judge to address in his 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;

The *DuBay* hearing was held on July 24 – 25, 2018. In his findings of fact and conclusions of law, the *DuBay* Judge specifically addressed the four questions directed by this Court and found that:

> (1) The lead and assistant trial defense counsel adequately pursued and considered an Article 31(b) suppression motion and considered legal and tactical matters in deciding filing such a motion would not prevail and would be fruitless;
> (2) Trial defense counsel acted reasonably and consistent with prevailing professional norms in not filing a motion they had determined was without merit and would not succeed;
> (3) No reasonable person would have believed [Yeoman First Class] (YN1) Nipp was acting in [an official law-enforcement or disciplinary] capacity and there is no reasonable probability an Article 31(b) suppression motion would have succeeded; and
> (4) There is a reasonable probability the members' findings would have been different [only as to the false official statement charge] had YN1 Nipp's testimony been suppressed.

J.A. at 228-30. After an order from the CGCCA, the *Dubay* Judge issued supplemental findings of fact on 3 November 2019. J.A. at 231. Considering the *Dubay* record, the lower Court held that under these facts Article 31(b), UCMJ, rights were not required and reaffirmed the findings and sentence. *United States v. Harpole*, 79 M.J. 737, 745 (C.G. Ct. Crim. App. 2019).

> (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;
> (3) Whether there is a reasonable probability that such a motion to suppress would have succeeded;
> (4) Whether there is a reasonable probability that the members' findings would have been different had YN1 Nipp's testimony been suppressed.

United States v. Harpole, 77 M.J. 231, 238 (C.A.A.F. 2018).

Statement of Facts

1. Appellant's Sexual Assault of SK3 GR

This case arises from events that occurred aboard CGC POLAR STAR while on port call in Pape'ete, Tahiti on February 26, 2014. J.A. at 58–59. While on liberty that evening the victim, Storekeeper Third Class (SK3) GR consumed at least twelve alcoholic drinks. J.A. at 60–62, 65–67. She then returned to her stateroom on POLAR STAR in the early morning hours of February 27, 2014, and passed out. J.A. at 70. Two of her roommates, SK3 Stephanie Robinson and Operational Specialist Third Class (OS3) Lourdes Putnam, were also asleep in the stateroom. J.A. at 97, 114–15. SK3 Robinson was woken up around 0500 by Appellant, who stated he was looking for SK3 GR. J.A. at 116–18. SK3 Robinson pointed to SK3 GR's rack, and observed Appellant walk over to her rack. J.A. at 119-20. Both roommates subsequently heard sounds of kissing and sexual intercourse coming from SK3 GR's rack. J.A. at 97–98, 119–20. OS3 Putnam later saw Appellant leave SK3 GR's rack and the stateroom. J.A. at 99–100.

When SK3 GR woke up that morning, she realized she was naked, felt like she had had sex, and remembered seeing flashes of Appellant on top of her. J.A. at 71–72, 79. She spoke to SK3 Robinson and OS3 Putnam about what had happened earlier that morning; and later that same day she made an unrestricted report of sexual assault to LCDR May Keogh, the senior-most VA on POLAR STAR. J.A.

at 75–78, 103–04, 122–24, 351–52. LCDR Keogh subsequently directed YN1 Holly Nipp, to prepare temporary duty travel orders for SK3 GR to travel back to Seattle, Washington.[2] J.A. at 224, 355, 358. Accordingly, on or about March 2, 2014, SK3 GR was transferred ashore via small boat. J.A. at 224. Appellant was aware SK3 GR was transferred off ship as he was part of the special sea detail for her small boat transfer. J.A. at 224, 321–22.

2. Appellant's Report and Discussion with the Victim Advocate

On the evening of March 2, 2014, YN1 Nipp, one of three designated VAs aboard POLAR STAR, awoke at approximately 2130 to a knock on her stateroom hatch. J.A. at 129–30, 224. She opened the hatch to find Appellant and his friend, Seaman Boatswains Mate (SNBM) Sean Childers, and then asked Appellant "what he wanted to talk about." J.A. at 129–30, 224. Appellant responded, "I would like to speak to you about something that had happened," and then the three of them, Appellant, SNBM Childers, and YN1 Nipp, proceeded to the unoccupied First Class Petty Officer's lounge. J.A. at 130, 224, 290. YN1 Nipp thought the First Class lounge would offer more privacy, and was larger than her stateroom. J.A. at 130, 224, 343.

[2] At the time of the incident and court-martial, now-CWO Nipp was a Yeoman First Class. To remain consistent with references in the record of trial and avoid confusion, CWO Nipp will be referred to as YN1 Nipp.

Unsure of what Appellant wanted to discuss with her but sensing something was wrong, YN1 Nipp asked Appellant "if it was okay that SNBM Childers was in the room" during the meeting. J.A. at 130, 224, 291, 339, 415. Appellant responded "yes" to this question and stated that he had already told SNBM Childers "everything" he was about to tell YN1 Nipp. J.A. at 130, 224, 415.

Earlier that evening, Appellant had approached SNBM Childers and told him that he felt he had been sexually assaulted in SK3 GR's stateroom after going there to retrieve his backpack. J.A. at 244, 429. It was then, at SNBM Childers' suggestion, that Appellant sought out one of the ship's VAs; however, it was Appellant who chose to report to YN1 Nipp in particular because he felt most comfortable speaking to her. J.A. at 303, 430.

Before Appellant made his report to YN1 Nipp, she informed him that whatever he told her would be unrestricted because he had already told SNBM Childers "everything" and SNBM Childers was going to remain present during the meeting. J.A. at 224, 332, 339, 415. YN1 Nipp then opened up the conversation by asking Appellant "what was going on?" or words to that effect. J.A. at 291, 339-40. Appellant proceeded to tell YN1 Nipp that he had spent the day with SK3 GR, they had both consumed alcohol, and then he had gone to SK3 GR's stateroom sometime that evening to retrieve his backpack. J.A. at 131–33, 224. Appellant stated after he knocked on SK3 GR's hatch, he did not remember anything, but that

he had been sexually assaulted in the past and knew what that felt like. J.A. at 133. According to YN1 Nipp, Appellant was "bouncing all over the place" during his statement, and she did not know "where he was going. . ." J.A. at 133.

