IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201900239
Joseph R. NELSON Lieutenant Commander (O-4) U. S. Navy Appellant	)	USCA Dkt. No. 21-0216/NA

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Issue Presented

ARTICLE 31(d), UCMJ REQUIRES SUPPRESSION OF STATEMENTS TAKEN IN VIOLATION OF ARTICLE 31(b). AFTER THE MILITARY JUDGE DETERMINED THAT NCIS AGENTS VIOLATED ARTICLE 31(b) BECAUSE THEIR RIGHTS ADVISEMENT DID NOT PROPERLY ORIENT APPELLANT TO THE NATURE OF THE SUSPECTED MISCONDUCT, DID THE MILITARY JUDGE ERR BY ONLY SUPPRESSING THE STATEMENT AS IT RELATED TO ONE SPECIFIC OFFENSE, BUT THEN ALLOWING THE EVIDENCE TO BE ADMITTED FOR THE REMAINDER OF THE OFFENSES?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dismissal. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members sitting as a general court-martial convicted Appellant, contrary to his pleas, of absence without leave, conduct unbecoming an officer, and patronizing sex workers, in violation of Articles 86, 133, and 134, UCMJ, 10 U.S.C. §§ 886, 933, 934 (2012). The Members sentenced Appellant to forfeiture of $7596 pay per month for four months and a dismissal. The Convening Authority approved the sentence as adjudged and, except for the dismissal, ordered the sentence executed.

The lower court dismissed the finding of guilty with respect to the specification of conduct unbecoming for making a false statement and reassessed Appellant's sentence to forfeiture of $6596 pay per month and a dismissal. *United States v. Nelson*, 80 M.J. 748, 760 (N-M. Ct. Crim. App. 2021).

On April 8, 2021, Appellant filed a Petition for Grant of Review at this Court. (Pet. for of Grant of Review, Apr. 8, 2021.) This Court granted Appellant's Petition on August 10, 2021. (Order Granting Review, Aug. 10, 2021.)

Statement of Facts

A. The United States charged Appellant with, inter alia, failing to report misconduct of others, patronizing prostitutes, and sex trafficking.

The United States charged Appellant with: Article 86, desertion;[1] Article 107, making a false official statement about his active duty status;[2] Article 133, conduct unbecoming an officer for making the false official statement,[3] for failing to report others' misconduct,[4] for cohabitating with prostitutes,[5] and for sex trafficking;[6] and, Article 134, conduct of a nature to bring discredit to the armed

[1] Members found Appellant guilty of the lesser included offense of absence without leave, the conviction was affirmed by the lower court. (J.A. 10, 286.)
[2] Members found Appellant not guilty. (J.A. 286.)
[3] Members found Appellant guilty, the conviction was reversed by the lower court. (J.A. 8, 286.)
[4] Military Judge dismissed pretrial. (J.A. 365.)
[5] Members found Appellant guilty, the conviction was affirmed by the lower court. (J.A. 10, 286.)
[6] Convening Authority dismissed pre-trial. (J.A. 98.)

forces for patronizing prostitutes,[7] sex trafficking in violation of an assimilated Federal statute,[8] and as a general disorder.[9] (J.A. 48–51.)

B. Pretrial, Appellant moved to suppress his statement to Law Enforcement. The Military Judge denied Appellant's Motion to Suppress his statement as evidence of patronizing and cohabitating with prostitutes.

1. Law Enforcement advised Appellant he was suspected of involvement in prostitution in violation of Article 134, UCMJ, and told him the investigation involved sex trafficking committed by others. When interviewed, Appellant admitted to patronizing multiple prostitutes and living with them in off-base housing.

In January 2018, Law Enforcement interrogated Appellant about his involvement with prostitutes and knowledge of the sex worker industry in Bahrain. (J.A. 367–452.) The Agents advised Appellant orally and in writing he was suspected of patronizing prostitutes in violation of Article 134, UCMJ. (J.A. 325, 374–77.) Appellant waived his rights and agreed to talk with Law Enforcement. (*Id.*)

Before the rights advisement, the Agents informed Appellant their investigation involved the "nefarious activity" of "other guys." (J.A. 374.) After telling him he was suspected of being involved in prostitution, and before the

[7] Members found Appellant guilty, the conviction was affirmed by the lower court. (J.A. 10, 286.)
[8] Convening Authority dismissed pretrial. (J.A. 98.)
[9] Convening Authority dismissed pretrial. (J.A. 98.)

questioning began, the Agents told Appellant the "heart of this investigation" was human trafficking. (J.A. 377.)

The Agents told Appellant they read him his rights because they suspected he paid the "key victim" of human trafficking for sex, and that she fled to his home to get out of "some bad stuff." (J.A. 377–78.) The Agents then asked if the Appellant knew "the situation [they were] talking about." (J.A. 378.) Appellant said, "I can tell you everything . . . I know," and the Agents began their questioning. (*Id.*)

The Agents asked about Appellant's cohabitation with prostitutes, his patronizing of prostitutes, and his knowledge of the sex trafficking scheme of which the prostitutes were victims. (J.A. 383–450.) Appellant admitted that he allowed known prostitutes to live in his home. (J.A. 390–98, 417–18.) He admitted that he paid five to six women for sex while stationed in Bahrain. (J.A. 411–14, 420–22.) Appellant also explained how women living with him were forced to work as prostitutes. (J.A. 383–86, 399–403, 423–28.)

2. Appellant moved to suppress his statements to Law Enforcement.

Appellant moved to suppress his confession to Law Enforcement, arguing initially the entire confession was involuntary, having been obtained through coercion. (J.A. 306–24.) Supplementing his Motion, Appellant argued he was not oriented to the offense of violating the assimilated Federal sex trafficking statute, a

charged offense at the time. (J.A. 335–41.) The United States opposed, arguing the statement was voluntary. (J.A. 326–34.)

3. In response to the Military Judge's questions during an Article 39(a), Trial Defense Counsel concurred that the remedy for Law Enforcement's failure to warn Appellant that he was suspected of failing to report misconduct was dismissal of the corresponding Specification.

During an Article 39(a) hearing on Appellant's Motion to Suppress, the Military Judge sua sponte asked if Appellant's rights advisement oriented him to the offense of failing to report the misconduct of others. (J.A. 76.) Trial Defense Counsel said: "there is no possible way [Appellant] could have come to the conclusion that his misconduct could be used against him in a case of human trafficking." (J.A. 79–80.)

The Military Judge discussed whether dismissing the failure to report charge would be the appropriate remedy if he found the Article 31(b) rights advisement was deficient as to only that offense. (J.A. 80–81, 90–91.) Trial Defense Counsel agreed: "the use of the statement for [the Specification of failing to report] would be completely inappropriate." (J.A. 92.) Appellant never requested another remedy. (J.A. 76–97.)

4. The Military Judge dismissed the failure to report Specification and ruled that Appellant's statement was otherwise admissible as to the remaining Charges.

The Military Judge issued a written Ruling with Findings of Fact and Conclusions of Law. (J.A. 358–65.) He found that Appellant was advised orally and in writing that he was suspected of prostitution, and was told that the investigation was concerned primarily with human trafficking. (J.A. 358.) He then concluded that the Agents violated Article 31(b) because Appellant was not on notice that "failure to report prostitution-related misconduct *by other service members* . . . was a crime that . . . he was suspected of." (J.A. 363.)

The Military Judge dismissed the failure to report Specification, the same remedy discussed during the Article 39(a).[10] (J.A. 365.)

The Military Judge separately concluded that, based on the totality of the circumstances, Appellant's admissions were voluntary and not the product unlawful influence. (J.A. 364.) The Military Judge denied the remainder of the Motion to Suppress, finding the remaining offenses were fairly included in Appellant's rights advisement. (J.A. 363–65.)

[10] Before trial, the Convening Authority dismissed the remaining three specifications relating to Appellant's involvement with sex trafficking. (J.A. 51, 98.)

C. At trial, the United States introduced evidence showing Appellant was absent without leave, made a false statement, and patronized and cohabitated with prostitutes.

1. During opening statements, only Trial Defense Counsel mentioned the misconduct of others.

Trial Counsel's opening statement never mentioned sex trafficking or misconduct by anyone but Appellant. (J.A. 103–10.) During Trial Defense Counsel's opening statement, he told the Members they could discount Appellant's statement to the Agents because his admissions were aimed at assisting their investigation into "this other case involving these two guys doing some nefarious activity." (J.A. 111–12.) Over objection, Trial Defense Counsel said that the reason Appellant allowed prostitutes to live in his home was because they "were not receiving help from the authorities." (J.A. 115.)

