IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S ANSWER TO APPELLANT'S SUPPLEMENT TO THE PETITION FOR REVIEW
v.	)	
Specialist (E-4) **JOSHUA D. LEWIS**, United States Army, Appellant	)	Crim. App. Dkt. No. 20180260
	)	USCA Dkt. No. 19-0109/AR

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Statement of the Case

On February 9, 2018, the convening authority referred two specifications alleging violations of Articles 120 and 120(b), Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 920b (2012) [hereinafter UCMJ], Sexual Assault and Sexual Assault of a Child, against Appellant to a general court-martial. (Charge Sheet). On April 30, 2018, the military judge suppressed three statements made by Appellant to three different law enforcement officers, Investigator (INV) LD, Special Agent (SA) AS, and SA MB, finding that they were made "involuntarily" under Military Rule of Evidence [hereinafter Mil. R. Evid.] 304.[1] (App. Ex. XIII). The military judge also suppressed derivative evidence obtained from those statements. (App. Ex. XIII). On May 3, 2018, the Government filed a motion for reconsideration as to Appellant's statements to SA AS and SA MB and the derivative evidence. (App. Ex. XIV). On May 14, 2018, the military judge reversed his original ruling suppressing the derivative evidence but declined to reverse his original ruling suppressing Appellant's statements to SA AS and SA MB. (App. Ex. XVII). On May 15, 2018, the government filed its notice of intent

[1] Investigator LD is now known as INV LM. This brief will use "INV LD" consistent with the military judge's ruling. The military judge found that Appellant's statements to INV LD were made involuntarily under Mil. R. Evid. 304 and suppressed them in his 30 April 2018 ruling. (App. Ex. XIII). The Government did not challenge the military judge's decision to suppress Appellant's statements to INV LD in its Article 62, UCMJ appeal.

to appeal the ruling of the military judge suppressing the statements Appellant made to SA AS and SA MB pursuant to Article 62, UCMJ. (App. Ex. XVIII). On October 26, 2018, the Army Court of Criminal Appeals (Army Court) held that the military judge erred in suppressing Appellant's statement to SA MB but did not err in suppressing Appellant's statement to SA AS. *United States v. Lewis*, 78 M.J. 602 (Army Ct. Crim. App. 2018). Appellant filed a Petition for Review on December 17, 2018, and a Supplement to the Petition for Review on January 8, 2019.

Statement of Statutory Jurisdiction

The Army Court reviewed this case pursuant to Article 62, UCMJ. If Appellant shows good cause, this Honorable Court may exercise jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."

Statement of Facts

On May 11, 2017, Fort Hood Criminal Investigation Office (CID) began investigating an incident where a female wearing a green jump suit and a Battle Dress Uniform jacket with "Walker" sewn on a nametape approached a soldier on CQ duty and complained that Appellant touched her daughter. (App. Ex. XIII, p.

1-2). Other than referring to herself as ex-military, the woman did not identify herself or her daughter or provide additional details about Appellant's interactions with her daughter. (App. Ex. XIII, p. 2). The soldier on CQ duty escorted the woman to Appellant's unit, but the woman stated she received a text from Appellant and left the building before any further action was taken. (App. Ex. XIII, p. 2). The incident was reported to CID. (App. Ex. XIII, p. 1-2).

On May 15, 2017, a noncommissioned officer escorted Appellant to CID for an interview with INV LD. (App. Ex. XIII, p. 2). While asking Appellant about his biographical information, INV LD stated, "Real quick, I had a crazy lady come in and report something, I don't know who she is, she mentioned something about a daughter, so do you happen to know someone whose mom is crazy?" (App. Ex. XIII, p. 2-3). Appellant identified MW, the mother of the alleged victim, ZC. (App. Ex. XIII, p. 3). When Appellant asked what was going on and explained that he wanted information because he thought he "settled the situation" with MW, INV LD asked if there was a "situation." (App. Ex. XIII, p. 3). Appellant stated, "They thought something happened between me and their daughter." (App. Ex. XIII, p. 3). Investigator LD left the room to discuss whether she should provide Appellant with a cleansing statement with several CID agents. (App. Ex. XIII, p. 3). INV LD decided not to provide a cleansing statement during the interview. (App. Ex. XIII, p. 3).

Investigator LD returned to the interview room and proceeded to collect more biographical data from Appellant. Investigator LD then asked Appellant, "Do you want to tell me about the story?" (App. Ex. XIII, p. 3). Appellant told INV LD that two years ago, when ZC was 15 years old, he touched ZC's leg and made her uncomfortable. (App. Ex. XIII, p. 3). Investigator LD asked Appellant for MW's contact information. (App. Ex. XIII, p. 3). After Appellant stated that MW's phone number was in his phone, SA RR escorted Appellant out of the room to retrieve his phone and obtain MW's phone number. (App. Ex. XIII, p. 3).

After Appellant returned to the interview room, INV LD informed him of his Article 31(b) rights and that he was suspected of abusive sexual contact. (App. Ex. XIII, p. 3).[2] After waiving his rights, Appellant admitted to touching ZC's thigh, rubbing her leg, and making her uncomfortable. (App. Ex. XIII, p. 4). The military judge found that the interview was not coercive in nature and lasted approximately 40 minutes after Appellant waived his rights. (App. Ex. XIII, p. 4).

One month later, on June 15, 2017, SA AS interviewed Appellant at the Fort Hood CID office. (App. Ex. XIII, p. 4). Prior to conducting the interview, SA AS reviewed the case file, watched all recorded witness interviews, and discussed the case with INV LD. (App. Ex. XIII, p. 4). Special Agent AS was aware that INV

[2] INV LD failed to inform Appellant of his Article 31(b) rights prior to this point because she feared that she would be unable to get the identity and contact information for MW if he invoked. (App. Ex. XIII, p. 3).

LD did not give a rights warning to Appellant prior to interviewing him. (App. Ex. XIII, p. 4). At the beginning of the interview, SA AS informed Appellant that he was suspected of sexual assault of a child and advised him of his Article 31(b) rights. (App. Ex. XIII, p. 4). Appellant acknowledged that he understood his rights and waived them. (App. Ex. XIII, p. 4). Special Agent AS did not give a cleansing statement to Appellant for his unwarned statement to INV LD. (App. Ex. XIII, p. 4).