Directly after the meeting with Appellant and SNBM Childers, YN1 Nipp met with the senior VA onboard, LCDR Keogh, to relay Appellant's unrestricted report of sexual assault. J.A. at 225, 342, 356, 359, 416. Together they relayed Appellant's allegations to POLAR STAR's Executive Officer and Commanding Officer. J.A. at 225, 344, 360, 416. Appellant was assigned a VA after his claim was reported POLAR STAR command. J.A. at 357, 361, 394. In accordance with Coast Guard VA policy, YN1 Nipp did not take any notes or direct Appellant or SNBM Childers to provide a written statement. J.A. at 225, 345–46, 418–19. It was not until late March 2014, in response to a Coast Guard Investigative Service (CGIS) request, that YN1 Nipp even provided an official statement regarding Appellant's unrestricted sexual assault report. J.A. at 136, 225, 403–05.

3. *Dubay* Hearing

Evidence introduced at the *Dubay* hearing showed YN1 Nipp believed she was meeting with Appellant solely in her role as a VA. J.A. at 418. She never considered herself to be part of an investigative team and was never directed to investigate any part of SK3 GR's allegation or develop information about the alleged crime. J.A. at 225, 341. In fact, YN1 Nipp only knew of SK3 GR's

allegation because on February 27, 2014, LCDR Keogh directed YN1 Nipp, in her capacity as a Yeoman, to prepare temporary duty travel orders for SK3 GR to travel from Tahiti to Seattle. J.A. at 134, 224, 358, 413. LCDR Keogh never directed to investigate any aspect of SK3 GR's sexual assault allegation. J.A. at 359.

SNBM Childers testified that at one point during Appellant's narrative, Appellant "said he went to the female berthing to get a backpack," and then YN1 Nipp asked Appellant, "What were you doing in the female berthing area?" or words to that effect, but immediately gestured to Appellant to convey "never mind." J.A. at 225, 318–20. SNBM Childers took the gesture to mean that YN1 Nipp was withdrawing the question, and Appellant continued on with his narrative. J.A. at 225, 318–20. TDC's file notes from a pretrial interview with SNBM Childers also reflect that YN1 Nipp asked "so what was your business in female berthing anyway?" and then immediately followed with "never mind, besides the point." J.A. at 248. At the *DuBay* hearing, Appellant testified he told YN1 Nipp that when he returned to the ship on the morning of 28 February he "was going down to retrieve [his] backpack." J.A. at 295. Only after mentioning needing to retrieve his backpack, did Appellant claim YN1 Nipp asked anything beyond her initial opening question. J.A. at 295–96. This meeting lasted between ten to fifteen minutes. J.A. at 304, 320.

Lead TDC, LCDR Tereza Ohley, and assistant TDC, LCDR Lindsay Pepi, JAGC, U.S. Navy, testified at the *DuBay* hearing. J.A. at 226–27. Both LCDR Ohley and LCDR Pepi indicated that they would have preferred to have Appellant's statements to YN1 Nipp suppressed, and ultimately decided to file a motion to exclude Appellant's statements under M.R.E. 514. J.A. at 272–73, 284, 369, 389. Both LCDR Ohley and LCDR Pepi also considered an Article 31(b), UCMJ, suppression motion, but decided not to file that motion because they believed it would fail. J.A. at 226–27, 266, 268, 369–70, 387. In evaluating whether to file a suppression motion, TDC conducted an interview of SNBM Childers, spoke to Appellant about his report to YN1 Nipp, and questioned YN1 Nipp at the Article 32, UCMJ, 10 U.S.C. § 832 (2012) preliminary hearing to gather further information about the context surrounding Appellant's statements to YN1 Nipp. J.A. at 226, 268–69, 284, 370, 389. LCDR Ohley also discussed the trial strategy with her supervisors and incorporated their insight into her preparation. J.A. at 226, 274.

Based on TDC's view of the evidence, they assessed that: YN1 Nipp was acting in her VA capacity and not on behalf of law enforcement, YN1 Nipp did not interrogate Appellant but was in "receiving mode," Appellant made a voluntary statement, and that Appellant specifically sought out YN1 Nipp. J.A. at 307, 370–71, 389. During her trial preparation, LCDR Ohley formed the impression that

YN1 Nipp "knew that [Appellant] had come to her in a VA capacity." J.A. at 260. LCDR Ohley also believed YN1 Nipp did not "couch[] her questions as [if in a] law enforcement investigation." J.A. at 269. LCDR Ohley also confirmed at the *DuBay* hearing that she "made the determination that a reasonable person would not have determined that was an interrogation." J.A. at 272, 274–75.

LCDR Pepi testified she also believed "all instances pointed to the fact that [Appellant] very much believed he was a victim," and "voluntarily made these statements." J.A. at 370. LCDR Pepi continued by stating "everything that [YN1 Nipp] said indicated she was treating [Appellant] as a victim, did not interrogate him at all, was not acting in a law enforcement capacity or to pursue good order and discipline, was very much in a receiving mode." J.A. at 370. Because TDC had made the judgment that Appellant felt like a victim and YN1 Nipp treated him in a victim capacity, filing the motion to exclude under M.R.E. 514 "seemed like a much stronger tactic" that also "went with what [Appellant] represented as his feelings." J.A. at 371–72.

Notably, TDC believed Appellant's statements to YN1 Nipp would have ultimately been admissible at trial because Appellant had earlier relayed the same information to SNBM Childers and these statements could not be suppressed under any theory. J.A. at 226–28, 270–71. Accordingly, TDC pursued the motion to

exclude under M.R.E. 514, believing it had the best chance of prevailing. J.A. at 266, 371.

Other facts necessary to the resolution of the issues are discussed below.

