IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Joseph R. NELSON** Lieutenant Commander (O-4) U.S. Navy Reserve, Appellant	**APPELLANT'S REPLY** USCA Dkt. No. 21-0216/NA Crim. App. Dkt. No. 201900239

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

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Argument

I. Because the government elected not to raise the issue of whether there actually was a scope violation while the case was at NMCCA, the Court should not now consider the new argument.

A. Because the government did not challenge the Military Judge's ruling when the issue was before the NMCCA, it became law of the case.

"Where neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties."[1] Contrary to the government's contention, it had an opportunity—and a reason—to challenge the military judge's ruling at the NMCCA and did not.[2] When the government did not challenge the military judge's ruling at the NMCCA, it became the law of the case.

The military judge's ruling on the Article 31(b) advisement "scope issue" was adverse to the government's interest from the moment it was issued. The government suggests that law of the case should not apply because there was no adverse ruling sufficient to merit a challenge.[3] And yet they *are* challenging it—for the first time—before this Court.

Of note, the government was able to brief and address the issue for this Court without requiring a separate set of filings here, just as they would have been

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[1] *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006).
[2] Appellee's Answer at 12.
[3] Appellee's Answer at 12-13.

able to do at the NMCCA. Most importantly, the issue Appellant raised has not changed between the NMCCA and this Court.[4] With the exception of some refinement in the wording, the issue this Court granted is identical to the first assignment of error Appellant raised at the NMCCA. If the military judge's ruling is sufficiently adverse to prompt the government to raise the claim before this Court, it was adverse before the NMCCA. In fact, the ruling was adverse to the government's interests at the time it was issued—it partially suppressed key evidence to the extent that a specification was dismissed.[5]

Contrary to the government's assertion, only *they* elected to not address the correctness of the military judge's ruling that was adverse to their interests. As such, this Court should find that because the government failed to challenge the adverse ruling at the lower court, they cannot now raise an issue that they previously elected not to raise.

B. The government waived the scope issue.

The government incorrectly states that the parties never addressed whether the military judge was correct to find that the rights advisement did not properly orient the accused.[6] This is false. In fact, Appellant prompted the government to address this issue on pages 19-21 in a section of his brief to the NMCCA

[4] Appellant's NMCCA Brief at 2, 17.
[5] J.A. 358-365.
[6] Appellee's Answer at 9.

appropriately titled "The military judge correctly found NCIS violated Article 31(b) during the interrogation."[7] In its answer at the NMCCA, the government elected not to respond to this argument.[8] And the very first argument in Appellant's NMCCA Reply brief noted the absence of a government challenge to Appellant's argument on that issue.[9] In his reply, Appellant also argued that this constituted a government concurrence that the ruling on the scope violation was correct.[10]

And after reflecting on the Appellant's brief, reply, and its own answer, the government objected to oral argument stating it was unnecessary because "The pleadings and Record of Trial provide all the necessary facts and legal arguments needed to decide the issues raised by Appellant."[11] Now, the government contradicts itself and contends that this Court needs to consider new arguments that it did not previously raise or give the Court of Criminal Appeals the opportunity to consider. Accordingly, this Court should find that the government's decision to not challenge the military judge's ruling before the NMCCA, and its affirmative assertion that no further arguments were required to resolve the issue – the same issue this Court is now considering – constitutes waiver.

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[7] Appellant's NMCCA Brief at 19-21.
[8] Appellee's NMCCA Answer.
[9] Appellant's NMCCA Reply at 2.
[10] *Id.*
[11] Appellee's Opposition to Appellant's Motion for Oral Argument at NMCCA.

C. Although generally the cross-appeal doctrine permits a prevailing party to challenge a lower court's ruling on any ground, it does not eliminate the ordinary rule that the parties must raise issues or waive them.