During his interview with Appellant, SA AS asked mostly open-ended questions, maintained a calm voice, and did not threaten Appellant. (App. Ex. XIII, p. 4). Appellant was "cooperative and inquisitive" throughout the rights advisement and interview. (App. Ex. XIII, p. 5). Appellant admitted to rubbing ZC's thighs to reassure her because she was out past her curfew. (App. Ex. XIII, p. 5).

On July 11, 2017, a noncommissioned officer escorted Appellant to Fort Hood CID for a polygraph conducted by SA MB. (App. Ex. XIII, p. 5). Prior to meeting with Appellant, SA MB reviewed a two-paragraph summary of the allegations and Appellant's statements in the case. (App. Ex. XIII, p. 5; App. Ex. X, p. 7). Special Agent MB did not review the case file or watch any of the videotaped witness interviews. (App. Ex. XIII, p. 5). Special Agent MB was not aware that INV LD did not initially advise Appellant of his rights prior to

interviewing him. (App. Ex. XIII, p. 5). Special Agent MB properly warned Appellant of his Article 31(b) rights prior to interviewing Appellant. (App. Ex. XIII, p. 5). Appellant waived his rights. (App. Ex. XIII, p. 5). Special Agent MB "did not use coercion and was non-confrontational." (App. Ex. XIII, p. 5). In fact, the military judge found that all three of Appellant's interviews at CID were not "coercive in nature or conducted under inhumane circumstances." (App. Ex. XIII, p. 9).

During the interview with SA MB, Appellant was "talkative and inquisitive." (App. Ex. XIII, p. 5). When asked by SA MB about whether Appellant penetrated ZC's vagina, Appellant "appeared to become 'overwhelmingly sad'" and admitted to penetrating ZC's vagina with his finger in order to convince her to have sex with him. (App. Ex. XIII, p. 5). Appellant signed a written sworn statement attesting to his admission. (App. Ex. XIII, p. 5). Special Agent MB did not conduct a polygraph examination because Appellant confessed to digitally penetrating ZC. (R. at 69).

On March 26, 2018, the defense filed a motion to suppress Appellant's statements to SA AS and SA MB as involuntary under Mil. R. Evid. 304. (App. Ex. VI). The defense alleged that Appellant's statements to SA AS and SA MB were made involuntarily because those statements were tainted by Appellant's unwarned statements to INV LD. (App. Ex. VI, p. 8-10). On March 29, 2018, the

Government filed its response. (App. Ex. VII). On April 12, 2018, in an Article 39(a) session, the parties presented argument and evidence before the military judge, including testimony from INV LD, SA AS, and SA MB. (R. at 24-126).

On April 30, 2018, the military judge suppressed Appellant's post-warning statements to SA AS and SA MB. The military judge found that the Government did not meet its burden to show that Appellant's statements were voluntary based upon the totality of the circumstances, which encompasses the characteristics of the accused and the facts surrounding the interrogations. (App. Ex. XIII, p. 9-12).

In considering the characteristics of Appellant, the military judge found that Appellant was a 24-year-old Specialist with six years of service. (App. Ex. XIII, p. 6). Appellant had a high school diploma and a GT score of 92, which the military judge considered to be "below average." (App. Ex. XIII, p. 11). The military judge also found that although Appellant was diagnosed with adjustment disorder and mixed anxiety and depressed mood in November 2017, approximately six months after the interrogations, "it is a reasonable presumption that the accused suffered from" those disorders at the time of his interrogations. (App. Ex. XIII, p. 11-12).

The military judge found that Appellant's statements to SA AS were made involuntarily based upon Appellant's personal characteristics; the fact that one month elapsed from the interview with INV LD; the fact that Appellant was in

custody; the fact that SA AS did not give a cleansing statement to Appellant; and the fact that SA AS prepared for his interview using materials from INV LD. (App. Ex. XIII, p. 12). Similarly, the military judge found that Appellant's statements to SA MB were made involuntarily based upon Appellant's personal characteristics; the fact that Appellant was not given a cleansing statement; the fact that Appellant was in custody subjected to custodial interrogation; the fact that Appellant was escorted to CID by a noncommissioned officer; and the fact that "SA [MB] clearly knew and used the accused's prior statements as a 'basis for his denials for the polygraph.'" (App. Ex. XIII, p. 12).

In making his determination that Appellant was in custody during the three interviews, the military judge considered that, in each interview, an escort accompanied Appellant to and from CID and CID agents searched him, placed his personal belongings in a locker, and escorted him through doors into an interview room. (App. Ex. XIII, p. 7). The military judge also found that while Appellant "may have been allowed to leave if he insisted, a reasonable person of the accused's age, experience, education, diagnoses, and military service would not have felt he was at liberty to terminate the interrogation and leave." (App. Ex. XIII, p. 7). The military judge included his finding that the "the accused was in custody and subjected to custodial interrogation" during his interviews with SA AS

and SA MB in his analysis of the voluntariness of Appellant's statements to those special agents. (App. Ex. XVII, p. 7).

On May 3, 2018, the Government filed a motion requesting that the military judge reconsider his ruling granting the motion to suppress as to Appellant's statements to SA AS and SA MB. At an Article 39(a) session on May 10, 2018, the parties presented evidence before the military judge on the Government's motion for reconsideration. (R. at 130-196). Among the evidence the Government presented was testimony from Major (MAJ) RB, a clinical psychologist, on the meaning of GT scores and how a diagnosis of adjustment disorder with mixed and anxiety and depressed mood does not impact the ability to make decisions. (R. at 131-136).

On May 14, 2018, the military judge denied the Government's motion for reconsideration and suppressed Appellant's statements to SA AS and SA MB. (App. Ex. XVII). In his decision, the military judge found that Appellant's adjustment disorder can affect mood and the ability to cope with stressors, but does not affect decision-making. (App. Ex. XVII, p. 6). The military judge also found that Appellant had a "low average or below average GT score." (App. Ex. XVII, p. 7). Additionally, in his voluntariness analysis, the military judge stated that the federal law governing *Miranda*[3] and the Fifth Amendment was not dispositive

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

because "that body of law does not resolve the Article 31 issues." (App. Ex. XVII, p. 6). The military judge then quoted various cases for his proposition that Article 31(b), UCMJ, is broader in scope in its protections than *Miranda* because of the nature of superior-subordinate relationships, rank, and position, which can equate a question to a command. (App. Ex. XVII, p. 6).