Summary of the Argument

First, the *Dubay* Judge's finding of fact regarding Appellant's statements to YN1 Nipp are not clearly erroneous. Second, the rationale behind Article 31(b), UCMJ, is to protect suspected service members who are being questioned for a law enforcement or disciplinary purpose. In this case, as the Court below and *Dubay* Judge correctly found, YN1 Nipp did not ask questions for those purposes, but rather to effectuate her duties as a VA. Appellant's that claim YN1 Nipp's rank and duty to report his allegation required her to provide him with Article 31(b), UCMJ, warnings is inconsistent with this Court's case law. Third, even if there was an Article 31(b), UCMJ, violation, Appellant has not rebutted the strong presumption TDC's actions were within the wide range of reasonable professional assistance. TDC were not deficient because succeeding on an Article 31(b), UCMJ, suppression motion was not a certainty. Moreover, finding TDC deficient after they investigated the relevant facts, devised a reasonable strategy, and made the reasonable decision an Article 31(b), UCMJ, suppression motion would not succeed, is the kind of hindsight bias this Court explicitly forbids. Regardless, even if Appellant's statement to YN1 Nipp had been suppressed the outcome of his

court-martial would only have been different as to the Article 107, UCMJ, charge. This Court should affirm the decision of the lower Court.

Argument

I. THE *DUBAY* JUDGE'S FACTUAL FINDING THAT APPELLANT'S INCRIMINATING STATEMENTS WERE NOT IN RESPONSE TO THE VICTIM ADVOCATE'S WITHDRAWN QUESTION IS SUPPORTED BY THE RECORD OF TRIAL.

Standard of Review

Factual findings made by a Military Judge at a *DuBay* hearing are reviewed "under a clearly erroneous standard." *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). "A finding of fact is clearly erroneous when there is no evidence to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (internal quotations and citations omitted). This Court "necessarily defer[s] to the *DuBay* judge's determinations of credibility" with regard to the factual findings. *Wean*, 45 M.J. at 463.

Discussion

The *Dubay* Judge's finding of fact that Appellant did not respond to YN1 Nipp's withdrawn questions is supported by the record. Appellant claims the *Dubay* Judge's finding that Appellant did not respond to YN1Nipp's withdrawn question, "What were you doing in the female berthing area?" was clearly

erroneous. App. Br. at 10-11. The *Dubay* Judge found that Appellant made no response to her question, and "Appellant's statement to YN1 Nipp was not affected at all by this question from YN1 Nipp." J.A. at 232. There is evidence in the *Dubay* record to support that finding of fact.

The *Dubay* Judge's finding is supported by TDC's notes from their interview with SNBM Childers, entered as an exhibit at the *Dubay* hearing. Those notes reflect SNBM Childer's statement that "[at] one point of the story [Appellant] was telling [YN1 Nipp], he said he went to female berthing to get a backpack. She interrupted him and said, 'so what was your business in female berthing anyway?' then 'never mind, besides the point.'" J.A. at 248. TDC's notes indicate that YN1 Nipp only asked Appellant the question about female berthing *after* he mentioned going down to female berthing to retrieve his backpack.

Appellant contends that this factual finding is clearly erroneous, claiming that the *DuBay* Judge disregarded evidence to the contrary. App. Br. 11. Yet, Appellant fails to cite to any portion of the record in support of this contention. App. Br. at 11. Appellant states he "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." App. Br. at 11. But the *Dubay* Judge found Appellant's "recollection of the meeting in the lounge to not be credible . . ."

J.A. at 232. This "determination of credibility" made by the *Dubay* Judge should accordingly be afforded "great deference." *Wean*, 45 M.J. at 463.

Even if the *Dubay* Judge had found Appellant credible, his own testimony actually corroborates TDC's notes of their interview with SNBM Childers. At the *Dubay* hearing, Appellant testified:

> Appellant: [SK3 GR] had told me that she was going to be heading back to the ship. So since I had been with her all day, I asked her if she would take back my backpack. At that point I had stayed [at the club] a little bit longer, and then I headed back to the ship, at which *point I had told Petty Officer Nipp that I was going down to retrieve my backpack*. And then ----
>
> Defense Counsel: At this -- go -- at this point, what function, if any, did Petty Officer Nipp ask of you?
>
> Appellant: She asked me why I needed my backpack and what was in it that I needed so importantly.
>
> Defense Counsel: After she asked you that question, how did you answer?
>
> Appellant: I just told her that it had my -- all my personal belongings as well as my iPad that I had used for my alarm clock during the whole deployment, and that I needed it so that I could wake up for special sea detail.

J.A. at 295–96 (emphasis added). This testimony spotlights the first instance in the *DuBay* hearing that Appellant discusses any alleged questions posed by YN1 Nipp beyond her initial opening "what's going on" question. J.A. at 291-5. It reinforces the same fact as recorded in TDC's notes, that Appellant referenced his backpack

before YN1 Nipp asked about female berthing, and provides additional support to the *Dubay* Judge's finding.

The factual finding that Appellant did not respond to YN1 Nipp's question is rooted in hearing exhibits, witness testimony, and permissive inferences drawn from this record. This Court should not find it clearly erroneous.[3]

II. THE VICTIM ADVOCATE WAS NOT REQUIRED TO ADVISE APPELLANT OF HIS RIGHTS UNDER ARTICLE 31(b), UCMJ.

Standard of Review

A *DuBay* Judge's conclusions of law are reviewed *de novo*. *Wean*, 45 M.J. at 463.

Discussion

1. A Victim Advocate, or any service member, not interrogating a suspected member for a law enforcement or disciplinary purpose is not required to advise a member of his Article 31(b) rights.

In this case "[t]he only Article 31(b), UCMJ predicate in dispute is whether the victim advocate interrogated or requested any statement from Appellant." *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018). Under that predicate "rights warnings are required if the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or

[3] The lower Court did find one of the *Dubay* Judge's findings of fact clearly erroneous, but did not find it to be significant. *Harpole*, 79 M.J. at 743.

inquiry." *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (internal citation and quotation omitted). Whether a person is conducting "a law enforcement or disciplinary investigation 'is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity.'" *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (quoting *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)). "The second determination is judged by reference to "a reasonable man in the suspect's position." *Jones*, 73 M.J. at 362 (quoting *Good*, 32 M.J. at 108). Questions by a person who is not acting in an official law enforcement or disciplinary capacity generally do not require Article 31(b) rights warnings. *United States v. Cohen*, 63 M.J. 45, 49-50 (C.A.A.F. 2006).