2. The United States offered the recording of Appellant's interrogation, in which he admitted to patronizing and cohabitating with prostitutes.

The United States offered the recording of Appellant's interrogation in its entirety, without objection. (J.A. 122–27.)

In his interrogation, Appellant admitted to paying for sex with multiple prostitutes and to living with them in his off-base quarters. (J.A. 390–98, 411–14, 417–18, 420–22.) The Military Judge instructed the Members to not consider statements by Law Enforcement for the truth of any matter asserted in those

statements. (R. 101–02, 126–27.) Appellant never objected to or made additional requests as to the limiting instruction. (*Id.*)

In light of the limiting instruction, the Military Judge directed Trial Counsel not to reference sex trafficking or human trafficking during closing argument. (J.A. 211.) Trial Counsel agreed, and Appellant requested no additional instructions. (J.A. 211, 214.)

3. During closing arguments, Trial Defense Counsel argued that law enforcement misled Appellant during rights advisement.

Trial Defense Counsel argued that the Agents misled Appellant when they told him they did not care about prostitution and that he was there as a witness. (J.A. 258.) He argued that Appellant cohabitated with prostitutes in an attempt to help them during a difficult time. (J.A. 265.)

D. The Members convicted Appellant of the lesser included offense absence without authority, of conduct unbecoming, and patronizing prostitutes. Members sentenced Appellant.

The Members found Appellant guilty of absence without authority, conduct unbecoming an officer for cohabitating with prostitutes and making a false statement, and of patronizing prostitutes. (J.A. 286.)

The Members sentenced Appellant to forfeit $7596 pay per month for four months and a dismissal. (J.A. 287.)

E. On appeal, the lower court held that the Military Judge did not abuse his discretion by admitting Appellant's statement to prove the offense for which Appellant was tried.

The lower court found that the Military Judge did not abuse discretion admitting Appellant's statement to Law Enforcement to prove the warned offenses. (J.A. 4–5.) The court accepted the Military Judge's Findings of Fact and Conclusions of Law about the voluntariness of Appellant's statements under the totality of the circumstances. (J.A. 4.)

The court did not address, and the Parties never briefed, if Appellant waived his objection to the admission of this statement for an Article 31(b) violation once the charge of failing to report was dismissed. (J.A. 1–5.) Nor did the court or parties address whether Appellant was, contrary to the Military Judge's conclusion of law, oriented to the offense of failing to report. (*Id.*)

F. The lower court dismissed Appellant's conviction for conduct unbecoming for a false statement, affirmed the remaining findings, and reassessed his sentence.

The lower court dismissed Appellant's conviction for conduct unbecoming for making a false statement and affirmed the remaining convictions of absence without authority, conduct unbecoming for cohabitating with prostitutes, and patronizing prostitutes. (J.A. 10.) The court reassessed Appellant's sentence, approving only as much of the sentence that includes forfeiture of $6596 per month and a dismissal. (J.A. 10.)

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING APPELLANT'S STATEMENT AS EVIDENCE OF THE OFFENSES FOR WHICH HE WAS TRIED BECAUSE APPELLANT WAS PROPERLY WARNED OF ALL OFFENSES. REGARDLESS, APPELLANT WAIVED ANY ERROR AND, EVEN IF HE HAD NOT, THERE WAS NO PREJUDICE BECAUSE THE FAILURE TO REPORT SPECIFICATION WAS DISMISSED PRETRIAL.

A. Standard of review.

Appellate courts review a trial ruling on a motion to suppress for a rights warning violation under Article 31(b), UCMJ, for abuse of discretion. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000). An abuse of discretion occurs "when the military judge's factual findings are clearly erroneous, view of the law is erroneous, or decision is outside of the range of reasonable choices." *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019).

B. Article 31(b) requires that law enforcement orient a subject to the offenses of which he is suspected before questioning.

Article 31(b) reads:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Article 31(b), UCMJ. The accused must "be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000).

1. Article 31(b) does not require that a suspected offense be spelled out with "technical nicety." A statement is admissible if the accused "knows the general nature of the charge" from "the surrounding circumstances."

"The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved." *United States v. Rice*, 11 C.M.A. 524, 527 (C.M.A. 1960). But "'it is not necessary to spell out the details of [the accused's] connection with the matter under inquiry with technical nicety.'" *See United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003) (quoting *Rice*, 11 C.M.A. at 526).

"'It is enough if, from what is said and done, the accused knows the general nature of the charge . . . . A partial advice, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy this requirement of Article 31.'" *Pipkin*, 58 M.J. at 360 (quoting *United States v. Davis*, 8 C.M.A. 196, 198 (C.M.A. 1957)).

To determine if an accused was properly informed, courts consider: (1) whether the conduct is part of a continuous sequence of events; (2) whether the conduct was within the frame of reference supplied by the warnings; or (3) whether

the interrogator had previous knowledge of the unwarned offenses. *Simpson*, 54 M.J. at 284. Although law enforcement might suspect an accused of several criminal offenses in the same course of conduct, it is "not necessary that an accused or suspect be advised of each and every possible charge under investigation." *See id.* at 284.

2. This Court can affirm for a reason the lower court did not consider—that Appellant's statement was voluntary for all offenses.

a. The law of the case doctrine does not apply when, as here, there was no ruling adverse to the party seeking review.

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. *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006). The law of the case doctrine is a matter of discretionary appellate policy and does not prohibit this court from reviewing the ruling below. *Id*. at 464–65.

In this case, a finding that the Military Judge abused his discretion does not implicate the law of the case doctrine because there was no ruling adverse to the United States, at any stage, with respect to the offenses of which Appellant stands convicted. *See, United States v. Savala*, 70 M.J. 70, 76–77 (C.A.A.F. 2011), *and, United States v. Lewis*, 63 M.J. 405, 412–13 (C.A.A.F. 2006) (applying law of case

doctrine where lower court found error but no prejudice and Government filed no cross-appeal but challenged lower court's finding of error).

Here, the Military Judge ruled that Appellant's statement was admissible to prove the offenses of patronizing a prostitute and wrongfully cohabitating with a prostitute. (J.A. 365.) The Navy Marine Corps Court of Criminal Appeals' decision later affirmed that favorable ruling. (J.A. 4–5.) There was thus no motivation for the United States to have appealed the admissibility of Appellant's statement for the charges he now stands convicted.

b. The cross-appeal doctrine allows the United States to defend the lower court's decision on alternative grounds.

Under the cross-appeal doctrine, "the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). An appellee may "defend a decision below on any ground "whether or not that ground was relied upon, rejected, or even considered by [the lower courts].'" *United States v. Steen*, 81 M.J. 261, 270 (C.A.A.F. 2021) (Maggs, J., dissenting) (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)).

"[T]he rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong

reason." *United States v. Leiffer*, 13 M.J. 337, 345 n.10 (C.A.A.F. 1982) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)). Thus, if this Court finds the lower court reached the right result for the wrong reason—that is, admitting Appellant's statement for the remaining offenses but misapplying Article 31(b) for the failure to report offense—it may affirm.

Applying the cross-appeal doctrine, the United States may defend the lower court's judgment affirming Military Judge's admission of Appellant's statement to prove the specifications of which he now stands convicted, on the grounds that Appellant was properly oriented to the offenses of which he was suspected, that Appellant waived this issue by consenting to the Military Judge's remedy, and that the Military Judge fashioned an appropriate remedy for an insufficient rights advisement.

3. The Agents properly oriented Appellant to all offenses for which he was questioned.

   a. Because Agents explicitly told Appellant they were investigating other service members' involvement in prostitution and human trafficking and were interested in what he knew, Appellant was oriented to the nature of the failure to report offense.

In *Davis*, the appellant had been in an "absent without leave" status for almost two years and was apprehended by law enforcement. *Davis*, 8 C.M.A. at 197. Before questioning, the law enforcement agent read the appellant Article 31 "sentence for sentence," and asked him to account for his activities "from the time

he went AWOL," but never explicitly stated that he suspected the appellant of desertion. *Id.* at 197–98. The Court found that this question, along with the surrounding circumstances, clearly oriented the accused that he was suspected of desertion. *Id.* at 198.

Similarly, in *United States v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997), law enforcement suspected the appellant of indecently assaulting victim 1 and raping victim 2. *Rogers*, 47 M.J. at 136. After being told he was suspected of sexual assault, Appellant waived his rights and made a statement discussing the assault of victim 1. *Id.*

The agent then told appellant he wanted to talk about victim 2. *Id.* The appellant then made a statement regarding the rape offense, which was the basis for his appeal after he was convicted of both the assault and the rape. *Id.* This Court held that the appellant had been properly warned of the nature of the accusation, that is, rape concerning victim 2, before further questioning. *Id.* at 138.