Generally, "the prevailing party may defend a judgement on any ground which the law and the record permit that would not expand the relief it has been granted."[12] In these instances, there is no requirement for the government to affirmatively certify the issue to an appellate court for review, or "cross-appeal."[13] But the doctrine does have limits. "The cross-appeal doctrine does not make consideration of the prevailing party's arguments mandatory when the prevailing party does not file a cross appeal *and the issue was neither argued before nor addressed by the lower courts*."[14]

In *Granfinanciera v. Nordberg*, although the respondent prevailed at the lower Court, the Supreme Court refused to consider an alternative argument in support of its favorable judgement that the respondent had failed to raise at a lower level of appeal.[15] The Court stated, "Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground *properly raised below* whether or not that ground was relied upon, rejected or even

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[12] *United States v. Steen*, 81 M.J. 261, 270 (C.A.A.F. 2021) (Maggs, J., dissenting).
[13] *Id.* at 269.
[14] *Id.* at 270 (emphasis added).
[15] *Granfinanciera v. Nordberg*, 492 U.S. 33, 38 (1989).

considered…provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgement below."[16] The Court ruled that because the respondent did not raise the issue below (and consequently the lower court did not address the unraised issue) absent exceptional circumstances, they would not consider the new argument.[17]

Here, as previously noted, during the appeal to the NMCCA, the government had the opportunity to defend the judgment by challenging the military judge on his "scope" ruling. They elected to not even mention it.[18] Likewise, they affirmatively asserted that no further arguments beyond those included in the briefs were necessary for the NMCCA to resolve the issue in this case—the exact same issue now before this Court.[19]

In its opinion, the NMCCA only notes the military judge's "scope" ruling. The Court did not do an analysis of whether the military judge's ruling on that issue was correct.[20] And the NMCCA never concluded for itself that the rights advisement was not properly scoped – which is unsurprising considering that the government never contested the issue.[21] The closest the NMCCA came was a

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[16] *Id.* at 38-39 (emphasis added).
[17] *Id.* at 38-40.
[18] Appellant's NMCCA Answer.
[19] Appellee's opposition to Appellant's motion for oral argument at NMCCA.
[20] *United States v. Nelson*, 80 M.J. 748, 753 (N-M. Ct. Crim. App. 2021).
[21] *Id.* at 753-54.

ruling regarding the voluntariness of the statement. That the NMCCA made a ruling on voluntariness is also unsurprising since this was the primary focus of the government's arguments to the NMCCA.[22] When the parties contested issues, the NMCCA addressed them. Accordingly, here, as in *Granfinanciera,* because the government did not raise the issue, and the lower court did not directly consider it, this Court should not allow the government to raise this issue here for the first time.

By comparison, *United States v. Steen* involved the admission of text messages at trial over defense objection.[23] At CGCCA, the defense argued that the text messages were not admissible, and that this prejudiced the accused.[24] The government argued that the messages were admissible, but that even if they were not, there was no prejudice.[25] The CGCCA agreed with defense that the text messages were not admissible, but ultimately ruled that there was no prejudice.[26]

The defense appealed to CAAF solely on the issue of whether the CGCCA's prejudice ruling was correct.[27] The government again argued that the text messages were admissible, and that there was no prejudice.[28] The defense argued

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[22] *Id.*
[23] *Steen*, 81 M.J. at 269.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

that the government could not challenge whether the text messages were actually admissible since the scope of the issue on appeal only extended to whether there was prejudice.[29] In his dissent, Judge Maggs responded to the defense argument that the government was foreclosed from arguing that the text messages were admissible without bringing a cross-appeal. He explained that the cross-appeal doctrine allowed the government to *re-raise* its argument regarding admissibility.[30] The majority explained in a footnote that it was "not holding that the granted issue somehow limits this Court's authority to review whether the text messages were properly admitted into evidence. We merely conclude that the CCA's holding that the texts were not admissible…was correct and thus unnecessary for us to duplicate."[31]

Regardless, this case is different than *Steen*. First, the specific ruling that was adverse to the appellee in *Steen* (that the evidence was not admissible) was issued by the CGCCA, not the military judge at trial.[32] Thus, unlike here, the first "opportunity" the government had to challenge the adverse ruling in *Steen* was at CAAF.