The focus of this Court's analysis in applying the second predicate of Article 31(b), UCMJ, has been to determine the purpose of the questions. *Jones*, 73 M.J. at 361-62. Focusing on the purpose of the questions is consistent with the Congressional intent of Article 31, UCMJ. In *United States v. Gibson*, 14 C.M.R. 164, 169-170 (C.M.A. 1954), this Court's predecessor court recognized the impetus for Article 31, UCMJ, and its predecessor Article of War 24, was not only to protect military members when questioned about a suspected offense by a

superior, but also when questioned by an authorized official investigating the member for the suspected offense.

When a questioner is not asking a suspected member questions for law enforcement or disciplinary purposes, this Court has found no Article 31(b), UCMJ, violation. In *Jones*, this Court found no violation of Article 31(b), UCMJ, because the questioner, despite his law enforcement responsibilities, had a "personal" motivation for his questions. 73 M.J. at 362-63. In *United States v. Bradley*, 51 M.J. 437, 441-2 (C.A.A.F. 1999), this Court found no violation of Article 31(b), UCMJ, because, although acting in an official capacity, the questioner was not "pursuing a criminal investigation, or [holding] any other law enforcement role" but only "seeking information for the proper review of appellant's security clearance status. . . ."

In *United States v. Loukas*, 29 M.J. 385, 386-89 (C.M.A. 1990), this Court's predecessor court found no violation of Article 31(b), UCMJ, because the questioner was fulfilling his operational responsibilities and not acting as part of a "law enforcement or disciplinary investigation." (emphasis in original). And in *United States v. Fisher*, 44 C.M.R. 277, 279 (C.M.A. 1972), the Court found no Article 31(b), UCMJ, violation, when a doctor questioned a suspected member "solely for medical diagnosis and treatment. . ."

In contrast, this Court has found violations when the purpose of the question

was for law enforcement or disciplinary investigation. In *United States v. Ramos*, 76 M.J. 372, 377-78 (C.A.A.F. 2017), this Court found an Article 31(b), UCMJ, violation when Coast Guard Investigative Service Agents continued to question a suspected member about marijuana possession after they realized there was no immediate threat to base security. In *United States v. Gilbreath*, 74 M.J. 11, 18 (C.A.A.F. 2014), this Court found a violation of Article 31(b), UCMJ, when the questioner's superior officer had directed him to investigate a missing weapon, and he suspected the accused had stolen the weapon. And in *United States v. Brisbane*, 63 M.J. 106, 113 (C.A.A.F. 2006), this Court found an Article 31(b), UCMJ, violation when a Family Advocacy Specialist's interview was pre-planned with investigators and for the specific purpose of helping investigators decide if there was sufficient evidence to proceed "with a case against [a]ppellant."

As demonstrated, the crux of this Court's decisions regarding the second textual predicate of Article 31(b), UCMJ, is whether the purpose of the questions served a law enforcement or disciplinary investigation. While this Court has recognized administrative and operational exceptions to the Article 31(b), UCMJ, warning requirement, in those cases this Court is simply recognizing there was some non-law enforcement purpose for the questions. *See Loukas*, 29 M.J. at 389; *Bradley*, 51 M.J. at 441-42. But as the lower court correctly concluded, "the point

is . . . [whether] questions asked in a victim advocate capacity have a law enforcement or disciplinary purpose." *Harpole*, 79 M.J. at 742.

2. There was no law enforcement or disciplinary purpose for YN1 Nipp's questions of Appellant.

The circumstances of Appellant's voluntary unrestricted sexual assault report to YN1 Nipp show that she was not acting in a law enforcement or disciplinary capacity. An examination of all the facts and circumstances surrounding the meeting between YN1 Nipp, SNBM Childers, and Appellant demonstrates that the purpose of YN1 Nipp's questions was to fulfill her duties as a VA.

First, YN1 Nipp was not ordered to conduct an official law enforcement or disciplinary investigation related to SK3 GR's report against Appellant, and was not engaged in a self-directed law enforcement or disciplinary investigation. J.A. at 229, 335-49. While YN1 Nipp testified she was aware of SK3 GR's allegation, she was not investigating Appellant, nor did anyone direct her to do so. J.A. at 341, 349. Appellant testified YN1 Nipp did not order him to answer any questions during the interview. J.A. at 305. And SNBM Childers felt that he and Appellant were free to leave at any time. J.A. at 320. YN1 Nipp did not do anything during or after the meeting consistent with a law enforcement or disciplinary investigation or activity. She did not take notes; did not ask Appellant or SNBM Childers to write a statement; and did not report Appellant's allegation to CGIS until CGIS reached

out to her for a statement. J.A. at 135-36, 140, 229, 345, 419. Instead of reaching out to CGIS, after her meeting with Appellant, YN1 Nipp informed the Operations Officer aboard POLAR STAR because the Operations Officer was the senior VA aboard. J.A. at 342. In fact, at the time Appellant was speaking with her, YN1 Nipp did not even know what Article 31(b), UCMJ, rights were. J.A. at 421.

The facts show YN1 Nipp was serving as, and believed herself to be serving as, a VA when Appellant voluntarily reported that he believed he had been sexually assaulted. J.A. at 229, 335-349, 417. First, Appellant came to her stateroom of his own volition at 2130 while YN1 Nipp was sleeping. J.A. at 128, 139-40, 413. Second, consistent with her role as a VA, YN1 Nipp agreed to speak with Appellant immediately, even though Appellant woke her up and she was assigned to an upcoming midnight watch. J.A. at 229, 339, 414. Appellant did not explain what he specifically wanted to report to YN1 Nipp. J.A. at 290, 339. In fact, YN1 Nipp did not know when Appellant knocked on her door that his report would have any connection to SK3 GR's report made several days before. J.A. at 339. Even during the Appellant's statement, YN1 Nipp at times could not decipher what Appellant wanted to tell her. J.A. at 133.