Like *Davis* and *Rogers*, the Agents oriented Appellant to the nature of the offenses for which he would be questioned—sex trafficking by others—through their questioning itself. (J.A. 374–78.) By the time Appellant acknowledged his Article 31 rights, the Agents had informed him they were looking into "some other guys for more nefarious activity." (J.A. 374.) Before the questioning, the Agents told Appellant the "heart of this investigation" involved human trafficking. (J.A.

377.) They described the people suspected of being involved, and described the criminal activity at the "heart" of the investigation." (J.A. 377.) They then explained to Appellant the connection between his suspected misconduct and the human trafficking: the trafficking was the reason one of the victims moved into Appellant's home. (J.A. 377–78.)

The Military Judge's Findings of Fact reflect this explicit notification. (J.A. 358–59.)

b. Because Appellant was oriented to the nature of the offense, it is irrelevant whether he knew the conduct was criminal. The Military Judge erred concluding, as a matter of law, that Appellant was not oriented to the offense of failing to report others' misconduct.

Where no dispute exists as to the relevant facts, this Court applies a de novo standard of review when determining whether a rights advisement is consistent with applicable rights warning requirements. *Simpson*, 54 M.J. at 284.

In *Rice*, law enforcement informed the pay clerk appellant of his Article 31(b) rights, informing him they were investigating unauthorized payments. *Rice*, 11 C.M.A. at 525–26. Although appellant was unaware that this was a criminal offense, this Court's predecessor held that he was properly oriented to the nature of the offense. *Id.* at 526–27.

In *United States v. Johnson*, 20 C.M.A. 320 (C.M.A. 1971), the Court held that despite being unaware that holding intercourse with the enemy was a specific

enumerated offense, the law enforcement agent should have known that defecting was illegal and simply drawn the appellant's attention to the fact that he was aware of his intention to contact the enemy. *Id.* at 324.

Here, unlike *Johnson*, the Agents explained the full scope of their investigation. Whether the Agents or Appellant were aware that as an Officer, Appellant could be charged for failing to report the misconduct of others, is immaterial. The Agents explicitly drew Appellant's attention to the fact that they were investigating misconduct of others and were aware Appellant had information he had failed to report. (J.A. 374–78.)

Based on *Rice*, it is irrelevant whether an accused is aware an investigation involves *criminal* misconduct, so long as he is oriented to the nature of the offenses. *See Rice*, 11 C.M.A. 526–27 (finding appellant properly oriented despite being unaware conduct was criminal). In his Conclusions of Law, however, the Military Judge found the Agents failed to orient Appellant toward the fact that "failure to report prostitution-related misconduct by other service members (a) was a crime that (b) he was suspected of." (J.A. 363.)

By improperly tying Appellant's knowledge of whether his misconduct was criminal to the adequacy of his Article 31(b) warning, the Military Judge functionally imposed the "technical nicety" requirement that this Court's predecessor explicitly eschewed in *Rice*. 11 C.M.A. at 526.

Because the Military Judge erred in finding Appellant was not properly warned of his Article 31(b) rights, no remedy was warranted.

4. Appellant's knowledge that other service members were engaging in sex trafficking was part of the same course of conduct as the offenses for which the Military Judge found Appellant was properly warned.

In *Simpson*, a law enforcement agent suspected the appellant of failure to obey an order or regulation, assault, indecent acts or liberties with a child, sodomy, and rape. *Simpson*, 54 M.J. at 282–83. During the interrogation, the agent notified him only that he was suspected of "indecent acts or liberties with a child." *Id.* The Court upheld his conviction for sodomy, holding that the offenses of indecent acts and sodomy, with the same victim, were sufficiently related so that the warning oriented the appellant to the nature of the accusations against him. *Id.* at 284.

Similarly, the Military Judge here concluded, as a matter of law, that Appellant's notification for the offense of patronizing a prostitute had oriented him to the offense of cohabitating with prostitutes because it was in the frame of reference supplied by the warnings. (J.A. 363.)

Appellant patronized and cohabitated with prostitutes who were the victims of the other service members' sex trafficking. (J.A. 377–78.) It was the Agents' theory—and also Appellant's explanation—that Appellant cohabitated with the "key victim" because she was in a dangerous living situation, due to the other

service members "profiting off [her] sex acts," and given that she "couldn't leave." (J.A. 377, 384–86, 394–95.)

Thus, Appellant's knowledge of the other service members' sex trafficking was relevant both to his belief that the women were prostitutes, and that they needed a place to stay. (*Id.*) His knowledge of, and failure to report, the women's status as sex trafficking victims, was part of the continuous sequence of events for which Appellant was warned.

C. Even if Appellant was not properly warned, he waived this issue by consenting to the Military Judge's remedy.

Whether an appellant waived an issue is a question of law appellate courts review de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When an appellant "intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citation omitted); *see also United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) ("[A] valid waiver leaves no error for us to correct on appeal.").

In *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020), the appellant waived his claim of error regarding the military judge's instruction on an element when he

stated, "No changes, sir," when asked if he had objections or requests for additional instructions, and "No, your honor," when asked again if he had any objections to the instructions. *Id.* at 330. This Court reasoned that by "'expressly and unequivocally acquiescing' to the military judge's instructions," the appellant waived his claim of instructional error. *Id.* at 331 (citations omitted).

In *United States v. Lucas*, 25 M.J. 9 (C.M.A. 1987), the appellant raised, for the first time on appeal, an alternative remedy that the Military Judge should have considered short of striking the full testimony of a defense witness. *Id.* at 11. The Court summarily rejected the appellant's argument, finding that the time to raise alternative remedies was at trial. *Id.*

Here, Appellant moved for suppression on two different grounds, coercion and failure to orient him to his own sex tracking offense. (J.A. 306–24, 335–41.) The Military Judge denied relief on both grounds. (J.A. 364–65, 362–63.) The Military Judge raised, *sua sponte*, the issue of whether Appellant was properly oriented to the offense of failing to report. (J.A. 76.)

In a colloquy with both Parties, the Military Judge discussed the remedy if he found Appellant was not oriented to the failure to report offense, but oriented to remaining offenses. (J.A. 80–91.) The Military Judge asked if dismissal of the failure to report Specification would be an appropriate remedy. (J.A. 80–81, 90–91.)

Appellant "agree[d]" with the Military Judge and Trial Counsel that, "the use of the statement for that charge would be completely inappropriate." (*See* J.A. 92.) Appellant never moved for suppression of the statement on these grounds.

As in *Lucas*, Appellant impermissibly asks this Court to retroactively impose a remedy he never sought at trial. Like *Davis*, by "acquiescing" to the Military Judge's proposed remedy, Appellant waived any claim of error. *See Davis*, 79 M.J. at 331.

Moreover, the Record shows why Appellant did not pursue at trial the remedy he now seeks on appeal: his argument at trial relied on the misconduct of others. (J.A. 112–15.) Appellant's theory was that his admissions to the warned offenses should be discounted because he was misled during the interrogation and was trying to help out women who "were not receiving help from the authorities." (J.A. 112–15.) The admissions Appellant now claims were erroneously introduced provided the only basis for this theory, which did not prevail at trial.

Appellant's suppression motions did not identify the grounds for exclusion that the Military Judge ultimately ruled on, and his consent to the Military Judge's remedy was the only request for relief Appellant made with respect to those grounds. *See* Mil. R. Evid. 304(f)(5) ("The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to

evidence"). After consenting to the remedy and arguing the statements to his benefit at trial, this Court should find waiver.

D. Even if this Court finds Appellant was not properly warned of the failure to report offense and declines to find waiver, the Military Judge did not abuse his discretion by admitting Appellant's statement. Article 31 does not prohibit the use of statements used exclusively to prove warned offenses before a court, even if those statements might also be related to unwarned offenses not before the court.

1. The standard of review is de novo.

"This court reviews questions of statutory interpretation de novo." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

2. Article 31(d) prohibits admission of statements if those statements are "obtained . . . in violation of [Article 31]."

a. The plain meaning of a statute is determined by the context of the entire Rule.