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[29] *Id.*
[30] *Id.*
[31] *Steen*, 81 M.J. at 263 n.1.
[32] *Id.*

More importantly, the appellant's contention in *Steen* focused on the manner in which the government "properly raises" this type of issue at CAAF.[33] The appellant contended that it required a cross-appeal.[34] But as Judge Maggs pointed out, it was precisely the situation the cross-appeal doctrine is intended to address—a prevailing party ordinarily does not need to file a cross-appeal in order to defend a judgement in its favor.[35]

But the situation in Appellant's case is different. Appellant does not contend that the government would have needed to cross-appeal to preserve the issue, or file separate briefs. To the contrary, Appellant contends that the government could and should have simply addressed the issue in its brief at the NMCCA as the appellant in *Steen* did. The issue is whether the government's choice to not present the issue to the NMCCA, and its affirmative statement that they had no further arguments relevant to resolving the case prevents them from bringing up the issue for the first time during the second level of appeal. This is not a situation where Appellant is seeking to "foreclose consideration of an alternative ground of affirmance merely by cleverly crafting the issue for which it seeks review."[36] As previously noted, the issue here is the same issue that was raised before the

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[33] *Id.*
[34] *Id.*
[35] *Id.* at 270.
[36] *Steen*, 81 M.J. at 271 n.3.

NMCCA – which is precisely why the government's failure to address the issue at the lower court is a problem here. Accordingly, this case is distinct from *Steen*. Rather, it is akin to *Granfinanciera*, where the Supreme Court stated that, in spite of the cross-appeal doctrine, a prevailing party that does not raise an issue and litigate it at a lower court cannot subsequently raise the new issue to defend the favorable judgement at a higher court.[37]

Additionally, allowing the government to make the argument would improperly expand its rights beyond what was established in the trial court. The cross-appeal doctrine only applies if "an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgement below."[38] In this case, it would expand the government's rights.

As it stands, the government was forced to dismiss the specification of failure to report other service members because the only evidence on the charge was partially suppressed when the military judge ruled that the rights advisement was not properly scoped.[39] If this Court disturbs the military judge's underlying ruling that the rights advisement did not properly orient the accused, it would provide the government a basis to resurrect the dismissed specification and subsequently use the statement against him at another trial. The government is

[37] *Granfinanceiera*, 492 U.S. at 38-40.
[38] *Id.* at 39.
[39] J.A. 365.

currently unable to do this. In short, Appellant could face additional criminal liability simply because he elected to assert his rights on a different issue on appeal.

Because the government did not properly raise the issue at the lower Court, and because it would expand the government's rights and reduce Appellant's, this Court should not consider the government's argument that the rights advisement was properly scoped.

D. The military judge's ruling that there was a scope violation was correct.

i. The rights advisement was inadequate because the investigator had previous knowledge of the unwarned offense and it was not within the frame of reference of the rights advisement.

If the Court does consider the government's argument, it should find the military judge correctly ruled that NCIS violated Article 31(b) when their questioning exceeded the scope of the rights advisement. Under *United States v. Simpson*, a rights advisement must "orient [the accused] to the transaction or incident in which he is allegedly involved."[40] Courts must consider the totality of the circumstances, but the Court of Appeals for the Armed Forces provided a non-exhaustive list of factors to consider including: whether the misconduct was part of a "continuous sequence of events," whether the conduct was within the frame of

[40] *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000).

reference supplied by the warnings, and whether NCIS had knowledge of the offenses at the time of the warning.[41]

In this case, the military judge analyzed the interrogation under the standards articulated in *United States v. Simpson*. He properly focused on the fact that NCIS affirmatively led Appellant to believe that he need not be concerned with providing them information about other service member's misconduct, which was a crime they suspected him of (failure to report the misconduct of others).[42] The military judge found NCIS's questioning violated Article 31(b) because it went beyond the scope of the notification they gave, and did not properly orient Appellant to the misconduct NCIS interrogated him about.[43]

Generally, "it is not necessary to spell out the details of accused's alleged misconduct with technical nicety in order to adequately inform him of the nature of the charge being investigated."[44] But it is also insufficient to simply draw an accused's attention to the "setting" of the crime generally (e.g., a period of time).[45] Rather, Article 31(b) requires "that he be informed 'of the nature of the

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[41] *Id.*
[42] J.A. 362-63.
[43] *Id.*
[44] *United States v. Reynolds*, 16 U.S.C.M.A. 403, 405 (C.M.A. 1966).
[45] *Id.* at 405 ("[T]he statute does not speak in terms of drawing the accused's attention to a time period or having him discuss all activities therein.").

accusation.'. . . to orient an accused or suspect as to allow him to intelligently weigh the consequences of responding to an investigator's inquiries."[46]

In *United States v. Reynolds*, the Court found that although law enforcement informed an accused that he was accused of U.A. and asked to discuss the events that took place during that time, the warning was insufficient.[47] This was particularly true where, as here, the investigator knew of the other misconduct at the time of the questioning.[48] But in this case, the rights advisement was more egregious than in *Reynolds*.