With this context in mind, the military judge found that although Appellant's interviews with SA AS and SA MB were neither coercive in nature nor lengthy, Appellant was in custodial interrogation "being asked for statements by Special Agents who were, and were more than likely perceived by the accused to be, superiors in position if not rank." (App. Ex. XVII, p. 7). The military judge relied on the fact that Appellant was a 23-year-old soldier[4] with six years in the Army, had a high school education, and had a "low average or below average GT score." (App. Ex. XVII, p. 7). Additionally, the military judge stated that although Appellant appeared to be speaking willingly and voluntarily, he became dejected immediately prior to confessing to digitally penetrating the alleged victim and was never given a cleansing statement prior to his interviews with SA AS and SA MB. (App. Ex. XVII, p. 7). After explaining these findings as part of a totality of the

[4] The military judge correctly noted that Appellant was 24 years old in his original ruling, but incorrectly stated that Appellant was 23 years old in his ruling on the Government's motion for reconsideration. (App. Ex. XIII, p. 11; App. Ex. XVII, p. 7).

circumstances analysis, the military judge found that there were no new sufficient facts to change his initial analysis and affirmed his ruling suppressing Appellant's statements to SA AS and SA MB. (App. Ex. XVII, p. 7). The Government appealed the military judge's ruling under Article 62, UCMJ, on May 15, 2018. (App. Ex. XVIII).

On October 26, 2018, the Army Court issued an Opinion of the Court finding that the military judge erred in suppressing Appellant's statement to SA MB but did not err in suppressing Appellant's statement to SA AS. *Lewis*, 78 M.J. at 618. The Army Court found that the military judge's finding that Appellant's adjustment disorder at the time of his three interviews was clearly erroneous. *Id*. at 610. The Army Court also found that the military judge erred when he considered Appellant's "age, education and military service in making a custody determination" under the Fifth Amendment and did not "appear to distinguish between the three interrogations and how an objective determination of custody might change at each instance." *Id*. at 613. The Army Court also found that the military judge's custody analysis was faulty because the military judge did not include his factual findings that the interviews were conducted without "harsh or coercive tactics" and that the interview with SA AS was "conducted with a calm voice and demeanor." *Id*. at 613-614.

Additionally, the Army Court found that the military judge erred by including his custody determination in his voluntariness analysis because custody has no bearing on whether a statement is voluntary and the error in the military judge's Fifth Amendment custody analysis tainted his voluntariness analysis. *Id*. at 613. The Army Court further concluded that the military judge's finding that fact that SA MB prepared for his interview of Appellant by reviewing a summary of Appellant's statement which contained a "misleading reference to a 'spontaneous' statement" was clearly erroneous and that the military judge further erred in his voluntariness analysis by weighing this erroneous finding. *Id*. at 615. The Army Court also found that the military judge erred in his voluntariness analysis of Appellant's statement to SA MB by considering the materials SA MB relied on in preparing for Appellant's interview. *Id*. In weighing the totality of the circumstances, the Army Court found that Appellant's statement to SA MB was voluntary. *Id*. at 618.

Summary of the Argument

First, this Court should deny the petition for review because the Army Court applied unremarkable propositions of law previously decided by this Court when it found that the military judge abused his discretion in finding that Appellant's statement to SA MB was involuntary. Therefore, Appellant has failed to demonstrate good cause. Second, this Court should deny the petition for review

because the military judge abused his discretion when he determined that Appellant was in custody and subject to custodial interrogation during SA MB's interview and included this determination in his voluntariness analysis. Third, the military judge made three clearly erroneous findings of fact: 1) that Appellant was suffering from adjustment disorder at the time of his interview with SA MB; 2) that SA MB relied on a reference to a "spontaneous statement" in preparing for Appellant's interview; and 3) that SA MB relied on Appellant's statements as a basis for his denials for the polygraph examination. This error was compounded by the inclusion of these facts in the military judge's assessment of the voluntariness of Appellant's statement to SA MB. Finally, considering the totality of the circumstances, the military judge abused his discretion when he determined that Appellant's statement to SA MB was involuntary.

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE SUPPRESSED SPC LEWIS' THIRD STATEMENT AS INVOLUNTARY UNDER MILITARY RULE OF EVIDENCE 304?

Standard of Review

This court reviews rulings on motions to suppress evidence for abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017). The court reviews the findings of fact for clear error and conclusions of law de novo. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). A military judge abuses

his discretion "when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2007). "If the findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

Law

"Voluntariness of a confession is a question of law reviewed de novo." *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). When analyzing voluntariness, "the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *Id*. A statement obtained involuntarily offends the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 163-167 (1986). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id*. at 167.

"Where an earlier statement was 'involuntary' only because the accused had not been properly warned of his Article 31(b) rights, the voluntariness of the second statement is determined by the totality of the circumstances." *United States v. Gardinier*, 65 M.J. 60, 64 (C.A.A.F. 2007), *see also United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991); *United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F.

2006). The totality of the circumstances considers "both the characteristics of the accused and the details of the interrogation." *Brisbane*, 63 M.J. at 114 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). In *Schneckloth v. Bustamonte*, the Supreme Court explained the specific factors concerning the accused and nature of the interview that are considered:

> Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional right, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

412 U.S. at 226 (citations omitted).

Additionally, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id*. at 318. This Court looks to *Elstad* "for guidance on evaluating the admissibility of a confession obtained subsequent to one that is deemed illegally obtained." *Brisbane*, 63 M.J. at 114; *see also United States v. Cuento*, 60 M.J. 106, 109 (C.A.A.F. 2004); *Phillips*, 32 M.J. at 79. This framework applies to statements made after an Article 31(b), UCMJ, violation. *Phillips*, 32 M.J. at 79.

Under *Elstad*, an earlier unwarned statement "does not presumptively taint

the subsequent confession" obtained after the administration of a rights warning absent "actual coercion, duress, or inducement." *Cuento*, 60 M.J. at 109 (quoting *Phillips*, 32 M.J. 76, 79 (C.M.A. 1991)); *see also Elstad*, 470 U.S. at 314 (finding that absent "deliberately coercive or improper tactics," the administration of subsequent warnings "ordinarily suffice to remove the conditions that precluded the admission of the earlier unwarned admissions."). In this circumstance, "the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314. Absent the presumption of taint, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made." *Id*. When analyzing the totality of the circumstances of a statement made after an unwarned statement, the absence of a cleansing statement, although a factor, is not fatal to a finding of voluntariness. *Phillips*, 32 M.J. at 79 ("The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession"); *see also Brisbane*, 63 M.J. at 114; *Gardinier*, 65 M.J. at 64.