The first step of statutory interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (citation omitted). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.*

To determine the plain meaning of a statute, courts look to (1) "'the language itself,'" (2) "'the specific context in which that language is used,'" and (3) "'the broader context of the statute as a whole.'" *McPherson*, 73 M.J. at 395 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also Sager*, 76

M.J. at 161 (same). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted). Only if a statute remains unclear after construing its plain language does a court turn to legislative history to resolve the ambiguity. *See Sager*, 76 M.J. at 161.

b. The Article 31(d) exclusionary rule applies to incriminating statements obtained in violation of Article 31 and "received in evidence against" an accused.

Article 31 of the Code is titled "[c]ompulsory self-incrimination prohibited." *See* Article 31, UCMJ. Under Article 31(b), no person subject to the Code may "interrogate, or request any statement" from a person suspected of an offense without first warning that person in accordance with Article 31(b). Article 31(b), UCMJ. "'Interrogation' includes any formal or informal questioning in which an *incriminating response* either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2) (emphasis added). An "incriminating statement," is one "that tends to establish the guilt of someone." *Incriminating statement*, Black's Law Dictionary (9th ed. 2010).

"No statement obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial." Article 31(d), UCMJ. *See also*, Mil. R. Evid. 304(a), 305(c)(1).

3. The plain language of Article 31 does not require suppression of Appellant's interrogation as to the offenses for which Appellant was properly warned and eventually tried. His statement was only used as evidence against him as to those properly warned offenses—because those were the only offenses before the Members—and, therefore, exclusion was not required under Article 31(d).

a. The ordinary meaning of Article 31(d) prohibits use of involuntary statements as "evidence against" an accused.

Article 31(d) prohibits use of an involuntary statements as "evidence against" an accused. Article 31(d), UCMJ. That Article does not govern statements that are innocuous or otherwise irrelevant. *See id.* Only relevant evidence is admissible at a court-martial. Mil. R. Evid. 402(b) (irrelevant evidence not admissible). Evidence is relevant if it "has a tendency to make a fact [of consequence] more or less probable than it would be without the evidence." Mil. R. Evid. 401.

Even assuming Appellant was not properly oriented to the failure to report offense, any part of his statement that was *only* relevant as that offense would not require exclusion under Article 31(d) as Appellant was not charged with that crime at trial. (J.A. 365 (Military Judge dismissed the charge pretrial).) His knowledge

of others' misconduct did not amount to proof of any of the elements of the offenses for which he was tried. (*See* J.A. 220–23.)

Likewise, Appellant himself made use of the admitted unwarned statements to support his theory that his admissions should be discounted because he was misled, and was trying to help women who "were not receiving help from the authorities." (J.A. 112–15.) As this Court has noted, precedent supports that the accused is the gatekeeper to and can open the door to use of unwarned statements violative of Article 31(b), such that Article 31(d) need not always provide the remedy of suppression. *See Swift,* 53 M.J. at 450-51 (listing cases). Appellant's positive use of the unwarned statements here is not inconsistent with that precedent.

At his court-martial, Appellant's statement was only used against his interests with respect to those offenses for which he was properly warned. And Appellant himself used the unwarned statement in his own favor.

By the ordinary meaning of its language, Article 31(d) does not require exclusion of Appellant's statement.

b. <u>This interpretation of Article 31(d)'s ordinary meaning is consistent with the broader context of Article 31</u>.

Article 31(b) necessitates an offense-specific analysis. *See e.g. United States v. Reynolds*, 16 C.M.A. 403, 407 (C.M.A. 1966); *Johnson*, 20 C.M.A. at 321–24; *see also United States v. Lewis*, 12 M.J. 205, 248 (C.A.A.F. 1982)

(admitting unwarned statement for one purpose but not another). The Article focuses on "incrimination," through both its title and prefatory requirement that there be an "interrogation" for the exclusion of an unwarned statement. *See* Article 31(b), UCMJ. Similarly, under Article 31(d) if the United States does not introduce an unwarned statement into evidence "against" Appellant—then the statement's admission is not contrary to the overall purpose of Article 31.

This interpretation is consistent with other Rules, such as Military Rule of Evidence 301. *See, e.g.*, Mil. R. Evid. 301. For example, a witness at a court-martial may not assert her privilege against compulsory self-incrimination if she "is not subject to criminal penalty as a result of an answer." Mil. R. Evid. 301(d); *see also Sasen v. Spencer*, 879 F.3d 354, 363 (1st Cir. 2018) ("This condition on the exercise of the privilege casts in bold relief the privilege's core purpose: to protect an individual from making statements against his interest that would subject him to criminal penalties.").

Even assuming portions of Appellant's statements w*ould have been* introduced into evidence "against" Appellant *only* to the failure to report charge, at his court-martial—Appellant never faced criminal penalty for that charge because the Military Judge dismissed it pretrial. The broader context of Article 31 and other rules governing courts-martial support this conclusion.

c. Even if the plain language of Article 31(d) were ambiguous, the statutes history and purpose support admission of Appellant's statement for the offenses for which he was tried.

Only if a rule remains unclear after construing its plain language does a court turn to legislative history to resolve the ambiguity. *See Sager*, 76 M.J. at 161. To accomplish this, courts look to "history and purpose to divine the meaning of language." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (citing *Maracich v. Spears*, 570 U. S. 48, 76 (2013).)

Since enactment of Article 31, this Court has applied it in the same way—upsetting only convictions for unwarned offenses after the incriminating statements pertaining to them are admitted at trial. *See United States v. Cohen*, 63 M.J. 45, 54 (C.A.A.F. 2006), *Reynolds*, 16 C.M.A. at 407, *see also* Section E.2, *infra*.

The Article's history and purpose support the remedy applied by the Military Judge in this case for Appellant's unwarned statements—dismissal of the failure to report Specification.

4. By dismissing the Specification for failure to report misconduct, the Military Judge prevented Appellant's statements from being used against him for that offense. The entire statement was admissible for the properly warned patronizing and cohabitating offenses.

In *Reynolds*, law enforcement suspected the appellant of absence without leave and wrongful appropriation of a vehicle. *Reynolds*, 16 C.M.A. at 404. By only advising the appellant that he was suspected of the former, the agents violated

Article 31(b) by failing to orient him to the latter. *Id.* at 405. In his statement, the appellant had admitted to being absent without leave and abandoning a stolen vehicle in Yosemite National Park, a place he had visited in his absentee status. *Id.* at 404.

The Court did not hold the appellant's statements inadmissible for the warned offense; if it had, it would have dismissed both convictions. *See id.* at 406 ("once . . . [a statement's] inadmissibility [is] shown, we believe prejudice is demonstrated by [the statement's] use . . . without regard to the state of the record otherwise.")

Here, the Military Judge's actions are consistent with this Court's actions in *Reynolds*: an unwarned charge was not allowed to stand but the Appellant's statement was otherwise admissible as to the properly warned statements. (J.A. at 365.) The remedy mirrored the *Reynolds* Court's analysis and remedy for Article 31(b) violation, albeit in advance.

5. <u>If the Military Judge erred, he erred only in admitting those parts of Appellant's statement that involve knowledge of others' misconduct</u>.[11]

If this Court finds *Reynolds* does not stand for admissibility of the entire statement to prove warned offenses, an alternative reading is that it stands for the

[11] Were the Court to hold the entire statement should have been suppressed, the United States would concede prejudice.

admissibility of the portions of the statement *about* the warned offenses. *See Reynolds*, 16 C.M.A. at 407. By refusing to set aside convictions for warned offenses in similar situations, this Court's predecessor tacitly approved of the admissibility of the appellants' statements to prove warned offenses. *See Reynolds*, 16 C.M.A. at 407; *Johnson*, 20 C.M.A. at 321–24.

The Court could therefore conclude that only statements specific to *unwarned* offenses should have been suppressed. *See United States v. Blanton*, No. 201400419, 2019 CCA LEXIS 198, at *28 (N-M. Ct. Crim. App. Jan. 9, 2009), *rev. denied*, *United States v. Blanton*, 79 M.J. 279 (C.A.A.F. 2019) (separating statements by topic).

Parts of Appellant's statement to Law Enforcement involve only patronizing or cohabitating with prostitutes. (*See* J.A. 390–98, 417–18 (admitting he allowed women he knew to be prostitutes to live in his home); J.A. 411–14, 420–22 (admitting he paid five to six women for sex).) During these parts, Appellant never admits to knowledge of others' misconduct, thus makes no statements about an unwarned offense. (*See id.*)

Thus, if this Court concludes that unwarned portions of Appellant's statement were inadmissible, it should hold that Appellant's admissions to the warned offenses were admissible.

E. Assuming arguendo that parts of Appellant's statement discussing his failure to report should have been suppressed, Appellant suffered no prejudice. The Military Judge's dismissal of the Specification rendered moot any prejudice.