Here, the NCIS agent did not simply passively avoid telling Appellant that his knowledge of others' misconduct was part of his criminal activity they were investigating.[49] The NCIS agents repeatedly, affirmatively told Appellant that he need not be concerned about making a statement regarding that distinct offense they suspected him of.[50] In doing so, NCIS disoriented him from the actual nature and scope of the investigation and denied him the opportunity to intelligently weigh the consequences of responding to the investigator's inquiries.

This is highlighted in the military judge's ruling where he found that although "Article 31(b) was *generally* complied with in this case, . . . with respect

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[46] *Id.*
[47] *Id.* at 404-06.
[48] *Id.* at 404-05.
[49] J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.
[50] J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.

to the offenses alleged under specification 2 of Charge III . . . Article 31(b) was not complied with."[51] "The warning provided by NCIS – that the accused was suspected of prostitution under Article 134 – did not orient the accused toward the fact that his failure to report prostitution related misconduct *by other service members* (a) was a crime that (b) he was suspected of."[52]

Accordingly, the rights advisement was deficient. NCIS knew about and suspected Appellant of the misconduct (failure to report other service members' crimes). But they intentionally scoped their warning so that Appellant would not be concerned with speaking to them about this topic and affirmatively told him that he did not need to worry about making statements in this regard. Thus, under *Simpson*, the rights advisement was inadequate and the military judge correctly ruled that NCIS's rights advisement violated Article 31(b).

ii. This case is distinguishable from the cases the government cited because here the agent knew of the misconduct and, instead of properly advising him, intentionally told him that he need not worry about making a statement.

The facts in this case are distinct from *United States v. Davis*, *United States v. Rogers* and *United States v. Rice*. In the first place, unlike in this case, in *Davis*, the Court found that the questioning agent did not have knowledge of any

[51] J.A. 362, 363 (emphasis added).
[52] J.A. 363 (emphasis in original).

misconduct beyond what he informed the appellant of.[53] The Court noted, "It is obvious, however, that if the examiner is without knowledge or suspicion that a particular offense has been committed by the person to be questioned, he cannot provide the preliminary advice required by Article 31."[54] By contrast, here, the agent was clearly aware of Appellant's potential knowledge of others' misconduct.[55]

It also does not matter whether the agent knew the specific article of the UCMJ or order this violated. In *United States v. Johnson*, an agent was going to advise the accused of an offense, but was told by his supervisor that it was not actually an offense (even though from personal experience the agent believed it was).[56] The Court found that it did not matter whether the agent knew the specific crime article under the UCMJ, he should have known that it was misconduct that required a warning.[57] And the failure to warn the accused regarding this misconduct constituted a violation of Article 31(b). Here because the agent knew of the malfeasance, but failed to advise Appellant that it was a crime he was suspected of, Article 31(b) was violated regardless of whether the NCIS Agent knew of the specific offense.

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[53] 8 U.S.C.M.A. 196, 197 (C.M.A. 1957).
[54] *Id.*
[55] J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.
[56] 20 U.S.C.M.A. 320, 321-23 (C.M.A. 1971).
[57] *Id.* at 324.

Also, *Rogers* and *Rice* involve the sufficiency of the scope of an Article 31(b) rights advisement, but are distinct from this case. In *Rogers* the investigating agent provided an initial Article 31(b) rights advisement about a suspected sexual assault.[58] Then, after completing that line of questioning, the agent told the accused that there was additional misconduct he wanted to discuss and specifically told the accused what that was, but did not re-read the entire Article 31(b) advisement.[59] The Court found that the advisement was sufficient.[60]

And in *Rice*, the accused claimed that he did not understand that he was suspected of a *criminal* offense based on the written language on the rights advisement that simply stated "pay and allowance matter" for the nature of the offense.[61] But the accused in *Rice* contrasted his own assertion in his testimony at trial where he admitted that he read and understood Article 31, and that the agent had provided a more thorough advisement orally.[62] Thus, the Court found that the accused's own testimony demonstrated that he was properly advised of the nature of the misconduct.[63] Notably, in *Rice*, there was no indication that the agents ever