Third, YN1 Nipp brought Appellant and SNBM Childers from the passageway outside her stateroom to the First Class lounge because she felt he deserved more privacy. J.A. at 414, 419. Fourth, YN1 Nipp asked Appellant if he

was comfortable having SNBM Childers present, and then YN1 Nipp asked "what was going on." J.A. at 340, 415. According to SNBM Childers, during Appellant's recitation of what happened YN1 Nipp stated "What were you doing in female berthing?" but immediately withdrew the question by signaling through a hand motion Appellant should not answer.[4] J.A. at 319-20. YN1 Nipp's retraction indicated she recognized her role as a VA, because Coast Guard policy in effect at the time limited the VA to provide "emotional support and assistance to the victim." J.A. at 466. Fifth, as required by policy, once Appellant claimed he had been sexually assaulted, YN1 Nipp relayed his report to the senior VA aboard POLAR STAR in her capacity as a VA. J.A. at 337, 342, 344.

Applying the *Dubay* Judge's clearly supported finding of fact to this Court's prior case law, the lower Court correctly concluded there was no Article 31(b), UCMJ, violation here. As the *DuBay* Judge found, the facts and circumstances of this case are even more benign than the circumstances in *Jones*. J.A. at 229. In *Jones*, Specialist Ellis, a military police augmentee, was involved in the investigation of offenses, participated in the search for evidence, and helped secure the scene of the burglary before questioning Appellant. *Jones*, 73 M.J. at 362. Nevertheless, this Court still found he had a personal motivation for his questions

[4] In TDC's interview notes of SNBM Childers, TDC noted SNBM Childer's stated that instead of withdrawing the question using a hand motion, YN1 Nipp stated "Never mind. Besides the point." J.A. at 248, 259-60.

because his questions were outside the scope of his "modest law enforcement responsibilities." *Id*. Unlike *Jones*, YN1 Nipp had no law enforcement role whatsoever in the investigation of SK3 GR's sexual assault report and had no law enforcement responsibilities. J.A. at 342, 358-59, 453-466. YN1 Nipp was only told of SK3 GR's allegation because she was the most discreet of the senior Yeoman onboard POLAR STAR, and TDY orders were needed to send SK3 GR back to Seattle. J.A. at 342, 358-59, 453-466.

The facts and holding in *Bradley* are also instructive. In *Bradley*, "the purpose of [the] questions was to determine whether charges were filed because that action would necessitate suspension of appellant's high level security clearance." 51 M.J. at 441. This Court noted that the questioner was not pursuing an investigation, had no law enforcement role, and immediately pulled the accused's security clearance after the conversation which corroborated his testimony. *Id.* at 442. Here, just as in *Bradley*, YN1 Nipp had a specific, non-law enforcement purpose for her questions, specifically to effectuate her role as a VA. J.A. at 229, 328-49. And also just like in *Bradley*, YN1 Nipp was not pursuing an investigation, had no law enforcement role, and after the meeting with Appellant and SNBM Childers immediately informed the senior VA of Appellant's report. J.A. at 341, 342, 346.

Furthermore, a reasonable person in Appellant's position would not have believed YN1 Nipp was acting in an official law-enforcement or disciplinary capacity. Whether the military questioner could be considered to be acting in an official-law-enforcement capacity is determined by "a reasonable man in the suspect's position." *Jones*, 73 M.J. at 362 (internal quotation and citation omitted). This is an objective standard, and consequently Appellant's personal beliefs or feelings about the meeting with YN1 Nipp are irrelevant. *Id.* In this case, it was Appellant's choice to approach YN1 Nipp at night to voluntarily make an unrestricted sexual assault report to her specifically because she was a VA, and because he was most comfortable going to her as opposed to the other VA's on the ship. J.A. at 303, 307. Appellant voluntarily went into the First Class lounge, and was free to leave at any time. J.A. at 305, 318, 320. A reasonable person in Appellant's position would understand that by asking if Appellant wanted SNBM Childers in the room, informing Appellant anything he said would be unrestricted, and then relaying his report up the chain of command, YN1 Nipp was taking actions consistent with her role as a VA. J.A. at 415-6. These facts show a reasonable person in Appellant's position would not have considered YN1 Nipp to be acting in an official law enforcement or disciplinary capacity.

3. Appellant's claim that YN1 Nipp's rank and requirement to report his allegation transformed her into a law enforcement official is directly contradicted by this Court's cases.

Appellant is mistaken in his assertion YN1 Nipp's superior rank and requirement to report his claim that he was sexually assaulted presumptively transformed YN1 Nipp into a law enforcement official. App. Br. at 15, 18-19. This Court has never held that questions by a superior outside a suspected member's immediate chain of command are presumed to be for a law enforcement or disciplinary purpose. Nor has it held that a service wide regulation requiring any member to report an allegation of sexual misconduct transforms a questioner into a law enforcement official. Indeed, this Court's case law specifically restricts the application of Article 31(b), UCMJ, from interfering "into all aspects of military life and mission." *Cohen*, 63 M.J. at 49.

To avoid far reaching and unintended consequences into all aspects of military life, the second textual predicate under Article 31(b), UCMJ, has been interpreted "in context, and in a manner consistent with Congress' intent that the article protect the constitutional right against self-incrimination." *Cohen*, 63 M.J. at 49. In *Gibson*, the Court of Military Appeals (CMA) recognized that, while the text of Article 31(b), UCMJ, would suggest a broad application, it should generally only apply when military members assigned to investigate offenses question an accused or suspected service member. 14 C.M.R. at 170. Since *Gibson*, this Court has reaffirmed this principle again and again. *See Fisher*, 44 C.M.R. at 278 (finding the language, history, and purpose of Article 31(b), UCMJ, is limited to a

request for a statement "in the course of an official interrogation"); *Gilbreath*, 74 M.J. at 16 (recognizing that if applied literally Article 31(b), UCMJ, could impose "absurd results").