1. In cases where law enforcement oriented an appellant to some but not all offenses, the remedy is dismissing the specification related to the unwarned offense—here, the Military Judge applied that remedy pretrial.

When an accused is convicted of a charge of which law enforcement failed to properly warn him, appellate courts remedy the error by dismissing the affected specifications. *See, e.g.*, *Reynolds*, 16 C.M.A. at 407. In *Reynolds*, once the Court found that law enforcement violated Article 31(b) it only set aside the conviction for that offense, affirming conviction for offenses for which the appellant was properly warned. *Id.* at 407.

In other cases, military courts have reached the same remedy under similar circumstances. *See, e.g.*, *Johnson*, 20 C.M.A. at 321–24 (warned offenses affirmed, unwarned offense reversed); *United States v. Willeford*, 5 M.J. 634, 636–37 (A.F. Ct. Crim. App. 1978) (same); *United States v. Blanton*, 2019 CCA LEXIS 198, at *19 (same).

Here, the Military Judge already applied the remedy—dismissal of the failure to report Specification—that this Court would apply. Stated differently, if the Military Judge had denied a meritorious motion to suppress Appellant's statement and Appellant had been convicted of conduct unbecoming for failure to

report others' misconduct, under the *Reynolds* line of cases, the Court would have remedied the error by dismissing the unwarned specification. *See Reynolds*, 16 C.M.A. at 407. The Military Judge's actions precluded any need for appellate remedy here.

2. Through its remedies, this Court has identified the prejudice that Article 31(b) protects against—convictions for unwarned offenses. Appellant was not prejudiced because, at trial, he was not charged with—much less convicted of—an unwarned offense.

Appellant cites no case—and the United States is unaware of any—to support his suggestion that a conviction for a properly warned offense should be set aside due to a failure to warn of a different offense for which an accused was never tried. (*See* Appellant's Brief 22–24.) Appellant's reliance on *Reynolds* and *Johnson* is misplaced because those cases dealt with unwarned offenses for which the appellants were not only tried, but also convicted. *Compare* (Appellant's Br. at 15–18)*, with Reynolds*, 16 C.M.A. at 404, *and Johnson*, 20 C.M.A. at 321. This Court should reject Appellant's invitation to create a rule requiring dismissal of all charges where rights advisement was only defective as to some offenses. (*See* Appellant's Br. at 22–24.)

Also, Appellant errs in relying on *Reynolds*, *Johnson*, *Willeford*, and *Blanton*, to support his claim that the Military Judge's admission of Appellant's statement for the warned charges "runs contrary to this Court's precedent regarding

'scope violations.'" (Appellant's Br. at 15.) Appellant ignores the fact that in each case the appellant was oriented to one suspected offense but not another, and military courts held the remedy was to set aside the conviction for the unwarned offense. *See, Reynolds*, 16 C.M.A. at 407; *Johnson,* 20 C.M.A. at 324*; Willeford*, 5 M.J. at 636–37; *Blanton*, 2019 CCA LEXIS 198, at *29.

Departing from text of the opinion, Appellant argues that the *Willeford* court actually suppressed the statement for *all charges* and *would have* reversed both convictions but for a finding of sufficient evidence (other than the appellant's statement) to sustain the conviction for the warned offenses. (*See* Appellant's Brief at 22.) If true, this would be the only precedent for the remedy Appellant seeks, yet the Air Force Court makes no mention of this analysis.

Appellant cites *Reynolds*, *Simpson*, *Johnson*, *Rice*, and *Davis* for the proposition that the charging decision does not govern the admissibility of an allegedly involuntary statement. (*See* Appellant's Brief at 16–17.) This reliance is misplaced, as none of those cases evaluate rights advisements in the context of uncharged misconduct.[12] Instead, the relevant portions of those cases stand for the proposition that an interrogator must fairly orient an accused to the misconduct they are investigating, but need not use the specificity required on a charge sheet.

[12] *See, Reynolds*, 16 C.M.A. 403 (evaluating rights advisements related to a charge the appellant was tried and convicted for); *Simpson*, 54 M.J. 281 (same); *Johnson,* 20 C.M.A. 320 (same); *Rice*, 11 C.M.A. 524 (same); *Davis*, 8 C.M.A. 196 (same).

See Section B.1, *supra*. Essentially, those cases permit an imprecise rights advisement so long as an accused is oriented to the nature of the suspected misconduct. *Id.*

The language of Article 31 has not changed since it was first enacted. *Compare* Article 31, UCMJ, 10 U.S.C. § 831 (1951), *with* Article 31, UCMJ, 10 U.S.C. § 831 (2012). *Accord*, *United States v. Gilbreath*, No. 14-0322, 2014 CAAF LEXIS 1206 at *22 (A.F. Ct. Crim. App. Dec. 18, 2014). The same remedy this Court's predecessor applied over fifty years ago in *Reynolds*, for incomplete Article 31(b) warnings—setting aside a conviction for an unwarned offense—has been applied in similar cases by the Court and service courts, alike. *See Johnson*, 20 C.M.A. at 324; *Willeford*, 5 M.J. at 636–37; *Blanton*, 2019 CCA LEXIS 198, at *29; *United States v. Huelsman*, 27 M.J. 511, 513 (A. Ct. Crim. Rev. 1988). This Court should decline Appellant's invitation to upset that precedent. *See United States v. Washington,* 1 M.J. 473, 475 (C.M.A. 1978) (Congress presumed to agree with legislation it reenacts in identical form).

Article 31(b) requires an accused be oriented to the nature of the accusation to "allow [the accused] intelligently to weigh the consequences of responding to an investigator's inquiries." *Reynolds*, 16 C.M.A. at 405 (citation omitted). This Court's prior holdings reversing convictions for unwarned offenses identify precisely the danger that the Article was intending to avoid—*convictions* for

unwarned offenses. It follows, therefore, that if an accused is not tried at court-martial for the unwarned misconduct in a statement to law enforcement, he avoids the prejudice Article 31 was meant to prevent.

3. Appellant was not prejudiced because even if parts of Appellant's statement should have been suppressed, there were enough admissible parts to support Appellant's convictions.

In *Cohen*, this Court found no prejudice when a military judge erroneously admitted a statement by the appellant that had been taken in violation of his Article 31(b) rights. *Cohen*, 63 M.J. at 54. There, an officer with the Office of the Inspector General questioned the appellant after he should have reasonably suspected the appellant of rape. *Id.* at 53. The appellant admitted he was present and had photographed the rape, and was ultimately convicted for digitally penetrating the victim while she slept. *Id.* at 46–47.

This Court held that although the statements were inadmissible, the appellant was not prejudiced by them because of other evidence of guilt. *Id.* at 54. First, the erroneously admitted statements did not include an admission to his own digital penetration of the victim. *Id.* Second, even though during the inadmissible statement the appellant admitted to being in the room with the victim, the Government introduced other evidence to support that fact, such as witness testimony and photographs. *Id.*

As in *Cohen*, assuming inadmissibility, those inadmissible portions were only relevant to the surrounding circumstances, and are not admissions to the specific conduct for which Appellant was convicted. *See Cohen*, 63 M.J. at 54 (inadmissible statements not per se admissions to charged conduct, minimizing prejudice despite error in admission).

Also, the admissible evidence in this case—the admissible portions of Appellant's statement—provided ample evidence of guilt for the specifications of which Appellant now stands convicted. *See* Section D.2, *supra*. There are dozens of pages of the transcript of Appellant's statement that contain admissions to patronizing a prostitute and cohabitating with prostitutes with no reference at all to his failure to report sex trafficking. (*See, e.g*. J.A. 390–98; 411–14; 417–18; 420–22.)

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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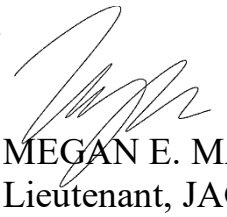

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United States v. Gilbreath

United States Court of Appeals for the Armed Forces

October 15, 2014, Argued; December 18, 2014, Decided

No. 14-0322

Reporter

2014 CAAF LEXIS 1206 *; 74 M.J. 11

UNITED STATES, Appellee v. Michael B. GILBREATH, Corporal U.S. Marine Corps, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION

Prior History: **[*1]** United States Court of Appeals for the Armed Forces. Crim. App. No. 201200427. Military Judge: Stephen F. Keane.

United States v. Gilbreath, 2013 CCA LEXIS 954 (N-M.C.C.A., Nov. 12, 2013)

Counsel: For Appellant: Major John J. Stephens, USMC (argued); Lieutenant Jared A. Hernandez, JAGC, USN.