[58] *United States v. Rogers*, 47 M.J. 135, 136 (C.A.A.F. 1997).
[59] *Id.*
[60] *Id.* at 138.
[61] *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (C.M.A. 1960).
[62] *Id.*
[63] *Id.* at 527.

told him that he need *not* be worried about making statements regarding the suspected misconduct.[64]

In contrast to both *Rogers* and *Rice*, in this case, the agents *never* informed Appellant that he was suspected of failure to report others' misconduct.[65] In fact, they told him the opposite—that he did not have to worry about it.[66] Thus both *Rogers* and *Davis* are distinct from this case.

Accordingly, because NCIS knew of the unwarned misconduct, failed to warn Appellant regarding it, and actively led him to believe it was not something he needed to be concerned with, the Article 31(b) rights advisement was deficient.

II. The defense filed two motions to suppress the statement for violations of Article 31(b) and the issue was thoroughly litigated on the record. The issue was well preserved and not waived.

A. The government waived any waiver argument.

Because the government did not argue wavier by the trial defense counsel in their argument to NMCCA, they cannot now raise it for the first time on appeal. As previously noted, the cross-appeal doctrine does not apply to cases where the prevailing party could have, but elected not to present an issue to a lower appellate court.[67] As in *Granfinanciera*, here the government did not raise waiver, nobody

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[64] *Id.*
[65] J.A. 366-452.
[66] J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.
[67] *Granfinanceiera*, 492 U.S. at 38-39; *Steen*, 81 M.J. at 270.

briefed it, and the Court did not consider it.[68] Thus, because the government did not challenge the adverse ruling in its briefing to NMCCA, this Court should find that it became law of the case, and that the government waived it. Thus this Court should not now consider the issue for the first time on appeal.

B. The defense preserved the issue.

Regardless, the trial defense counsel preserved the issue in this case. This Court has held that "the law does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context'."[69] In this case, the defense made a motion to suppress Appellant's statement to NCIS and then filed a supplement to the motion containing additional arguments.[70]

In the first motion, the defense argued that the statement was involuntary because it was obtained through coercion, unlawful influence, and unlawful inducement.[71] Although the defense argued the issue under the umbrella of improper inducement, the defense addressed the NCIS agent's tactic of failing to orient Appellant to the nature of the investigation during the rights advisement.[72]

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[68] Government's NMCCA Answer; *Nelson*, 80 M.J. at 751-60.
[69] *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014).
[70] J.A. 306-25, 335-47.
[71] J.A. 306-25.
[72] J.A. 318-24.

In the second supplemental motion, the defense specifically argued that Article 31(b) was violated because the rights advisement was not properly scoped so as to orient Appellant to the nature of the accusations.[73]

During the course of oral argument on the motions, the military judge focused on the defense's concern regarding a scope violation as it related to an alleged failure to report knowledge of other servicemembers' misconduct.[74] In fact, the military judge's ruling that there was a scope violation was captioned "RULING ON DEFENSE MOTION TO SUPPRESS THE ACCUSED'S STATEMENTS TO NCIS ON 23 JANUARY 2018."[75] The military judge clearly considered the scope violation issue with regard to "failure to report known misconduct of other service members" as part and parcel of the defense's motion. Thus, this issue was directly before the court-martial and thoroughly litigated via motion and oral argument.

The government also contends that the defense was unclear about its requested remedy. In both motions, the defense requested that the statement made to NCIS be suppressed.[76] And during a discussion about remedy, the prosecutor specifically acknowledged that defense wanted the entire statement suppressed

[73] J.A. 335-47.
[74] J.A. 75-91.
[75] J.A. 358.
[76] J.A. 324, 341.

stating, "Well, the Defense is moving to suppress the statement as a whole . . . ."[77] Contrary to the government's assertion, the fact that the defense said "the use of the statement for that charge would be completely inappropriate" is wholly consistent with the remedy they specifically requested.[78] The defense never backed off or changed its requested relief of suppression of the entire statement. The issue was plainly preserved and not waived.

III. Contrary to the Government's argument, there is no precedent that suggests that even after an Article 31(b) scope violation, the statement is still permitted to be used for some offenses.