Argument

I. This Court should deny the petition because Appellant has failed to demonstrate good cause.

This Court should deny Appellant's petition for review because the petition meets none of the criteria for good cause outlined in this Court's Rules of Practice and Procedure [hereinafter C.A.A.F. R.]. This Court shows a preference for

finding cause for granting a petition for review where the petition presents a novel question not previously decided by this Court, when the lower court decided a question in a way that conflicts with other cases, when the lower court adopted a rule of law inconsistent with federal civilian practice, when the lower court decided the validity of some enactment, when the lower court decided the case en banc or by a divided vote, or when the lower court strayed from the normal course of judicial proceedings. C.A.A.F. R. 21(b)(5). None of these conditions apply in this case.

In its opinion, the ACCA held that the military judge erred in his custody and voluntariness determinations. The Army Court's opinion was a straightforward application of law from this Court and the Supreme Court. It drew no dissent nor en banc review and does not conflict with any other authority. Because Appellant's petition meets none of the criteria for good cause, this Court should not grant review.

II. This Court should deny the Petition because the military judge abused his discretion in finding that Appellant's statement to SA MB was involuntary.

A. The military judge abused his discretion by improperly applying the law because he included a legally faulty custody analysis in his voluntariness analysis.

The military judge improperly applied the law when he considered Appellant's personal characteristics, including his "age, experience, education, diagnoses, and military service," in determining whether Appellant was in custody

for purposes of *Miranda* during his interview with SA MB.[5] (App. Ex. XIII, p. 7). The military judge's legally faulty custody determination tainted his analysis of the voluntariness of Appellant's statement to SA MB because: 1) the military judge factored his custody determination in his voluntariness determination, 2) it was inappropriate for the military judge to consider the legal concepts of "custody" and "custodial interrogation" in his voluntariness analysis. (App. Ex. XVII, p. 7).

i. The military judge applied an incorrect legal standard when conducting his custody analysis.

Generally, an accused must be informed of his *Miranda* rights prior to custodial interrogation. *Miranda*, 384 U.S. at 445. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444. "[T]he court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (internal quotations and citation omitted). When determining whether a person is in custody, courts consider: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which

[5] Because the military judge did not conduct a separate custody analysis for Appellant's interviews with INV LD, SA AS, as SA MB, this error extended to his finding that Appellant was in custody when interviewed by INV LD and SA AS. (App. Ex. XIII, p. 7).

questioning occurred, and (3) the length of the questioning." *United States v. Chatfield*, 67 M.J. 432, 438 (C.A.A.F. 2009). Custody "must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004). Thus, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994).

In *Yarborough v. Alvarado*, the Supreme Court held that a state court decision that failed to mention a 17-year-old's age as part of the *Miranda* custody analysis was not objectively unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (1996). *Yarborough*, 541 U.S. at 665. In *Yarborough*, the Ninth Circuit Court of Appeals reversed a state court's determination that Alvarado was not in custody because the state court failed to account for the suspect's "youth and inexperience when evaluating whether a reasonable person would have felt free to leave." *Id.* at 659. The Ninth Circuit found that "'there was no principled reason'" why the characteristics of the accused considered in the test for voluntariness of a statement "should not also apply to the *Miranda* inquiry." *Id.* at 660, 668 (quoting *Alvarado v. Hickman*, 316 F.3d 841, 580 (9th Circ. 2002)).

In its rationale for reversing the Ninth Circuit's judgment, the Supreme Court distinguished between the objective *Miranda* inquiry and the test for voluntariness of a statement that considers the subjective characteristics of the accused. *Id.* at 667-668. The Court noted that the "consideration of a suspect's characteristics [in the *Miranda* custody determination] – including his age – could be viewed as creating a subjective inquiry." *Id.* at 668. The Court emphasized that the objective *Miranda* test was designed to give clear guidance to the police and does "not ask police officers to consider [] contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights." *Id.* Accordingly, the Court found that reliance on Alvarado's prior history with law enforcement was an improper consideration in the *Miranda* custody determination as a *de novo* matter. *Id.* at 668. Additionally, the Court noted that it has never required that a suspect's age be considered as a factor in the custody determination. *Id. at* 666.[6]

"By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his

[6] Although a juvenile's age is an appropriate consideration when determining whether a juvenile is in custody, the Court has not held similarly for an adult. *See J.D.B. v. North Carolina*, 564 U.S. 261, 271 (1984). The Court in *J.D.B.* reasoned that a child's age is an appropriate consideration because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* Because Appellant is 24 years old, the Court's holding in *J.D.B.* is not applicable to this case.

freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *J.D.B.*, 564 U.S. at 270. In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court found that officers are not required to "make guesses" as to the circumstances "unknowable" to them at the time when determining whether to read the *Miranda* warning to a suspect. *Id.* at 430-431. The Court emphasized this again in *Yarborough* by noting that officers are not to "consider [] contingent psychological factors" when determining if a *Miranda* warning is necessary. *Yarborough*, 541 U.S. at 668.

In this case, the military judge's consideration of Appellant's personal characteristics, including his "age, experience, education, diagnoses, and military service" in his *Miranda* custody determination contravenes the Court's rationale and holding in *Yarborough*. (App. Ex. XIII, p. 7). Appellant's "age, experience, education, diagnoses, and military service" are personal, subjective characteristics that are distinguishable from the objective facts related to the interrogation itself. *See Thompson*, 516 U.S. at 112. Absent prior knowledge of such conditions, an individual's "age, experience, education, diagnoses, and military service" are all factors that are unknowable to a law enforcement official. Attributing varying personal characteristics to a hypothetical reasonable person burdens law

enforcement officials "with the task of anticipating" the personal characteristics of a suspect and speculating how those characteristics would affect his or her state of mind – the precise problem that the Court sought to prevent in the *Miranda* context. *J.D.B.*, 564 U.S. at 270. There is no evidence that SA MB knew of Appellant's

"age, experience, education, diagnoses, and military service" at the time of Appellant's interview. In particular, SA MB could not have known Appellant's diagnoses when such diagnoses occurred six months *after* the interview. Accordingly, because the military judge used Appellant's personal characteristics to turn the objective *Miranda* inquiry into a subjective one, the military judge erred in his custody determination.