For Appellee: Lieutenant Ian D. MacLean, JAGC, USN (argued); Colonel Mark K. Jamison, USMC, and Brian K. Keller, Esq. (on brief); Colonel Stephen C. Newman, USMC, and Major Tracey L. Holtshirley, USMC.

Judges: BAKER, C.J., delivered the opinion of the Court, in which ERDMANN, STUCKY, RYAN, and OHLSON, JJ., joined.

Opinion by: BAKER

Opinion

Chief Judge BAKER delivered the opinion of the Court.

Contrary to his plea, a general court-martial composed of officer and enlisted members convicted Appellant of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921 (2012). He was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged, and the United States Navy-Marine Corps Court of Criminal Appeals (CCA) affirmed. United States v. Gilbreath, No. NMCCA 201200427, 2013 CCA LEXIS 954, at *12, 2013 WL 5978034 at *4 (N-M. Ct. Crim. App. Nov. 12, 2013).[1] On Appellant's petition, we granted review of the following issue:

> WHETHER INDIVIDUAL READY RESERVISTS, SUBJECT TO PUNISHMENT UNDER THE UCMJ, ARE ENTITLED TO THE PROTECTIONS OF ARTICLE 31(b) WHEN QUESTIONED BY SENIOR SERVICE MEMBERS ABOUT SUSPECTED **[*2]** MISCONDUCT COMMITTED ON ACTIVE DUTY.

We also specified for review a second issue:

> WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT APPELLANT'S STATEMENTS WERE ADMISSIBLE UNDER ARTICLE 31(b), UCMJ, AND MILITARY RULE OF

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[1] We heard oral argument in this case aboard United States Marine Corps Base Camp Lejeune, North Carolina, as part of the Court's "Project Outreach." See United States v. Mahoney, 58 M.J. 346, 347 n.1 (C.A.A.F. 2003). This practice was developed as part of a public awareness program to demonstrate the operation of a federal court of appeals and the military justice system.

EVIDENCE 305.

Appellant was serving in the Individual Ready Reserve (IRR) at the time he was questioned by Sergeant (Sgt) Nicholas Muratori regarding a pistol missing from the unit armory. Appellant did not receive Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012), warnings. The questions presented in this case are: Does Article 31(b), UCMJ, apply in the case of an active duty military questioner interacting with a member of the IRR? If so, were Article 31(b), UCMJ, warnings required in the context presented in this case? The Government contends that Article 31(b), UCMJ, cannot apply to the questioning of IRR members by active duty military personnel because members of the IRR are not subject to the UCMJ, as they are not listed within Article 2, UCMJ, 10 U.S.C. § 802 (2012). Further, the Government argues, members of the IRR are not subject to **[*3]** the sorts of military pressures of grade and rank which Article 31(b), UCMJ, was intended to address.

We hold that the plain language of Article 31(b), UCMJ, as informed by the legislative purpose behind the article, makes the article applicable to members of the IRR. Further, in the context of this case, Sgt Muratori's questioning of Appellant required an Article 31(b), UCMJ, rights advisement because it involved "(1) a person subject to the UCMJ, (2) interrogat[ing] or request[ing] any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard[ed] the offense of which the person questioned [was] accused or suspected." United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnotes omitted) (citing United States v. Cohen, 63 M.J. 45, 49 (C.A.A.F. 2006)). This is also a case in which "the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." Id. Accordingly, we reverse.

BACKGROUND

Appellant enlisted in the Marine Corps in 2006 through the Delayed Entry Program, began active duty service in 2007, and, from June 2009 until the conclusion of his active duty service, served as the armory custodian for Force Reconnaissance Company, First Reconnaissance Battalion at Camp Pendleton, California. Sgt Muratori served as **[*4]** the company training chief and headquarters platoon sergeant for Force Company. Sgt Muratori was always senior to Appellant during his active duty service, and described himself as Appellant's "superior." Among other things, Sgt Muratori testified that "if [Appellant] would have [proficiency and conduct markings], I would be the one to recommend [them]." Appellant was also friends with Sgt Muratori. The two men shared a house off base along with their wives.

In January 2011, Appellant left active duty to fulfill the remainder of his service obligation as a member of the IRR. Having served four years on active duty, he had an additional obligation of four years in the IRR. He returned home to Oklahoma. Appellant was issued Department of Defense Form 214, which advised him that he was released from active duty service and that "[w]hile a member of the Marine Corps Reserve, you will keep the Commanding General, MOBCOM . . . informed of any change of address, marital status, number of dependents, civilian employment, or physical standards. Subject to active duty recall and/or annual screening."

According to Sgt Muratori's sworn statement, in May 2011, Captain (Capt) John Collins -- the Executive **[*5]** Officer for Force Company -- "spoke to [him] about the screwed up paperwork" regarding an M1911 pistol. Sgt Muratori testified that "we did not have the pistol and we were trying to find paperwork to figure out where the pistol had gone." According to the sworn statement, on May 5, 2011, Capt Collins "told [him] to find out about

the paperwork screw up with the 1911."[2]

Sgt Muratori began to look into the matter, and discovered that the responsible platoon "hadn't seen [the] weapon since January 2010." He decided that Appellant, who had served as armory custodian at the time, "seemed like a logical person to ask" about the pistol. Sgt Muratori then directed junior Marines in the armory to telephone Appellant and "not to accuse him of anything, just to ask if he had any situation awareness on where the [pistol] might be. I didn't want him to be on the defensive."

The junior Marines left a message for Appellant, who returned the phone call. **[*6]** Lance Corporal Thomas Olson answered, after which Sgt Muratori "took the phone and talked to [Appellant.]" Without identifying which pistol from the armory he was discussing, Sgt Muratori informed Appellant that a pistol was missing and asked if he knew about it. Appellant immediately knew which pistol Sgt Muratori was referencing, and claimed that it "went up to Quantico to get destroyed." Sgt Muratori considered this response to be a "dead give away," asked Appellant "to shoot straight with [him]," and "asked him where the 1911 was." He told Appellant that "a lot of people's heads [were] on the line" because of the missing weapon.

At this point, Appellant came clean and told Sgt Muratori that he knew where the pistol was -- he had it. Sgt Muratori informed Appellant that the pistol would need to be returned. He then immediately reported the substance of the conversation to Capt Collins. Sgt Muratori called Appellant again and, at the recommendation of Capt Collins, "told him that he should turn himself in." Appellant then offered to return the pistol, and reached an agreement with Sgt Muratori to do so.

Sgt Muratori again reported the conversation to Capt Collins, and advised him that **[*7]** Appellant had agreed to resolve the issue by returning the pistol. In response, Capt Collins told Sgt Muratori that "the whole thing was going to be handled another way." Sgt Muratori then called Appellant once more, informing him that there was nothing for either of them to do except to "stand by."

The Naval Criminal Investigative Service (NCIS) then contacted Sgt Muratori "very quickly." Sgt Muratori gave a sworn statement, and was asked whether he would agree to "meet up with [Appellant] and get the pistol back." Sgt Muratori then drove with NCIS special agents to an intended meeting spot in Texas, during which time NCIS recorded additional phone calls between Sgt Muratori and Appellant. During these phone calls, Appellant was not informed of any law enforcement involvement, and Sgt Muratori assured him that "I might have to talk to Captain Collins . . . . Other than that, I won't talk to anybody."

NCIS eventually became aware that Appellant had retained counsel. The special agents "made the decision, at that point, to go overt with the operation." NCIS contacted Appellant, and Appellant's attorney -- now in possession of the pistol -- contacted NCIS, offering to surrender the weapon. **[*8]** NCIS retrieved the pistol, and the Secretary of the Navy approved the Marine Corps's request to involuntarily recall Appellant from the IRR to active duty for purpose of court-martial pursuant to Article 2, UCMJ, and Article 3, UCMJ, 10 U.S.C. § 803 (2012). At no time was Appellant provided with Article 31(b), UCMJ, warnings by Sgt Muratori or NCIS.

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[2] Capt Collins had deployed to Afghanistan at the time of trial, and did not testify to clarify his exact words to Sgt Muratori. Trial counsel phrased the conversation as Sgt Muratori being "tasked to try to figure out what was going on with the paperwork."