Appellant's argument that the combination of YN1 Nipp's rank and her requirement to report his claim of sexual assault would turn this Court's reading of Article 31(b), UCMJ, on its head. App. Br. at 12. Appellant claims that since YN1 Nipp was "a superior non-commissioned officer" and a "victim advocate with a reporting responsibility, [she] had official law enforcement/disciplinary duties that [were] implicated by asking Appellant an incriminating question."[5] App. Br. at 22. Such a rule would have dramatic practical implication and is inconsistent with this Court's reasoning and historical interpretation of Article 31(b), UCMJ.

Appellant's proposed rule would require an Article 31(b), UCMJ, warning every time a superior questions a member suspected of an offense, the exact situation this Court has sought to prevent. It is not just VAs who must report allegations of sexual assault, but every Coast Guard member. J.A. at 458. And this reporting requirement is not just limited to sexual assault. Coast Guard regulations require every Coast Guard member to report any misconduct or fraud which they become aware of. CIM 5000.3B, Coast Guard Reg. 9-1, 9-2 (1 May 2009). In fact,

[5] Appellant acknowledges but disregards the cases where this Court has found questioning by a superior only in the *immediate* chain of command creates the disciplinary presumption. *Swift*, 53 M.J. at 446; *Loukas*, 29 M.J. at 389, n. *.

every service either requires their members to report misconduct they are aware of, or creates a duty to report specific kinds of misconduct. U.S. Navy Reg. Chap. 11, General Reg. para 1137 (16 Dec. 2015) (requiring all members to report offenses under the UCMJ which they observe); Army Reg. 600-20: Army Command Policy, para 4-19 (6 Nov. 2014) (requiring the reporting of hazing and bullying); Air Force Instruction 1-1, Air Force Standards, para 1.7.4.6.2 (12 Nov. 2014) (requiring all Air Force members to report fraud, waste, violation of law, and misconduct through appropriate supervisory channels or to the IG). Consequently, since all service members are under some obligation to report offenses, Appellant's rule would literally require any superior who "interrogate[d], or requeste[d] any statement from an accused or person suspected of an offense . . ." to inform that person of their Article 31, UCMJ, rights. Article 31(b), UCMJ. This rule would require a VA to stop a victim reporting a sexual assault in order for the VA to provide Article 31(b), UCMJ, rights if the VA suspected the victim of any collateral misconduct.[6] Taken to its logical conclusion, Appellant's proposed rule would be completely inconsistent with the primary purpose of a VA, which is to "of facilitate[e] advice and assistance to the alleged victim." M.R.E. 514(a).

[6] Appellant's rule would also require VAs, and service members generally, to be intimately familiar with the UCMJ, and make decisions in the moment on whether acts were criminal.

Appellant's reliance on *Cohen* and *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 1996) to support his argument is unfounded. Appellant argues that this case is controlled by *Cohen* because both the VA in this case and the Inspector General (IG) in *Cohen* were "obligated to forward unrestricted reports of sexual abuse" to law enforcement. App. Br. at 18. Appellant misreads *Cohen* and the Coast Guard VA policy. In *Cohen*, this Court emphasized the investigatory responsibilities of the Air Force IG. 63 M.J. at 51-52. The Air Force IG regulations required the IG to analyze complaints to determine if a policy, regulation, or law was violated, consult with law enforcement whether allegations should be turned over to law enforcement or left with the IG, provide a process for an IG investigation to turn into a law enforcement investigation, and most fundamentally, the IG was "responsible for investigating wrongdoing." *Id.*

In contrast, VAs do not "gather" information about alleged assaults, consult with law enforcement, or conduct any type of investigation. App. Br. at 18. Instead, a VA's three responsibilities are, "to support and inform; to act as a companion in navigating investigative, medical, and recovery processes; and to help ensure the victim's safety." Supplemental J.A. at 035. YN1 Nipp's testimony at the *Dubay* hearing demonstrated her understanding of the policy. *See* J.A. at 336. Coast Guard VAs also are not required to stop an interview and consult with a legal advisor if they learn of "matters of a criminal nature," and then inform the

suspect Article 31, UCMJ, rights if the interview continues, as was the Air Force IG. *Cohen*, 63 M.J. at 52. Further, a VA is one of the specifically designated categories of individuals eligible to receive confidential restricted reports of sexual assault, which is completely antithetical to the duties of an IG, or law enforcement officer.[7] J.A. 453. Since the basis of this Court's holding in *Cohen* was that IG regulations create a law enforcement or disciplinary authority, and since a VA does not have a similar "scope of authority," *Cohen* does not support Appellant's argument YN1 Nipp was required to provide Appellant Article 31(b), UCMJ, rights warnings.[8] *Jones*, 73 M.J. at 362.

Similarly, *Benner* does not provide support for Appellant's argument. Despite Appellant's arguments, this case and *Benner* are distinguished by the fact that *Benner* involved a confidential communication and misunderstanding of the

[7] The Coast Guard VA policy specifically distinguishes VAs from "criminal investigators." Supplemental J.A. at 036. And at a more practical level, at the time Appellant reported his allegation to YN1 Nipp she was not even aware of Article 31(b), UCMJ, rights. J.A. at 421.

[8] Appellant also claims that in *Cohen* this 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." App. Br. at 16. But in *Cohen* itself this Court expressly stated it looks at "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement of disciplinary capacity." *Cohen*, 63 M.J. at 49 (internal quotations omitted). Examining only whether a regulation places any arguable law enforcement responsibility on a questioner is inconsistent with this Courts requirement in *Cohen* to examine "all the facts and circumstances." *Id*. at 50.

relevant regulation. App. Br. at 20. Those distinctions are key for two reasons. First, this Court based its decision on the fact the questioner in *Benner* was a chaplain. "[I]f a military officer who is also a chaplain acts on the premise the penitent's disclosures are not privileged, then warnings are required." *Benner*, 57 M.J. at 212. Second, since the chaplain was misinformed about Army policy, his intent was to report Sergeant Benner's confession to law enforcement. *Id.* at 213-14. Here, instead of reporting to law enforcement so it could begin an investigation, YN1 Nipp reported to LCDR MK so Appellant could be assigned a VA.[9] J.A. at 342.