The military judge also erred in his custody determination because he failed to conduct an individual custody analysis for each of Appellant's interviews and failed to consider several relevant findings of fact in his analysis. Because the military judge simply considered Appellant's interviews with INV LD, SA AS, and SA MB in total, he did not consider distinguishing characteristics between the interviews that could have influenced his custody determination. For example, he failed to consider the amount of time that passed between each interview and that after each interview Appellant was free to leave. As the Army Court noted, "A conclusion that a person reasonably believed he was not free to leave becomes less

and less tenable after each prior interrogation has ended and the accused was left to go about his business." *Lewis*, 78 M.J. at 613. Additionally, the military judge did not consider his findings of fact relevant to the atmosphere of the investigation, such as his finding that none of Appellant's interviews at CID were "coercive in nature or conducted under inhumane circumstances." (App. Ex. XIII, p. 9); *see also Chatfield*, 67 M.J. at 438.

ii. The military judge erred as a matter of law in his voluntariness analysis by considering his finding that Appellant was in custody.

In his ruling on the Government motion for reconsideration, the military judge weighed his determination that Appellant "was in custody and subjected to custodial interrogation" during his interview with SA MB in his analysis of the voluntariness of Appellant's statement to SA MB. (App. Ex. XVII, p. 7). Because the military judge included this erroneous custody determination in his analysis of the voluntariness of Appellant's statements, his voluntariness analysis was tainted by legal error. Even if a properly conducted custody analysis determined that Appellant was in custody and subject to custodial interrogation under *Miranda*, the military judge erred by considering that finding in a voluntariness analysis.

In his ruling on the Government's motion for reconsideration, the military judge began his voluntariness analysis by noting that:

> However persuasive the Government's analysis of federal law governing Fifth Amendment/*Miranda* jurisprudence, it ultimately is not dispositive. Even assuming for argument's sake that the subject subsequent statements would be admissible under Fifth Amendment jurisprudence, that body of law does not resolve the Article 31 issues. '[U]nique factors in the military environment – unknown in the civilian setting – lead' the Court of Military Appeals 'to interpret Article 31(b) as being broader in scope of its protections than in the mandate of *Miranda*.' *United States v. Phillips*, 32 M.J. 76, 80 (C.M.A. 1991).

(App. Ex. XVII, p. 6). In its motion for reconsideration, the Government argued that Appellant's statements to SA AS and SA MB were not presumptively tainted under *Elstad* and were voluntary under the totality of the circumstances. (App. Ex. XIV, p. 9-16). In its response to the Government motion for reconsideration, the defense asserted that:

> The reliance on the argument that the Court should follow the reasoning and logic in *Oregon v. Elstad*, 470 U.S. 298 (1985), completely overlooks the totality of the circumstances assessment in *United States v. Cuento* and the related Court of Appeals for the Armed Forces case law. 60 M.J. 106, 109 (C.A.A.F. 2009). It also fails to recognize that Article 31(b) is more protective of Soldiers than is Miranda because of the subtle pressure that exists in military society. *United States v. Jones*, 73 M.J. 357 (C.A.A.F. 2014).

(App. Ex. XV). In his ruling on the Government motion for reconsideration, the military judge effectively adopted the defense's position that the voluntariness of Appellant's statements to CID should not be analyzed under *Elstad* because the

protections of Article 31(b), UCMJ, are broader than *Miranda*. (App. Ex. XVII, p. 6).

The military judge's legal analysis that purports to differentiate between Article 31(b), UCMJ, and *Miranda* in a voluntariness analysis is incorrect as a matter of law for two reasons. First, in *United States v. Phillips*, the Court of Military Appeals explicitly rejected the notion that *Elstad* does not apply merely because of the special protections of Article 31(b), UCMJ. *Phillips*, 32 M.J. at 80.

Second, the voluntariness of a statement and applicability of Article 31(b) and/or *Miranda* are two distinctly differently legal concepts. Voluntariness analyzes whether an individual's "will was overborne" in making a confession and whether the confession is a "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 225-226; *Columbe v. Connecticut*, 367 U.S. 568 (1961). An involuntary confession violates the Due Process Clause of the Fourteenth Amendment. *Jackson v. Denno*, 378 U.S. 368, 385-386 (1964); *Scheckloth*, 412 U.S. at 225; *Connelly*, 479 U.S. at 163-167. The failure to provide *Miranda* warnings to an individual subjected to custodial interrogation is a violation of the self-incrimination privilege or the Due Process Clause of the Fifth Amendment, and such a violation, or a violation of Article 31(b), UCMJ, renders a statement "involuntary" by operation of law. *See* Mil. R. Evid. 304. "Custody" and "custodial interrogation" are legal concepts that determine when law

enforcement should provide *Miranda* warnings. The provision of a rights warning under Article 31, UCMJ, turns on whether the individual being questioned is a suspect. Therefore, "custody" and "custodial interrogation" are irrelevant to the determination of whether there has been a violation of Article 31(b), UCMJ, or whether a statement is involuntary.

Additionally, although each analysis considers many of the same overlapping facts, the legal determination of whether an individual is in custody or facing custodial interrogation is irrelevant to the determination of whether a statement is made voluntarily under the Due Process Clause of the Fourteenth Amendment. The military judge therefore erred when he considered his legal determination that Appellant was in "custody" and subject to "custodial interrogation" in his analysis of the voluntariness of Appellant's statement and Article 31, UCMJ. (App. Ex. XVII, p. 6).

B. Three of the military judge's findings of fact are clearly erroneous.

This Court should find that the military judge made three erroneous findings of fact: (1) that Appellant was suffering from adjustment disorder at the time of his interviews with SA MB; (2) that SA MB prepared for the interview using a summary of the case which contained a "misleading reference to a 'spontaneous' statement[,]"; and (3) that "SA [MB] clearly knew and used the accused's prior statements as a 'basis for his denials for the polygraph." (App. Ex. XIII, p. 11;

App. Ex. XVII, p. 7, 12). The military judge further abused his discretion when he included these erroneous findings of fact in his analysis of the voluntariness of Appellant's statement to SA MB.

i. There is no evidence that Appellant suffered from adjustment disorder at the time of his interview with SA MB.