At trial, the defense moved to suppress "any statements of the accused elicited in violation of his Article 31(b) rights and the incriminating evidence derived from such statements." The defense motion cited this Court's decisions, including United States v. Swift, 53 M.J. 439 (C.A.A.F. 2000), to assert that "[t]he case law and the legislative history of Article 31(b) reveal that [Appellant] deserves [its] protections." Quoting Swift, 53 M.J. at 445, the defense contended that "Article 31(b) mandates rights warnings for anyone 'suspected of an offense'" under the UCMJ. Moreover, the defense asserted that "the Marine Corps [is] famed for producing highly obedient individuals who exercise immediate obedience to orders and immediate response to questions, factors that likely would not be lost a mere [four] months after the end of active service." Thus, Appellant argued that the matter should be resolved as any other motion based on Article 31(b), UCMJ, **[*9]** arising in the military justice system.

The Government opposed the motion. At the threshold, the Government contended that "members of the IRR may not invoke the protections of Article 31(b), UCMJ." In support of this position, the Government cited United States v. Christian, 6 M.J. 624 (A.C.M.R. 1978), asserting that an individual "not subject to the Uniform Code of Military Justice [under Articles 2 and 3] . . . could not invoke Article 31 thereof." Id. at 625. The Government argued that "members of the IRR are immune from the positional pressure that stems from an inquiry by a senior officer," and therefore not entitled to the protection of Article 31(b), UCMJ. Finally, even if Appellant was entitled to Article 31(b), UCMJ, rights as a general matter, in the Government's view, no rights warning was required in this case because Sgt Muratori "was not engaged in a disciplinary investigation," and "once he established that the accused was in possession of the pistol, his single line of inquiry involved determining how the accused was going to return the weapon."

The military judge accepted the Government's argument and denied Appellant relief. On the question of applying Article 31(b), UCMJ, to an IRR member, the military judge concluded that Appellant **[*10]** "was not subject to the UCMJ and thus not entitled to the added protections of Article 31(b)." Notwithstanding that conclusion, the military judge also held that pursuant to United States v. Duga, 10 M.J. 206 (C.M.A. 1981), "Sgt Muratori was not acting in a law enforcement or disciplinary function," and therefore was not required to warn against self-incrimination.

On appeal, a majority of the NMCCA concluded that "[r]ead literally, Article 31(b) has a broad sweep, and would apply to the situation at hand, as Sgt [Muratori] was clearly 'a person subject to this chapter' and was requesting a statement from the appellant, whom he suspected of an offense." Gilbreath, 2013 CCA LEXIS 954, at *7-*8, 2013 WL 5978034, at *3. However, the CCA also noted that taking into account the purposes of the article, members of the IRR are "far removed in time and place from the coercive military environment contemplated by Congress," and have only "attenuated" ties to military authority. Id. at *10, 2013 WL 5978034, at *3. Therefore, while the article might literally apply, the CCA concluded:

> If Congress created Article 31(b) as "a precautionary measure," meant to counteract the implicit coercion of the military command structure, that precaution is unnecessary in these circumstances, in which the appellant was far removed from any military environment **[*11]** that "might operate to deprive [him] of his free election to speak or to remain silent." [United States v. Gibson, 3 C.M.A. 746, 754, 14 C.M.R. 164, 172 (1954.)] In determining whether the protections of Article 31(b) extend to members of the IRR, who

> are themselves not subject to the UCMJ, "[j]udicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation." Id. at 170. We eschew a literal application of Article 31(b) and conclude that the military judge did not err in determining that the appellant was not entitled to the protections of Article 31(b).

Id. at *11-*12, 2013 WL 5978034, at *4 (first and third alterations in original). Having reached that conclusion, the lower court declined to address the specific facts of Sgt Muratori's questioning.[3]

DISCUSSION

THE GENERAL APPLICATION OF ARTICLE 31(b), UCMJ

The question of whether Article 31(b), UCMJ, applies in the circumstance of an active duty servicemember questioning a member of the IRR, as a question of law, is reviewed de novo. See United States v. Watson, 71 M.J. 54, 56 (C.A.A.F. 2012) (citation omitted) ("[W]here the issue appealed involves pure questions of law, we utilize a de novo review.").

Our analysis "begins with the language of the statute." Leocal v. Ashcroft, 543 U.S. 1, 8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). Article 31(b), UCMJ, reads:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

What is immediately apparent from a plain text reading is that Article 31(b), UCMJ, is a proscription that applies to the questioner. That is why our cases are primarily concerned with "the questioner's status and the military context **[*13]** in which the questioning occurs." Cohen, 63 M.J. at 49. Thus, the appropriate analysis works forward from whether the facts and circumstances require the questioner to comply with Article 31(b), UCMJ, not from the question of whether the suspect is entitled to Article 31(b), UCMJ, rights. See, e.g., United States v. Gardinier, 65 M.J. 60, 62 (C.A.A.F. 2007) ("A military investigator who interviews a suspect must provide that suspect with the statutorily required rights warnings under Article 31(b), UCMJ.").

The enactment of Article 31(b), UCMJ, "reflect[ed] a decision by the post-World War II Congress -- which included many veterans familiar with the military justice system and its relationship to military missions and operational requirements -- that the unique circumstances of military service required specific statutory protections for members of the Armed Forces." Swift, 53 M.J. at 445. As illustrated by the testimony of Mr. Felix Larkin, Associate General Counsel for the Department of Defense, the drafters of Article 31(b),

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[3] Judge Fischer concurred in the result, finding that Appellant's status in the IRR was not dispositive. Gilbreath, 2013 CCA LEXIS 954, at *12, 2013 WL 5978034, at *4 (Fischer, J., concurring in the result). Rather, Judge Fischer found that Sgt Muratori was acting in an official law enforcement or disciplinary capacity under the totality of the circumstances, but Appellant did not subjectively perceive that he was doing so pursuant to the second prong of Duga, 10 M.J. at 210 (applying a subjective analysis), overruled in part by Jones, 73 M.J. at 362 (explicitly **[*12]** rejecting a subjective test). Therefore, applying our prior case law without the benefit of Jones, Judge Fischer found Appellant's incriminatory statement to be admissible. Gilbreath, 2013 CCA LEXIS 954, at *19-*20, 2013 WL 5978034, at *6.

UCMJ, understood that they were writing law to govern the questioning of suspects within the military justice system, and enacting a proscription that applies against the questioner:

> [Article 31(b), UCMJ,] covers a wider scope [than the Articles of War] in that you can't **[*14]** force a man to incriminate himself beforehand -- not just on the trial, if you will. And this in addition, since it prohibits any person trying to force a person accused or one suspected, would make it a crime for any officer or any person who tries to force a person to do that.

Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs., 81st Cong. 914 (1949) (statement of Felix Larkin, Ass't General Counsel, Dep't of Defense), reprinted in Index and Legislative History, Uniform Code of Military Justice (1950) (not separately paginated).

The plain text of the statute also draws a distinction between the questioner, who is a person subject to the UCMJ, and the individual being questioned, who is "an accused or a person suspected of an offense." Article 31(b), UCMJ. This latter provision directs itself to a person who is suspected of an offense under the UCMJ, and is not addressed to the military status of the person questioned. It is not dissimilar from language elsewhere in the UCMJ directed to any "person," which is directed toward the interaction of the military justice system and external persons. See, e.g **[*15]** ., Article 48(a), UCMJ, 10 U.S.C. § 848(a) (2012) (military judges' authority to punish "any person" for contempt of court); Article 106, UCMJ, 10 U.S.C. § 906 (2012) ("[a]ny person" acting as a spy during a time of war may be tried by general court-martial or military commission); Article 121(a), UCMJ, 10 U.S.C. § 921(a) (2012) (larceny under the UCMJ is committed by a person subject to the UCMJ and involves the property of "another person").[4]

The reach of Article 31(b), UCMJ, however, is not unlimited. The text is limited to "interrogation and the taking of 'any' statement." Cohen, 63 M.J. at 49 (discussing United States v. Gibson, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954)). Thus, application of Article 31(b), **[*16]** UCMJ, involves a contextual assessment of what is meant by "interrogation and the taking of 'any' statement" in the armed forces. Id.

Further, this Court has recognized that "were these textual predicates applied literally, Article 31(b) would potentially have a comprehensive and unintended reach into all aspects of military life and mission." Id. As a result, this Court does not interpret Article 31(b), UCMJ, to reach literal but absurd results, such as imposing a rights warning requirement in an operational context where it could impede success of the military mission. United States v. Loukas, 29 M.J. 385, 389 (C.M.A. 1990). Rather, this Court has long looked to the purposes behind the article to inform its contextual application.