The government incorrectly argues that because the Courts in *Reynolds*, *Johnson*, and *United States v. Willeford* "upset[] only convictions for unwarned offenses after the incriminating statements pertaining to them are admitted at trial," the Courts "tacitly approved of the admissibility of the appellants' statements to prove warned offenses."[79] This is incorrect because it relies on speculation and it runs contrary to the Court's analysis in *Johnson*, which provides some insight into how the Court fashioned its remedy.

As an initial matter, until now, this issue has never been presented squarely to this Court. For example, in *Reynolds*, after finding that there was a scope violation, the Court held that "the accused's statement was obtained without proper

[77] J.A. 80.
[78] Appellee's Answer at 21; J.A. 92.
[79] Appellee's Answer at 27, 29.

advice under [the] Code . . . and was, therefore, inadmissible in evidence against him."[80] The Court also noted that Congress implemented the language of Article 31(d) "without equivocation."[81] The Court ultimately held that once an Article 31(b) violation has occurred, the "ensuing statement" must be suppressed.[82] After finding prejudice, the Court ruled that the remedy would be that the conviction related to the unwarned misconduct was set aside, but it affirmed the remainder of the findings of guilt without explanation.[83] In so ruling, the Court did not address whether the statement could be used for other offenses.

Willeford had the same result and the Court did not explain why it came to that conclusion.[84] The government presumes it is because the Court must have found that the statement is "otherwise admissible as to the properly warned" offenses.[85] But the Court did not say that, and as noted below, there are other more likely explanations of why the Court ruled the way it did.

The government's reasoning ignores another possible explanation for why the Court's judgments fell out the way they did. In each of those cases, there was likely enough evidence to sustain convictions on the other offenses without relying

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[80] *Reynolds*, 16 U.S.C.M.A. at 406.
[81] *Id.*
[82] *Id.* at 407.
[83] *Id.*
[84] *Willeford*, 5 M.J. at 636-37 (A.F.C.M.R. 1978); *Johnson*, 20 U.S.C.M.A. at 324, 325.
[85] Appellee's Answer at 28.

on the statement at all. In fact, the Court in *Johnson* indicates that is precisely what it did, stating, "*since the accused's statement, Prosecution Exhibit 3, is the only evidence in the record relating to this offense*, Charge II and its specification must be dismissed."[86] Thus, the Court acknowledged that the reason why they only set aside one conviction and not others was simply due to the state of the record without the statement at all. The remainder of the offenses had sufficient evidence to support the conviction without the statement. The unwarned statement did not.

Likewise, in *United States v. Cohen*, the Court came to a similar result. This Court concluded that even after a statement that violated Article 31(b) had been excluded completely, there was sufficient evidence to support the conviction.[87] Thus, contrary to the Government's argument, there is no precedent that suggests an Article 31(b) scope violation still permits the statement to be used for some offenses.

Conclusion

This Court should not permit the government to argue for the first time that the military judge erred in finding there was a scope violation because: 1) the military judge's ruling on the issue is law of the case; 2) the government waived

[86] *Johnson*, 20 U.S.C.M.A. at 324 (emphasis added).
[87] *United States v. Cohen*, 63 M.J. 45, 54 (C.A.A.F. 2006).

the issue by electing not to raise it to the lower court; and 3) it would improperly expand the government's rights in relation to the partially suppressed evidence and dismissed specification.

If this Court does consider the argument, it should find that the military judge was correct and there was an Article 31(b) violation. Additionally, the government waived its waiver argument regarding Appellant's requested remedy of total suppression. Regardless, the defense clearly preserved the issue by filing two motions and thoroughly arguing the issue before the military judge. The prosecutor even acknowledged that the defense sought to have the whole statement suppressed. Finally, this Court should find that contrary to the Government's argument, there is no precedent that suggests an Article 31(b) scope violation still permits the statement to be used for some offenses.

Accordingly, this Court should set aside the findings of guilt to Charge III, Specification 1 (conduct unbecoming for wrongful cohabitation with prostitutes) and the sole Specification of Charge IV (patronizing prostitutes).

Respectfully submitted,

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Certificate of Compliance

This Reply complies with the type-volume limitations of Rule 24(c) because it does not exceed 7000 words, and 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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I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 29, 2021.

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