In his ruling on the motion to suppress, the military judge found that although Appellant was not diagnosed with adjustment disorder until November 2017, "it is a reasonable presumption that the accused suffered from adjustment disorder with mixed anxiety and depressed mood at the time" of his interviews with INV LD, SA AS, and SA MB. (App. Ex. XIII, p. 11-12). The military judge included this fact in his analysis of the voluntariness of Appellant's statement to SA MB. (App. Ex. XIII, p. 11-12). In his ruling on the Government motion for reconsideration, the military judge explicitly stated, "The accused was suffering from a psychological disorder that affects his mood and his ability to deal with additional stress." (App. Ex. XVII, p. 7). This finding of fact is clearly erroneous because Appellant was diagnosed with adjustment disorder in November 2017, approximately six months after his interview with SA MB, and there is no evidence Appellant suffered from the disorder at the time of SA MB's interview. (App. Ex. IX, p. 8-9).

On November 8, 2017, a board convened pursuant to Rules for Court-

Martial (R.C.M.) 706 issued a report that determined that Appellant suffered from "DSM-5 309.28 (F43.23) – Adjustment Disorder with Mixed Anxiety and Depressed Mood." (App. Ex. XIV, encl. 3). As the Army Court noted, the DSM-5 "defines the diagnosis of adjustment disorder as '[t]he emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s).'" *Lewis*, 78 M.J. at 611 (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013)). There is no evidence that Appellant suffered from adjustment disorder at the time of his interview by SA MB in July 2017, such as expert testimony establishing the existence of the diagnosis at the time or evidence that the "identifiable stressor" existed prior to the interview with SA MB. In Appellant's recorded oath to his sworn statement to SA MB, he displayed no symptoms that suggested that his condition manifested at that point in time. Therefore, the military judge's finding that Appellant suffered from adjustment disorder at the time of his interview with SA MB is clearly erroneous.

Even if Appellant's adjustment disorder was a proper consideration as a characteristic of Appellant's at the time of the interviews, the military judge should not have weighed the diagnosis against the Government. In his voluntariness analysis, the military judge did not consider the testimony from MAJ RB that adjustment disorder with mixed anxiety and depressed mood has no effect on the

ability to make decisions. (R. at 132-133). Therefore, the condition was not a psychological handicap that affected Appellant's ability to understand the rights warning provided to him by SA MB.

"Mental illness does not make a statement involuntary per se." *United States v. Mott*, 72 M.J. 319, 330-331(C.A.A.F. 2013); *see also Connelly*, 479 U.S. at 170 (holding that the unprovoked confession of a schizophrenic experiencing command hallucinations by the "voice of God" was not involuntary); *United States v. Robinson*, 26 M.J. 361, 366-67 (C.M.A. 1988) (appellant's "weak character" did not make his confession involuntary). "A mental impairment is a factor to be considered in determining voluntariness of the challenged confession only if government overreaching is also shown." *United States v. Campos*, 48 M.J. 203, 207 (C.A.A.F. 1998); *see also Connelly*, 479 U.S. at 164 (mental condition of an accused is a "more significant factor in the 'voluntariness' calculus where law enforcement officers have "turned to more subtle forms of psychological persuasion."). Voluntariness "is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Connelly*, 479 U.S. at 170 (quoting *Elstad*, 470 U.S. at 305). Even assuming Appellant was suffering from adjustment disorder at the time of his interview with SA MB, there is no evidence that the condition affected Appellant's ability to cope with questioning by SA MB, that SA MB engaged in any form of coercion or other

government overreach, or the condition affected Appellant's ability to understand the choice that he had to waive his rights.

ii. The summary of facts which SA MB relied upon did not contain a reference to a "spontaneous statement."

Appellant conceded before the Army Court that the military judge's finding that SA MB prepared for the interview with Appellant using a summary of the case which contained a "misleading reference to a 'spontaneous' statement" was clearly erroneous. *Lewis*, 78 M.J. at 615. The military judge compounded this error by including this clearly erroneous finding in his voluntariness analysis. (App. Ex. XIII, p. 12). Even if this finding was not erroneous, it is irrelevant as a matter of law to the determination of voluntariness. It matters not whether SA MB knew of the information Appellant provided in his unwarned statement or any statement tainted by a rights warning violation, but whether SA MB made "bootstrapping" references to Appellant's previous unwarned statement to the Appellant during the interrogation. *Phillips*, 32 M.J. at 81.

The use of Appellant's prior unwarned statement in preparation for the interrogation has no bearing on whether Appellant made voluntary statements in the interrogation. Accordingly, the military judge abused his discretion in his application of the law by weighing the erroneous fact that SA MB relied upon a "misleading reference to a 'spontaneous' statement'" in preparation for the interrogation with Appellant. (App. Ex. XIII, p. 12).

iii. SA MB did not rely on Appellant's statements as a basis for his denials for the polygraph examination.

The military judge's finding of fact that "SA [MB] clearly knew and used the accused's prior statements as a 'basis for his denials for the polygraph'" is clearly erroneous. (App. Ex. XIII, p. 12). This factual finding is unsupported by the evidence because: 1) SA MC, who created the document SA MB relied upon in preparing for Appellant's interview, cannot recall which interviews he used to write the summary of Appellant's statements; and 2) SA MB could not have used Appellant's statements as a "basis for his denials for the polygraph" because he never performed a polygraph examination. (App. Ex. XI, p. 1; R. at 69).

The military judge's factual finding that SA MB "used the [Appellant's] prior statements as a 'basis for his denials for the polygraph'" is nearly verbatim to the assertion by defense in their motion to suppress that "SA [MB] was provided information from SPC Lewis' previous statements … to form the basis of his denials for the polygraph." (App. Ex. XIII, p. 12; App. Ex. VI, p. 3). It is apparent that the defense referenced an instrumental polygraph examination rather than Appellant's pre-instrumental interview with SA MB: "Prior to the administration of the polygraph, [Appellant] waived his rights and admitted to penetrating Ms. [ZC's] vagina with his finger after Ms.[ZC] told him no." (App. Ex. VI, p. 3). Thus, the defense is clearly distinguishing between Appellant's interrogation with SA MB and the instrumental polygraph examination. However, the instrumental

polygraph examination was never performed because Appellant confessed to digitally penetrating ZC during the interrogation. (R. at 69).