Specifically, Congress intended Article 31(b), UCMJ, to address the subtle and not so subtle pressures that apply to military life and might cause members of the armed forces to feel compelled to self-incriminate. The

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[4] In reforming the armed forces after World War II, Congress contemplated that individual members might serve in the Ready Reserve. See Armed Forces Reserve Act of 1952, 66 Stat. 481, 483 (requiring that each branch of the Armed Forces establish a Ready Reserve comprised of units or members, or both). And individuals have done so well before Congress established the IRR as a matter of statutory law in Pub. L. 103-337, § 1661(a)(1), 108 Stat. 2663, 2973 (1994). See, e.g., No. S. Rep. 96-197, at 102 (1979), reprinted in 1979 U.S.C.C.A.N. 1818, 1821 (describing the IRR as "the primary force of trained individuals for replacement and augmentation in emergencies").

"unique circumstances of military service require[] specific statutory protections for members of the armed forces" from coercive self-incrimination. Swift, 53 M.J. at 445. In this regard, the CCA concluded that IRR members are "far removed in time and place from the coercive military environment contemplated by Congress," **[*17]** and thus held as a matter of law that Article 31(b), UCMJ, does not apply to active duty military members questioning members of the IRR. Gilbreath, 2013 CCA LEXIS 954, at *10, 2013 WL 5978034, at *3. We disagree. The IRR can be every bit as "coercive," or perhaps better put, respectful of military grade and rank as active duty service. This is evident when one considers the cultural knowledge of military service and does not just assume constructive knowledge of the law.

As recent experience demonstrates, IRR members stand ready to set aside civilian life and serve their country when called to active duty. See, e.g., John J. Kruzel, Marines to Alert 1,800 Individual Ready Reservists for Reactivation, Dep't of Defense News (Mar. 26, 2007), http://www.defense.gov/news/newsarticle.aspx?id=32588. Therefore, a member of the IRR:

> has not become a full-fledged civilian and his military status is such that he is in fact part and parcel of the armed services. . . . He is part of that body of men who [are] characterized as ready reserves, and he is subject to serve on active duty almost at the scratch of the Presidential pen. . . .

United States v. Wheeler, 10 C.M.A. 646, 655, 28 C.M.R. 212, 221 (1959) (Latimer, J.) (plurality). In this case, Appellant had just left active duty service and was still imbued with the cultural norms of the Marine Corps, reflected by his immediate **[*18]** response to calls from junior Marines in the Armory.

Because an IRR servicemember may well feel compelled to respond to an official military questioner without considering any privilege against self-incrimination, we have no reason to depart from our case law, supported by a plain reading of the statute, its legislative history, and the fundamental purpose of the statutory protection as expounded in Jones, Cohen, and Swift. Thus, we hold that the lower court erred in concluding that as a matter of law the article does not apply in the case of an active duty military servicemember questioning a member of the IRR. Article 31(b), UCMJ, governs official questioning in the military justice system, and absent any statutory command to the contrary, an IRR member who is sufficiently integrated into the military to qualify for court-martial jurisdiction is sufficiently integrated so as to be entitled to the statutory protection of the article. See United States v. Stevenson, 53 M.J. 257, 259 (C.A.A.F. 2000) (provision of the Military Rules of Evidence (M.R.E.) applies to all courts-martial absent specific exclusion).

ARTICLE 31(b), UCMJ, APPLIED

Having concluded that Article 31(b), UCMJ, is applicable in the case of active duty military personnel questioning members of the IRR, we turn to whether it **[*19]** applies in this case. "'When there is a motion to suppress a statement on the ground that rights' warnings were not given, we review the military judge's findings of fact on a clearly-erroneous standard, and we review conclusions of law de novo.'" Jones, 73 M.J. at 360 (quoting Swift, 53 M.J. at 446). Under these standards, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

This case involves a tasking from Capt Collins to Sgt Muratori, the gravamen of which was to investigate a

missing weapon in the Marine Corps. Our task is to determine whether Sgt Muratori was acting in an official capacity, including law enforcement or disciplinary capacity, when he questioned Appellant, as distinct from acting in a manner that is "informal or personally motivated." United States v. Brown, 40 M.J. 152, 154 (C.M.A. 1994). In considering this question, we look to all of the facts and circumstances surrounding the questioning, including Sgt Muratori's "authorities and responsibilities" as related to Appellant. Cohen, 63 M.J. at 51.

The military judge in this case concluded that no rights warning was required, because "[Sgt] Muratori was attempting to clear up the discrepancy not get [Appellant] in trouble. The evidence demonstrated that **[*20]** [Appellant] perceived the conversation to be informal and that [Sgt] Muratori would attempt to resolve the issue on behalf of [Appellant] without command involvement."

We disagree, and conclude that the military judge erred in reaching this conclusion. Sgt Muratori's own preference to avoid the military justice system is not dispositive. As discussed below, the appropriate analysis looks objectively to the facts and circumstances of the questioning, not the suspect's subjective perceptions. Jones, 73 M.J. at 362.

The circumstances of this case demonstrate that Sgt Muratori was acting in an official capacity when he questioned Appellant. Among other things, Sgt Muratori was acting at the direction of his superior commissioned officer, Capt Collins. He immediately reported the progress of the investigation to Capt Collins. And, he used elicitation tactics to discover more information than Appellant initially volunteered. In this setting, we have no doubt that Sgt Muratori "was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity" during the questioning. Jones, 73 M.J. at 362.

The Government's response -- that Sgt Muratori was acting in an administrative or operational capacity **[*21]** -- is not persuasive. Even if Sgt Muratori hoped to confine the matter of a missing pistol to a wholly administrative issue to be resolved outside the military justice system, a questioner's "administrative focus . . . does not ultimately answer the critical question as to whether he was acting in an official law enforcement or disciplinary capacity while also performing his administrative duties." Cohen, 63 M.J. at 51. The answer to that question is found in reviewing the totality of the circumstances, not in a bright-line distinction between law enforcement or disciplinary duties and administrative duties.

Perhaps most critically, in this case, Sgt Muratori's questioning regarded the whereabouts of a missing weapon in the Marine Corps. Sgt Muratori testified to the significance of this factor: "[P]retty much everybody is very quick to throw their hand up and say . . . I don't want to deal with that because it's such a serious deal." This cultural understanding is significant to our analysis and belies the notion that Sgt Muratori and Appellant were merely engaged in an informal discussion as friends. As Appellant states in his brief, "There is no such thing as a casual discussion about a missing or stolen weapon **[*22]** in the Marine Corps."

An individual member of the Ready Reserve equipped with this cultural knowledge might feel compelled to respond to questions asked by a more senior NCO. That fact is particularly evident here, where Appellant incriminated himself in response to Sgt Muratori's questioning and invocation of military duty. Sgt Muratori's questioning therefore falls within the scope of Article 31(b), UCMJ, and demonstrates the reason why Congress legislated in this area. See Swift, 53 M.J. at 445 ("In such an environment, a question from a

superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination."). Once Sgt Muratori suspected Appellant of committing larceny, he was required under Article 31(b), UCMJ, to advise him of his privilege against self-incrimination before pursuing further questioning.

The UCMJ and the M.R.E. provide that a statement obtained without a rights warning is akin to an involuntary statement, and is inadmissible. Article 31(d), UCMJ; M.R.E. 305(a); M.R.E. 304(a). As we have previously noted, although the UCMJ has undergone several revisions since 1951, Congress has kept this "strict enforcement mechanism" intact. Swift, 53 M.J. at 448-49. As a result, **[*23]** Appellant's statement to Sgt Muratori was inadmissible, and the military judge erred in denying the motion to suppress.

The question of whether Appellant was prejudiced by this ruling turns on "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999). In this case, the Government's case derived from Appellant's initial admission to Sgt Muratori. There was no other parallel chain of evidence. Moreover, "[a] confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." United States v. Ellis, 57 M.J. 375, 381 (C.A.A.F. 2002) (quoting Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)) (internal quotation marks omitted). There is no question that Appellant's confession constituted strong, material evidence offered against him. Under these circumstances, the military judge's error materially prejudiced Appellant's substantial rights under Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012).

CONCLUSION

We hold that Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012), applies to active duty military members questioning members of the IRR; as a result, depending on the facts and circumstances of a particular case, **[*24]** an active duty military questioner may be required to warn an individual member of the Ready Reserve against self-incrimination. We further hold, applying the analysis from the United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014), and United States v. Cohen, 63 M.J. 45 (C.A.A.F. 2006), line of cases, that such a warning was required in this case.

Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The finding and sentence are set aside. The record of trial is returned to the Judge Advocate General, and a rehearing may be authorized.

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