More fundamentally, while this Court suppressed the statement in *Benner*, the Court did not hold the chaplain was acting in a law enforcement or disciplinary capacity. *Id.* at 214. The issue in *Benner* was "whether [the] confession was voluntary." *Id.* at 211. This Court found that Sergeant Benner's confession was involuntary because "the chaplain made clear that if he invoked his rights [when talking to law enforcement], the chaplain would reveal his confession." *Id.* at 214. As *Benner* does not address the second textual predicate of Article 31(b), UCMJ, it has little relevance to this case.

III. TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE BECAUSE THEY UNDERTOOK REASONABLE STEPS TO EXCLUDE APPELLANT'S STATEMENT TO YN1 NIPP.

[9] As noted, Appellant was assigned a VA by LCDR Keogh. J.A. at 357, 361, 394.

Standard of Review

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011).

Discussion

To prevail on an ineffective assistance of counsel claim, an appellant must show both that (1) counsel's performance was deficient and (2) that this deficient performance prejudiced their defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F 2009). This Court evaluates counsel "under the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Mazza*, 67 M.J. at 475 (internal quotations omitted). To overcome this strong presumption of competence, an appellant must show that counsel's performance fell "below an objective standard of reasonableness." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Generally, courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *Mazza*, 67 M.J. at 475. To overcome the strong presumption of competence and prevail on an attack of defense counsel's trial strategy or tactics, Appellant has the burden of showing "specific defects in counsel's performance that were unreasonable under prevailing norms." *Id.* Courts have consistently declined to "assess counsel's actions through the distortion of

hindsight" and instead consider whether counsel, in considering available alternatives, at the time made an objectively reasonable choice. *Id.* at 474-75. When an appellant claims his counsel was ineffective for failing to file a motion to suppress, he must "prove that his [suppression] claim is meritorious." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Prejudice exists when "there is a reasonable probability, but for counsel's [] errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

1. TDC were not deficient because an Article 31(b), UCMJ, suppression motion would not have been meritorious.

TDC were not deficient because had they filed a motion to suppress Appellant's statements to YN1 Nipp based on Article 31(b), UCMJ, it is not a certainty it would have been granted. This Court first applied the standard articulated in *Morrison* for ineffective assistance of counsel claims based on a failure to file a motion to suppress in *United States v. Loving*, 41 M.J. 213, 244 (C.A.A.F. 1994). But in *United States v. Napolean*, 46 M.J. 279, 284 (C.A.A.F. 1997) this Court appears to have modified the standard to "an appellant must show that there is a *reasonable probability* that such a motion would have been meritorious."[10] (emphasis added). Under the *Morrison* standard, to find a counsel

[10] Both cases involved a suppression issue, though based on different theories of suppression. *Compare Loving*, 213 M.J. at 244 *with Napoleon*, 46 M.J. at 284.

deficient a Court must find a suppression motion would have been granted.[11] *See Premo v. Moore*, 562 U.S. 115, 124 (2011); *Evans v. Davis*, 875 F.3d 210, 218 (5th Cir. 2017); *See also Black's Law Dictionary* (11th ed. 2019) (defining meritorious as "of legal victory; having enough legal value to prevail in a dispute."); *But see Grueninger v. Director, Virginia Dept. of Corrections*, 813 F.3d 517, 524-25 (4th Cir. 2016) (applying a lower standard to the deficiency prong of *Strickland* when an ineffectiveness claim is based on a motion to suppress).

By adding "reasonable probability" in *Napoleon,* this Court appears to have lowered the standard articulated in *Morrison*.[12] Lowering the standard allows for a reasonable disagreement over the success of motion to be transformed into potentially finding counsel ineffective. It also incentivizes TDC to file plausible motions they still do not believe will succeed just to avoid an appellate court second-guessing their trial performance. The United States asserts that when a claim of ineffective assistance of counsel is premised, as in *Morrison* and here, on

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[11] The Supreme Court emphasized this point later in its opinion. ". . .a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence." *Morrison*, 477 U.S. at 382.

[12] The "reasonable probability" language could have been taken from the second portion of the test articulated in *Morrison*. In *Morrison*, the Supreme Court used the phrase "reasonable probability" in an articulation of the second part of *Strickland*'s two-part ineffective assistance of counsel test. *Morrison*, 477 U.S. at 375.

a failure to litigate a suppression motion, an appellant must show more than a "reasonable probability" of success on the suppression motion in order to rebut the strong presumption of competence this Court provides TDC in ineffective assistance of counsel claims.[13] *Mazza*, 67 M.J. at 475.

Regardless of the appropriate standard, Appellant cannot even show a reasonable probability that an Article 31(b), UCMJ, suppression motion would have succeeded. Assuming *arguendo* it is a close call, one Judge on this Court, three appellate Judges on the lower Court, and the *Dubay* Judge found an Article 31(b), UCMJ, suppression motion would not have succeeded. *Harpole*, 77 M.J. at 238 (Stucky, J. dissenting); *Harpole*, 79 M.J. at 737; J.A. at 229-30. Given those opinions, and associated reasoning, it is not certain an Article 31(b), UCMJ, motion would have succeeded. Consequently, TDC were not ineffective.

2. TDC were not deficient because they investigated the Article 31(b), UCMJ suppression theory, concluded it was unlikely to succeed, and sought to exclude Appellant's statements on other grounds.

TDC were not deficient because they investigated whether YN1 Nipp was acting in a law enforcement and disciplinary capacity, determined she was not, and filed an alternative motion to exclude Appellant's statement's to YN1 Nipp. First, TDC were not deficient because there is no Article 31(b), UCMJ, violation on

[13] Additionally, in *Morrison* the Supreme Court made clear "failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel . . ." *Morrison*, 477 U.S. at 384.

these facts. But even if there were, TDC were not deficient because they responsibly investigated the Article 31(b), UCMJ, suppression theory, sought input from their advisory counsel, concluded it would not succeed, and then chose to attempt to exclude Appellant's statements under a different evidentiary theory TDC thought had a reasonable chance of success.