Even if this factual finding is correct, it was inappropriate for the military judge to weigh this fact in his totality of the circumstances analysis for the same reason that it was error for the military judge to weigh the erroneous assertion that SA MB relied upon a "'misleading reference to a "spontaneous statement.'" (App. Ex. XIII, p. 12). It matters not whether SA MB used Appellant's prior tainted statements in the preparation for the interrogation but rather whether SA MB made "bootstrapping" references to Appellant's previous statements to Appellant during the interrogation in order to secure a confession. *Phillips*, 32 M.J. at 81.

There is no evidence that SA MB referenced or "bootstrapped" Appellant's previous statements in his pre-instrumental interview with Appellant apart from asking Appellant why he lied in his previous statement. *Phillips*, 32 M.J. at 81. (App. Ex. VI, p. 16). Special Agent MB asked this question *after* Appellant admitted to digitally penetrating ZC's vagina. (App. Ex. VI, p. 16). Thus, SA MB's question to Appellant about why he lied in his previous statement did not "bootstrap" his unwarned statement to INV LD into his interview with SA MB in order to secure a confession as to Appellant's digital penetration of ZC's vagina. *Phillips*, 32 M.J. at 81. Accordingly, the finding that SA MB used Appellant's "prior statements as a 'basis for his denials for the polygraph'" is clearly erroneous

and should not have weighed against a finding of voluntariness.

C. Under the totality of the circumstances, Appellant's statement to SA MB was made voluntarily.

In light of the military judge's erroneous findings of fact and his erroneous application of the law, the military judge abused his discretion when he found that Appellant's statement to SA MB was involuntary. The military judge failed to consider *all* of the facts surrounding Appellant's statement to SA MB when he purported to weigh the totality of the circumstances and failed to explain why the rights warnings by SA MB did not clear the taint from Appellant's unwarned statements to INV LD. All of the circumstances indicate that Appellant's decision to make a statement to SA MB after being advised of his rights was "the product of an essentially free and unconstrained choice." *Schneckloth*, 412 U.S. at 225-226.

Contrary to Appellant's assertion, SA MB did not engage in any coercive or prohibited interrogation tactics, such as that barred under *Missouri v. Seibert*, 542 U.S. 600 (2004), during Appellant's interview. In *Seibert*, the police deliberately withheld providing a *Miranda* warning to the suspect until after she confessed in an unwarned custodial interrogation. *Id.* at 604-605. After the suspect confessed, the police read her the *Miranda* warning, obtained a waiver of rights, resumed the questioning, and confronted her with her unwarned statement. *Id.* at 605. The break between the warned and unwarned confession was 20 minutes. *Id.* The suspect's warned confession was "'largely a repeat of the information …

obtained' prior to the warning." *Id.* at 605-606 (citation omitted). A plurality of the Supreme Court held that the warned confession was not admissible because the police tactic employed violated *Miranda*'s constitutional requirements. *Id.* at 604.

In *United States v. Brisbane*, this Court found that an appellant's statements to Air Force Office of Special Investigations (AFOSI) were voluntary and not barred under *Seibert*. 63 M.J. at 116. In that case, that appellant made an unwarned confession to Family Advocacy approximately a month and a half before making a warned confession to AFOSI. *Id.* at 115. This Court found the facts in *Brisbane* to be distinguishable from *Seibert* because "although there was coordination between AFOSI and the Family Advocacy staff, the record does not demonstrate a deliberate effort aimed at securing an unwarned confession for later use in securing a warned confession." *Id.*

Additionally, this Court in *Brisbane* found the appellant's statement to AFOSI was voluntary despite the lack of a cleansing statement because his interview with AFOSI was not conducted under "coercive or inhumane" conditions. *Id.* Additionally, a month and a half had passed since the appellant's unwarned confession to Family Advocacy, which "was a substantial amount of time for the appellant to weigh the pros and cons of continuing to talk with military authorities…." *Id.* Finally, this Court noted that the appellant was a 28-year-old

staff sergeant with approximately ten years of service, thus he was a "mature, experienced member of the military[.]" *Id.*

Like this Court found in *Brisbane*, this Court can distinguish *Seibert* from this case because there is no evidence to suggest that there was a deliberate tactic among INV LD, SA AS, and SA MB to conduct "successive interrogations to secure an admissible confession." *Id.*[7] While SA AS reviewed the case file and conferred with INV LD prior to interrogating Appellant, this amounted to mere coordination. (App. Ex. XIII, p. 12). Special Agent MB's level of coordination amounted only to reviewing the summary of statements made by Appellant and ZC in the case. (App. Ex. XIII, p. 12). As this Court noted in *Brisbane*, "*Seibert* does not ban coordination among individuals. Rather, it is aimed at a very specific, deliberate practice of successive interrogations to secure an admissible confession." *Id.* at 115. Therefore, the facts in this case do not rise to the level of *Seibert*.

[7] Although INV LD purposefully interrogated Appellant without initially providing him with an Article 31(b) warning, the military judge found that her conduct "did not amount[] to the condemned tactic in *Missouri v. Seibert*." (App. Ex. XIII, p. 8). Regardless of whether INV LD's actions violated *Seibert*, the Government is not challenging the suppression of Appellant's warned statement to INV LD that followed Appellant's deliberately unwarned statement. Therefore, the only issue is whether Appellant's statement to SA MB is inadmissible under *Seibert*.

Furthermore, the facts in *Brisbane* that led this Court to find that the appellant's statements were voluntary are also present in this case with respect to Appellant's statement to SA MB. First, Appellant was interviewed by three different interrogators over the course of two months, with 52 days passing in between Appellant's interview with INV LD and SA MB and 21 days between his interviews with SA AS and SA MB. Appellant was advised of his *Miranda* and Article 31(b) rights in each interview. Appellant's interview with SA MB was the last of these interviews. By the time Appellant met with SA MB, he was well apprised of his *Miranda* and Article 31(b) rights and his familiarity with the military justice system was greater at the time of SA MB's interview than his interview with INV LD and SA AS. *See Bubonics*, 45 M.J. at 96 (whether an accused has "been involved with military justice before the night of his apprehension and interrogation" is a factor considered when analyzing the voluntariness of a statement). Appellant was free to leave after each interview. Therefore, like in *Brisbane*, this is "a substantial amount of time for [Appellant] to weigh the pros and cons of continuing to talk with military authorities . . . ." *Brisbane*, 63 M.J. at 115. Fifty-two days was more than a sufficient break in custody to purge any taint of Appellant's unwarned statement to INV LD. The military judge failed to consider these facts in his voluntariness analysis.

The military judge also considered and weighed against a finding of voluntariness the fact that SA MB did not provide a cleansing statement to Appellant. (App. Ex. XIII, p. 12). Special Agent MB was not aware that Appellant was not given a rights warning prior to his interview with INV LD, therefore the fact that SA MB did not give a cleansing statement to him for those statements should not weigh against the Government. (R. at 62). *See United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002) ("[W]e cannot fault the CID agents for not providing an appellant with a cleansing warning" when there "is no indication in the record that they were aware of" the rights violations which occurred with the appellant's previous statements). The more appropriate consideration would have been for the military judge to include in his evaluation of the totality of the circumstances the "high probative value" that Appellant was warned of his rights. *Elstad*, 470 U.S. at 318.

Third, Appellant's interview with SA MB was neither inhumane nor coercive in nature. (App. Ex. XIII, p. 9). Although Appellant was escorted to his interview with SA MB by a noncommissioned officer, he met with SA MB on his own accord because he consented to a polygraph. (App. Ex. X, p. 7). Appellant himself admitted in his sworn statement that he was allowed to take breaks, eat or drink whenever he wanted, slept more than usual the night before, did not feel deprived of anything during the interview, and was treated "great" by SA MB

during the interview. (App. Ex. VI, p. 16). Appellant further stated that that he did not admit "to the things [he] [has] admitted to in this statement for any other reason other than they are the truth" and was not enticed or promised anything for his confession. (App. Ex. VI, p. 16). Additionally, although Appellant's interview with SA MB was not recorded, the videotape of SA MB swearing Appellant to his sworn statement clearly demonstrates that Appellant was aware of and understood his rights, willingly spoke in absence of any coercion, signed the sworn statement without any hesitation, and did not appear to be in any mental or physical distress. (App. Ex. X (video)). These facts weigh heavily in favor of a finding of voluntariness. Additionally, under *Elstad*, because there was no "actual coercion, duress, or inducement" by INV LD, SA AS, or SA MB, and SA MB advised Appellant of his Article 31(b) rights prior to interviewing him, Appellant's statement to SA MB was not presumptively tainted by the initial failure of INV LD to read Appellant his Article 31(b) rights. *Elstad*, 470 U.S. at 314; *Cuento*, 60 M.J. at 109.

Furthermore, the military judge found that while Appellant's "*appearance* is one of willingness and voluntariness," he became "dejected" immediately prior to confessing to SA MB that he digitally penetrated ZC. (App. Ex. XVII, p. 7). He appeared to weigh this fact against the government in his voluntariness analysis. However, the post-confession videotaped session between SA MB and Appellant

clearly demonstrates that at the time SA MB and Appellant reviewed his rights and the sworn statement, Appellant appeared to be under no form of coercion. (App. Ex. X (video)). Throughout the interview, Appellant was "very cooperative" and "seemed like he wanted to engage in conversation with" SA MB. (R. at 61, 73). The evidence suggests that Appellant only became emotional because he was "anxious to tell his story." *United States v. Warren*, 47 M.J. 649 (Army Ct. Crim. App. 1997); *see also United States v. Lichtenhan*, 40 M.J. 466, 470 (C.M.A. 1994) ("All the evidence in this case indicates that appellant was willing--even anxious--to disclose his drug problem"). Appellant explicitly stated in his sworn statement that he finally told the truth because, "I want the case over. I want this to go away and I know being honest will be the fastest way to make this go away." (App. Ex. VI, p. 16). Therefore, simply because Appellant became "dejected" after finally confessing to digital penetration does not weigh against a finding of voluntariness.

Fourth, Appellant's own admission that he confessed to digitally penetrating ZC in his interview with SA MB because he wanted to finally be "honest" and make the case "go away" further demonstrates that SA MB's interview was untainted by his previous two interrogations. During the interview, SA MB made no "bootstrapping" references to Appellant's unwarned statement to INV LD or the warned statement made to SA AS. *Phillips*, 32 M.J. 76, 81 (C.A.A.F. 1991). Appellant's admissions to SA MB "far exceeded those made during the first and

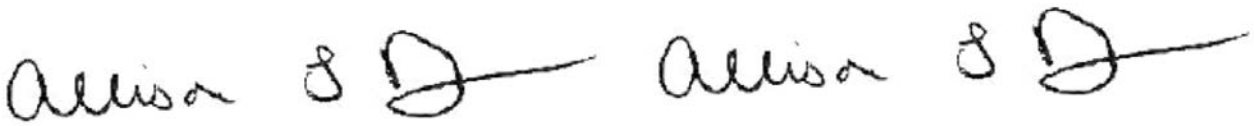
second interrogations." *Lewis*, 78 M.J. at 616. In fact, Appellant did not confess to any crime during his interview with INV LD or SA AS; he merely admitting to touching ZC's thigh to reassure her. In his interview with SA MB, Appellant admitting to rubbing ZC's thigh and penetrating her vagina with his fingers to convince her to have sex with him. Simply put, the "cat" was not "out of the bag" during Appellant's interview with INV LD and SA AS. *Seibert*, 542 U.S. at 615. The degree to which the unwarned and warned statements have "overlapping content" is one consideration as to whether a warned statement is involuntary because of a prior unwarned statement. *Seibert*, 542 U.S. at 615; *Cuento* 60 M.J. at 108-10. These facts lessen the weight of the failure of SA MB to provide a cleansing statement and indicate that Appellant did not feel compelled to confess simply because of his prior statements.

Fifth, Appellant was a 24-year-old specialist with six years of service of low or below average intelligence. (App. Ex. XIII, p. 11). Although the Army Court found that these facts provide "some weight" against a finding of voluntariness, this is outweighed by the fact that Appellant "did not testify or explain how his will was overborn." *Lewis*, 78 M.J. at 616, 618. There was no evidence put forth to rebut Appellant's own admission in his sworn statement that his statement was voluntary.

In conclusion, the totality of the circumstances, including the absence of any coercion by SA MB, does not demonstrate that Appellant's free will was overborne during his interview with SA MB or that his statement to SA MB was tainted by his unwarned statement to INV LD. *See Connelly*, 479 U.S. at 167 (police coercion is "necessary predicate" to a finding that a statement is involuntary); *Seibert*, 542 U.S. at 604. Therefore, this court should find that the military judge abused his discretion when he found that Appellant's statement to SA MB was involuntary.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court deny the petition or affirm the Army Court's decision.



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