Appellant's TDC considered filing a motion to suppress Appellant's statements under Article 31(b), UCMJ, based on available evidence at the time. J.A. at 228, 268, 369. TDC conducted an interview of SNBM Childers, spoke to Appellant about his report to YN1 Nipp, and questioned YN1 Nipp at the Article 32, UCMJ, preliminary hearing to gather further information. J.A. at 368-70. Lead TDC also discussed the trial strategy with her supervisors, and incorporated their insight into her preparation. J.A. at 228, 274.

Appellant claims his TDC never considered whether YN1 Nipp was acting in a law enforcement or disciplinary capacity, but contrary to Appellant's claim TDC did consider the issue, and based on their assessment of all the facts, TDC determined YN1 Nipp was not acting in a law enforcement capacity or disciplinary capacity.[14] J.A. at 269, 272-73, 370-71. And TDC did file a motion to exclude Appellant's statements to YN1 Nipp under M.R.E. 514. J.A. at 393-402.

[14] The bases for TDC's belief YN1 Nipp was not acting in a law enforcement or disciplinary capacity are consistent with this Court's cases. Specifically, that YN1 Nipp was acting consistently with her VA role, that YN1 Nipp was not taking

In this case, Appellant has failed to show that TDC's performance and trial strategy dropped below "prevailing professional norms." As the *Dubay* judge found, Appellant has not shown TDC is required to file "each and every motion that has either a remote possibility of succeeding or a 'non-zero' chance of prevailing." J.A. at 228. Rather than devoting their time on preparing an, at best, weak motion to suppress pursuant to Article 31(b), UCMJ, TDC focused their efforts on preparing a motion to exclude under M.R.E. 514, an issue of first impression that, after investigating the Article 31(b), UCMJ, motion, they believed had a higher likelihood of succeeding. J.A. at 228, 272, 369-372. Finding ineffectiveness here would be using the hindsight bias this Court prohibits especially since TDC acknowledged there was no way to keep out Appellant's statements to SNBM Childers. J.A. at 317-23, 415; *see Mazza*, 67 M.J. at 475. TDC's decision to not file a motion to suppress under Article 31(b), UCMJ, that they did not believe would be meritorious was consistent with prevailing professional norms and a reasonable strategic decision. *See Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

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notes or acting in a manner consistent with an interrogation, and was not asking questions but only receiving Appellant's statements. J.A. at 369-71. Their assessment was further supported by SNBM Childer's statement that YN1 Nipp only asked one question about Appellant's presence in the berthing area, but then retracted the statement prior to Appellant answering it. J.A. at 319-20.

3. Assuming TDC were deficient, the only possible prejudice in this case would relate to the Article 107, UCMJ, charge.

Assuming this Court disagrees with the lower court that Article 31(b), UCMJ, warnings were required and that TDC's performance was constitutionally deficient, the only prejudice in this case would relate to the Article 107, UCMJ, false official statement to YN1 Nipp. Appellant cannot show prejudice as to the other charges and specifications because the Government could have called SNBM Childers to testify about Appellant's apparent false exculpatory narrative. Before YN1 Nipp even arguably asked any questions regarding the subject matter of the incident, Appellant specifically stated that he had earlier told SNBM Childers everything he was about to tell YN1 Nipp. J.A. at 415. Additionally, TDC was well aware of this fact and that Appellant's statement to SNBM Childers could not be suppressed under any theory and would have come in as substantive evidence. J.A. at 270; M.R.E. 801(d)(2).

To the extent the members gave any weight to Appellant's statements beyond the Article 107, UCMJ, charge, those statements would have been admitted any way through SNBM Childers. In this regard, the findings would not have been different as to the sexual assault charge under Article 120, UCMJ, or the housebreaking charge under Article 130, UCMJ, even if Appellant's statements had been suppressed.

First, as to the Article 120, UCMJ, sexual assault charge, the United States' case was supported by multiple other forms of evidence, in addition to YN1 Nipp's testimony. SK3 GR's testimony established that Appellant had sexual intercourse with her and that she was incapable of consenting to sex with Appellant. *See* J.A. at 61-76. The testimony of SK3 GR's roommates corroborated SK3 GR's testimony, as their testimony established Appellant entered the stateroom by himself, there were sounds of intercourse coming from SK3 GR's rack, and Appellant got dressed quickly and departed the stateroom by himself. See J.A. at 97-100, 116-121. SK3 GR's sexual assault claim was further corroborated by the DNA evidence taken from the SANE exam. Supplemental J.A. at 032-4.

Second, YN1 Nipp's testimony was not required to prove the elements of the Article 130, UCMJ, housebreaking charge. The United States presented the testimony of SK3 GR, SK3 Robinson, and OS3 Putnam to support this charge. None of these witnesses testified that they let Appellant into the room. Rather, SK GR testified that she immediately went to sleep when she entered her stateroom and did not recall letting Appellant into the room. J.A. at 70-72. SK3 Robinson also testified that Appellant woke her while she was asleep in her rack and subsequently observed Appellant getting dressed and departing the stateroom by himself. J.A. at 116-121. Further, OS3 Putnam testified that she awoke to sounds of intercourse and saw Appellant getting dressed and departing the stateroom. J.A.

at 97-100. The testimony of all of these witnesses supported a finding that Appellant entered SK3 GR's stateroom unaccompanied and without permission, and contradicted the statement Appellant made to YN1 Nipp. Therefore, there is no reasonable probability that this finding would have been different had Appellant's statement to YN1 Nipp been suppressed.

Finally, since it found an Article 31(b), UCMJ, suppression motion would have failed, the lower Court did not address "whether there is a reasonable probability that the members' findings would have been different had YN1 HN's testimony been suppressed." *Harpole*, 79 M.J. at 745. If this Court finds TDC were deficient it should remand this case so the lower Court may complete this Court's direction in *Harpole*, 77 M.J. at 238, with respect to whether TDC performance resulted in prejudice within the meaning of *Strickland*.

Conclusion

Wherefore, the United States respectfully requests this Court affirm the decision of the lower Court.

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Certificate of Filing and Service

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Defense on 27 July 2020.

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This brief complies with the type-volume limitations of Rule 24(c) because it contains 9247 words, and it complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one inch margins on all four sides.

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